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Foreword

Welcome to the fifth Military Justice Symposium, the annual criminal law year in review. This month's issue of *The Army Lawyer* contains Volume I of the Symposium. It includes articles on recent developments in courts-martial jurisdiction, pretrial procedure, discovery, evidence, substantive criminal law, fraternization, and instructions. Volume II of the symposium will appear in the May 2000 issue of *The Army Lawyer* and will contain articles on unlawful command influence, Fourth Amendment and urinalysis, Fifth Amendment, Sixth Amendment, sentencing, post-trial procedures, and capital litigation.

As in past versions of the Symposium, we do not offer a complete case digest. Instead, the nine members of the Criminal Law Department, The Judge Advocate General's School, U.S. Army, and three members of the Army Trial Judiciary, offer an assessment of the most significant cases and developments in military justice over the past year. Our goal is to provide perspective on the most significant opinions by the Court of Appeals for the Armed Forces (CAAF) and the service courts. The chart below provides additional information on the activity of the CAAF, as well as individual judges, over the last year. We hope that you find our articles interesting and helpful in your practice and, as always, we welcome comments from the field.

Court of Appeals for the Armed Forces

Author	**Total Opinions**	**Majority Opinions**	**Dissenting Opinions#**	**Concurring Opinions***
Chief Judge Cox	23	21	1	1
Judge Crawford	50	27	15	8
Judge Gierke	41	24	9	8
Judge Effron	37	20	8	9
Judge Sullivan	64	23	17	24
Judge Everett	3	1	0	2
Totals for Court	225**	123	50	52

Based on figures provided by the Office of the Clerk, United States Court of Appeals for the Armed Forces, for the October 1998 through September 1999 term.

Includes dissent; dissent in part and concur in part; dissent in part and concur in result and in result; dissent in part and concur in part and in result.

* Includes concur; concur in part and in result; concur in result.

** Includes seven per curiam opinions.

The Court-Martial Cornerstone: Recent Developments in Jurisdiction

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Introduction

"*Three things are to be looked to in a building: that it stand on the right spot; that it be securely founded; that it be successfully executed.*"[1]

Like a well-constructed house, a court-martial must be built upon a solid foundation—a foundation not only consisting of legally sound pretrial procedure,[2] but a foundation that also contains an impenetrable theory of jurisdiction. During trial and on appeal, jurisdiction serves as the cornerstone for the court's existence, and must be the first legal principle considered when addressing an issue before a military court. Often this part of the structure is assumed to be sturdy; but, as our military courts emphasize in this year's jurisdiction cases,[3] without it, the court-martial will collapse.

In concept, the jurisdictional cornerstone of a court-martial is not complicated. It consists of proper subject matter and personal jurisdiction, and a properly comprised court-martial.[4] This article addresses the recent cases that touch on issues impacting each one of these basic tenets of jurisdiction. In addition to issues arising from court-martial jurisdiction, this article also discusses appellate jurisdiction—specifically, the authority of our courts to issue writs. In each area, the article briefly explains the relevant jurisdictional concept, reviews the case or cases that touch on the concept, and identifies any trends that may exist. Like previous years, this year's jurisdiction cases do not present a singular theme or trend; rather, each case exhibits a unique thesis. Regardless of the theme involved, each case illustrates the importance of having a court-martial built upon the solid foundation of jurisdiction.

Subject Matter Jurisdiction: The "Service Connection" Requirement in Capital Cases

In the area of subject matter jurisdiction, the United States Court of Appeals for the Armed Forces (CAAF) continues to perpetuate the issue of whether the government must establish a connection between the offense and the military to assert court-martial jurisdiction in a capital case.[5] This is a past trend, but is worth discussing again because the CAAF, once more, raises the issue.[6]

This year, in the capital murder case of *United States v. Gray*,[7] the accused argued before the CAAF that the court-martial lacked jurisdiction because the prosecution failed to show that his murder charges were service connected.[8] The accused's argument stems from the 1969 Supreme Court case *O'Callahan v. Parker*,[9] in which the Court limited the reach of courts-martial jurisdiction by requiring a connection between the accused's military duties and the crime, commonly referred to

1. James Anthony Froude, Elective Affinities of 1808, *reprinted in* JOHN BARTLETT, FAMILIAR QUOTATIONS 477a (1968).

2. *See* Major John Saunders, *The Emperor's New Clothes: Developments in Court-Martial Personnel, Pleas and Pretrial Agreements, and Pretrial Procedures*, ARMY LAW, Apr. 2000, at 14 for a discussion of recent pretrial procedure cases.

3. This article focuses on cases decided by the military appellate courts during the 1998 term, a term that began 1 October 1998 and ended 30 September 1999.

4. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 201(b)(1)-(5) (1998) [hereinafter MCM]. Rule for Courts-Martial (R.C.M.) 201(b) sets forth the five elements of court-martial jurisdiction. They are: (1) jurisdiction over the offense (subject matter jurisdiction), (2) jurisdiction over the accused (personal jurisdiction), (3) a properly composed court, (4) a properly convened court, and (5) properly referred charges (the last three equate to a properly composed court-martial).

5. The connection between the crime and the military is referred to as a "service connection." *See* Relford v. Commandant, 401 U.S. 355 (1971).

6. *See* Major Martin H. Sitler, *The Power to Prosecute: New Developments in Courts-Martial Jurisdiction*, ARMY LAW., Apr. 1998, at 2. A portion of the article discusses how the military appellate courts have given credence to the idea that the government must establish a connection between the crime and the military in a capital case.

7. 51 M.J. 1 (1999).

8. *Id.* at 11.

9. 395 U.S. 258 (1969). It is important to note that *O'Callahan* is a non-capital case. Prior to 1969, subject matter jurisdiction was defined by status—was the accused subject to the UCMJ at the time of the alleged crime. If so, subject matter jurisdiction was satisfied. Therefore, not only did the government have to show proper status, but it also had to establish a nexus between the crime and the military. The Court determined that the service connection requirement provided the necessary rational to assert military jurisdiction over its members.

as a "service connection."[10] Eighteen years later, however, this limitation ended.

In 1987, the Supreme Court abandoned the service connection requirement for court-martial jurisdiction with its decision in *Solorio v. United States.*[11] With *Solorio*, the Court made clear that to satisfy subject matter jurisdiction, the government only has to show that the accused was subject to the Uniform Code of Military Justice (UCMJ) at the time of the offense. No other prerequisites exist. In reaching its decision, the Court looked to the plenary powers of Congress, and concluded that if Congress wanted to limit court-martial jurisdiction to crimes connected to the service it would have expressly done so. As it did not, the Court overturned the service connection limitation created in *O'Callahan.* This, however, is not the end of the story. A closer look at *Solorio*, and in particular Justice Stevens's concurrence and the results therefrom, reveals the vitality of the service connection limitation in capital cases.

In *Solorio*, the Court decided 6-3 that court-martial jurisdiction existed.[12] Five justices in the majority agreed that court-martial jurisdiction does not depend on the service connection of the offenses charged. Rather, subject matter jurisdiction is determined solely by the status of the accused at the time of the offense.[13] In a concurring opinion, Justice Stevens agreed that court-martial jurisdiction existed but did not agree that the Court should eliminate the service connection requirement.[14] Justice Stevens's attachment to the service connection test resurfaced in 1996 with the Army's capital murder case of *Loving v. United States.*[15]

In *Loving*, the primary issue the defense raised before the Supreme Court was the constitutionality of the military's capital sentencing scheme. In a unanimous decision, the Court held that the military's capital sentencing scheme was proper.[16] In a concurring opinion in which three other Justices joined, Justice Stevens focused on jurisdiction—an issue the defense did not raise with the Court.[17] He seized the opportunity to once again promote his belief in the service connection requirement. He emphasized that *Solorio* was a non-capital case, and questioned its precedential value in capital cases. Then, he asserted his beliefs that the service connection test applies to capital cases. After employing the service connection test, Justice Stevens concluded, "the 'service connection' requirement has been satisfied."[18] Although just dicta, the military courts have recognized, and even applied the rule set forth in Justice Stevens's concurrence.[19] Unfortunately, none of the courts have ruled on its necessity. This year was no different.

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10. *See id.* at 267. *See also* Relford v. Commandant, 401 U.S. 355 (1971) (enumerating many factors for courts to consider in determining whether a crime is service connected, i.e., proper absence from base, location, committed during peacetime, connection to military duties, status of victim, damage to military property, etc.).

11. Solorio v. United States, 483 U.S. 435 (1987). In *Solorio*, the Supreme Court overruled *O'Callahan*, abandoning the "service-connection" test, and held that subject matter jurisdiction of a court-martial depends solely on the accused's status as a member of the armed forces. In reaching its decision, the Court deferred to the plenary power of Congress to regulate the armed forces. *Id.* at 441.

12. *Id.* at 437. Richard Solorio, an active duty member of the Coast Guard, was convicted of crimes committed while stationed in Juneau, Alaska. The crimes (non-capital) were committed off-post and consisted of sexual abuse of two young females. Solorio challenged jurisdiction before the Supreme Court. He argued that there was no service connection between the charged offenses and the military; and therefore, no jurisdiction to bring the matter before a court-martial. *Id.* at 440.

13. *Id.* at 450. As Richard Solorio was subject to the UCMJ at the time of the offenses, jurisdiction vested.

14. *Id.* at 451. His conclusion, however, was based on application of the service connection test. Applying the service connection test to the facts of *Solorio*, he opined there was sufficient evidence to link the crimes to the military.

15. 517 U.S. 748 (1996). Private Loving, an Army solider stationed at Fort Hood, Texas, murdered two taxicab drivers. He attempted to murder a third, but the driver escaped. Loving's first victim was an active duty service member and his second victim was a retired service member. In January 1996, *Loving* was argued before the Supreme Court.

16. *Id.* at 773.

17. *Id.* at 774 (Stevens, J., concurring).

18. *Id.* Once again, it is important to emphasize that *O'Callahan*, the precedent that established the service connection, is a non-capital case.

19. *See* United States v. Curtis, 44 M.J. 106 (1996). Within three weeks of the *Loving* decision, the CAAF issued its opinion in *Curtis*, another military capital-murder case (*Loving* was decided 3 June 1996 and *Curtis* was decided 21 June 1996). Although the defense did not raise the issue, in the first paragraph of the discussion, the court made a specific finding that the service connection test was met. *Id.* at 118. The court stated: "The offenses were service connected because they occurred on base and the victims were appellant's commander and his wife." *Id.* In support of this official conclusion, the court cited Justice Stevens's concurring opinion in *Loving. Id.*

Similarly, in *United States v. Simoy,* 46 M.J. 592 (A.F. Ct. Crim. App. 1996), an Air Force capital-murder case, the Air Force Court of Criminal Appeals, sua sponte, found a service connection between the murder and the military. *Id.* at 601. The majority stated: "The felony murder was service-connected because it occurred on base and the victim was an active duty military member." The Air Force court also cited Justice Stevens's concurring opinion. *Id.*

Citing *O'Callahan* and Justice Stevens's concurring opinion in *Loving*, the accused in *Gray* raised the service connection issue before the CAAF. The CAAF "agreed with Justice Stevens that the question whether *Solorio* applies in a capital case is an important question."[20] However, the court made a conscious decision to not decide the issue.[21] Instead, the CAAF validated the question by assuming the service connection rule "applies to capital courts-martial."[22] Looking to the facts of the case, and relying on service connection precedent, the court disagreed with the accused and found that there was a "sufficient service connection . . . to warrant trial by court-martial."[23]

By applying the service connection requirement to *Gray*, the CAAF has, in effect, assumed that the military's capital sentencing scheme is inherently unfair, and before the military can assert it, there must exist a more compelling reason to do so than just "status." After all, this was the rationale the Supreme Court relied on in deciding *O'Callahan* thirty-one years ago—the *non-capital* case that created the service connection requirement. In *O'Callahan*, the Supreme Court went to great lengths to highlight the differences between the civilian criminal justice system and the military justice system. The Court viewed these differences as inadequacies that left the court-martial system unfair. Therefore, before the military could impose its unfair system of justice on a service member, there needed to be more than just status. The Court determined that the service connection requirement provided the necessary rationale to justify the military asserting courts-martial jurisdiction over its members. Unfortunately, what the CAAF and Justice Stevens have failed to do is articulate the inadequacies of the military's capital sentencing scheme to justify the jurisdictional limitation of the service connection requirement—a limitation that neither Congress nor the Supreme Court demands.[24]

Regardless of the CAAF's underlying rationale, there is undoubtedly a trend to recognize a service connection requirement in military capital cases. Practitioners should heed this message. When faced with a capital case, counsel should develop facts at the earliest stage possible that either support or attack a service connection finding.

Personal Jurisdiction: Defining a Discharge

The concept of personal jurisdiction focuses on the time of trial. Specifically, can the military assert court-martial jurisdiction over the accused at the time of trial? Similar to subject matter jurisdiction, the answer to this question hinges on the status of the accused. If at the time of trial the accused is subject to the UCMJ, personal jurisdiction is satisfied.

Generally, a person's status under the UCMJ begins at enlistment and ends at discharge.[25] Of the two defining events, discharge is the most litigious issue. A discharge occurs when a service member receives a valid discharge certificate, a final accounting of pay, and completes a clearing process.[26] Regardless of where you are in the pretrial or trial stage, if the accused receives a discharge, personal jurisdiction is lost and the court-martial crumbles.[27] This year, two of the service courts grappled with the requirements of a discharge.

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20. United States v. Gray, 51 M.J. 1, 11 (1999). *Gray* is a capital-murder case from the Army. In 1988, a general court-martial found the accused guilty of the pre-meditated murder of two victims and attempted pre-meditated murder of another, and sentenced him to death. In 1993, the case made its way before the CAAF. *Id.* at 9, 10. See Major Paul Turney's forthcoming May 2000 capital litigation article in *The Army Lawyer* for a detailed discussion of the capital issues associated with *Gray.*

21. *Gray*, 51 M.J. at 11.

22. *Id.*

23. *Id.* (citing Relford v. Commandant, 401 U.S. 355 (1971); O'Callahan v. Parker, 395 U.S. 258 (1969) (identifying many factors for courts to consider in determining if a crime is service connected); . The court based its service connection finding on the following facts: (1) the accused was a member of the military, that is, had proper status; (2) both murder victims were associated with the post (one was a member of the military assigned to the post and the other was a civilian who worked there); and (3) the bodies were found on the post. *Id*.

24. *See generally* MCM, *supra* note 4, R.C.M. 1004. Furthermore, in *Solorio*, the Supreme Court unequivocally put the service connection requirement to rest.

25. MCM, *supra* note 4, R.C.M. 202(a) discussion. This provision states:

> In general, a person becomes subject to court-martial jurisdiction upon enlistment in or induction into the armed forces, acceptance of a commission, or entry into active duty pursuant to orders. Court-martial jurisdiction over active duty personnel ordinarily ends on delivery of a discharge certificate or its equivalent to the person concerned issued pursuant to competent orders.

Id.

26. *See* 10 U.S.C.S. § 1168(a) (LEXIS 2000). *See also* United States v. Keels, 48 M.J. 431 (1998) (holding that delivery of a valid discharge certificate, a Department of Defense Form 214 (DD 214), and final accounting of pay defines a discharge); United States v. Batchelder, 41 M.J. 337 (1994) (finding that the early delivery of a discharge certificate for administrative convenience does not terminate jurisdiction when the certificate is clear on its face that the commander issuing the certificate did not intend the discharge to take effect until later); United States v. King, 27 M.J. 327 (C.M.A. 1989) (refusing to complete a reenlistment ceremony after receiving a discharge certificate does not terminate jurisdiction because the accused did not undergo a clearing process); United States v. Howard, 20 M.J. 353 (C.M.A. 1985) (holding that jurisdiction terminates upon delivery of a discharge certificate and final accounting of pay).

In *United States v. Melanson*,[28] the Army Court of Criminal Appeals considered the issue of when a discharge is complete. Much of the court's analysis focused on the completion of a clearing process. In the end, the court found that a clearing is complete when the accused out-processes from the armed forces, and not just from the accused's unit. When stationed overseas, this not only includes an administrative out-processing from the accused's unit, but also a clearing from the host nation.[29]

Private Melanson was one of many potential suspects in an aggravated assault investigation. The assault occurred outside a German nightclub, and the victim was unsure of the identity of his assailants.[30] While the investigation progressed, Private Melanson, who was being administratively separated from the Army for drug use, began out-processing from his unit.[31] On 19 May 1998, Private Melanson completed out-processing from his unit. At 0008 the next day, with a copy of his discharge certificate and a plane ticket to the United States in hand, his unit escorted him to the nearest airport.[32] He was to fly from Nuremberg airport to Frankfurt airport. After a short layover in Frankfurt, he was to fly to Washington, D.C.[33]

While in route to the Frankfurt airport, two eyewitnesses to the assault identified Private Melanson in a photo lineup as one of the assailants.[34] The command was quick to respond. Soon after Private Melanson's plane arrived in Frankfurt, he was apprehended and returned to his unit.[35] Shortly thereafter, charges were referred to a general court-martial.

At trial, the accused challenged the jurisdiction of the court-martial. He argued that the court-martial lacked personal jurisdiction to try him because he had been discharged. The military judge denied his challenge, finding that he had not received a valid discharge certificate, or a final accounting of pay.[36] The military judge did find that he had cleared his unit. On appeal, the Army court focused on the clearing process.

The Army court agreed with the military judge that the accused cleared his unit yet further found that this was not enough to satisfy the clearing process from the Army.[37] Because the accused was stationed in Germany, the United States had to repatriate the accused, that is, return the accused to the United States. This was a requirement under the North Atlantic Treaty Organization Status of Forces Agreement (NATO SOFA).[38] Since this did not occur, the court found that the accused's "out-processing from the Army was incomplete, and thus his status as a soldier was never terminated prior to his apprehension at the Frankfurt airport."[39] The court ended its opinion with a declaration that the military judge was correct when she found that the accused never received a valid discharge certificate.[40] There was no discussion supporting this

27. *See* Smith v. Vanderbush, 47 M.J. 56 (1997) (finding that personal jurisdiction was lost when an accused received a valid discharge certificate, underwent a clearing process, and obtained a final accounting of pay, even after arraignment).

28. 50 M.J. 641 (Army Ct. Crim. App. 1999).

29. *Id.* at 644. The Army court determined that "[f]or soldiers stationed overseas, the process of separating from the Army includes compliance with all treaty obligations." *Id.* The Army court interpreted the NATO SOFA to require the United States to repatriate its soldiers stationed overseas. According to the court, this meant removing the soldier from the host nation (Germany) and returning him to the United States. Until this process was complete, the soldier had not cleared the Army. *Id.* at 644 (citing June 19, 1951-Oct. 27, 1953, NATO, T.I.A.S. No. 2846 [hereinafter NATO SOFA]; Agreement to Supplement NATO SOFA with respect to Foreign Forces stationed in the Federal Republic of Germany, Aug. 3, 1959-June 1, 1963, NATO, T.I.A.S. No. 5351 [hereinafter Supplementary Agreement]).

30. *Melanson*, 50 M.J. at 642. The assault occurred outside the Nashville Club in Vilseck, Germany.

31. *Id.*

32. *Id.* at 643. Private Melanson's unit gave him copy 4 of his DD 214. The nearest airport was Nuremberg airport.

33. *Id.*

34. *Id.*

35. *Id.* The command obtained the services of the German *polizei* to apprehend the accused.

36. *Id.* After the military judge denied the accused's motion to dismiss for lack of jurisdiction (R.C.M. 907(b)(1)(A)), the accused filed an extraordinary writ to the Army court. The Army court denied hearing the writ, and the CAAF denied the accused's writ appeal. The issue came before the Army court in the ordinary course of its appellate review of the case. *Id.* at 642.

37. *Id.* at 644.

38. If a service member decides to remain in Germany after being discharged, repatriation is not required; instead, the United States must notify German authorities that the service member has not been repatriated. Additionally, the service member must obtain a valid passport and visa. *See* NATO SOFA, *supra* note 29; Supplementary Agreement, *supra* note 29; and accompanying text.

39. *Melanson*, 50 M.J. at 645.

40. *Id.*

conclusion. The court did not address the issue of whether the accused received a final accounting of pay.

Melanson highlights that the clearing process for an accused stationed overseas may be broader than outprocessing from the local unit; a clearing from the armed forces, in this case repatriation, may be necessary. *Melanson* also reinforces the three prerequisites necessary to satisfy a discharge.[41]

Another service court case that addresses when a discharge is effective is *United States v. Williams*.[42] The jurisdiction issue in *Williams* was not raised at trial; rather, the defense argued the issue for the first time on appeal.[43] Specifically, the accused argued that the court-martial lacked personal jurisdiction because the government had discharged him.[44]

Private First Class (PFC) Williams was physically unfit to perform duties in the U.S. Marine Corps. As such, on 18 December 1996, his unit sent him home to await the final disposition of his physical evaluation board, which would serve as the basis for his medical discharge.[45] Meanwhile, an investigation began into the theft of military identification cards from PFC Williams's unit. The accused soon became a prime suspect.

On 15 January 1997 at approximately 2230, the accused's commander signed a letter that abated the accused's medical discharge and placed him on legal hold.[46] On the same date, without the commander's knowledge, a previously prepared discharge certificate (DD 214) reflecting a medical discharge effective 15 January 1997 at 2359 was mailed to the accused.[47] The following day a relative of the accused received the certificate. By 22 January 1997, the accused was back with his unit; he was eventually court-martialed.[48]

On appeal, the accused challenged the jurisdiction of the court-martial. He argued that the discharge certificate trumped the legal hold letter. He asserted that the time on the discharge certificate was not determinative; rather, the date controlled. Therefore, because the effective date of his discharge certificate was 15 January 1997, any action to stop the discharge on that same day was futile.[49] The Navy-Marine Corps court disagreed. The court held that the legal hold letter signed hours before the effective date and time of the discharge certificate voided the certificate.[50] The eleventh hour action on the part of the commander indicated a clear intent not to discharge the accused. *Williams* stresses that the commander's intent to discharge is an important fact to consider when determining the validity of a discharge certificate.

Both *Melanson* and *Williams* emphasize the technical aspects of a discharge. Interestingly, the common factual thread in both cases is that if the accused had the benefit of one more day, the government would have lost personal jurisdiction. Fortunately for the government, this was not the case. Regardless, the message from these cases is clear—when a discharge occurs, jurisdiction is lost.[51] This is clearly a concept that is a significant part of the jurisdictional cornerstone of a court-martial.

The Effect of a Valid Discharge: The Concept of Continuing Jurisdiction

There are several exceptions to the general rule that a discharge terminates court-martial jurisdiction.[52] One exception that surfaced this year is the concept of continuing jurisdiction—not a statutory exception, but an exception recognized by case law.[53] Under this concept, a court-martial can continue to proceed even though the military discharged the accused. This

41. On 3 February 2000, *United States v. Melanson* was argued before the CAAF. It will be interesting to see how the CAAF addresses the issue of the overseas clearing process.

42. 51 M.J. 592 (N.M. Ct. Crim. App. 1999).

43. *Id.* at 595. Among other offenses, the accused was charged with larceny and forgery. He pled guilty before a military judge alone and was convicted. Failure to raise the lack of jurisdiction issue at trial did not waive it. *See* MCM, *supra* note 4, R.C. M. 905(e).

44. *Williams*, 51 M.J. at 593.

45. *Id.* at 594.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.* at 595.

50. *Id.*

51. In two recent cases, Judge Crawford strongly urged the services or the President to promulgate a regulation that limits the authority to discharge those under charges or pending appellate review to the service secretary or a designated under secretary. *See* Steele v. Van Riper, 50 M.J. 89, 92 (1999); Smith v. Vanderbush, 47 M.J. 56 (1997).

is not a new theory of jurisdiction post-discharge. In 1997, in *Smith v. Vanderbush*,[54] the government urged the CAAF to apply the concept of continuing jurisdiction to a situation where the Army inadvertently discharged the accused after arraignment.[55] The government argued that once arraignment occurred, court-martial jurisdiction attached and the "issuance of an administrative discharge would not divest a court-martial of jurisdiction to try a civilian former member of the armed forces."[56]

In rejecting this argument, the CAAF held that there was no statutory authority that extended the concept of continuing jurisdiction to the trial. The CAAF clarified that continuing jurisdiction only permits appellate review and execution of a sentence "in the case of someone who already was tried and convicted while in a status subject to the UCMJ."[57] This year, the courts addressed two cases that discussed the concept of continuing jurisdiction—one CAAF case,[58] and one service court case.[59] When examining these two cases, together with *Vanderbush*, one can define the parameters of this jurisdictional concept.

In *Steele v. Van Riper*,[60] the CAAF addressed the effect of a post-conviction administrative discharge on a court-martial. A special court-martial convicted Private First Class (PFC) Steele of wrongfully using marijuana and sentenced him to a bad-conduct discharge and reduction to private.[61] Eleven months later, the convening authority eventually took action on the findings and sentence.[62] During this period, PFC Steele performed his duties at his unit without incident, and seven months after his court-martial, but before the convening authority's action, Steele's command honorably discharged him on his expiration of term of service (ETS).[63] Three months later, the convening authority took action by approving the findings and sentence, placed Steele on involuntary leave, and informed him that he had been erroneously discharged.[64] In response, Steele filed a petition with the Navy-Marine Corps Court of Criminal Appeals to stop the government from invalidating his honorable discharge. The service court denied the petition, and Steele raised the issue before the CAAF.[65]

In its brief to the CAAF, the government eventually agreed that the accused was entitled to his honorable discharge. "The Government further acknowledged the sentence could not be approved by the convening authority 'and [was] effectively remitted due to [Steele's] honorable discharge.'"[66] These concessions made the issue moot. Regardless, the CAAF opined that even though the administrative discharge remitted the puni-

52. *See* UCMJ arts. 2(a)(7), 3(a)–(d) (LEXIS 2000). *See also* Willenbring v. Neurauter, 48 M.J. 152 (1998) (holding that jurisdiction existed over the accused, a member of the reserve component at the time of trial, to try him for misconduct committed while a member of the regular component despite an intervening discharge); United States v. Reid, 46 M.J. 236 (1997) (finding that Article 3(b) requires a two-step trial process when prosecuting an accused for misconduct committed prior to the fraudulent discharge: first, a trial to determine if the accused committed a fraudulent discharge, then a trial to if the accused committed the other misconduct); United States v. King, 30 M.J. 334 (C.M.A. 1990) (prosecuting an accused after receiving a punitive discharge is permissible when the accused is serving a sentence of confinement imposed by a prior court-martial).

53. *See generally* Carter v. McClaughry, 183 U.S. 365 (1902); United States v. Montesinos, 28 M.J. 38, 46 (C.M.A. 1977).

54. 47 M.J. 56 (1997).

55. *Id.* at 59. Sergeant Vanderbush was administratively assigned to Eighth United States Army (EUSA), Korea, but was operationally assigned to the 2d Infantry Division (2ID), Korea. As his ETS approached, he committed misconduct, which eventually led to 2ID referring charges. The government arraigned Sergeant Vanderbush, and set a trial date. Meanwhile, unaware of the pending court-martial, EUSA discharged Sergeant Vanderbush from the Army. Soon thereafter, the defense moved to dismiss the charges due to a lack of personal jurisdiction. The military judge denied the motion. The defense filed a writ of extraordinary relief with the Army Court of Criminal Appeals, challenging the military judge's ruling. The Army court dismissed the charges for lack of personal jurisdiction, finding that Sergeant Vanderbush received a valid discharge. The CAAF agreed with the Army court. One of the arguments presented by the government to justify jurisdiction was the concept of continuing jurisdiction. *Id.* at 57-59.

56. *Id.*

57. *Id.*

58. Steele v. Van Riper, 50 M.J. 89 (1999).

59. United States v. Byrd, 50 M.J. 754 (N.M. Ct. Crim. App. 1999).

60. 50 M.J. 89 (1999).

61. *Id.* at 90.

62. *Id.*

63. *Id.* Private First Class Steele cleared his unit, was issued a DD 214 discharge certificate, and received his final accounting of pay. This occurred three months before the convening authority took action on the court-martial.

64. *Id.*

65. *Id.*

tive discharge, it did not "affect the power of the convening authority or appellate tribunals to act on the findings and sentence."[67]

In *Steele*, the CAAF unambiguously affirmed that after a conviction (that is, the announcement of sentence), jurisdiction exists to review the findings and sentence of the court-martial despite an intervening administrative discharge. This means that the convening authority and military appellate courts can approve the findings and sentence of the court-martial. An administrative discharge may remit the punitive discharge, but it will not divest the convening authority and appellate courts of jurisdiction to review the court-martial.

In *United States v. Byrd*,[68] the Navy-Marine Corps court discussed another facet of the concept of continuing jurisdiction. Specifically, what happens when the accused's punitive discharge is executed? The court finds that jurisdiction ceases, provided the discharge results from an act of judicial character.[69]

On 15 October 1996, the Navy-Marine Corps Court of Criminal Appeals affirmed the findings and sentence of Hospital Corpsman Third Class Byrd's court-martial.[70] As he did not appeal the service court's decision to the CAAF within sixty days, the Navy executed the bad-conduct discharge.[71] Despite the discharge, Byrd petitioned the CAAF. The CAAF, unaware that the Navy had executed the punitive discharge, waived its sixty-day filing rule and heard Byrd's petition.[72]

After hearing Byrd's petition, the CAAF set aside the service court's decision and remanded the case for an additional fact-finding inquiry.[73] On its return to the Navy-Marine Corps court, the government informed the court for the first time that Byrd had been discharged. Armed with this important fact, the government argued that the appellate courts lacked jurisdiction to review Byrd's court-martial any further.[74] The service court agreed.

In reaching its decision, the Navy-Marine Corps court drew a distinction between an administrative discharge—a discharge made pursuant to command action, and the execution of a punitive discharge—a discharge predicated upon an act of judicial character. When the discharge is a command action, the concept of continuing jurisdiction applies, and appellate review can advance. If, however, the "acts of judicial character resulted in the termination of jurisdiction," no authority exists for further appellate review.[75] When Byrd failed to petition the CAAF within sixty days, his court-martial conviction became final. As such, the Navy acted properly when it executed Byrd's punitive discharge. The discharge did not result from command action; rather it resulted from the service court affirming Byrd's court-martial findings and sentence—an act of judicial character. Therefore, the punitive discharge divested the appellate courts of further review.

Synthesizing *Vanderbush*, *Steele*, and *Byrd*, one can better define the parameters of continuing jurisdiction. The concept attaches upon conviction, and ceases once the punitive discharge is executed. Should the government administratively discharge the accused during the appellate process, the discharge does not divest the appellate courts of review, rather it remits the punitive discharge that the court-martial adjudged. Although an exception to the general rule that a discharge terminates jurisdiction, the concept of continuing jurisdiction applies to a limited situation—post-conviction to sentence execution.

A Properly Composed Court-Martial

The concepts of subject matter and personal jurisdiction make up the bulk of the jurisdictional cornerstone; however, the

66. *Id.* at 91. The government filled two responses to the CAAF. In the first response, the government argued that the convening authority could approve the punitive discharge. In the second response, the government changed its position and conceded that the accused is entitled to the honorable discharge.

67. *Id.* at 92.

68. 50 M.J. 754 (N.M. Ct. Crim. App. 1999).

69. An example of an act of judicial character is when an appellate court affirms or disaffirms a court-martial finding or sentence. *Id.* at 757. *Cf.* UCMJ art. 2(a)(7) (LEXIS 2000) (stating that "[p]ersons in custody of the armed forces serving a sentence imposed by a court-martial" are subject to the UCMJ despite the execution of a punitive discharge).

70. *Byrd*, 50 M.J. at 755.

71. *Id.* at 756. "By rule of the United States Court of Appeals for the Armed Forces (CAAF), [Byrd] had 60 days to petition CAAF for review." *Id. See also* UCMJ art. 67(b).

72. *Byrd*, 50 M.J. at 756. The accused's petition argued that he was deprived of his Sixth Amendment right to effective assistance of counsel.

73. *Id.* The CAAF ordered a *Dubay* hearing to gather additional facts to determine if the accused received effective assistance of counsel. *See* United States v. Dubay, 37 C.M.R. 411 (C.M.A. 1967).

74. *Byrd*, 50 M.J. at 756.

75. *Id.* at 757.

composition of the court-martial (the personnel necessary for the court-martial to exist) is the mortar that holds it together.[76] Two years ago, in *United States v. Turner*,[77] the CAAF determined that under certain circumstances errors in court-martial composition may not weaken the jurisdiction of a court-martial provided the rules are substantially complied with.[78] This year, the service courts wrestled with this concept of substantial compliance. The Navy-Marine Corps court limited its application, whereas the Army court fully embraced the doctrine. To fully appreciate the issue, one must begin with *Turner.*

At trial, Chief Warrant Officer Turner's defense counsel made a written and oral request for trial by military judge alone.[79] The accused did not, on the record, *personally* request or object to trial by military judge as required by Article 16.[80] On appeal, the defense challenged jurisdiction, arguing that the court-martial was not properly convened because the accused did not personally request to be tried by military judge alone.[81] The Navy-Marine Corps court agreed. Relying on the language of Article 16,[82] the service court held that "failure of the accused personally to make a forum choice was a fatal jurisdictional defect and reversed" the conviction.[83]

The CAAF overturned the Navy-Marine Corps court's decision and found substantial compliance with Article 16. The court's finding, however, is based on the record of trial as a whole and limited to the facts of the case.[84] The CAAF clearly found a violation of Article 16, but determined that because there was substantial compliance, any error committed "did not materially prejudice the substantial rights of the accused."[85]

This year, in *United States v. Townes*,[86] when faced with a similar court-martial composition issue, the Navy-Marine Corps court once again relied on the plain language of the statue to find a jurisdictional error.[87] In doing so, the service court unequivocally refused to apply the substantial compliance doctrine.[88] *Townes* focused on Article 25, not Article 16. Article 25 is the statute that gives an enlisted accused the ability to request trial by officer and enlisted members. The language in Article 25 is similar to the language of Article 16 except that Article 25 includes the word "personally," whereas Article 16 does not.[89] This difference, although just one word, was enough for the service court to justify its refusal of the substantial compliance doctrine.[90]

The facts in *Townes* present a situation in which the accused, although tried, convicted, and sentenced by a panel of officer and enlisted members, did not personally request on the record to be tried by such a forum.[91] At no time during the trial did the accused object to the forum of the court-martial, but on appeal before the Navy-Marine Corps court the accused argued that the court-martial lacked jurisdiction.[92] The accused premised his argument on the fact that he did not *personally* make the forum election as required by Article 25.[93] The government looked to the CAAF's rationale in *Turner* to argue that the court-martial substantially complied with Article 25.[94] The court agreed with the accused.

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76. *See* MCM, *supra* note 4, R.C.M. 202(b)(2). This rule states that "[t]he court-martial must be composed in accordance with these rules with respect to number and qualifications of its personnel. As used here "personnel" includes only the military judge, the members, and the summary court-martial." *Id.*

77. 47 M.J. 348 (1997).

78. *See* United States v. Seward, 49 M.J. 369 (1998) (holding that failure of the accused to request a trial by military judge alone before assembly violates Article 16, but is not a jurisdictional error, and therefore, should be tested for prejudice).

79. *Turner*, 47 M.J. at 349.

80. UCMJ art. 16 (LEXIS 2000). Article 16(1) permits the accused to elect trial by military judge alone when tried at either a general or special courts-martial. In pertinent part, Article 16(1)(B) provides: "only a military judge, if before the court is assembled the accused, knowing the identity of the military judge and after consultation with defense counsel, requests orally on the record or in writing a court composed only of a military judge and the military judge approves."

81. *See Turner*, 47 M.J. at 348. *See also* United States v. Turner, 45 M.J. 531 (N.M. Ct. Crim. App. 1996). In relying on the plain language of UCMJ, Article 16, the service court determined that the accused must personally elect to be tried by military judge alone. Failure to personally make such a request is not a "meaningless ritual;" rather "it is the only way for the military judge sitting alone to obtain jurisdiction." *Turner*, 45 M.J. at 534.

82. UCMJ art. 16.

83. *Turner*, 47 M.J. at 349.

84. *Id.* at 350.

85. *Id*. On the record, Turner's defense counsel stated that Turner wanted to be tried by military judge alone. Turner's defense counsel also submitted a written request for trial by judge alone. Finally, when the military judge informed Turner of his forum rights, Turner indicated for the record he understood his rights to be tried by military judge alone.

86. 50 M.J. 762 (N.M. Ct. Crim. App. 1999).

87. *Id.* at 765.

88. *Id.*

The Navy-Marine Corps court refused to apply the substantial compliance analysis. The court opined that Article 16 and Article 25 are different.[95] Under Article 25, Congress used the word "personally," a clear indication that the accused is the one who must make the election to be tried by officer and enlisted members. The court posited that this is not meaningless language, and cannot be ignored.[96] In the end, the service court found that the accused's failure to personally make a request for enlisted members was a jurisdictional error.[97]

Three months later, in *United States v. Daniels*,[98] the Army Court of Criminal Appeals addressed the same issue, but came to a different result. Similar to the facts in *Townes*, the accused in *Daniels* did not personally make an election to be tried by officer and enlisted members as required by Article 25.[99] On appeal before the Army court, the accused argued that this omission equated to a jurisdictional error. In response, the court ordered a *Dubay* hearing to determine the accused's understanding of forum.[100] During the hearing, the accused testified that she remembered discussing the issue of forum election with her defense counsel, and recalled telling her defense counsel she wished to be tried by officer and enlisted members.[101] Armed with the information gleaned from the *Dubay* hearing, the Army court concluded that, based on the entire record, the court-martial substantially complied with Article 25.[102] The failure of the accused to make the election to be tried by officer and enlisted members on the record was a procedural defect and not a jurisdictional error. Further, under the circumstances, the defect was harmless.[103]

In reaching its decision, the Army court relied heavily on the outcome of the *Dubay* hearing.[104] It is likely that the court would have reached a different result had the accused testified that she did not understand her forum election. An interesting

89. UCMJ art. 25(c)(1) states:

> Any enlisted member of an armed force on active duty who is not a member of the same unit as the accused is eligible to serve on general and special courts-martial for the trial of any enlisted member of an armed force who may lawfully be brought before such courts for trial, but he shall serve as a member of a court only if, before the conclusion of a session called by the military judge under section 839(a) of this title (article 39(a)) prior to trial or, in the absence of such a session, *before the court is assembled for the trial of the accused, the accused personally has requested orally on the record or in writing that enlisted members serve on it.* After such a request, the accused may not be tried by a general or special court-martial the membership of which does not include enlisted members in a number comprising oat least one-third of the total membership of the court, unless eligible enlisted members cannot be obtained on account of physical conditions or military exigencies. If such members cannot be obtained, the court may be assembled and the trial held without them, but the convening authority shall make a detailed written statement, to be appended to the record, stating why they could not be obtained.

UCMJ art. 25(c)(1) (LEXIS 2000) (emphasis added). *Cf.* UCMJ art 16(1)(B).

90. *Townes*, 50 M.J. at 766. The court also relied on *United States v. Brandt*, 20 M.J. 74 (C.M.A. 1985), to justify its holding. The court determined that in *Brandt*, the Court of Military Appeals "made it clear that Congress intended the election of enlisted members be made by the accused." *Id.* at 765.

91. *Id.* at 763. Sergeant Townes was charged with a multitude of misconduct. He pled guilty to some of the offenses, and not guilty to remaining offenses. To those offenses he pled not guilty to, he was tried by a general court-martial composed of officer and enlisted members.

92. *Id.* at 764.

93. *Id.* at 765. In an attempt to gather more facts, the service court ordered a *Dubay* hearing. *See* United States v. Dubay, 37 C.M.R. 411 (C.M.A. 1967). During the hearing, the accused testified that he did not recall making any choice as to forum election. *See also Brandt*, 20 M.J. at 74.

94. *Townes*, 50 M.J. 765.

95. *Id.* at 766.

96. *Id.*

97. *Id.* The court set aside the findings to the charges that went before the members, and also set aside the sentence. In a dissenting opinion, Judge Anderson, citing to *Turner*'s substantial compliance doctrine opined that the case involved a technical error and not a jurisdictional defect in the court-martial. Looking at the entire record, Judge Anderson believed that Article 25 had been substantially complied with and there was no prejudice. *Id.* (Anderson, dissenting).

98. 50 M.J. 864 (Army Ct. Crim. App. 1999).

99. *Id.*

100. *See id. See also* United States v. Dubay, 37 C.M.R. 411 (C.M.A. 1967).

101. *Daniels*, 50 M.J. at 865. This is a significant factual distinction from *Townes*. In *Townes*, the accused testified during the *Dubay* hearing that he did not recall making a forum election. *Townes*, 50 M.J. at 765.

102. *Daniels*, 50 M.J. at 867.

103. *Id.*

point of comparison is that in *Turner*, the CAAF did not require a *Dubay* hearing before employing the substantial compliance analysis. Although one may distinguish the facts in *Townes* and *Daniels*, the analysis used by each court is different. Specifically, the Navy-Marine Corps court refused to apply the substantial compliance analysis used by the Army court to resolve Article 25 errors.

The CAAF recently resolved the issue. On 9 December 1999, the CAAF heard argument on *Townes*,[105] and on 8 March 2000 rendered its decision.[106] With little discussion, the CAAF unanimously applied the substantial compliance analysis to *Townes*, and once again, disagreed with the Navy-Marine Corps court's strict statutory interpretation.[107] The CAAF's decision in *Townes* perpetuates a trend that technical errors with the court-martial composition process are not jurisdictional. Further, at least at the appellate level, the courts will use the substantial compliance analysis to determine the effect of the error. What cannot be overlooked is that the failure to follow the court-martial composition procedural requirements is error. The issue can easily be avoided if the military judge and counsel remain vigilant to the court-martial composition rules.

Military Writ Authority

Once the court-martial has been built upon a solid jurisdictional foundation, the government can try the case. If the court-martial results in a conviction, the service appellate courts may review the case and all its related issues. Similar to the court-martial stage, the first issue the appellate courts must determine is whether their review is founded upon a sound jurisdictional basis. If not, the appellate review will crumble. Generally, the authority for appellate jurisdiction lies in Articles 66, 67, and 69.[108] Another jurisdictional theory of appellate review can also be found under the All Writs Act.[109] This year, in *Clinton v. Goldsmith*,[110] the Supreme Court clarified the scope of the CAAF's writ authority under the All Writs Act.

In 1948, Congress enacted the All Writs Act,[111] which gave federal appellate courts the ability to grant relief in aid of their jurisdiction. In 1969, the Supreme Court held that the All Writs Act applied to the military appellate courts.[112] Consistent with other federal courts, the military appellate courts view writ relief as a drastic remedy that should only be invoked in truly extraordinary situations.[113] In addition to the actual jurisdiction granted military appellate courts under the UCMJ,[114] those courts have relied on the All Writs Act as a source of potential, ancillary, or supervisory jurisdiction.[115] The issue often

104. *Id.* at 866. The Army court viewed the *Dubay* hearing as part of the "record of trial as a whole." And, when considering the record of trial as a whole, the court concluded that Article 25 had been complied with. *Id.* at 867.

105. Telephone Interview with Glenda Martin, Legal Technician, United States Court of Appeals for the Armed Forces (Mar. 7, 2000) [hereinafter Martin Interview].

106. United States v. Townes, No. 99-5004 (C.A.A.F. Mar. 8, 2000) (to appear at 52 M.J. ___).

107. *Id.* at slip op. 4. The CAAF found that the accused's failure to make the election for enlisted members on the record was error, but determined that "the 'record of trial as a whole makes clear that the selection was the accused's choice, and that the error . . . did not materially prejudice the substantial rights of the accused.'" *Id.* (quoting United States v. Turner, M.J. 348, 350 (1997)). The CAAF emphasized that its decision does not "relieve judges of their obligation to obtain a personal election by the accused on the record." *Id.*

108. *See* UCMJ arts. 66, 67, 69 (LEXIS 2000). Article 66 establishes the parameters for appellate review by the service courts of criminal appeals. Article 67 establishes the parameters for appellate review by the CAAF. Article 69 provides for appellate review by the judge advocates general of the various services.

109. 28 U.S.C.S. § 1651(a) (LEXIS 2000).

110. 119 S. Ct. 1538 (1999).

111. 28 U.S.C.S. § 1651(a).

112. Noyd v. Bond, 395 U.S. 683 (1969). Within the military justice system there are four writs that are commonly used: mandamus, prohibition, error coram nobis, and habeas corpus. A writ of mandamus is an order from a court of competent jurisdiction that requires the performance of a specified act by an inferior court or authority. BLACK'S LAW DICTIONARY 866 (5th ed. 1979). The writ of prohibition is used to prevent the commission of a specified act or issuance of a particular order. *Id.* at 1091. The writ of error coram nobis is used to bring an issue before the court that previously decided the same issue for the purpose of reviewing error of fact or retroactive change in the law, which affects the validity of the prior proceeding. *Id.* at 487. The writ of habeas corpus is used to challenge either the legal basis for or the manner of confinement. *Id.* at 638. Rules 27 and 28 of the United States Court of Appeals for the Armed Forces Rules of Practice and Procedure sets forth the requirements for the contents of a petition for extraordinary relief. UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES RULES OF PRACTICE AND PROCEDURES (27 Feb. 1996).

113. Daniel J. Wacker, *The "Unreviewable" Court-Martial Conviction: Supervisory Relief Under the All Writs Act From the United States Court of Military Appeals*, 32 HARV. C.R.-C.L. L. REV. 33 (1975).

114. *See* UCMJ arts. 66, 67, 69 (LEXIS 2000).

115. *See* McPhail v. United States, 1 M.J. 457, 462 (C.M.A. 1976); Dew v. United States, 48 M.J. 639, 645 (Army Ct. Crim. App. 1998).

becomes, as was the situation this year, when can military appellate courts exercise relief under the All Writs Act?

In *Goldsmith*, the accused, U.S. Air Force Major James Goldsmith, was convicted of an HIV aggravated assault.[116] He was sentenced to a lengthy period of confinement, but no punitive discharge.[117] In 1995, the Air Force Court of Criminal Appeals affirmed his conviction and sentence. Goldsmith did not petition the CAAF, and his conviction became final.[118]

While in confinement, the accused filed a writ before the Air Force Court of Criminal Appeals. The accused complained that the confinement facility was improperly administering and maintaining his HIV medication.[119] By the time the writ came before the Air Force court, the accused had been released from confinement and the HIV issue was moot. Therefore, the writ was denied.[120]

Soon thereafter, the accused filed a writ appeal to the CAAF, not arguing that the denial of the initial writ was improper; instead, the accused raised a new issue before the court.[121] The challenge was that the government was unlawfully dropping the accused from the rolls of the Air Force.[122] Because the accused was not adjudged a punitive discharge in his court-martial, the government sought to discharge the accused by dropping him from the rolls of the Air Force—action taken pursuant to a federal statute. The law in effect at the time of the accused's conviction, however, did not permit the government to drop an officer from the rolls based solely on a court-martial conviction. This action by the government, argued the defense, was additional punishment that violated the ex post facto clause of the Constitution.[123] Before addressing this issue, however, the CAAF had to determine if it possessed the jurisdiction to grant the relief. Specifically, could the CAAF grant relief over an issue that it did not address, and could not address, under its statutory appellate authority?

Before the CAAF, the government insisted that "dropping [the accused] from the rolls [was] only an 'administrative' matter and [did] not concern punishment."[124] Therefore, because the challenge did not amount to a military justice matter, the CAAF lacked even the supervisory authority under the All Writs Act to grant relief. In denying the government's argument, the majority declared that the action by the government, that is, dropping the accused from the rolls, amounted to additional punishment.[125] Since the action equated to punishment, the issue was a military justice matter. As such, the majority of the court reasoned it could exercise its inherent supervisory power under the All Writs Act to grant relief if necessary.[126] Under the facts in the case, the CAAF felt it necessary to grant relief, and ordered the government to not drop the accused from the rolls of the Air Force.[127]

On 4 November 1998, the Supreme Court agreed to review *Goldsmith*, and to address the issue of the scope of the CAAF's supervisory authority under the All Writs Act.[128] This year, in a 9-0 decision, the Supreme Court reversed the CAAF.[129]

The Supreme Court unequivocally held that the CAAF lacked jurisdiction to grant Major Goldsmith's petition for

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116. *Goldsmith*, 119 S. Ct. 1541.

117. *Id.* The accused was sentenced to six years of confinement.

118. *Id.*

119. *Id.*

120. *Id.*

121. *See* Goldsmith v. Clinton, 48 M.J. 84 (1998). By allowing the petitioner to first raise the issue before the CAAF, the court made clear that its previous holding in *ABC, Inc. v. Powell*, 47 M.J. 363 (1997) (declaring that a writ for extraordinary relief must first be brought before the Court of Criminal Appeals absent good cause) is not an ironclad rule. *Goldsmith*, 48 M.J. at 88.

122. *Id.* at 86.

123. *Id.* at 89.

124. *Id.* at 90.

125. *Id.*

126. *Id.* at 87.

127. *Id.* at 90. The CAAF held that the government's action in dropping the accused from the rolls of the Air Force violated the ex post facto clause of the Constitution. In a concurring opinion, Chief Judge Cox cautions that the court's exercise of jurisdiction in the case is limited to its facts. Judges Gierke and Crawford strongly disagreed with the court's decision.

128. Clinton v. Goldsmith, 119 S. Ct. 402 (1998).

129. Clinton v. Goldsmith, 119 S. Ct. 1543, 1545 (1999).

extraordinary relief. The Court looked to the appellate authority granted the CAAF by Congress.[130] Dropping a service member from the rolls is not a finding or sentence that the CAAF has authority to review under its statutory authority. Rather, the process is an executive action.[131] Furthermore, even if there existed a jurisdictional basis to address the issue, granting the relief was not necessary or appropriate "in light of alternative remedies available."[132]

The message the Supreme Court sent in *Goldsmith* is clear: the CAAF does not have jurisdiction "to oversee all matters arguably related to military justice, or to act as a plenary administrator even of criminal judgments it has affirmed."[133] The foundation on which the CAAF has built many writ cases is not as broad as what the court intended. It will be interesting to see how our appellate courts, especially the service courts, interpret and apply *Goldsmith* to future writ cases.

Conclusion

This year's jurisdiction cases present several interesting developments. In most instances, the courts perpetuate existing trends. For example, in *United States v. Gray,*[134] the CAAF continues to recognize the issue that a service connection showing may be required to satisfy subject matter jurisdiction in capital cases. Unfortunately, instead of answering the issue when given the opportunity, the CAAF acquiesces in its existence, applies it, but leaves it unresolved. Also, the courts continue to strictly construe the requirements that define a discharge. In several of this year's cases, the appellate courts either rely on an exception to the general rule that a discharge terminates jurisdiction, or look to the technical requirements needed to satisfy a discharge, in finding that court-martial jurisdiction exists.

In a few cases, however, we see the emergence of a new trend or the end of an old trend. A development emerged as the service courts grappled with Article 25, and the failure of an enlisted accused to personally elect on the record to be tried by a court composed of officer and enlisted members. What surfaced was a split among the service courts on what the appellate test is for such a failure—is the error jurisdictional or administrative? If it is administrative, does the doctrine of substantial compliance apply? The CAAF answered this question in *United States v. Townes*.[135] It appears that technical errors with the court-martial composition process are not jurisdictional and the doctrine of substantial compliance applies. Finally, in *Clinton v. Goldsmith*,[136] the Supreme Court puts an end to a trend by considerably curtailing the CAAF's long-standing, self-proclaimed theory of supervisory writ authority under the All Writs Act. Despite this year's jurisdiction cases presenting a variety of trends and issues, one message is clear: Whether at trial or on appeal, jurisdiction is the cornerstone to a well-constructed court-martial. For without it, the case will surely topple.

130. *Id.* at 1542.

131. *Id.* at 1544.

132. *Id.* at 1543.

133. *Goldsmith*, 119 S. Ct. at 1543.

134. 51 M.J. 1 (1999).

135. United States v. Townes, No. 99-5004 (C.A.A.F. Mar. 8, 2000) (to appear at 52 M.J. __) *See* Martin Interview, *supra* note 105; *see also* text accompanying note 105.

136. 119 S. Ct. 1538 (1999).

The Emperor's New Clothes:[1] Developments in Court-Martial Personnel, Pleas and Pretrial Agreements, and Pretrial Procedures

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My sister's expecting a baby, and I don't know if I am going to be an uncle or an aunt.[2]

Telling it like it is means telling it like it was and how it is now that it isn't what it was to the is now people.[3]

Introduction

Trying to discern new developments in the past year of military court decisions in the areas of court personnel, pleas and pretrial agreements, and pretrial procedure, is a perilous undertaking, just as efforts to forecast future trends or to purport to "tell it like it is" can be. Such efforts run the risk of imposing the subjective view or expectations (or shortcomings) of the reviewer on the "is" that is under discussion. This, in turn, can lead to artificial and, as the quotes above indicate, inherently flawed or meaningless conclusions. Nevertheless, casting caution to the winds, such exercises do have merit. They create at least one prism or lens through which to compare emerging case law with the decisions that have gone before and provide some basis, if ultimately only speculative, for predicting future paths a court's decisions may take.

One pervasive theme emerging from the decisions of the Court of Appeals for the Armed Forces (CAAF) of the past year could be characterized as increasing deference. Deference, that is, to convening authorities, military judges, staff judge advocates (SJAs), and others on the government side of the military justice process, by way of defining very broadly the discretionary zone in which these officials act. Thus, whether actually called upon to do so or not, the court in several cases assessed the roles and behavior of various court-martial personnel and seemingly pushed back the restrictions on their actions in the court-martial arena. This theme is less identifiable in some areas, such as pleas and pretrial agreements, where the court sanctioned a new provision of a pretrial agreement, but set aside a case in which seemingly collateral circumstances affected the sentence that the members sought to impose.

This article analyzes selected recent decisions by the military appellate courts that focus on court-martial personnel, panel selection, voir dire, and pleas and pretrial agreements. Discussion of every case would not be possible, so only those cases that purport to say something significant about the roles of court personnel or the panel selection process, or that might affect the accused's ability to bargain with the convening authority, will be discussed. In that practical limitations preclude a full survey of all the service appellate courts, most of the cases reviewed will be those from the CAAF. Finally, where possible, this article identifies and discusses a decision's practical implications for trial and defense counsel.

Court-Martial Panel Selection

The most notable development in the area of panel selection is the random selection report, recently prepared by the Joint Service Committee on Military Justice (JSC) and delivered to Congress in the fall 1999.[4] In 1997, Congress, responding to criticism of the military's method of panel selection, directed the Secretary of the Department of Defense (DOD) to study alternatives to the present method of selection, including random selection of panel members, which the military does not practice.[5] Indeed, Congress, in enacting Article 25, Uniform Code of Military Justice (UCMJ), the statutory scheme governing panel selection, mandated that the convening authority personally, rather than randomly, select panel members.[6] Thus, Article 25 requires that the convening authority select only those members who, in his opinion, best comply with the criteria of Article 25, UCMJ.[7]

1. HANS CHRISTIAN ANDERSON, THE EMPEROR'S NEW CLOTHES (1989). This portion of the title of Anderson's work is quoted to suggest, consonant with the theme of this article, that the military courts, particularly the Court of Appeals for the Armed Forces, are showing increased deference to military justice authorities, namely, the convening authority, the military judge, and the staff judge advocate. This article questions whether such deference is appropriate, and whether we should heed the few, brave, lonely voices, often raised in dissent, which warn the Emperor that his marvelous raiment is illusory.

2. ROSS PETRAS & KATHRYN PETRAS, THE 776 STUPIDEST THINGS EVER SAID 175 (1993) (quoting Chuck Nevitt).

3. *Id.* 195 (quoting Jill Johnston).

4. DOD JOINT SERVICE COMMITTEE ON MILITARY JUSTICE, REPORT ON THE METHODS OF SELECTION OF MEMBERS OF THE ARMED FORCES TO SERVE ON COURTS-MARTIAL 6 (Aug. 1999) [hereinafter REPORT] (on file with the Office of the Judge Advocate General, U.S. Army).

Interestingly, Congress directed the DOD to study alternatives that were *consistent* with the Article 25(d) criteria. Arguably, consideration of a truly or mathematically random selection scheme was beyond the scope of the directive.[8] The DOD General Counsel requested that the JSC conduct a study and prepare a report on random selection.[9] The JSC conducted research and sought the opinions of each service, and reviewed court-martial selection practices in Canada and the United Kingdom.[10] The JSC considered six alternatives. They were: maintain the current practice, random nomination,[11] random selection,[12] random nomination and selection,[13] modifying the source of the appointment,[14] and an independent selection authority.[15] After reviewing these different proposals, the JSC concluded that the current practice "ensures fair panels of court-martial members who are best qualified" and that there is "no evidence of systemic unfairness or unlawful command influence."[16] The JSC report has been sent to Congress and we await further word on this issue.

Change to the Manual for Courts-Martial Effects Reserve Military Judges

The President implemented several changes to the *Manual for Courts-Martial (MCM)*[17] over the past year. One of those changes removes a holdover provision concerning qualifications for military judges. Although not required by Congress, the *MCM* had mandated that, to be qualified to try courts-martial, military judges be commissioned officers on active duty in the armed forces.[18] The President's Executive Order removed the active duty requirement from R.C.M. 502.[19] This change will enable reserve military judges to try cases while on active

5. *See* Major Gregory Coe, *On Freedom's Frontier: Significant Developments in Pretrial and Trial Procedure*, ARMY LAW., May, 1999, at 1 n.8 (discussing The Strom Thurmond National Defense Authorization Act for Fiscal Year 1999, Pub. L. No. 105-261, § 1, 112 Stat. 1920 (1998), which required the Secretary of Defense to develop and to report on a random selection method of choosing individuals to serve on courts-martial panels); *see also* Major Guy P. Glazier, *He Called For His Pipe And He Called for His Bowl, And He Called For His Members Three–Selection Of Juries By The Sovereign: Impediment To Military Justice*, 157 MIL. L. REV. 1 (1998).

6. *See* UCMJ art. 25 (LEXIS 2000).

7. Those criteria are: age, education, training, experience, length of service, and judicial temperament. *Id.*

8. *See id.* n.12, n.21 ("By mandating that the alternatives remain consistent with Article 25(d)(2), the JSC believes that Congress intended that any alternative must have sufficient provisions to maintain high levels of court-martial member competence.").

9. REPORT, *supra* note 4, at 3.

10. *Id.*

11. *Id.* at 20 (creating a system for random nomination of prospective members; the convening authority would then select the members of the panel from the nominees).

12. *Id.* at 26 (explaining that nominations would be provided by subordinate commands, the panel members would be randomly selected, and the convening authority would then screen the selectees to ensure availability and compliance with Article 25).

13. *Id.* at 30 (explaining that panel members would be nominated and selected at random; the convening authority would screen the potential selectees to ensure availability and compliance with Article 25 before the random selection would occur).

14. *Id.* at 35 (expanding, either geographically or along command lines, the source from which members would be identified and selected; from the expanded source, potential members would be nominated using Article 25 criteria, and later selected by the convening authority). *See id.* at 35 n.78 ("The British military justice system now uses this approach by selecting court-martial members from a lateral command separate from that of the commander who refers a case to their prosecuting attorney.").

15. *Id.* at 40 (removing the convening authority from the selection process and placing her with an authority outside the command). *See id.* at 40 n.82 ("[I]n Canada, the Chief Military Trial Judge screens and details randomly selected court-martial members from a worldwide source.").

16. *Id.* at 45.

17. MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998) [hereinafter MCM].

18. *Id.* R.C.M. 502(c).

> A military judge shall be a commissioned officer *on active duty* who is a member of the bar of a Federal court or a member of the bar of the highest court of a State and who is certified to be qualified for duty as a military judge by the Judge Advocate General of the armed force of which the military judge is a member. In addition, the military judge of a general court-martial shall be designated for such duties by the Judge Advocate General or the Judge Advocate General's designee, certified to be qualified for duty as a military judge of a general court-martial, and assigned and directly responsible to the Judge Advocate General or the Judge Advocate General's designee. The Secretary concerned may prescribe additional qualifications for military judge is special courts-martial. As used in this subsection "military judge" does not include the president of a special court-martial without a military judge.

Id. (emphasis added).

duty, inactive duty training, or inactive duty training and travel.[20] It should be noted, however, that this change only increases their opportunities to try special courts-martial. It does not qualify them to try general courts-martial (GCM).[21]

CAAF Review of Challenges to Panel Selection

Over the past two years, the CAAF has resolved three cases that show a predilection on the part of the court in dealing with challenges to panel selection. Specifically, the CAAF upheld the denial of challenges to the panel in *United States v. Bertie*,[22] *United States v. Upshaw*,[23] and *United States v. Roland*.[24] As a result of the combined holdings of these cases, the burden on the defense to show impropriety in panel selection is, arguably, increasingly onerous. A majority of the CAAF, apparently, used each of these cases to toughen the burden on defense counsel who seek to challenge the array, and capitalized on the opportunity to articulate guidance for military judges to resolve such challenges.

In *Bertie*, the accused, a specialist (SPC) or E-4, challenged the panel arrayed for his trial. The panel was composed of predominantly higher-ranking members (no member was below major (0-4), or sergeant first class (E-7)). The defense argued that the practice of the command proved that an inappropriate criteria was used in the selection of members. Namely, that the convening authority had focused on the members' ranks in selecting them for court-martial duty. Rank is not an appropriate criteria for selecting panel members.[25] While the record established that court-martial nominees were requested and provided in all grades down to private first class, the defense, nevertheless, presented evidence showing that no officer below the grade of 0-3 and no enlisted person below the grade of E-7 had been selected to serve over the course of the previous year. Despite this evidence, the military judge found that there was no impropriety in the selection of the panel.

In upholding the panel selection, the CAAF held that, contrary to the defense argument, there was no presumption of impropriety that flowed from the composition of the panel. The CAAF began by characterizing the accused's argument as one of court-stacking; that is, the claim that the convening authority purposefully stacked a panel with members of senior grades or ranks "to achieve a desired result."[26] Acknowledging that the intent of the convening authority is an essential factor in determining compliance with Article 25, the CAAF observed that the "lynchpin" of the accused's argument was that the composition of the panel created a presumption of court stacking.[27] The majority found no precedent for this finding.

While suggesting that a statistically-based challenge under Article 25 was still viable, the CAAF stated that "other evidence" must be considered in deciding what a convening authority's motive was in a particular case.[28] The CAAF's conclusion appeared to hinge on the evidence that the acting SJA had advised the convening authority of the Article 25 criteria and admonished him not to use rank or other criteria to systematically exclude qualified persons. In addition, the CAAF noted that the convening authority stated in a memorandum that he had considered Article 25.[29] After considering this evidence, the CAAF concluded that the accused did "not persuasively establish a court-stacking claim."[30]

The *Bertie* result reflects the CAAF's unwillingness to set aside panel selections unless there is evidence of bad faith by the convening authority or the convening authority's minions. In 1998, the CAAF rejected a challenge to a panel where, it was shown that otherwise qualified service members were deliberately excluded from convening authority consideration. In

19. Exec. Order 13,140, 64 Fed. Reg. 55,120.

20. *Id*.

21. *Cf.* U.S. DEP'T OF ARMY, REG. 27-10, LEGAL SERVICES: MILITARY JUSTICE, ch. 8 (20 Aug. 1999) (United States Army Trial Judiciary – Military Judge Program); *see also* discussion *supra* note 18 (detailing R.C.M. 502(c)).

22. 50 M.J. 489 (1999).

23. 49 M.J. 111 (1998).

24. 50 M.J. 66 (1999).

25. *See, e.g.*, United States v. Smith, 37 M.J. 773 (A.C.M.R. 1993) (discussing where the convening authority used rank as a selection criteria when he directed the staff judge advocate to "get" a soldier of a specified rank from each of the subordinate units).

26. *Bertie*, 50 M.J. at 492.

27. *Id*.

28. *Id*. (citation omitted).

29. *Bertie*, 50 M.J. at 493.

30. *Id*. (citation omitted).

United States v. Upshaw,[31] the SJA had solicited panel nominees based on the mistaken belief that the accused was an E-6. As a result, he requested nominees in the grade E-7 and above. At trial, it was apparent that the accused was an E-5, and the defense moved to dismiss for lack of jurisdiction based on the convening authority's exclusion of E-6s from consideration. The military judge denied the challenge and the CAAF upheld, holding that an innocent, good faith mistake on the part of the convening authority's subordinates did not imperil the panel selection absent a showing of prejudice.[32] The accused could not show prejudice, and his case was affirmed.

Nevertheless, Judge Effron dissented and had, arguably, the stronger position. Defense counsel should look to his dissent for guidance when challenging a panel's composition. Judge Effron noted that, innocent mistake or not, a violation of Article 25 had occurred because an entire category of otherwise qualified members were excluded from consideration.[33] Judge Effron pointed out three situations where the court-martial panel selection excludes or includes potential members: instances that rise to the level of command influence; instances where the convening authority is attempting to apply Article 25 through some shorthand method, such as using rank as a criteria; and instances such as the situation in *Upshaw*, where the exclusion was an administrative mistake but nonetheless error in the selection process which entitles an accused to a new panel.[34] This framework will be helpful in evaluating the last panel selection case.

United States v. Roland [35] appeared, at first blush, to be a replication of *Upshaw* but with a twist. In *Roland*, the SJA *deliberately* failed to request nominees from otherwise qualified groups of service members. As in *Upshaw*, the SJA sent out a memorandum to solicit nominees for the court-martial panel. The SJA requested nominees in the grades "E-5 to O-6"; thus, service members in the grade of E-4 were excluded (the accused was an E-2). Although most E-4s would probably not fit the Article 25 criteria, the courts have increasingly recognized, particularly in the Air Force, that E-4s have significant educational background and military experience that enhances their eligibility as court members.[36] Moreover, the military courts have recognized that, based on the application of Article 25, only service members in the grade of E-1 and E-2 are presumptively disqualified from service on courts-martial panels.

When the defense challenged the panel selected based on the SJA's memorandum, the SJA claimed that she had never intended to exclude groups of otherwise eligible nominees; she had simply identified other groups for consideration. In addition, the special court-martial convening authority (SPCMCA) testified that he was aware of Article 25, and that he knew he could nominate anyone in his command who he felt was qualified. Supporting the defense notion that the SJA's memorandum had excluded certain nominees was the testimony of two executive officers from units subordinate to the convening authority's headquarters, who stated they felt they were precluded from nominating anyone below the grade of E-5. The military judge found no impropriety in the panel selection.

In affirming, the CAAF majority focused on evidence that the general court-martial convening authority (GCMCA) who referred the case (but who, incidentally, never testified) had been told, according to the SJA's memoranda, that he was not limited to the nominees provided, and that he did, in fact, nominate a member who was not among the SPCMCA's nominees. Moreover, the CAAF noted the presumption that the GCMCA was aware of his duty under Article 25 as well as his unlimited discretion.[37]

The CAAF characterized the relevant standard of proof as follows: "Once the defense comes forward and shows an improper selection, the burden is upon the government to show that no impropriety occurred."[38] The CAAF held that the defense had not met its burden of showing "that there was command influence."[39] Writing for the majority, Judge Crawford identified with the SJA, reiterating the rather beguiling slight-

31. 49 M.J. 111 (1998). *See* Coe, *supra* note 5, at n.24 (discussing *United States v. Upshaw*). Although it is not technically a "new development," *Upshaw* provides further insight into the deference the CAAF has shown to the convening authority's selection process, especially where there is acknowledged error by the government.

32. *Upshaw*, 49 M.J. at 113.

33. *Id.* at 115.

34. *Id.*

35. 50 M.J. 66 (1999).

36.

> [I]n the Air Force, the majority of E-4s have served 5 or more years on active duty, the majority of E-5s have served 10 or more years on active duty, and the majority of E-6s have served 15 or more years on active duty. . . . Likewise, we take judicial notice that 88 percent of E-4s have some amount of post-secondary education, 18 percent of E-5s have an associate's or higher degree, and 33 percent of E-6s have an associate's or higher degree.

United States v. Benson, 48 M.J. 734, 739 (A.F. Ct. Crim. App. 1998) (citations omitted).

37. *Roland*, 50 M.J at 68.

38. *Id.* at 69.

of-hand that the SJA had not excluded any groups from consideration: "Other groupings simply had been identified."[40] Judge Sullivan, in a concurrence, agreed there was no violation of Article 25, UCMJ, or Article 37, UCMJ, and, with a nod to the Department of Defense, noted somewhat axiomatically that "if a random selection now being studied . . . is adopted, challenges like the one in this case would occur less."

Judge Gierke would have none of this argument, however, claiming that the *government* had not met *its* burden. Judge Gierke correctly pointed out that in none of the precedent cited by the majority had the courts required the defense to show command influence. "All that was required of the defense was a showing that qualified, potential members appeared to have been excluded."[41] Taking issue with the SJA's suggestion that her memorandum was simply guidance, Judge Gierke wrote that this "does not pass the reality test." The SJA "acted with the mantle of command authority," and her memorandum effectively excluded other potential, qualified service members from consideration.

Applying the template suggested by Judge Effron in *Upshaw*, it seems apparent that a majority of the CAAF will require that defense challenges to the panel selection produce evidence of bad faith or an intent to "stack" the court on the part of the convening authority. This is, however, as Judge Effron's *Bertie* template suggests and Judge Gierke proclaims in *Roland*, an inappropriately heavy burden for the defense and one that is not required when challenging the panel under Article 25. Indeed, the majority's formulation of the standard in *Roland* is most troubling because it confuses a challenge under Article 25, UCMJ, with a challenge under Article 37, UCMJ.[42] Under Article 25, UMCJ, once the defense has shown that "qualified, potential members appeared to be systematically excluded,"[43] the matter is ended. Yet a majority of the CAAF seems determined to require the defense to show command influence in every panel challenge. This is neither supported by the opinions of the service courts nor the CAAF ample precedent.[44]

A Reassuring Note on Interloper's and Jurisdiction

As the foregoing discussion indicates, the current era is one where the CAAF and the service courts are taking a "more liberal approach to technical defects in the composition of courts-martial."[45] Perhaps it is because this approach is the dominant theme among courts of review that it is reassuring to see that courts remain committed to ensuring that the accused is tried only by those personnel whom the convening authority has personally selected. In *United States v. Peden*, the convening authority, in selecting panel members, chose a SFC Doyle to sit on the court-martial. Unfortunately, a legal clerk typed in the name of SFC Doss, the person immediately preceding SFC Doyle on the alphabetical list. Doss had not been selected by the convening authority to serve on the court-martial. Nevertheless, SFC Doss duly sat at the accused's court-martial. The accused pleaded guilty, and SFC Doss participated in the deliberations on sentencing. Sometime after action, the convening authority disclosed in a memorandum for record that SFC Doyle had originally been selected but that he "ratified" SFC Doss's selection.[46]

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39. *Id.*

40. *Id.*

41. *Id.* at 70 (Gierke, J., dissenting).

42. The majority stated that the burden shifts to the government to show no improper selection occurred only *after* "the defense comes forward and shows an improper selection." *Id.* at 69. Such a standard should cause government counsel concern as well, for how can the government show no impropriety occurred once the defense has shown impropriety occurred?

43. *Id.* at 70 (Gierke, J., dissenting).

44. *Cf.* United States v. Smith, 37 M.J. 773, 776-77 (A.C.M.R. 1993) (noting that the convening authority's motivation in selecting members based on rank was never inquired into, let alone considered dispositive of the alleged Article 25, UCMJ, violation).

The CAAF's decision in *Roland* (and, for that matter, in *Bertie)* is contrary to precedent. *See, e.g.*, United States v. Nixon, 33 M.J. 433 (C.M.A. 1991) (holding that a lack of enlisted personnel on the panel below E-8 created an appearance of impropriety); United States v. McClain, 22 M.J. 124 (C.M.A. 1986) (noting that the SJA recommended against selecting junior members to avoid lenient sentences and the convening authority selected only E-7s and above); United States v. Daigle, 1 M.J. 139 (C.M.A. 1975) (holding that the selection process under which commanders asked to nominate only captains and above impermissibly used rank as a device for systematic exclusion of qualified persons); United States v. Greene, 43 C.M.R. 72 (C.M.A. 1970) (holding that selection of only colonel and lieutenant colonel members gave rise to the appearance that members had been "hand picked" by the government); United States v. Benson, 48 M.J. 734, 739 (A.F. Ct. Crim. App. 1998) ("When circumstances surrounding the selection process create an appearance of systematic exclusion of qualified persons, however, doubts will be resolved in the accused's favor."). The refusal of the CAAF to recognize that presumption in either *Bertie* or *Roland* tolls the knell of the "appearance of impropriety" challenge. *See* Coe, *supra* note 5, at n.49 ("It appears that the CAAF has, sub silentio, reversed or modified those cases that hold the issue of improper selection is raised by the presence of high rank or many commanders on a panel.").

45. United States v. Peden, 52 M.J. 622 (1999) (citing United States v. Cook, 48 M.J. 434, 436 (1998) (holding that an excusal of more than one-third of the members by the staff judge advocate "does not involve a matter of such fundamental fairness that jurisdiction of the court-martial would be lost"); United States v. Turner, 47 M.J. 348 (1997) (holding that a request for trial by military judge alone made by counsel, rather than the accused, not jurisdictional error); United States v. Mayfield, 45 M.J. 176, 178 (1996) (holding that an accused's failure to make a judge alone request orally or in writing prior to adjournment is a technical error, not jurisdictional); United States v. Kaopua, 33 M.J. 712 (A.C.M.R. 1991) (holding that failure to announce the names of court members on the record is not a jurisdictional defect)).

In reviewing the selection process, the Army Court of Criminal Appeals (ACCA) looked to "long standing precedent" finding jurisdictional error where interlopers (personnel not properly detailed to the court) had participated in court proceedings.[47] Comparing this precedent with a more liberal approach, mentioned above,[48] the ACCA was, nevertheless, unwilling to find some sort of "substantial compliance" with the UCMJ and the Rules for Courts-Martial. The ACCA refused to allow the convening authority to ratify SFC Doss's presence,[49] holding that "SFC Doss's participation as an interloper in the sentencing hearing was a jurisdictional error that renders the sentencing proceedings a nullity."[50] Having found jurisdictional error, the ACCA further buttressed its ruling by stating that, even if SFC Doss's presence were not a jurisdictional defect, it was error and, because the ACCA could not be convinced the error did not affect the sentence, the sentence was set aside.[51]

Peden serves as a telling reminder to all trial participants to scrutinize the panel selection documents. For the defense, such scrutiny may produce a basis for mounting a jurisdictional attack on the court. For the government, such review is vital to ensure that the panel is properly constituted and that the case will not have to be tried a second time.

Pleas and Pretrial Agreements

The CAAF's deference to convening authorities spilled over into the realm of pretrial negotiations as the CAAF delineated the broad discretion vested in the convening authority to negotiate, enter into, and withdraw from pretrial agreements, even though that withdrawal appears to result from unlawful command influence. Also notable in this area was the CAAF's sanctioning of a new provision for pretrial agreements and reminding practitioners of other provisions prohibited by public policy.

Convening Authority's Discretion to Withdraw from Pretrial Agreements

The military justice system differs from its civilian counterparts in a number of ways. One notable distinction is that, while the military permits pretrial agreements (PTAs) or, more colloquially, plea bargaining, such agreements are between the accused and the convening authority.[52] The Rules for Courts-Martial place few limitations on the ability of the accused and the convening authority to enter into pretrial negotiations or PTAs.[53] While the accused has virtually unfettered ability to withdraw from a PTA,[54] the convening authority does not enjoy such untrammeled discretion. It is true that a convening authority may withdraw from a PTA for any reason before an accused begins performance of the agreement.[55] After the accused begins performance, however, the convening authority may withdraw: (1) where the accused has failed to perform a material promise or condition of the PTA, (2) where the judge determines there is a disagreement among the parties over the interpretation of a material term of the PTA,[56] or (3) where an appellate court later finds the guilty plea improvident.[57] The breadth of the convening authority's discretion to withdraw from a PTA before performance by the accused was the issue at stake in the Navy case, *United States v. Villareal*.[58] The CAAF seized the opportunity that this case presented to further entrench its deference to convening authority discretion in the realm of pretrial negotiations.

46. *Id*. at 623.

47. *Id.* (citing United States v. Harnish, 31 C.M.R. 29, 29-30 (1961) (when interlopers sit as court members, proceedings are a nullity) (other citations ommitted)).

48. *See supra* note 44 (discussing the trend toward more liberal treatment of defects in the composition of courts-martial).

49. The ACCA distinguished *United States v. Padilla*, 5 C.M.R. 31 (C.M.A. 1952), which permitted consideration of the convening authority's intent to determine who the proper members of a court-martial were, holding that courts have "never permitted after-the-fact ratification of court members not properly selected. . . . When the convening orders are clear and unambiguous, however, the subjective desires of the convening authority are of no import." *Peden*, 52 M.J. at 623.

50. *Peden*, 52 M.J. at 623.

51. Because *Peden* was a guilty plea, the presence of the interloper only affected the sentencing proceedings.

52. MCM, *supra* note 17, R.C.M. 705(a).

53. *Id.* R.C.M. 705(c)(1) (prohibiting certain terms and conditions, for example, a term depriving the accused of the right to counsel).

54. *Id.* R.C.M. 705(c)(4)(A) (noting that the accused may withdraw from a PTA "at any time").

55. *Id.* R.C.M. 705(d)(5)(B).

56. *Id*.

57. *Id*.

58. 52 M.J. 27 (1999).

In *Villareal*, the accused "senselessly" shot the victim, his best friend, during a game "similar to Russian roulette."[59] While the victim was talking on the telephone, the appellant spun the cylinder of the .32-caliber revolver and fired at his friend, "[h]aving apparently deviated from their normal procedure of checking the position of the round to make sure it was 'safe.'" The victim died, and the accused was charged with, among other things, murder, under Article 118(3), UCMJ.

The accused and the convening authority, Captain Schork, agreed to a PTA that permitted the accused to plead guilty to involuntary manslaughter in exchange for the convening authority's promise to suspend any confinement in excess of five years.[60] When the victim's family learned of the PTA, they were quite upset, feeling that the accused was guilty of murder and that the agreed sentence was too lenient. Captain Schork, under pressure to withdraw from the pretrial agreement, telephoned an old friend and shipmate, Captain Eckart, for advice. On the day the call occurred, Captain Eckart was, technically, the superior GCMCA.[61] After discussing Captain Schork's concerns, Captain Eckart suggested that he withdraw from the pretrial agreement. Captain Schork did withdraw, contrary to the advice of his SJA. The SJA, however, alertly managed to get the case shipped to another GCMCA for disposition.

The new convening authority referred the case to trial, and the accused filed a motion to compel specific performance of the pretrial agreement, arguing that Captain Schork's withdrawal was the product of unlawful command influence. The military judge found that the telephone call raised the appearance of command influence.[62] He also found, however, that insofar as the appearance of command influence had tainted the processing of the case, that taint was purged by sending the case forward to a new GCMCA.[63] The accused, denied relief, pleaded not guilty to all charges and specifications. He was convicted of involuntary manslaughter, obstruction of justice, and violation of an order relating to the possession of the weapon. His sentence included ten years of confinement.[64]

On review, the CAAF found that there was no command influence. The CAAF relied on *United States v. Gerlich*,[65] which found unlawful command influence in the transmission of a letter from the convening authority's superior suggesting that the convening authority set aside an Article 15, UCMJ, punishment in order to refer the case to court-martial. Distinguishing *Gerlich*, the CAAF noted that, in *Villareal*, the contact was initiated by the *subordinate* convening authority rather than by the superior.[66] The CAAF then noted that, even if the phone call did raise the appearance of unlawful command influence, that was a conclusion which the court "need not reach here."[67] In any event, any command influence was "cured by the transfer of the case to a new convening authority for separate consideration and action."[68]

The CAAF found that there was no basis to order specific performance of the PTA because the accused had not relied upon it to his detriment. While he was clearly denied the five-year confinement cap and he "certainly was *placed in a different position* by the convening authority's decision to withdraw from the agreement, this is not the type of legal prejudice that would entitle appellant to relief."[69]

Having effectively insulated the convening authority's withdrawal decision from appellate scrutiny, the CAAF announced, in language seething with portent, that, "in the military justice system, discretion to plea bargain is a policy and leadership decision; it is not a legal decision subject to the remedies that this [c]ourt offers."[70]

59. United States v. Villareal, 47 M.J. 657, 658 (N.M. Ct. Crim. App. 1997), *aff'd*, 52 M.J. 27 (1999).

60. The convening authority also promised to limit forfeitures to one-half of the accused's pay per month for a period of 60 months from the date of court-martial. *Villareal*, 52 M.J. at 29.

61. *Id*. n.3. The superior command was Commander, Naval Air Forces Pacific (AIRPAC); Captain Eckart was the Chief of Staff to the Commander of AIRPAC, Admiral Spane. On the day that Captain Schork called Captain Eckart, Captain Eckart was the Acting AIRPAC Convening Authority.

62. *Id.* at 30.

63. *Id*.

64. *Id.* at 28. The Navy Marine Corps Court of Criminal Appeals reduced the confinement to seven and one-half years. *Id.* at 29 n.2.

65. 45 M.J. 309 (1996).

66. *Villareal*, 52 M.J. at 30.

67. *Id*. This statement is paradoxical, given that the CAAF had previously stated its acceptance of the military judge's findings of fact: "The military judge made detailed findings of fact, and these findings are clearly supported by the record. We accept them for our de novo analysis." *Id.*

68. *Id*.

69. *Id.* (emphasis added). The accused was "placed in a different position" to the tune of an extra two and one-half years' confinement. *Id.* at 29 n.2. "As for prejudice, appellant is liable for 2 ½ more years of confinement." *Id.* at 31 (Sullivan, J., dissenting).

70. *Id.* at 31.

The idea of deference to the convening authority permeates the majority's language in *Villareal*. The language is so sweeping in its import that one might question whether the CAAF truly meant what it said. Is a convening authority's decision to enter into or withdraw from a PTA so virtually immune from scrutiny? Does not the Constitution's Due Process Clause require, at the very least, that the convening authority act reasonably and not on a whim? Is the minimal second-guessing required by *Gerlich* overruled, if only sub silentio? What about the manner in which the majority distinguished *Villareal* from *Gerlich*?

The dissenters seemed to be troubled by these questions as well. Judge Sullivan would have found that command influence tainted the decision to withdraw from the PTA, noting that Article 37, UCMJ, recognizes no "old friend and shipmate exception . . . nor an exception for the convening authority who first initiates the discussion with the superior concerning the case."[71] He took issue with "the majority's trumpeting of the command's right to enter plea bargains as somehow justifying this additional punishment" received by the accused. The right to enter into a PTA, he reminded the court, is "not absolute, and it must give way to the overarching concerns of due process of law."[72]

Similarly, Judge Effron found the majority's attempt to distinguish *Gerlich* unconvincing, noting that "when a subordinate contacts a superior on a military justice matter that rests within the discretion of the subordinate, the superior must scrupulously avoid improper influence on the subordinate's discretion, regardless of whether their relationship is otherwise characterized by friendship."[73] The key here is that "convening authority Captain Schork, like the convening authority in *Gerlich*, testified that his superior's comment made him reexamine his position."[74] Therefore, the military judge's finding was correct. Judge Effron further noted that, while the convening authority had the authority to withdraw from the PTA before the accused began performance, that withdrawal was "tainted by unlawful command influence."[75] Transferring the case to a new GCMCA did not purge the taint of the command "from the discretionary action already taken."[76]

The prejudice to the accused, said Judge Effron, flows from the circumstances of this case.

> A decision to abide by an agreement already in place is qualitatively different from the decision-making process that goes into the negotiation of a new pretrial agreement . . . . [U]ntil appellant acted in reliance on the agreement, the new convening authority would have had the right to withdraw from the agreement, but appellant would not have had the unfair burden of having to try to negotiate a new agreement as a direct result of the unlawful command influence.[77]

Military due process dictates, therefore, that the accused's case should have been transferred to a new GCMCA with the pretrial agreement intact.

What lessons, if any, can be learned from the accused's travails in *Villareal*? The majority's conclusion does not bode well for accused, seeming to guarantee to the convening authority virtually unfettered autonomy to enter into and withdraw from PTAs. While it may be difficult to bind convening authorities to the terms of favorable agreements, counsel should consider, as a starting point, ways to begin "performance" of the PTA as soon as possible to lock in the convening authority before he has a chance to withdraw from the pretrial agreement. For example, an accused may begin performance of the PTA by signing a stipulation of fact.[78] Further, faced with a situation similar to that of the accused in *Villareal*, counsel should keep the focus on the central issue in such cases, that is, the ability of the convening authority to take discretionary decisions that are nonetheless tainted by at least an appearance of command influence. The opinions of the dissenting judges are important not only for their assessment of prejudice but for the significant distinction drawn between negotiating PTAs on the one hand and entering into them on the other.[79]

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71. *Id.* at 32.

72. *Id*. (citing UCMJ art. 37).

73. *Villareal*, 52 M.J. at 33 (Effron, J., dissenting).

74. *Id*.

75. *Id*.

76. *Id*.

77. *Id*.

78. *Cf.* United States v. Manley, 25 M.J. 346 (C.M.A. 1987) (holding that the convening authority could not withdraw from agreement where accused had performed the provisions of the PTA, to include entering into the stipulation of fact).

79. Judge Effron implies that the convening authority's decision to negotiate a PTA is entitled to greater deference than is the convening authority's decision to withdraw from a PTA.

Terms of Pretrial Agreements

The *MCM* clearly recognizes the right of an accused to make certain promises or waive procedural rights as bargaining chips in negotiating a PTA.[80] At the same time, there are provisions that he may not waive.[81] Finally, the *MCM* prohibits provisions that violate public policy.[82] However, R.C.M. 705 is not exclusive, and the CAAF has sanctioned several PTA provisions over the years that are not specified in R.C.M. 705.[83]

During this past year, the CAAF was very active in the realm of PTAs, confronting two new PTA provisions, retracing its judicial steps over ground previously explored, and passing judgment on other PTA provisions that had been previously condemned. In addition, the CAAF reviewed the effect of ostensibly collateral service regulations on the accused's understanding of his PTA, and, ultimately, the providency of the plea. Finally, the CAAF strode into the shadowy twilight of ambiguous agreements and sub rosa agreements.

Accused's Waiver of Article 13, UCMJ, Motion

In *United States v. McFadyen*,[84] the accused argued that public policy prohibited him from waiving his right to litigate an allegation of pretrial punishment in violation of Article 13, UCMJ.[85] The accused was an airman who had been placed in pretrial confinement in a Navy brig. While not arguing that this constituted pretrial punishment per se, the accused claimed that he had been stripped of his rank, denied an opportunity to contact counsel, and, when he could contact his attorney, he claimed their calls were monitored.

Believing these actions by the Navy violated Article 13, the accused nevertheless offered to waive his right to litigate that claim as part of his pretrial agreement.[86] The government acceded to that request and agreed to the PTA that the accused proposed. At trial, the military judge fully explored the PTA with the accused, and conducted a thorough inquiry of the accused's understanding of the provision waiving the Article 13 motion. During the pre-sentencing phase of the trial, the military judge allowed the accused to discuss the circumstances of the pretrial punishment and also permitted defense counsel to argue those circumstances as matters in mitigation and extenuation.[87] On appeal, the accused contended that public policy should preclude him from waiving a right to litigate a claim of punishment in violation of Article 13.[88]

The CAAF dealt quickly with the validity of the actual waiver, crediting the military judge with conducting a thorough inquiry into the PTA.[89] It was evident that the term at issue originated with the accused and that the defense did not wish to

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80. MCM, *supra* note 17, R.C.M. 705(c)(2). This section permits pretrial agreements to contain the following terms:

> (A) A promise to enter into a stipulation of fact concerning offenses to which a plea of guilty or as to which a confessional stipulation will be entered;
> (B) A promise to testify as a witness in the trial of another person;
> (C) A promise to provide restitution;
> (D) A promise to conform the accused's conduct to certain conditions of probation before action by the convening authority as well as during any period of suspension of sentence, provided that the requirements of R.C.M. 1109 must be complied with before an alleged violation of such terms may relieve the convening authority of the obligation to fulfill the agreement; and
> (E) A promise to waive procedural requirements such as the Article 32 investigation, the right to trial by court-martial composed of members or the right to request trial by military judge alone, or the opportunity to obtain the personal appearance of witnesses at sentence proceedings.

Id. See also United States v. Gansemer, 38 M.J. 340, 342 (C.M.A 1993) (recognizing as "an important bargaining chip" the fact that the accused was willing to accept either a punitive or an administrative discharge in lieu of a harsher sentence).

81. MCM, *supra* note 17, R.C.M. 705(c)(1), prohibits terms or conditions:

> (A) *Not voluntary.* A term or condition in a pretrial agreement shall not be enforced if the accused did not freely and voluntarily agree to it.
> (B) *Deprivation of certain rights.* A term or condition in a pretrial agreement shall not be enforced if it deprives the accused of: the right to counsel; the right to due process; the right to challenge the jurisdiction of the court-martial; the right to complete sentencing proceedings; the complete and effective exercise of post-trial and appellate rights.

82. *Id.* R.C.M. 705(d)(1). This section provides that "[e]ither the defense or the government may propose any term or condition not prohibited by law or public policy." *Id.*

83. *See, e.g.*, *Gansemer*, 38 M.J. 340 (accused may waive the right to a post-court-martial separation board).

84. 51 M.J. 289 (1999).

85. UCMJ art. 13 (LEXIS 2000).

86. *McFadyen*, 51 M.J. at 290.

87. *See* MCM, *supra* note 17, R.C.M. 1001(c).

raise the motion. The CAAF, however, remained somewhat concerned about such terms in future cases. The CAAF created a prospective rule to ensure that such waivers are truly knowing and voluntary. For all cases tried after 20 November 1999,[90] a military judge faced with such a provision should "inquire into the circumstances of the pretrial confinement and the voluntariness of the waiver, and ensure that the accused understands the remedy to which he would be entitled if he made a successful motion."[91]

Despite the CAAF's favorable review of the military judge's actions and the sanctioning of a new PTA provision, the inescapable impression, however, is that the *McFadyen* holding is problematic. Military judges have broad discretion in fashioning remedies for Article 13, UCMJ, violations.[92] But what should the military judge tell an accused who wishes to waive an Article 13 motion? Must the military judge fashion a notional, hypothetical remedy on the spot, without any facts? Should the military judge hold an evidentiary hearing? And if the military judge should hold a hearing, what is to be gained from allowing such a waiver in the first place? Finally, what happens if the military judge informs the accused of the potential remedy for an Article 13 violation and the accused then withdraws from the PTA, requesting the remedy stated by the military judge but, after a hearing, the military judge finds there was no Article 13 violation (or one of a much lesser magnitude)? Counsel for both sides must be alert for such issues when confronted with the type of waiver encountered by the court in *MacFadyen.*

Is Anyone Listening? Accused May Not Waive Speedy Trial Violation In PTA!

As suggested earlier, the CAAF has ruled categorically that certain PTA terms violate public policy. Provisions that purport to waive the accused's right to a speedy trial have been viewed in this light.[93] Such terms, however, continue to appear and to spark appellate litigation.

In *United States v. McLaughlin*,[94] the accused offered, as part of a PTA, to waive his right to challenge a violation of his right to a speedy trial. Although confirming at trial that the accused did not wish to raise the issue, the defense on appeal argued that a viable speedy trial motion existed and that the offer to waive that motion violated public policy.[95] The defense pointed out that the accused was in pretrial confinement for ninety-five days and that the burden is on the government to prove that it acted with reasonable diligence. Noting the demise of the ninety-day *Burton* rule,[96] the CAAF refused to revitalize the notion of a "magic number" for speedy trial violations. Nevertheless, the CAAF found that the speedy trial provision of the PTA was impermissible and unenforceable.[97] The military judge should have made such an announcement at trial and given the accused the opportunity to make a speedy trial motion. If the accused declined to do so, "his waiver [would be] clearer."[98] In any event, said the CAAF, the accused must make a prima facie showing that he was prejudiced by the waiver of the motion. Despite the delay of ninety-five days, the accused could not show that he was prejudiced, that he made a demand for trial, or that the charged offenses were so simple

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88. *McFadyen*, 51 M.J. at 290. Article 13, UCMJ, provides:

> No person, while being held for trial, may be subjected to punishment or penalty other than arrest or confinement upon the charges pending against him, nor shall the arrest or confinement imposed upon him be any more rigorous than the circumstances required to insure his presence, but he may be subjected to minor punishment durign that period for infractions of discipline.

UCMJ art. 13.

89. *McFadyen*, 51 M.J at 291.

90. The CAAF announced the rule would apply to "all cases tried on or after 90 days from the date of this opinion [16 August 1999]." *Id.*

91. *McFadyen*, 51 M.J. at 291.

92. *See, e.g.*, United States v. Newberry, 37 M.J. 777, 781 (A.C.M.R. 1992) (noting that the nature and amount of sentencing relief for pretrial punishment vary from case to case).

93. United States v. Cummings, 38 C.M.R. 174, 176 (1968) (holding that a pretrial agreement may not be conditioned on the accused's waiver of his statutory and constitutional right to speedy trial).

94. 50 M.J. 217 (1999).

95. *Id.* at 218.

96. United States v. Burton, 44 C.M.R. 166 (C.M.A. 1971) (holding that an accused in pretrial confinement for more than 90 days raised a presumption that he had been denied his right to a speedy trial). *Burton*'s presumption was abolished by *United States v. Kossman*, 38 M.J. 258 (C.M.A. 1993).

97. *McLaughlin*, 50 M.J. at 218.

98. *Id.* at 219.

that they would not need the amount of time taken by the government to investigate.[99] Thus, the CAAF denied relief.

The door is by no means closed on accused who wish to waive speedy trial motions but then seek relief on appeal. As suggested by the CAAF, the accused may be entitled to relief if he can show that he was prejudiced by waiver of the motion; in other words, if he could show he had an otherwise valid claim of a violation of his right to speedy trial. This is borne out in a case handed down last year by the Navy-Marine Corps Court of Criminal Appeals. There, in *United States v. Benitez*,[100] the accused offered as part of his PTA to waive "all non-constitutional or non-jurisdictional motions."[101] At trial, the military judge determined that the defense had previously intended to raise a speedy trial motion, that the basis for this motion would have been the statutory (rather than constitutional) right to speedy trial, and that the provision had originated with the *government*.[102]

On appeal, the accused argued the provision violated public policy and the case should be set aside. The Navy-Marine Corps court agreed, finding a colorable claim of a violation of Article 10, UCMJ,[103] based on the lengthy time the accused spent in pretrial confinement before arraignment (117 days).[104] Having found error, the court stated: "[W]e cannot conclude the error was harmless," and returned the case to the Navy for a rehearing.[105]

Taking *McLaughlin* and *Benitez* together, the possibility remains for the accused to waive a speedy trial issue as part of a PTA, but yet prevail on appeal if there is evidence in the record that suggests a violation of the accused's speedy trial right. The moral of the story is that the government should think twice about accepting PTAs that contain offers to "waive all motions" or to "waive a speedy trial motion." Or, at least, government counsel must be aware that such provisions are simply void and should be stricken by the military judge. More importantly, offers to waive a speedy trial should *not* originate with the government, particularly if a "colorable" claim of a speedy trial violation could be made out from the record. A conditional plea[106] might be just the ticket for resolving these issues. The government could thus ensure a plea of guilty while permitting the accused to raise a speedy trial motion and if needed, the protection of a pretrial agreement.

An Empty Ritual? A De Facto Guilty Plea Sans Providence Inquiry

As the preceding cases suggest, the accused in negotiating a pretrial agreement enjoys wide latitude to propose terms to the convening authority. Rule for Courts-Martial 705 places certain areas off-limits for pretrial negotiations, however, and public policy concerns may occasionally trump the accused's terms.[107] But does public policy preclude an accused from having an agreement that effectively allows him to plead no contest and avoid the rigors of a providence inquiry? In *United States v. Davis*,[108] the accused posed this question by skirting the rigorous *Care*[109] inquiry through a plea of not guilty and a promise to present no evidence.

The accused was charged with larceny and with use of drugs. For reasons that remain unclear, the accused could not admit to the intent element of the forgery or to the wrongfulness element of the drug use. However, he sought the protection of a pretrial agreement. In exchange for the convening authority's agreement to suspend any confinement in excess of twelve months, the accused promised to request trial by judge alone, enter into a confessional stipulation, to call no witnesses and to present no evidence on his behalf, and complete an in-patient drug rehabilitation program.[110] The stipulation admitted basically all elements of the offenses except the wrongfulness of marijuana use and the intent to defraud concerning the bad check offenses.[111] At trial, the military judge was concerned that the stipulation

99. *Id*.

100. 49 M.J. 539 (N.M. Ct. Crim. App. 1998).

101. *Id.* at 540.

102. *Id.* at 541 (emphasis in original).

103. UCMJ art. 10 (LEXIS 2000).

104. *Benitez*, 49 M.J. at 542.

105. *Id.*

106. *See* MCM, *supra* note 17, R.C.M. 910.

107. *See supra* notes 81 and 82 (reflecting R.C.M. 705's prescriptions concerning pretrial agreement terms).

108. 50 M.J. 426 (1999).

109. United States v. Care, 40 C.M.R. 247 (1969).

110. *Davis*, 50 M.J. at 427.

amounted to a confessional stipulation, so he conducted a searching inquiry in accordance with *United States v. Bertelson*.[112] The military judge found the accused guilty of all charges and specifications.

On appeal, before the CAAF, the accused claimed that the acceptance of his PTA meant that his trial (his plea of not guilty coupled with his promise to present no evidence) was an empty ritual. He claimed his plea violated public policy by avoiding the providence inquiry, in violation of the scheme envisioned by Congress in Article 45, UCMJ.[113] The CAAF noted that confessional stipulations are permitted by the *MCM*.[114] The CAAF held, however, that the agreement to enter into a confessional stipulation but present no evidence was a violation of part of the holding in *Bertelson*.[115] Nevertheless, the CAAF was apparently loath to set aside the findings and sentence, and instead tested for prejudice. Inquiring into the terms of the pretrial agreement, the CAAF emphasized that the military judge thoroughly discussed the stipulation of fact and all terms of the PTA with the accused, that he repeatedly ensured that the accused understood the proceedings and his rights, and he secured the accused's knowing and voluntary waiver of his rights on the record.[116] In light of such evidence, the CAAF held that the accused was not deprived of due process. The CAAF refused to condone or encourage such agreements, but found no prejudice to the accused's rights.[117]

Judge Crawford noted insightfully that the proceedings in this case probably resulted from the accused's inability, "when faced with the moment of truth . . . [to] admit the elements involved."[118] Judge Crawford also suggested that the ruling from the majority is somewhat ambiguous because it "fails to clarify which portion of *Bertelson* still applies."[119] In other words, it is not clear what set of rules should apply to guide proceedings such as occurred in *Davis*. Judge Crawford surveyed federal case law and determined that "[n]o circuit seems willing to equate a confessional stipulation with a guilty plea. However, most circuits that have examined this topic do afford some constitutional protections . . . requir[ing] that the trial judge inquire into whether the defendant entered the stipulation voluntarily and intelligently."[120] Judge Crawford concludes that the problems in *Davis* could have been avoided "had defense counsel stated on the record" that the accused could not admit to the wrongfulness of drug use or the intent to defraud for the bad check offenses.[121] She recognized that military law should "permit a plea like the one in this case when there is no contest concerning the underlying facts," and noted that Congress could amend Article 45 to permit the accused to enter an *Alford*[122] plea.[123]

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111. *Id.* The stipulation also omitted a Navy instruction that would have prohibited the wrongful possession of drug paraphernalia.

112. 3 M.J. 14 (C.M.A. 1977). *Bertelson* requires that, before a military judge may admit a confessional stipulation into evidence, he must establish that the accused knowingly and voluntarily enters into the stipulation and that she fully understands its meaning and effect. Here, the military judge ascertained that, among other things, the accused understood that his confessional stipulation "practically admits" each element of the offense charged. *Davis*, 50 M.J. at 427.

113. UCMJ art. 45 (LEXIS 2000). Article 45(a) requires the military judge to reject a guilty plea if the accused "makes an irregular pleading, or after a plea of guilty sets up a matter in consistent with the plea, or if it appears that he has entered the plea of guilty improvidently or through lack of understanding of its meaning and effect." This is further implemented by R.C.M. 910(c), which requires the military judge to inform the accused of the nature of the offense to which his plea is offered, the maximum punishment, his right to counsel, to plead not guilty, etc.

114. MCM, *supra* note 17, R.C.M. 811(c). The Discussion to R.C.M. 811(c) states:

> If the stipulation practically amounts to a confession to an offense to which a not guilty plea is outstanding, it may not be accepted unless the military judge ascertains: (A) from the accused that the accused understands the right not to stipulate and that the stipulation will not be accepted without the accused's consent; that the accused understands the contents and effect of the stipulation; that a factual basis exists for the stipulation; and the accused, after consulting with counsel, consents to the stipulation; and (B) from the accused and counsel for each party whether there are any agreements between the parties in connection with the stipulation, and if so, what the terms of such agreements are.

MCM, *supra* note 17, R.C.M. 811(c), discussion.

115. *Davis*, 50 M.J. at 430. According to the CAAF, *Bertelson* recognized that allowing the government to enter into PTAs conditioned upon a stipulation "(as opposed to a plea) of guilt coupled with a promise not to raise any defense or motion would utterly defeat the Congressional purpose behind Article 45(a), for it would allow the Government to avoid the hurdles Congress imposed in Article 45(a) while nevertheless reaping benefits equivalent to a guilty plea." *Id*. (quoting *Bertelson*, 3 M.J. at 317).

116. *Davis*, 50 M.J. at 430-31.

117. *Id.*

118. *Id.* (Crawford, J., concurring).

119. *Id.* at 432 (Crawford, J., concurring).

120. *Id.* at 434-35.

121. *Id.* at 435.

Davis is somewhat opaque, with the CAAF unanimous that the accused was not deprived of due process, but hesitant to open the floodgates and endorse a new form of abbreviated guilty plea that seems to do an end run around Article 45, UCMJ.[124] Whether Judge Crawford's concurring opinion will usher in a bold, new era of "*Davis* pleas" remains to be seen, but the language of her opinion has an innovative air about it.[125]

Ambiguous Terms, Unforeseen Consequences, and Sub Rosa Agreements: The CAAF Reaches Out

As the discussion above suggests, this term saw the CAAF deal with a wide variety of issues arising from pretrial agreements. The CAAF was called upon to resolve ambiguity in the terms of pretrial agreements, deal with the issue of unforeseen consequences of the terms of those agreements, and struggle with allegations of sub rosa agreements raised for the first time on appeal. Significantly, at least as concerns the issue of unforeseen consequences and sub rosa agreements, these may be the only two areas in which the CAAF permitted itself to defer to the accused. First, however, we shall deal with the CAAF's analysis of ambiguity in the PTA.

In deciding *United States v. Acevedo*,[126] the CAAF set out a formula for resolving ambiguities in PTAs. In *Acevedo*, the accused pleaded guilty to offenses arising from a scheme to steal and pawn Coast Guard equipment and supplies. He pleaded guilty in exchange for the convening authority's agreement to enter into a plea bargain, one of the terms of which specified the following:

> A punitive discharge may be approved as adjudged. If adjudged and approved, a dishonorable discharge will be suspended for a period of 12 months from the date of the court-martial at which time, unless sooner vacated, the dishonorable discharge will be remitted without further action.[127]

The military judge sentenced the accused to confinement for thirty months, total forfeitures, reduction to E-1, and a *bad-conduct* discharge (BCD). The convening authority approved the sentence but suspended a portion of the confinement pursuant to another provision of the PTA. At issue was whether the convening authority could approve the bad-conduct discharge without suspending it.

On appeal, a majority of the Coast Guard court determined that the parties understood that the convening authority was not bound to suspend the BCD.[128] The dissenters on the Coast Guard court disagreed, contending that a suspended dishnorable discharge (DD) is less serious than an unsuspended BCD– the suspended DD was a *cap*, a "ceiling for punitive discharges above which the convening authority could not go."[129]

In agreeing with the majority of the Coast Guard court, the CAAF noted that contract law principles apply to construction of PTA terms.[130] The CAAF set out a template for reviewing ambiguous terms, looking first to the language of the PTA itself.[131] "When the terms of the contract are unambiguous, the intent of the parties is discerned from the four corners of the contract."[132] When the agreement is ambiguous, extrinsic evidence is admissible to determine the meaning of the term.

Here, the CAAF found that the "fact that the agreement does not specifically mention a [BCD] suggests that no condition applies to a [BCD]."[133] The CAAF, however, went on to look at the actions of the participants at trial, particularly the response from defense counsel when the military judge inquired about the BCD. The military judge acknowledged that there was nothing in the agreement about "doing anything"

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122. North Carolina v. Alford, 400 U.S. 25 (1970) (permitting an accused to plead guilty while maintaining his innocence).

123. *Id.*

124. UCMJ art. 45 (LEXIS 2000).

125. *See* Major Douglas Depeppe, The *Davis* Plea: Better than an *Alford* Plea for the Military (Apr. 1999) (unpublished research paper) (on file with the Criminal Law Department, The Judge Advocate General's School, U.S. Army, Charlottesville, Va.) (advocating the use of the plea to ease potential conflicts between counsel and accused over potential pleas, and to permit fair, efficient proceedings for accused who want—but are unable—to plead guilty and who are willing to enter into a confessional stipulation of fact).

126. 50 M.J. 169 (1999).

127. *Id.* at 171.

128. *Id.*

129. *Id.* at 171-72.

130. *Id.* at 172.

131. *Id.*

132. *Id.*

with the BCD, to which the defense counsel responded in the affirmative.[134] The accused never asserted that he had believed any punitive discharge would be suspended. Finally, neither defense counsel nor the accused took issue with the SJA's post trial recommendation under R.C.M. 1106 or contended that they understood the BCD would be suspended. Satisfied that the parties fully intended that the convening authority was only have been required to suspend only a DD, the CAAF ruled against the accused, refusing to speculate, as had the dissenters on the Coast Guard court, which punishment was more severe, an unsuspended bad conduct discharge or a suspended dishonorable discharge. At least one member of the CAAF suggested that such a conclusion might be appropriate in a different case, leaving the issue to be litigated another day.[135]

Unforeseen Consequences and Collateralness

Over the years the courts have wrestled with the problem of regulations or statutes that may eviscerate or at least limit the terms of a PTA.[136] Generally, the courts find such issues to be collateral.[137] During this term, the CAAF again faced the problem of service regulations effectively precluding the favorable terms negotiated in the PTA and, in *United States v. Mitchell*,[138] the CAAF signaled a significant departure from the settled case law in remanding the case for further proceedings.

In *Mitchell*, the accused had enlisted in the Air Force in 1974.[139] He reenlisted in 1988 for six years. In April 1994, he voluntarily extended his enlistment for nineteen months. His extension was not effective until 19 September 1994, however. In July 1994, approximately two months before his extension became effective, he committed the misconduct for which he was ultimately tried at court-martial.[140] Acknowledging that he needed help, the accused sought to expedite his trial and to provide financially for his family. He and the convening authority signed a PTA that included the following provision: the convening authority agreed to suspend any adjudged forfeiture of pay and allowances, to the extent that such forfeiture would result in the accused receiving less than $700 per month.[141] The forfeitures would be suspended for a period of twelve months or the duration of the confinement, whichever was greater. In addition, the accused agreed to execute an allotment to his family for $700 per month.

The accused's trial occurred on 14 September, five days before his enlistment would have become effective. The military judge fully explored the provision of the PTA concerning the accused's forfeitures. During the presentencing hearing, the accused asked the panel members to punish him, not his family, for his misdeeds. The panel members posed several questions concerning the accused's eligibility for pay if confined. The military judge instructed the members that the accused would not lose either his base pay or his basic allowance for quarters. The court sentenced the accused to confinement for five years,

133. *Id.* The ACCA recently wrestled with a similarly ambiguous provision in *United States v. Ladoucer*, No. 9800724 (Army Ct. Crim. App. Oct. 19, 1999), where the agreement stated: "The Convening Authority agrees to disapprove any confinement adjudged in excess of 180 days and a bad conduct discharge." The military judge sentenced the accused to four months of confinement and a bad conduct discharge. At issue was whether the convening authority could approve the bad conduct discharge. The ACCA resolved the issue against the accused, relying on *Acevedo*:

> (1) the interpretation of a pretrial agreement is a question of law which we review de novo; (2) when interpreting pretrial agreements, resort to basic contract principles is appropriate [unless outweighed by the Constitution's Due Process clause protections] and; (3) if a pretrial agreement is ambiguous on its face because it may be interpreted more than one way, then examination of extrinsic evidence is appropriate to assist in determining the intended meaning of the ambiguous terms.

Ladoucer, No. 9800724, slip op. at 3 (citation omitted). The ACCA resorted to the record of trial, in which the military judge had inquired of both parties, including the accused, whether the sentence could be approved as adjudged and both sides responded affirmatively. *Id.* slip op. at 3-4.

134. *Acevedo*, 50 M.J. at 173.

135. *Id.* at 175 (Effron, J., concurring).

136. *See, e.g.*, United States v. McElroy, 40 M.J. 368 (C.M.A. 1994) (holding that generally judge should not instruct on collateral, administrative consequences of sentence); United States v. Paske, 29 C.M.R. 505 (C.M.A. 1960) (ruling that an SJA did not err in failing to advise a convening authority of the adverse financial impact on sentence as a result of decision of comptroller general); United States v. Pajak, 29 C.M.R. 502 (C.M.A. 1960) (holding that a plea of guilty was not improvident where the appellant was unaware that legislation would have effect of denying him retirement earned after 25 years active service); United States v. Lee, 43 M.J. 518 (A.F. Ct. Crim. App. 1995) (holding that the general rule has been that collateral consequences of a sentence are not properly a part of the sentencing consideration).

137. *Acevedo*, 50 M.J. at 175.

138. 50 M.J. 79 (1999).

139. *Id.* at 80.

140. *Id.*

141. *Id.*

forfeiture of $500 pay per month for five years, and reduction to the grade of E-4.[142] The adjudged forfeitures would have been suspended to the extent necessary to permit the accused to continue to receive $700 pay per month to support his family. His pay would have continued for the nineteen months remaining on his enlistment.[143] The convening authority, pursuant to the PTA, ultimately approved confinement for four years and reduction to the grade of E-4.[144]

Unfortunately for the accused, his desire to expedite the proceedings may have precluded, at least ostensibly, his extension from becoming effective. As of 14 September, he lost his eligibility to extend because he was confined.[145] Thus, his regular enlistment, and his entitlement to pay, ended on 19 September.[146] The CAAF noted:

> Had appellant begun serving his confinement after September 19, 1994–the date on which his enlistment extension became effective–the pretrial agreement would have been implemented in the manner anticipated by the participants. Under Air Force personnel regulations, the enlistment extension could not take effect while appellant was in confinement, even with an approved extension.[147]

The accused argued before CAAF that the unanticipated termination of his pay status reflected a substantial misunderstanding of the effects of his pretrial agreement.[148] Complicating the issue was that the defense introduced documentation to the CAAF showing that the accused was retirement eligible and that he, in fact, retired from the Air Force on 1 February 1998.[149] The CAAF, understandably bemused by these documents, remanded the case for determination of the accused's status by the Air Force Court of Criminal Appeals.[150]

While the facts of *Mitchell* are unique, and somewhat chaotic by virtue of the Air Force granting the accused a retirement, the CAAF, in remanding the case, appears to be reversing the trend referred to earlier.[151] That is, the CAAF's decision reflects an inclination to grant relief to accuseds who are adversely affected either because the sentencing authority was not told of the ramifications of proposed sentences, or because of some, arguably, collateral regulatory administrative actions that may affect the terms of a pretrial agreement. After all, the CAAF directed the Air Force Court of Criminal Appeals to determine if:

> [T]he Secretary's action [granting retirement] could be viewed as an adequate means of providing appellant with the *benefit of his bargain*. . . . Moreover, even if the Court of Criminal Appeals concludes the Secretary's action is insufficient to provide appropriate alternative relief . . . the court may set aside the findings, as well as the sentence, and authorize a rehearing based on appellant's improvident pleas.[152]

Thus the CAAF recognized that the regulation in question was beyond the ken of the convening authority, the SJA, counsel, and the accused, at the time the PTA was signed. More importantly, the CAAF concluded, at least tacitly, that the impact of this regulation was not collateral, and thus the opinion's focus was on ensuring the accused got the "benefit of his bargain." Finally, the CAAF implicitly rejected the notion that a service's finance and personnel records were matters collateral to the pretrial agreement and the accused's plea. Thus, it appears that, to the CAAF, where personnel and finance regulations obviate the terms of a PTA, such impact will no longer be considered collateral. This idea is already showing signs of becoming a trend.[153]

Sub Rosa Agreements

If we had to pick two areas that seemed to run counter to the trend of deference to convening authorities, SJAs, and military

142. *Id.*

143. *Id.* at 81.

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.* (citation omitted).

148. *Id.* at 81-82.

149. *Id.*

150. *Id.* at 83.

151. *Id.*

152. *Id.* at 83 (emphasis added).

judges, the possibility of unintended consequences of a PTA, discussed above, might be one, and the second might very well be the area of sub rosa agreements. A case reviewed during this past year suggests that, at least to the extent that sub rosa agreements implicate command influence concerns, the CAAF is willing to shoulder the mantle of its care-taking function and continue to ferret out command influence.

Before looking to the significant case this term, it helps to set the stage by looking back to a case decided two years ago, *United States v. Bartley.*[154] In *Bartley*, the accused argued on appeal that command influence was evinced by a poster in the convening authority's waiting room. The poster purported to debunk "myths" about drug use, to include such apocrypha as "drug users can be dependable airmen."[155] The accused claimed that he had wanted to raise this command influence issue, but that a sub rosa agreement between the trial and defense counsel buried the motion.

In a battle of the post-trial affidavits, the defense counsel stated that he had in fact drafted such a motion, that he had sent the motion to the government, but that he did not raise the issue because he believed it was not a "sure fire winner."[156] The defense claimed, nevertheless, that he felt the motion made the government more receptive to the proposed PTA. The defense further claimed that part of the inducement for the government to enter into the PTA was that "we would drop the motion."[157] The government, during appellate argument, conceded that there was indeed a sub rosa agreement concerning unlawful command influence.[158] The CAAF, with Judge Crawford writing for the majority, simply could not be convinced beyond a reasonable doubt that unlawful command influence did not induce the guilty plea.[159]

The CAAF was confronted with another post trial allegation of a sub rosa agreement in *United States v. Sherman*.[160] There, the accused claimed that his commander had unlawfully interfered with his pretrial confinement hearing. He alleged, however, that he had not raised the issue at trial because his defense counsel had told him that by making such a motion he would lose a chance at a favorable pretrial agreement.[161] In another battle of the affidavits, defense alleged that trial counsel had "implied" he might not support the PTA if an unlawful command influence motion was raised.[162] The trial counsel, predictably, disputed this claim, saying he recalled the defense mentioning a possible unlawful command influence motion but "I do not recall . . . a sub rosa" agreement.[163] The CAAF elected to order a *Dubay*[164] hearing, finding the affidavits raised a factual dispute as to the existence of a sub rosa agreement.[165]

The hearing was ordered over the strenuous dissent of Judge Crawford, who argued that, "when a military judge properly inquired and received assurances from appellant that no sub rosa agreements existed, we will not consider inconsistent post-trial assertions."[166] *Sherman* "is not" *Bartley*, in which "a col-

153. *See, e.g.*, United States v. Williams, 49 M.J. 542 (N.M. Ct. Crim. App. 1998), *review granted*, 1999 CAAF LEXIS 1480 (C.A.A.F. June 4, 1999). In *Williams*, the Navy-Marine Corps court was asked to invalidate the accused's plea because a Department of Defense regulation placed him in a no-pay status, thus invalidating a provision of the PTA in which the convening authority agreed to suspend any adjudged forfeiture of pay and waive automatic forfeitures. The Navy-Marine Corps court found the DOD regulation's impact to be collateral and affirmed the findings and sentence. *Williams*, 49 M.J. at 548.

154. 47 M.J. 182 (1997).

155. *Id.* at 184.

156. *Id.* at 185.

157. *Id.*

158. *Id.* at 186.

159. *Id.* at 186-87.

160. 51 M.J. 73 (1999).

161. *Id.* at 74.

162. *Id.* at 75.

163. *Id.* at 74.

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

165. *Sherman*, 51 M.J. at 76. The CAAF posed six questions to be answered in the *Dubay*: (1) Did the convening authority threaten the initial review officer to keep the accused in pretrial confinement? (2) Did the convening authority threaten accused's wife with the loss of base housing unless she cooperated with the prosecution? (3) Were witnesses interfered with? (4) At R. 56–was the accused telling the truth when he told the judge there were no agreements other than the written pretrial agreement? (5) Did defense counsel knowingly remain silent and allow the accused to give an untruthful answer when the accused said no other agreements induced him to plead guilty? (6) Were there any sub rosa agreements made with the defense that were outside the wording of the PTA?

166. *Id.* at 76 (quoting United States v. Muller, 21 M.J. 205, 207 (C.M.A. 1986)).

orable claim of command influence . . . appears on the record"[167]

Military justice practitioners might very well ask, in the end, why all the fuss about sub rosa agreements? Why should we be concerned about such agreements, or the rulings in *Bartley* and *Sherman*? The answer to these questions is multifaceted.

One concern is systemic integrity.[168] Pretrial agreements exist between the accused and the convening authority.[169] When trial and defense counsel bargain away important issues such as allegations of unlawful command influence, they contravene the *MCM*'s prescription that PTAs be between the convening authority and the accused. Equally important, sub rosa agreements that bargain away command influence preclude the appellate courts from exercising their care-taking and oversight functions through which they stand guard against the "mortal enemy" of military justice.[170] Practitioners should be concerned when counsel seem to be burying issues of great moment in the pretrial negotiation process. Finally, and of most immediate significance for counsel on both sides of the aisle, the decisions in *Bartley* and *Sherman* reflect a disturbing judicial skepticism of counsel's representation that a PTA contains "all agreements" between the government and the defense.[171] The fact that such skepticism is not without justification should cause all practitioners to be concerned that counsel are not being as candid with the tribunal as they should.

How can the system guard against sub rosa agreements? The solution may lie, at least in part, in identifying the problem, and recognizing the potentially cavalier pretrial negotiations of trial and defense counsel. Some suggestions include the following.

First, teach counsel to be sensitive about the weighty issues they may encounter in pretrial negotiations. For example, government counsel should *never* tell defense counsel, especially concerning allegations of command influence, "if you raise that motion, the deal goes away." Such a lesson may easily be lost in the rough-and-tumble, hurly-burly world of pretrial negotiation, but counsel need to understand that the CAAF has expressed a preference for the litigation of command influence issues.

Second, a trial counsel who has been tipped off to a potential command influence issue must relay such information to her superiors. The SJA can then review the issue and advise the convening authority to take action as appropriate. Staff judge advocates could direct that trial counsel inform the defense to "raise or forego" such issues, but it should be made clear that neither course of action will affect the pretrial agreement.[172] Finally, SJAs, trial counsel, and defense counsel should take full advantage of the provision of the *MCM* permitting conditional guilty pleas.[173]

Ultimately, sub rosa agreements benefit neither side and represent a dysfunction in the system of military justice that must be avoided.

Voir Dire and Challenges

There is little in the area of voir dire and challenges that could be described as truly "new" or ground-breaking, but several notable cases dealing with issues in voir dire and challenges evince the CAAF's continuing deference to the role of the military judge in the trial process.[174] As has been stated, nowhere is this deference more evident than in the realm of selection of panel members.[175]

United States v. Belflower[176] serves as an excellent refresher to both government and defense counsel that there is no guar-

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167. Notably, in *Bartley* it was the concession of a sub rosa by the government at oral argument rather than anything in the record of trial that supported the inference of a sub rosa agreement. Aside from the government's concession during appellate argument that such an agreement existed, the two cases are largely indistinguishable.

168. Discussion with Colonel Frederic L. Borch, Staff Judge Advocate, Fort Gordon (Oct. 6, 1999) (providing compelling thoughts on the issue of sub rosa agreements).

169. *See* MCM, *supra* note 17, R.C.M. 705(a).

170. Unlawful "command influence is the mortal enemy of military justice." United States v. Thomas, 22 M.J. 388, 393 (CMA 1986). Indeed, this is the concern that seemed of greatest import to the court in *Sherman*.

171. Two of the six questions posed by the CAAF to the *Dubay* hearing involve the candor of the accused and counsel to the court. *Sherman*, 51 M.J. at 76. Moreover, Judge Crawford suggests the problematic difficulty of raising such issues post-trial: "Candor with the tribunal requires that both parties be open and honest at the time of trial and not litigate these issues through post-trial affidavits." *Id.* at 77.

172. *Cf.* United States v. Conklan, 41 M.J. 800 (Army Ct. Crim. App. 1995) (PTA reflecting higher quantum if DC sought to raise command influence motion was violative of public policy).

173. MCM, *supra* note 17, R.C.M. 910(a)(2).

174. *See* Coe, *supra* note 5 (discussing the CAAF's "Reaffirmation of Power and Respect" for the military judge).

175. *Id.*

anteed right to individual voir dire of members and that the parties must demonstrate that individual voir dire is necessary because certain areas could not be covered in group questioning. In this case, the accused pleaded guilty to several offenses involving sexual activity with a child, and chose to have members for sentencing.

After group voir dire, the defense requested individual voir dire of four members: Lieutenant Colonel (LTC) Russi, Major (MAJ) Burry, Captain (CPT) Dougherty, and CPT Ali. During the military judge's initial voir dire instructions, LTC Russi had indicated he had a degree in criminology and that he worked in a courthouse "drug program" in the 1970s. He told the military judge that he understood that he should not bring any knowledge from that experience to the *Belflower* case. The defense later requested individual voir dire of LTC Russi to further explore his criminology background, as well as its potential influence on the other members. The military judge stated that he had already inquired about the background and that LTC Russi had said nothing that suggested the need for individual voir dire.[177]

Major Burry was a nurse, who had worked in adult intensive care. The defense questioned her during group voir dire, eliciting that she had little training on dealing with sexual abuse victims, "other than reporting."[178] Nevertheless, defense requested individual voir dire of her as well, to further explore her education and training. The military judge denied the request.

The defense did not question either CPT Dougherty or CPT Ali during group voir dire, but sought individual voir dire of these members. Captain Dougherty was a single parent, and the defense wanted to ask about the impact of the separation from his child upon him. As to CPT Ali, the defense felt that his religious beliefs could be relevant, since Arabic countries tend to mete out harsh punishment for criminal behavior.[179] The military judge denied both requests.

In finding that the military judge had not abused his discretion, the CAAF noted that the parties must show "that individual voir dire is necessary because certain areas could not be covered in group questioning.[180] As to LTC Russi, his professional background in substance abuse seemed irrelevant to the instant case and, in any event, he had assured the military judge that he would not let any knowledge gained from that experience influence him in the instant case.[181]

Concerning MAJ Burry, the military judge did not abuse his discretion because MAJ Burry's training had been explored on group voir dire, and she had indicated that she had little training in dealing with sexually abused children beyond the necessity of reporting.[182] Similarly, the military judge did not abuse his discretion when he denied the requests for individual voir dire of CPT Dougherty and CPT Ali. There appears to have been nothing in the questions that defense sought to ask which would have been "likely to produce a response which would have poisoned the remainder of the panel." The questions of CPT Ali's religion would not have involved such intimate details that he would have refused to speak freely before the other members.[183]

The CAAF did give a nod, at least, to the tension that may exist between the requirement to establish a need for individual voir dire and the risk of the member saying something that might "poison" the panel. However, said the CAAF, "it was within the discretion of the military judge to take that risk."[184]

The concurring opinion points out that the majority did not distinguish the *Belflower* holding from *United States v. Jefferson*.[185] In *Jefferson*, the then-Court of Military Appeals applied an abuse of discretion test to determine if the defense was inappropriately denied individual voir dire.[186] The *Jefferson* majority held that the military judge errs when he cuts off "further inquiry . . . on a critical issue."[187] The majority in *Belflower* elected to forego the further inquiry test for an abuse of discretion standard "focusing on the defense counsel's failure to ask the challenged questions during group voir dire."[188]

176. 50 M.J. 306 (1999).

177. *Id.* at 307.

178. *Id.* at 308.

179. *Id.*

180. *Id.* at 309 (citing United States v. Jefferson, 44 M.J. 312 (1996)).

181. *Id.* at 309.

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.* at 310 (Sullivan, J., concurring) (noting that the majority does not distinguish *Belflower* from *United States v. Jefferson*, 44 M.J. 312 (1996)).

186. *Jefferson*, 44 M.J. at 317.

The CAAF majority opinion offers some sound guidance to counsel seeking individual voir dire of particular members. The judges suggest, for example, that defense counsel could have (1) asked more detailed questions during group voir dire, (2) asked the military judge to re-open or (3) asked for an Article 39(a) session to alert the military judge to specific matters which the defense wished to pursue on individual rather than group voir dire. All counsel would do well to heed the message that individual voir dire is not a right. Counsel should be ready to argue for individual voir dire in a particular case, and, if nothing else, err on the side of asking all questions on general voir dire rather than banking on the opportunity to conduct individual voir dire.

As suggested, by departing from *Jefferson* and reviewing refusals of requests for individual voir dire under an abuse of discretion standard, the CAAF evinces in *Belflower* great deference to the military judge's control of voir dire. This deference was also at the heart of the CAAF's decision in *United States v. Schlamer.*[189]

In *Schlamer*, the accused was charged with the brutal premeditated murder of a female Marine. The case was referred capital and, prior to trial, each member completed a nineteen-page questionnaire prepared by the government and the defense.[190] Two members gave responses on the questionnaires and during voir dire that became the basis of appellate issues.

The first member, a SSG B, wrote "yes" in response to the question of whether an accused should have to produce evidence that he is not guilty. She also stated that she believed courts did not deal "severely enough" with criminal accused.[191] Further, she stated she believed there should be set punishments for certain crimes: "'An eye for an eye;' Rape–castration. Theft–remove hand." Concerning her general feelings about the death penalty, she stated: "If you take a life, you owe a life."[192] Not surprisingly, these responses generated extensive questioning of SSG B during voir dire.

In summary, SSG B stated during the questioning that she would follow the military judge's instructions, that she would listen to the evidence on both sides, that she would apply the presumption of innocence, and that she had not made up her mind concerning the accused's guilt or potential punishment.[193] At the conclusion of the voir dire, the defense challenged SSG B for cause. The military judge denied the challenge, finding that SSG B had not "already made up her mind . . . . I completely believe her."[194]

The CAAF applied the standards of actual and implied bias to assess the military judge's ruling. The CAAF noted that, to find actual bias, the test is whether the bias will not yield to the evidence presented and the judge's instructions.[195] For implied bias, the test is whether a reasonable person would question the fairness of the proceedings.[196] The CAAF held that the member's thoughtful responses to repeated questioning from the military judge and counsel showed she would keep an open mind, that she would consider all the facts, and that she would not automatically vote for the death penalty. Although noting that SSG B's beliefs were "out of line with the maximum penalties for rape and larceny," the majority found her views on those offenses were less significant because those offenses were not charged.[197]

Ultimately, the majority held that the military judge's assessment of the member's credibility was entitled to deference, that a reasonable person would not question the fairness of the proceedings in light of the member's responses, and that the military judge had not abused his discretion.[198] "An inflexible

187. *Id.* at 321 ("[T]his court cannot countenance cutting off voir dire questions as to potential grounds for challege of members having friends and family who were victims of crimes.").

188. *Id.* at 310 (Sullivan, J., concurring) (agreeing that no error occurred with respect to LTC Russi, CPT Doughterty, and CPT Ali, and that the military judge did not abuse his discretion in refusing to allow further voir dire of MAJ Burry).

189. 52 M.J. 80 (1999).

190. *Id.* at 86.

191. *Id.*

192. *Id.*

193. *Id.* at 87-92.

194. *Id.* at 92.

195. *Id.*

196. *Id.* at 94.

197. *Id.* at 93.

198. *Id.* at 94.

member is disqualified," said the majority, "a tough member is not."[199]

A second challenge for cause was debated on appeal. The government had challenged 1LT H, a member who had disclosed that he once received punishment under Article 15, UCMJ,[200] for destruction of government property. First Lieutenant H acknowledged that he had initially felt that he should not have been punished under Article 15, but stated that the punishment was appropriate.[201] The trial counsel challenged 1LT H based on the concern about his "overidentification with the accused." The military judge initially denied the challenge, but later changed his mind, stating 1LT H "cannot be fair and impartial."[202] In upholding the challenge on appeal, the CAAF, again, deferred to the military judge's assessment of the member (who had appeared "embarrassed"), and held that granting the challenge was consistent "with the liberal grant mandate."[203]

Judge Effron, in dissent, took issue with the majority's decision affirming the challenge for cause against SSG B. He argued that SSG B's "firm and unwavering support for sentences that have long been outside the accepted range of punishment in military jurisprudence" showed that she was "not qualified" under Article 25, UCMJ.[204] Thus, the military judge's denial of the challenge for cause was an abuse of discretion.

Inevitably, the majority's opinion strikes one as slightly unbalanced, and the impression lingers that undue deference was given to the military judge. It is troubling, for example, that SSG B, with her disturbingly Draconian predisposition toward punishment, could be allowed to sit, despite the mandate that challenges for cause be liberally granted. When compared with the *granted* challenge against 1LT H, the logic of the opinion seems that much more inconsistent and insupportable. Staff Sergeant B, according to the majority, never stated she was biased, but her answers to the questionnaire displayed a medieval punishment philosophy. Yet she was allowed to sit. However, 1LT H neither said that he was biased in favor of the accused or the government, nor did there appear to be any basis for assuming 1LT favored leniency toward the accused. Indeed, the inference that 1LT H, who had, apparently, damaged a government vehicle sometime in his past, would "overidentify" with an accused charged with a brutal murder of a fellow Marine seems unjustified.

The CAAF's invocation of the "liberal grant" mandate as further justification for the military judge's action is an ironic blow indeed, because, arguably, the liberal grant mandate should favor the defense.[205] The disturbing impression left in the wake of the majority opinion is that "a tough member" is to be preferred over a member who might show any inclination toward leniency.

As indicated in the preceding discussion, the theme of the CAAF's deference to the military judge was most extant in the realm of voir dire. But the deference was also evident in the review of a wide range of decisions relating to the military judge's control of the courtroom.[206] While space limitations preclude discussion of these cases here, they are commended to counsel's review.

The Article 32 Investigation and Report

The extent to which the Article 32, UCMJ,[207] investigating officer may assist the government counsel in case preparation, and what should be done with the fruits of that assistance, was at issue in *United States v. Holt*.[208] Lance Corporal Holt was, in

199. *Id.* at 93 (citation omitted).

200. UCMJ art. 15 (LEXIS 2000).

201. *Schlamer*, 52 M.J. at 94.

202. *Id.* at 95.

203. *Id.*

204. UCMJ art. 25; *Schlamer*, 52 M.J. at 97 (Effron, J., dissenting).

205. *Cf.* United States v. Carter, 25 M.J. 471, 478 (1988) (Cox, J., concurring) ("The Government has the functional equivalent of an unlimited number of peremptory challenges.").

206. *See, e.g.*, United States v. Barron, 52 M.J. 1 (1999) (holding that the military judge did not abuse his discretion in refusing to grant mistrial where government psychological expert witness improperly passed notes to trial counsel); United States v. Cooper, 51 M.J. 247 (1999) (holding that the military judge did not lose appearance of impartiality where he expressed his personal irritation with defense counsel before members); United States v. Vassar, 52 M.J. 9 (1999) (holding that the military judge erred in applying wrong evidentiary standard but there was no prejudice); *but see* United States v. Weisbeck, 50 M.J. 461 (1999) (holding that the military judge abused his discretion in denying a request for continuance to arrange for testimony of important expert witness; denial based on desire for expeditious processing; case reversed).

207. UCMJ art. 32.

208. 52 M.J. 173 (1999).

the parlance of our times, a "biker." He, along with several fellow bikers, to include one Private (PVT) Sprenger and Corporal (CPL) Arthurs, stole a trailer to transport their motorcycles. Military investigative authorities discovered the trailer at Camp Pendleton, and questioned Private Sprenger. Worried that the investigation could affect his anticipated reassignment to Washington state, the accused, allegedly, encouraged PVT Sprenger to flee. Private Sprenger absented himself without leave. Testimony established that the accused was concerned that CPL Arthurs was being indiscreet and "running his mouth."[209] The accused then, allegedly, killed CPL Arthurs with a knife.

The accused proved to be far more indiscreet than CPL Arthurs, and, over the course of several days following the murder, he told at least four people what he had done. He also donned Arthurs' riding leathers and took his motorcycle, and showed Sprenger his blood-stained jeans as further proof. Ultimately, investigative authorities seized the motorcycle and, from a garage at the home of the accused's mother, the riding leathers and a pair of jeans. The jeans were sent for testing to the U.S. Army Crime Laboratory at Fort Gillem, Georgia (USACIL). Unfortunately, the testing showed no signs of blood on the jeans. Requests for further testing by other labs were refused by the USACIL authorities.

Meanwhile, in August 1992, the Article 32, UCMJ, investigation convened. Major N, the investigating officer, recommended that the charges be referred to a general court-martial (GCM) as a capital case. After completing his duties, MAJ N attended a forensic conference in December 1992. One of the presentations concerned blood spatter analysis evidence by a civilian law enforcement expert, Rod Englert. On his return to Camp Pendleton, MAJ N had a conversation with the trial counsel about the *Holt* case. Major N described Mr. Englert's presentation and gave the trial counsel Mr. Englert's name and telephone number. After arraignment, the jeans were sent to Mr. Englert for testing. Mr. Englert and one of his colleagues testified for the government at trial. The substance of their testimony was that luminol testing revealed human blood stains on the jeans and that the stains showed blood spatter consistent with stabbing.[210]

The accused was convicted. The conversation between the Article 32 investigating officer and the trial counsel only came to light after trial, however, and was raised for the first time on appeal.[211] The Navy-Marine Corps Court of Criminal Appeals found that the communication between the investigating officer and trial counsel was improper, and made the investigator appear to be an "adjunct trial counsel."[212]

The CAAF noted that two issues were raised by this communication, each one suggesting a different remedy. Either the investigating officer could have been biased in the original Article 32 investigation, in violation of the accused's right to an impartial Article 32 investigation, or the communication could support a claim that the investigator served in a prohibited role, such as trial counsel.[213] Because the accused did not raise the issue of bias on the part of the investigator, only the latter issue was before the CAAF.

The CAAF determined that the accused suffered no prejudice as a result of the ex parte contact. The CAAF noted that, even if the investigator was deemed to be a de facto member of the prosecution, none of his actions prejudiced the accused in this case. Rather, the investigator merely suggested an individual as a potential witness and to test certain evidence. Major N made no tactical or strategic decisions concerning the conduct of the trial. Moreover, the decisions with respect to the testing and the timing of the witnesses and evidence and the disclosure to the defense were all made by the trial counsel, not MAJ N. Finally, the CAAF concluded that the communication had no effect on the military judge's rulings.

> Either [the government witnesses] were experts or they were not. Either testimony was relevant and admissible, or it was not. Either there was a valid objection under *Garries* or there was not. Information concerning the role of Major N in suggesting the possibility of such testing to trial counsel would not have made a substantive difference as to the propriety of the military judge's rulings on any of these issues.[214]

Thus, the CAAF held that Major N's role did not result in prejudicial error during the trial proceedings.

The CAAF's holding is instructive to counsel in the field who are seeking to raise an impropriety. The framing of the issue will dictate the relief that can be granted. For example, the defense could have argued that the investigating officer's (IO) actions prejudiced the accused at trial *and* that his actions showed a prosecutorial bias which skewed the result of the Arti-

209. *Id.* at 174.

210. *Id.* at 178.

211. *Id.* at 182.

212. *Id.* at 183.

213. *Id.* at 183. R.C.M. 405(d) prohibits an investigating officer from acting later "in the same case in any other capacity." MCM, *supra* note 17, R.C.M. 405(d).

214. *Holt*, 52 M.J. at 184.

cle 32, UMCJ, investigation. Had the defense in *Holt* argued that the post-investigation behavior of the Article 32 officer displayed a governmental bias, the remedy would have to be a new Article 32 investigation, rather than having CAAF simply review the military judge's rulings to see if they were tainted by the IO's behavior. This is not to say that the result would have been different, but at least the CAAF would have had to address the alleged bias of the Article 32 officer.

The CAAF decision is troubling for two reasons. First, there is the prejudice that the accused suffered from the Article 32 investigating officer's obvious desire to assist the government's case; the government, it may be presumed, would not have otherwise obtained the expert testimony that suggested there was blood on the jeans seized from the accused and that the spatter pattern was consistent with a stabbing. This was an essential part of the government's case, because it corroborated obvious aspects of the accused's supposed confession.

Second, the CAAF did not even mention, let alone resolve, the issue of whether prejudice was *presumed*. The *MCM* requires that an Article 32 officer be impartial. Having served as the IO, therefore, he may not participate in the case in any other capacity.[215] Here, the CAAF conceded that the IO "may have created at least appearance of impropriety" by giving the trial counsel the supplemental recommendation. Indeed, the CAAF noted the defense contention that the IO may have become a *de facto* member of the prosecution, which would violate the *MCM*'s prohibition. More importantly, the CAAF did not address the extent to which the IO's discussion with trial counsel was a *substantive ex parte communication*. Military appellate courts have, in the past, applied a presumption of prejudice to such contacts.[216] By choosing to test for prejudice rather than presume it, the CAAF signaled a departure from the prior case law.

It may be simply that the CAAF was satisfied that the evidence against the accused was overwhelming and that, even if erroneous, the Article 32 IO's behavior could not possibly have prejudiced the result against the accused. Ultimately, however, the court's analysis does not bode well for future challenges based on ex parte contacts between trial counsel and the IO.

SJA Involvement in Pretrial Negotiations

It may be axiomatic among trial practitioners that SJAs should remain above the fray, so to speak, if only because they need to maintain a certain sense of aloofness to be able to provide independent, impartial assessment of a particular court-martial to the convening authority.[217]

United States v. Jones[218] examined such an issue. In that case, the accused, a finance clerk, was charged with soliciting several soldiers to help submit false claims to finance and splitting the proceeds.[219] Convinced that the accused was the kingpin of the operation, the government made pretrial agreements with at least three co-accused. These co-accused were to be key witnesses against the accused.[220] They struck a deal with the government to avoid courts-martial. They would instead receive punishment under Article 15, UCMJ, in exchange for which they would testify against the accused.[221]

The mechanics of the plan, however, had not been fully worked out. While each of the three received nonjudicial punishment, they did not receive grants of immunity immediately from the convening authority. Thus, when it came time for the three witnesses to testify at the accused's Article 32 investigation, they refused to testify on advice of counsel. This prompted a call from the SJA to the regional defense counsel (RDC). The SJA wished the RDC to pass the word to each of the counsel that, if their clients refused to testify against the accused, then "court-martial action is likely."[222]

Needless to say, the three eventually testified against the accused. At trial, the defense sought to preclude their testimony on the grounds that they had been unlawfully influenced. The military judge refused to suppress the testimony, although she did note that, if the three co-accused were ever prosecuted, the government's actions could "constitute a de facto grant of immunity."[223]

On appeal, the defense argued that the three co-accuseds' deal with the government constituted sub rosa agreements and de facto grants of immunity.[224] To the extent that the defense was seeking to argue that the government had violated the self-incrimination rights of *A*, *B*, and *C*, the CAAF found that the accused had no standing to raise such a claim. However, the

215. MCM, *supra* note 17, R.C.M. 405(d).

216. *See, e.g.*, United States v. Payne, 3 M.J. 354 (C.M.A. 1977) (holding that a presumption of prejudice applies to improper actions of judicial officer such as Article 32 investigating officer).

217. *See, e.g.*, UCMJ art. 34 (LEXIS 2000).

218. 52 M.J. 60 (1999).

219. *Id.* at 61-62.

220. *Id.*

221. *Id.* at 62.

accused had standing to raise such a claim to "prevent a serious risk of unreliable evidence being received at the movant's trial."[225] In other words, the accused could allege that inappropriate command influence had pressured the witnesses to testify against him and that this raised concerns about the reliability of the testimony presented against him.

The CAAF went on to review the accused's claim that the government's actions prejudiced his right to a fair trial. The CAAF began by noting that R.C.M. 704 recognizes both testimonial and transactional immunity, and that a promise by an SJA may result in de facto immunity.[226] An assessment of de facto immunity is essentially an after-the-fact determination that a promise by a person with apparent authority to make it means that an accused will not be prosecuted.[227] In addition, said the CAAF, some jurisdictions recognize informal or "pocket" immunity;[228] this means immunity exists where there is a "voluntary agreement between a government official and a witness not to prosecute that witness based on his or her testimony. Such a grant of immunity may "give rise to a judicial determination that the actions taken and the promises made constitute de facto immunity."[229] Having found that such immunity was granted here, the CAAF majority stated that it need not address the propriety of granting informal immunity in the military system.

The CAAF nevertheless embarked upon a discussion of the relative merits of formal versus informal immunity, finding that the CAAF's past decisions had enforced informal immunity through judicial findings of de facto immunity.[230] Under informal immunity, however, an individual may not be prosecuted for a failure to testify, thus, "leaving the government in a lurch."[231] Formal immunity, on the other hand, eliminates post-trial issues over the scope and extent of immunity (that is, transactional versus testimonial immunity).[232] In any event, the informal agreement in this case benefited the three co-accused because it "resulted in de facto transactional immunity versus testimonial immunity."[233]

The actions of the SJA in calling the RDC were not designed to pressure the three co-accused, however. Rather, the SJA's call was intended to "set forth practically what would happen if" the three did not testify.[234] The CAAF found that these actions had no adverse impact upon the reliability of the evidence presented against the accused.[235] The SJA, wrote the court, did not behave inappropriately when he apprised the co-accused of the practical implications of their failure to testify; this was not command influence which coerced the three co-accused to testify against the accused.[236] Moreover, because the substance of the agreements had been disclosed to defense counsel, there was no issue concerning sub rosa compacts between the government and the co-accused. While the court gently upbraided the government for not reducing its agreement with the three co-accused to writing, it refused to find that the accused was prejudiced.[237]

In his concurring opinion, Judge Sullivan bluntly asserted the impropriety of the SJA's behavior, pointing out that R.C.M. 704(c) permits only the convening authority to grant immunity, and that R.C.M. 704(d) requires that such grants be in writing.

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222. *Id.* at 62-63.

223. *Id.* at 62.

224. *Id.* at 63.

225. *Id.* at 64.

226. *Id.* at 65-66.

227. *Id.*

228. *Id.*

229. *Id.* at 65.

230. *Id.* at 66 (citation omitted).

231. *Id.* at 66.

232. *Id.*

233. *Id.*

234. *Id.* at 67.

235. *Id.*

236. *Id.* at 68.

237. *Id.* at 68-69.

Somewhat prophetically, Judge Sullivan took issue with the majority's discussion of informal immunity and its failure to take a sterner stand on the propriety of the SJA's behavior, echoing a case from 1888 in which Justice Bowen wrote that "obiter dicta, like the proverbial chickens of destiny, come home to roost sooner or later in a very uncomfortable way to the Judges who have uttered them."[238]

In keeping with the theme of deference noted throughout this article, it is clear, although rather disturbing, that a majority of the CAAF was untroubled by the SJA's involvement in this case. Indeed, the majority's discussion of informal immunity tacitly recognizes that the SJA has broad authority to use immunity as a bargaining chip in the pretrial negotiation process. Perhaps more disconcerting is the CAAF's analogizing the SJA's telephone call with the RDC in *Jones* to a "prosecutor" presenting "to a defendant the unpleasant alternatives of going to trial."[239] This is an unfortunate conclusion because, as noted by Judge Sullivan, it is directly contrary to provisions of the *MCM* and was pure obiter dicta. In fact, as mentioned, the CAAF needlessly found that the SJA's action had granted informal *transactional* immunity, despite a lack of findings from the trial judge that supported that conclusion. Ironically, for all the majority's talk of standing, the opinion failed to note that the military judge at trial had *refused* to rule on the issue of de facto immunity because it simply was not *ripe*. It may be, therefore, that the best lesson to take from *Jones* is that the CAAF's tacit endorsement of the use of informal immunity may, paradoxically, be more of a burden than a boon to SJAs who entangle themselves in pretrial negotiations and unwittingly confer transactional immunity on an accused.

Conclusion

This article has reviewed some of the significant decisions issued by the CAAF during the past year in an attempt to discern trends among the significant cases issued. Because this article was not intended as a survey, it may have excluded cases other authors would have included. Generally, however, it seems fair to say that the CAAF is increasingly deferring to court-martial personnel such as the convening authority and the SJA. In most cases such deference is probably warranted, because seldom do those who implement and enforce the military justice system seek to achieve improper ends. As the ministers of military justice, judge advocates must take care to ensure that when they act within the military justice system, they do so, always, in the name of justice.

238. *Id.* at 69 (Sullivan, J., concurring) (citation omitted).

239. *Id.* at 68 (citations omitted). Such an analogy is completely at odds with the *Manual for Courts-Martial*, which presumes that the SJA, as the supposedly impartial adviser to the convening authority, will remain above the fray of criminal prosecutions and that she will not, by definition, be a prosecutor. *Cf*. MCM, *supra* note 17, R.C.M. 406 discussion (stating that the SJA pretrial advice must include "independent and informed appraisal" of charges); United States v. Sorrell, 47 M.J. 432 (1998) (holding that R.C.M. 1106(b) provides that an SJA is disqualified from the post-trial review process if the SJA acted as a member, military judge, prosecutor, defense counsel, or investigating officer); United States v. Coulter, 14 C.M.R. 75 (C.M.A. 1954) (holding that the presumption of prejudice from an Article 6(c) violation; same officer served as trial counsel and as staff judge advocate to the reviewing authority); United States v. Plumb, 47 M.J. 771 (A.F. Ct. Crim. App. 1997) (holding that R.C.M. 1106 contemplates that the SJA who authors the post-trial recommendation will be sufficiently impartial as to provide the convening authority with a balanced and objective evaluation of the evidence).

New Developments in Discovery: Two Steps Forward, One Step Back

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Introduction

Military appellate courts provide an important function. The appellate courts have a responsibility for filling gaps left by the Uniform Code of Military Justice (UCMJ), the *Manual for Courts-Martial*, and service regulations.[1] The military appellate courts took a step forward in two important areas of discovery: the trial counsel's duty of due diligence and the in camera inspection. These developments make these areas clearer than they were previously, but the courts have issues left to resolve. In one important area, *Brady* violations, the courts took a step backwards.

This article first reviews the developments in the trial counsel's duty of due diligence. This duty has two separate legal antecedents, one constitutional and one statutory. The constitutional basis for this duty comes from *Brady v. Maryland*[2] and its progeny. These cases collectively require a prosecutor, as a matter of due process, to disclose to the defense any evidence favorable to the accused,[3] to disclose favorable evidence whether the defense submits a request for discovery or not;[4] and to discover evidence favorable to the accused known to others acting on the government's behalf in the case.[5]

The statutory basis for the duty of due diligence is Article 46, UCMJ.[6] Rule for Court-Martial (R.C.M.) 701 implements Article 46, UCMJ. Rule for Court-Martial 701 codifies the requirements of *Brady* and its progeny.[7] It also requires the trial counsel to disclose reports of physical or mental examinations and scientific tests that are known, or *by the exercise of due diligence* may become known, to the trial counsel which are material to the preparation of the defense.[8] The statutory requirement is not limited to evidence favorable to the accused.[9] In *United States v. Williams*,[10] the Court of Appeals for the Armed Forces (CAAF) gave trial counsel guidance about the scope of the duty of due diligence.

This article also reviews several military appellate decisions addressing the power of the military judge to order in camera inspections to settle discovery issues. The CAAF designated the in camera review as the preferred method of balancing the privacy interests of witnesses with the accused's due process rights.[11] Although courts use the deferential abuse of discretion standard in reviewing the decisions of trial judges in this area, this year's appellate decisions have some teeth. In two cases, appellate courts found an abuse of discretion. However, the appellate courts have not established a clear standard for when judges should conduct in camera reviews.

Finally, this article reviews several cases dealing with *Brady* violations. A *Brady* violation has three elements: the undisclosed evidence must be favorable to the accused, either because it is exculpatory or impeaching; the evidence must have been suppressed by the state; and the undisclosed evi-

1. DAVID A. SCHLUETER, MILITARY CRIMINAL JUSTICE 8 (1999).

2. 373 U.S. 83 (1963).

3. *Id.*

4. United States v. Agurs, 427 U.S. 97 (1976).

5. Kyles v. Whitley, 514 U.S. 419 (1995).

6. "The trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe." UCMJ art. 46 (LEXIS 2000).

7. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 701(a)(6) (1998) [hereinafter MCM].

8. *Id.* R.C.M. 701(a)(2)(B) (emphasis added). *See, e.g.*, United States v. Simmons, 38 M.J. 376 (C.M.A. 1993).

9. United States v. Trimper, 28 M.J. 460 (C.M.A. 1989) (holding a positive urinalysis test report, which was totally unrelated to the charged offenses and used in rebuttal, was material to the preparation of the defense).

10. 50 M.J. 436 (1999).

11. United States v. Briggs, 48 M.J. 143, 145 (1998).

dence must be material.[12] Notwithstanding all of the cases dealing with *Brady* issues, the meaning of the word "material" is still beyond the grasp of mere mortals. Consequently, the results of *Brady* cases are unpredictable.[13] The state of the military law in this area is even more confusing. Military law purports to afford accused soldiers more protection than *Brady* and its progeny, based on the generous discovery provisions contemplated by Article 46, UCMJ.[14] This year's military cases ignore the additional protection based on Article 46 without explanation. The courts may be taking a step back.

This article attempts to explain these issues, critique the courts' analyses, and assist military practitioners in reacting to the impact of these cases.

Duty of Due Diligence

The CAAF addressed the prosecutor's duty of due diligence to learn of evidence favorable to the defense in *United States v. Williams*.[15] The court ultimately held that a prosecutor does not have a duty to search the unit files of government witnesses in the absence of a defense discovery request.[16] The court, in reaching this conclusion, reviewed where a prosecutor must look for evidence favorable to the accused.

Private First Class (PFC) Williams was convicted of two specifications of aggravated assault and false swearing. The discovery issue relates to an aggravated assault which occurred on 2 July 1995. Private First Class Williams was a passenger in a car driven by a female friend, PFC F. After PFC Williams exchanged derogatory comments with the passenger of another car, the two cars stopped, and a fight ensued. After the fight, PFC Williams's opponent, Mr. B, was bleeding severely from several stab wounds to the back. The government charged PFC Williams with aggravated assault for stabbing Mr. B.[17]

The government proved this specification with the testimony of Mr. B, PFC F, and a doctor who treated Mr. B. The defense theory was that PFC F stabbed Mr. B. The defense relied on the testimony of Mr. B that he did not see PFC Williams with a knife during the altercation. Moreover, Mr. B had initially told a law enforcement officer that he had been stabbed by a female. The defense asserted that PFC F had a motive to lie to conceal her own guilt.[18]

After trial, the defense counsel discovered an unrelated property damage investigation where the military police questioned PFC F about slashing the tires of another soldier in early August 1995.[19] Private First Class F denied she slashed the tires. The military police searched PFC F's barracks room and found a knife, which the police seized as evidence. The government disclosed neither the property damage investigation nor the knife to the defense counsel prior to trial.[20]

On appeal, the defense argued that the trial counsel failed to exercise due diligence by failing to discover evidence favorable to the defense after the defense requested "any and all investigations or possible prosecutions which could be brought against any witness the government intends to call during the trial."[21] The defense asserted that this request obligated the trial counsel to review the files relating to PFC F maintained by her unit.[22] The court framed the issue as whether the prosecution is obligated to review unit disciplinary files of government witnesses for information concerning investigations and possible prosecutions where the defense discovery request does not specifically request the trial counsel review the unit files.[23]

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12. Strickler v. Greene, 119 S. Ct. 1936, 1948 (1999). This case will be published in the United States reporter at 527 U.S. 263; however, the final published version has not been released. This article will cite to the Supreme Court reporter for all references to *Strickler v. Greene*.

13. The only predictable feature of the three *Brady* cases reviewed in this article is that the accused received no relief. In this writer's opinion, two of these cases warranted relief. In the third case, the court improperly used the *Brady* materiality standard to deny the accused relief.

14. *See* United States v. Hart, 29 M.J. 407 (C.M.A. 1990). *See also* United States v. Green, 37 M.J. 88 (1993); United States v. Stone, 37 M.J. 558 (A.C.M.R. 1993).

15. 50 M.J. 436 (1999).

16. *Id.* at 443.

17. *Id.* at 436-37.

18. *Id.* at 438.

19. The confrontation between PFC Williams and Mr. B occurred on 2 July 1995. The tire-slashing incident occurred in August 1995. The second charged aggravated assault occurred on 1 September 1995. The accused's court-martial convened after 1 September 1995. *Id.* at 436-38.

20. *Id.* A military police investigator (MPI) investigated the tire-slashing incident. The MPI seized the knife as evidence. *Id.* at 438. This investigation was completely separate from the investigation of the aggravated assault on 2 July 1995. *Id.* The knife was not in PFC F's unit file. Appellant's theory was the trial counsel was required to check the unit files, and "[h]ad the trial counsel reviewed the file or asked the commander about any criminal actions involving . . . PFC [F], he would have discovered the knife." *Id.* at 439.

21. *Id.* at 439.

The court noted that R.C.M. 701(a)(6) requires the trial counsel to disclose to the defense any evidence known to the trial counsel that reasonably tends to negate the guilt of the accused, reduce the degree of guilt, or reduce the punishment.[24] Rule for Courts-Martial 701(a)(6) implements the requirements of *Brady v. Maryland*,[25] which held that due process requires a prosecutor to disclose information requested by a defendant that is material to the issue of guilt or sentence. *Kyles v. Whitley*[26] imposed a duty on a prosecutor "to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police."[27] In *Williams*, the CAAF assumed the undisclosed evidence was favorable to the defense,[28] and focused on whether the evidence was located within a file the trial counsel had a duty to review.[29]

The court held that the trial counsel did not have a duty to review unit disciplinary files in the absence of a defense request for discovery.[30] The court summarized a trial counsel's duty of due diligence. First, the trial counsel must review his own files pertaining to the case.[31] Beyond his own files, a trial counsel must review the files of law enforcement authorities that have participated in investigating the charged offenses.[32] A trial counsel must also review investigative files in related cases that are maintained by an entity closely aligned with the prosecution.[33] Finally, a trial counsel must review "other files, as designated in a defense discovery request, that involv[e] a specified type of information within a specified entity."[34] Because the defense did not specifically request the government review the unit disciplinary files for specific information, "neither Article 46 nor the *Brady* line of cases require[d] the prosecution to review records that are not directly related to the investigation of the matter that is the subject of the prosecution."[35]

Williams is an important case for trial counsel because the court clearly and coherently defined the limits of the trial counsel's duty to seek out evidence favorable to the accused. Trial counsel should develop a system that causes them to determine which files they must review and the location of those files; ignorance is not an excuse.[36] Law enforcement files include any files maintained by local law enforcement activities and law enforcement activities from other installations that partici-

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22. *Id.* at 439 n.2. The appellant did not assert that the prosecutor knowingly withheld favorable evidence from the defense even though the trial counsel who prosecuted the case also advised the military police investigator on the tire-slashing incident before the military police closed the tire slashing investigation. *Id.* at 438-39. The trial counsel submitted an affidavit that stated the tire-slashing incident occurred more than a month before he knew PFC F would be a witness against PFC Williams, and he did not remember the tire-slashing incident. *Id.*

23. *Id.*

24. *See id.* at 440. *See also* MCM, *supra* note 7, R.C.M. 701(a)(6).

25. 373 U.S. 83 (1963).

26. 514 U.S. 419 (1995).

27. *Id.* at 437.

28. *Williams*, 50 M.J. at 440. The court scolded the appellant for failing to provide any evidence showing the undisclosed knife was or could have been used in the assault. *Id*. at 441-42.

29. *Id.* at 440.

30. *Id.* at 443.

31. *Id.* at 441.

32. *Id. See, e.g.*, United States v. Simmons, 38 M.J. 376 (C.M.A. 1993). In *Simmons*, the trial counsel failed to disclose statements by a key government witness which were contained in a polygraph examination report in the Criminal Investigation Command (CID) file. *Id.*

33. *Williams*, 50 M.J. at 441; *see, e.g.*, United States v. Romano, 46 M.J. 269 (1997); United States v. Hankins, 872 F. Supp. 170, 172 (D.N.J.), *aff'd*, 61 F.3d 897 (3d. Cir. 1995).

34. *Williams*, 50 M.J. at 441. *See, e.g.*, United States v. Green, 37 M.J. 88 (C.M.A. 1993). In *Green*, the trial counsel failed to disclose an Article 15 imposed on a government witness after the defense requested "'[a]ny record of prior conviction, and/or nonjudicial punishment of any prosecution witness." *Id*. at 89.

35. *Williams*, 50 M.J. at 443.

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> We are . . . concerned with Captain B's views on disclosure based on his testimony that, 'I can't be held to a duty to disclose' evidence in a CID case file to the defense 'if I don't have knowledge of it.' We believe that Captain B's failure to immediately provide SSG Shattles' last two statements to the defense team when he became aware of them and his attitude about his duty to seek out and disclose evidence in a CID case file to the defense are the type of conduct condemned by the Court of Military Appeals . . . we find that Captain B's attempts to accomplish his duty in this regard were especially careless and an example not to be followed by other trial counsel.

United States v. Kinzer, 39 M.J. 559 (A.C.M.R. 1994).

pated in the investigation.[37] If the government plans to use evidence examined at a forensics laboratory, then the trial counsel must review the files of the laboratory.[38] If a civilian law enforcement agency participated in the investigation, trial counsel should inspect the law enforcement agency's files as well.

Files maintained by an entity "closely aligned with the prosecution" would certainly include files maintained by a trial counsel prosecuting a co-accused.[39] However, due diligence may require more. In *Williams*, the CAAF cited *United States v. Hankins*,[40] as legal support for the requirement to review files maintained by an entity closely aligned with the prosecution. In *Hankins*, the prosecutor failed to disclose statements made by a government witness in an affidavit pertaining to an assets forfeiture proceeding which contradicted statements made by the witness in a statement to a Drug Enforcement Agency agent.[41] The district court held that the prosecuting assistant U.S. attorney had a duty to review the assets forfeiture file maintained by another assistant U.S. attorney.[42] The court reasoned, "[c]ertainly the civil division of the United States Attorney's Office is 'closely aligned with' the criminal division of the United States Attorney's Office."[43] If we apply this criminal division-civil division template to a staff judge advocate's office, the duty of due diligence may affect files maintained by the "civil divisions" of a staff judge advocate's office, including relevant Article 139 claims,[44] Article 138 complaints,[45] reports of survey,[46] and, possibly, other files. Trial counsel will have to rely on future cases to further define the extent of the prosecutor's duty to search for evidence favorable to the accused in the files of entities closely aligned with the prosecution.

Williams is an important case for defense counsel because defense counsel can affect the scope of the trial counsel's duty of due diligence.[47] Defense counsel should not interpret *Williams* as a license to burden trial counsel with the review of clearly unrelated files. However, the CAAF did not address the issue of what showing of relevance, if any, the defense must make to trigger the duty for the trial counsel to review a file.[48] The CAAF focused on the specificity of the request:

> The prosecutor's obligation under Article 46 is to remove obstacles to defense access to information and to provide such other assistance as maybe [sic] needed to ensure that the defense has an equal opportunity to obtain evidence. . . . With respect to files not related to the investigation of the matter that is the subject of the prosecution, there is no readily identifiable standard as to how extensive a review must be conducted by the prosecutor in the preparation of a case. The defense need for such files is likely to vary significantly from case to case, and the defense is likely to be in the best position to know what matters outside the investigative files may be of significance. The Article 46 interest in equal opportunity of the defense to obtain such information can be protected adequately

37. United States v. Bryan, 868 F.2d 1032 (9th Cir. 1989). The Ninth Circuit reversed the district court, which limited the U.S. Attorney's discovery responsibilities to information within the District of Oregon. "As with [Federal] Rule [of Criminal Procedure] 16(a)(1)(C)'s definition of government, we see no reason why the prosecutor's obligation under *Brady* should stop at the border of the district." *Id.* at 1037.

38. *See* United States v. Sebring, 44 M.J. 805 (N.M. Ct. Crim. App. 1996). The trial counsel failed to disclose reports of quality control inspections, which indicated problems with testing at the laboratory that tested Sebring's urine sample. "[T]he trial counsel's obligation to search for favorable evidence known to others acting on the Government's behalf in the case extends to a laboratory that conducts tests to determine the presence of a controlled substances for the Government." *Id.* at 808.

39. United States v. Romano, 46 M.J. 269 (1997). In *Romano*, the trial counsel failed to disclose statements made by a government witness at the Article 32 investigation of a co-accused which contradicted her in-court testimony against Romano. *Id.*

40. 872 F. Supp. 170, 172 (D.N.J.), *aff'd*, 61 F.3d 897 (3d. Cir. 1995).

41. *Id.* at 172.

42. *Id.* at 173.

43. *Id.*

44. Article 139 gives soldiers a means of redress for willful damage to property or the wrongful taking of property by another soldier. UCMJ art. 139 (LEXIS 2000); *see also* U.S. Dep't of Army, Reg. 27-20, Legal Services: Claims, ch. 9 (31 Dec. 1997).

45. Article 138 gives a soldier who feels he has been wronged by his commanding officer a mechanism to complain about the problem. UCMJ art. 138; *see also* U.S. Dep't of Army, Reg. 27-10, Legal Services: Military Justice, ch. 20 (20 Aug. 1999).

46. U.S. Dep't of Army, Reg. 735-5, Property Accountability: Policies and Procedures for Property Accountability, ch. 13 (31 Jan. 1998).

47. "In short, the parameters of the review that must be undertaken outside the prosecutor's own files will depend in any particular case on the relationship of the other governmental entity to the prosecution and the nature of the defense discovery request." United States v. Williams, 50 M.J. 436, 441 (1999).

48. *Id.* at 443 n.7.

> be [sic] requiring the defense to provide a reasonable degree of specificity as to the entities, the types of records, and the types of information that are the subject of the request.[49]

Defense counsel should aggressively use the discovery process, including the trial counsel's duty of due diligence, by making specific, good-faith requests for information and evidence to prepare the best possible defense for their clients.

Often the defense will request access to files that contain sensitive information.[50] Trial judges have to balance the privacy concerns of witnesses against the rights of the accused. Witnesses have an interest in keeping their private lives private and victims do not deserve to be traumatized a second time by the trial process. On the other hand, the accused is entitled to exculpatory evidence and information which the defense can use to impeach government witnesses.[51] A military judge has broad discretion when regulating discovery. A judge may prescribe the time, place, and manner for discovery.[52] A judge can also issue protective and other appropriate orders.[53] One judicial tool for regulating discovery is the in camera review.

In Camera Review

This year's cases focus on the military judge's authority to review disputed discovery materials in camera. The cases involve in camera inspections of information requested during discovery by the defense but not produced by the government. In these cases the defense then made a motion to compel discovery. In one case, the trial judge inspected the disputed information in camera; in the other cases, the judges did not. These cases are interesting when trying to determine what a defense counsel must do or show to get the trial judge to review the disputed evidence in camera. The in camera inspection is one tool the military judge has to regulate discovery;[54] however, the Rules for Courts-Martial do not offer military judges any guidance on how or when to conduct these reviews.[55]

In *United States v. Abrams*,[56] the court-martial convicted the accused of, among other things, pandering and soliciting another to engage in prostitution. The defense requested the entire military record for the government's witness on the pandering and solicitation specifications. The government agreed to turn over documents from the witness's military record related to her performance as a prostitute. The defense counsel insisted he needed to see her entire record to determine if there was anything else in the record which he could use to impeach the witness.[57] The military judge ruled that the defense had not made a showing that the information in the witness's file would be relevant or necessary to the defense. The judge ruled there was no basis to order the government to produce the records to the defense, but the military judge reviewed the records in camera.[58] The precise issue in *Abrams* was the failure of the judge to seal the records he reviewed in camera and attach them to the record of trial. The CAAF remanded the case to the Navy court with an order to produce the records reviewed in camera for appellate review.[59]

The interesting thing about *Abrams* is that the trial judge decided to conduct the in camera review even though the "defense counsel had not made any kind of threshold showing

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49. *Id.* at 442-43.

50. *See, e.g.*, Pennsylvania v. Ritchie, 480 U.S. 39 (1987). In this case the defendant was accused of child abuse by his daughter. The defendant's daughter was interviewed by Child Youth Services. Because of privacy concerns, the government opposed an unsupervised search by the defense of the confidential files of the child welfare agency in order to discover exculpatory information. The trial judge did not conduct an in camera inspection of the records. The Court remanded the case to have the trial court review the file in camera to determine if it contained evidence favorable to the defense. The Court held "[the defendant] is entitled to have the C[hild] Y[outh] S[ervices] file reviewed by the trial court to determine whether it contains information that probably would have changed the outcome of his trial." *Id.* at 59-61.

51. *See* United States v. Bagley, 473 U.S. 667 (1985).

52. MCM, *supra* note 7, R.C.M. 701(g)(1).

53. *Id.* R.C.M. 701(g)(2).

54. United States v. Abrams, 50 M.J. 361, 363 (1999) (recognizing the power of the judge to review evidence in camera to strike a balance between the accused's right to a fair trial and government confidentiality considerations); *see also* MCM, *supra* note 7, R.C.M. 703(f)(4)(C).

55. The only guidance on in camera inspections in the *MCM* is contained in MRE 505 (Classified Information) and MRE 506 (Government Information Other than Classified Information). These rules allow the government to request the in camera inspection and provide the judge a clear standard for when evidence falling within these privileges must be disclosed. MCM, *supra* note 7, MIL. R. EVID. 505, 506.

56. 50 M.J. 361 (1999).

57. The defense proffered that the witness had been to therapy prior to enlisting in the Navy. *Id.* at 362.

58. *Id.*

59. *Id.* at 364.

that what may be in there would be necessary and relevant to the defense."[60] Rule for Courts-Martial 703(f) states the defense is entitled to have evidence produced by the government if the defense can show the evidence is relevant and necessary.[61] The discovery rules do not specify the showing, if any, required of the defense counsel to entitle the defense to an in camera review.[62]

In *United States v. Sanchez*,[63] the government charged the accused with fraternization and adultery. The defense asked the trial judge to compel production of all documents concerning an investigation into the complaining witness's allegations against a senior noncommissioned officer. The defense believed that the officer who investigated the allegations concluded the witness was not credible. The trial judge denied the defense motion to compel discovery.[64] The Air Force court, in an earlier order, had ordered the government to provide a copy of the report for an in camera inspection. The Air Force court reviewed the records and did not find any information favorable to the defense.[65]

The interesting part of this case is that the trial judge denied the motion to compel discovery, implying the defense did not show the materials were relevant and necessary to the defense. However, unlike the trial judge in *Abrams*, the trial judge did not conduct an in camera inspection. Although the appellate court found error, the court did not specify a standard for when a judge should conduct an in camera review.

In *United States v. Kelly*,[66] the court-martial convicted the accused of larceny and communicating a threat. The defense counsel requested disclosure of the personnel and medical records of the person to whom the accused allegedly communicated the threat. The defense received an unfavorable letter and a redacted version of a physical profile, but was otherwise denied access to the records. The trial judge denied the trial counsel's motion to perform an in camera review of the records.[67]

The Army court found that the trial judge did not abuse his discretion by denying the trial counsel unfettered access to the records.[68] Beyond the unfavorable letter and the profile, the defense could not show the relevance or necessity of the requested records. However, the Army court found that the military judge erred by relying on the representations of the trial counsel as to what was in the requested records and not inspecting them for himself.[69] The Army court did not grant relief or return the record to the military judge to conduct the inspection because they found no prejudice to the accused.[70]

In all three of these cases, the defense was unable to make a showing of relevance or necessity for access to the records being sought.[71] In one of the cases, the trial judge conducted an in camera inspection anyway. In the two cases where the trial judge did not perform an in camera review, the appellate courts found that the trial judges abused their discretion. However, the cases do not set a standard that judges can apply in deciding when they should review records in camera. The only lessons from *Sanchez* and *Kelly* are based on the facts of the case. In *Sanchez*, the defense made a "hypothetical" showing of relevance: if the investigating officer found her incredible, then the records might contain evidence favorable to the defense.[72] The lesson from *Kelly* may be the military judge must conduct an in camera inspection where the defense counsel questions the trial counsel's representation of what is in the file.[73]

One benefit of conducting an in camera review is that the judge inspects the requested records for evidence favorable to

60. *Id.* at 362.

61. MCM, *supra* note 7, R.C.M. 703(f).

62. *But see* Pennsylvania v. Ritchie, 480 U.S. 39, 55-61 (1987) (holding that the defendant is entitled to have confidential files inspected in camera without a showing of relevance or necessity and suggesting denial of an in camera inspection may violate the Due Process Clause and the Compulsory Process Clause).

63. 50 M.J. 506 (A.F. Ct. Crim. App. 1999).

64. *Id.* at 508-09.

65. *Id.* at 509.

66. United States v. Kelly, No. 9600774, 1999 CCA LEXIS 332 (Army Ct. Crim. App. Sept. 29, 1999).

67. The trial counsel requested an in camera inspection and the defense counsel initially opposed it. The defense counsel later withdrew her objection. *Id.* at*3-*5.

68. *Id.* at *8.

69. *Id.* at *8-*9.

70. *Id.* at *10. *See infra* note 158 and accompanying text for further discussion of this case.

71. If the defense counsel requests production of a piece of evidence, provides a description of the item, its location, and custodian, and can show the evidence is relevant and necessary, the defense is entitled to have the piece of evidence produced by the government. MCM, *supra* note 7, R.C.M. 703(f)(3). Since the defense counsel could not demonstrate the relevance of the evidence in these cases, the issue becomes whether the defense is entitled to inspect, or have the court inspect, the requested files absent any showing of relevance.

the accused and can eliminate potential *Brady* violations. When the defense specifically requests the government to produce or inspect certain files, the trial counsel's duty of due diligence arises.[74] If neither the trial counsel nor the trial judge inspect a specifically requested record, and the record contains evidence favorable to the accused, the result could be a *Brady* violation. If the trial counsel inspects a requested record and the trial counsel is unsure whether a document should be disclosed to the defense and the witness does not want the document disclosed, the trial counsel can ask the court to review the document in camera. By reviewing the requested files, the judge can eliminate potential *Brady* issues.

Brady Evidence

This year the United States Supreme Court decided *Strickler v. Greene*,[75] an important case building on the *Brady v. Maryland*[76] line of cases. In *Brady*, the Supreme Court held that the suppression by the government of evidence favorable to the defense, upon request by the defense, violated Due Process if the undisclosed evidence is material either to guilt or to punishment.[77] Later, the Court held that this duty to disclose applies even without a defense request for discovery.[78] The Court later expanded the meaning of evidence favorable to the accused to include impeachment evidence in addition to exculpatory evidence.[79] The Court also defined the term "material." Undisclosed evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."[80] Most recently, the Court imposed a duty on prosecutors to learn of favorable information known to others acting on the prosecution's behalf, including the police.[81] In *Strickler*, the Court focused again on the meaning of "material."

Tommy D. Strickler was convicted of abducting, robbing, and murdering Leanne Whitlock on 5 January 1990. Strickler was sentenced to death.[82] In a separate trial, Ronald Henderson, Strickler's co-defendant, was convicted of first degree murder, a non-capital offense.[83]

At trial, a key government witness, Anne Stoltzfus, described Whitlock's abduction at a shopping mall in Harrisonburg, Virginia. Stoltzfus testified that she had seen Strickler, Henderson, and a blonde girl together several times inside the mall before the abduction. She described the abduction in vivid detail. Stoltzfus testified that as she was leaving the mall parking lot to go to another store, she saw Strickler get into Whitlock's car, beat her, summon his friends into the car, and then force Whitlock to drive away. On 13 January 1990, police discovered Whitlock's dead body.[84]

After trial, the defense discovered notes taken by the police detective who interviewed Stoltzfus before trial as well as sev-

72. *Cf.* United States v. Briggs, 48 M.J. 143 (1998) (holding that the denial of a defense request for a rape victim's complete medical record was not an abuse of discretion where the defense was unable to point to any possibility that there was exculpatory material contained within the victim's medical records); United States v. Reece, v. Reece, 25 M.J. 93 (C.M.A. 1987) (holding that the military judge should have conducted an in camera inspection of the victim's treatment and disciplinary records where the defense counsel made as specific a showing of relevance as possible, given that he was denied all access to the documents).

73. The court in *Kelly* framed the issue as "whether a defense counsel is entitled to inspect the official personnel file of a victim when that counsel distrusts the government's response to a discovery request, with or without a showing that the file contains material relevant and necessary to the defense case." The court found the "military judge erred by 'relying upon a judicial determination by government counsel,' rather than inspecting the sought-after personnel records in camera and making his own decision on the need to furnish defense additional documentation." United States v. Kelly, No. 9600774 1999 CCA LEXIS 332, at *7 (Army Ct. Crim. App. Sept. 29 1999).

74. *See supra* notes 31-34 and accompanying text.

75. 119 S. Ct. 1936 (1999).

76. 373 U.S. 83 (1963).

77. *Id.* at 87.

78. United States v. Agurs, 427 U.S. 97, 107 (1976).

79. United States v. Bagley, 473 U.S. 667, 676 (1985).

80. *Id.* at 682. In cases involving knowing use of perjured testimony by a prosecutor, the undisclosed evidence is material unless the nondisclosure is harmless beyond a reasonable doubt. *Id.* at 680.

81. Kyles v. Whitley, 514 U.S. 419, 437 (1995).

82. *Strickler*, 119 S. Ct. at 1941.

83. *Id.*

84. *Id.* at 1943-44. Ms. Whitlock apparently suffered a horrible death. Forensic evidence indicated she died of multiple blunt force injuries to the head. A sixty-nine pound rock, speckled with blood, was found near her body. The location of the rock and the blood on it suggest the rock was used to inflict the blunt force trauma that killed her. *Id.* at 1942.

eral letters written by Stoltzfus to the detective. These materials were not disclosed to the defense before trial.[85] The undisclosed documents cast serious doubt on the confident testimony Stoltzfus presented at trial.

At trial, Stoltzfus identified Strickler as the person who beat and abducted Whitlock in the mall parking lot. When asked if pretrial publicity influenced her identification, Stoltzfus confidently said "absolutely not."[86] Stoltzfus said she had an exceptionally good memory and had no doubt about her identification. She said that Strickler had made an emotional impression on her and that she paid attention.[87] The undisclosed documents indicated that Stoltzfus had not remembered being at the mall that day, but that her daughter had helped to jog her memory. The documents indicated her memory was vague and uncertain. A letter from Stoltzfus indicated she was not paying attention to what she observed. "I totally wrote this off as a trivial episode of college kids carrying on and proceeded with my own full-time college load at J[ames] M[adison] U[niversity]."[88] Moreover, an undisclosed summary of the detective's notes of his interviews with Stoltzfus indicated that two weeks after the abduction she was not sure if she could identify the two males involved in the abduction.[89]

At trial, Stoltzfus identified the victim, Ms. Whitlock, from a photograph. Stoltzfus described Whitlock as a college kid who was singing and happy. Stoltzfus even described her clothing. One undisclosed document indicated that during the first interview between the detective and Stoltzfus two weeks after the abduction, Stoltzfus could not identify the victim. A later note from Stoltzfus to the detective indicated that Stoltzfus spent several hours with Whitlock's boyfriend looking at recent photographs of Whitlock. Stoltzfus could not identify the victim during her first interview with police two weeks after the abduction, but she could identify Ms. Whitlock at trial.[90]

In contrast to her vivid, confident testimony, another undisclosed letter from Stoltzfus to the detective thanked the detective for his patience with her muddled memories. The letter also stated that if another student had not called the police, she would have never made "any of the associations that you helped me make."[91]

The Court followed the classic *Brady* analysis. A *Brady* violation has three elements: the undisclosed evidence must be favorable to the accused, either because it is exculpatory or impeaching; the evidence must have been suppressed by the state; and the defendant must be prejudiced.[92] A defendant is prejudiced if the undisclosed evidence is material to either the issue of guilt or sentence.[93] In *Strickler*, there was no doubt that the undisclosed evidence was favorable to the defendant and that the police suppressed it.[94] The outcome depended on materiality.

The Court first announced a standard for determining whether undisclosed evidence was material in cases not involving prosecutorial misconduct[95] in *United States v. Bagley*.[96] If prosecutorial misconduct is not involved, undisclosed evidence is material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."[97] A reasonable probability

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85. The appellant claimed that eight documents were not disclosed. The prosecutor maintained that three of the documents were in his file when he allowed the defense counsel open access to his file. The Court did not resolve this discrepancy. *Id.* at 1945 n.11.

86. *Id.* at 1944.

87. *Id.*

88. *Id.* at 1944-45.

89. *Id.*

90. *Id.* at 1944-45.

91. *Id.* at 1945.

92. *Id.* at 1948.

93. "[T]he Court treats the prejudice enquiry as synonymous with the materiality determination under *Brady v. Maryland*." *Id.* at 1956 n.2. (Souter, J., concurring in part and dissenting in part).

94. *Strickler*, 119 S. Ct. at 1948. A lack of bad faith on the part of the prosecutor is immaterial. *Brady*, 373 U.S. at 87. A prosecutor is responsible for any favorable evidence in the possession of any governmental agency working on the case, including the police. United States v. Kyles, 514 U.S. 419, 437 (1995). In this case, the non-disclosure may have resulted from the fact that crime occurred and was investigated in one county but the prosecutor from another county tried the case. *Strickler*, 119 S. Ct. at 1945 n.12.

95. In a case involving knowing use of perjured testimony, the "fact that the testimony is perjured is considered material unless failure to disclose it would be harmless beyond a reasonable doubt." United States v. Bagley, 473 U.S. 669, 680 (1985). *See, e.g.*, Giglio v. United States, 405 U.S. 150 (1972); Napue v. Illinois, 360 U.S. 264 (1959); Mooney v. Holohan, 294 U.S. 103 (1935).

96. 473 U.S. 667 (1985).

is "a probability sufficient to undermine confidence in the outcome."[98]

After exhausting his appeals in the state courts, Strickler filed a federal habeas corpus petition in the federal district court for the Eastern District of Virginia.[99] The district court concluded that without the powerful trial testimony of Stoltzfus, the jury may have believed Henderson was the ringleader behind Whitlock's murder. The district court found the undisclosed documents were material because there was a reasonable probability of a different result at trial if the undisclosed evidence had been disclosed to the defense. The district court reasoned that without Stoltzfus's testimony, there was a reasonable probability that the jury may have convicted Strickler of first degree murder, a noncapital offense, and not capital murder.[100]

The Fourth Circuit Court of Appeals reversed the district court's decision. The Fourth Circuit Court of Appeals concluded the undisclosed evidence was not material because the record contained ample evidence of guilt independent of Stoltzfus's testimony. The court found the verdict and sentence worthy of confidence because even without Stoltzfus's testimony, the evidence supported the jury's finding of guilt to capital murder as well as the special findings of vileness and future dangerousness that warranted the sentence to death.[101]

The Supreme Court disagreed with both lower courts. The Supreme Court found that the Fourth Circuit applied the wrong standard. The test for materiality is not "whether, after discounting the inculpatory evidence in light of the undisclosed evidence, the remaining evidence is sufficient to support the jury's conclusions."[102] The Court disagreed with the district court's finding of a reasonable probability of a different result at trial.

> The District Court was surely correct that there is a reasonable *possibility* that either a total, or just a substantial, discount of Stoltzfus' testimony might have produced a different result, either at the guilt or sentencing phases. . . . [H]owever, petitioner's burden is to establish a reasonable *probability* of a different result.[103]

In *Kyles*, the Court emphasized that "the question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence."[104] "The question is whether 'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'"[105] The Supreme Court found the verdict and sentence worthy of confidence based on the modicum of difference between a "reasonable possibility" and a "reasonable probability."[106]

Justice Souter wrote a separate opinion concurring in part and dissenting in part.[107] Justice Souter agreed that Strickler failed to show that the undisclosed evidence was material to Strickler's conviction for capital murder; however, Justice Souter believed that Strickler demonstrated that the undisclosed evidence was material to Strickler's sentence.

> [T]he prejudice enquiry does not stop at the conviction but goes to each step of the sentencing process: the jury's consideration of aggravating, death-qualifying facts, the jury's discretionary recommendation of a death sentence if it finds the requisite aggravating factors, and the judge's discretionary decision to follow the jury's recommendation. . . . It is with respect to the penultimate step in determining the sentence that I think Strickler carried his burden. I believe there is a reasonable probability (which I take to mean a significant possibility) that disclosure

97. *Id.* at 682.

98. *Id.*

99. *Strickler*, 119 S. Ct. at 1946.

100. *Id.* at 1953.

101. *Id.* at 1952.

102. *Id.*

103. *Id.* at 1953.

104. United States v. Kyles, 514 U.S. 419, 434 (1995).

105. *Strickler*, 119 S. Ct. at 1952. *Kyles*, 514 U.S. at 435.

106. Strickler was executed on 21 July 1999. *Student's Murderer Executed; Governor, U.S. Supreme Court Reject Last-Minute Appeals*, WASH. POST, July 22, 1999, at B8.

107. *Strickler*, 119 S. Ct. at 1955. Justice Kennedy joined Justice Souter.

> of the Stoltzfus materials would have led the jury to recommend life, not death.[108]

Justice Souter's opinion criticized the majority for using "the unfortunate phrasing of the shorthand version"[109] of the *Bagley* standard.

Justice Souter objected to the Court's use of "the familiar, and perhaps familiarly deceptive, formulation [of the test for materiality]: whether there is a 'reasonable probability' of a different outcome if the evidence withheld had been disclosed."[110] Justice Souter proposed substituting "substantial possibility" for the phrase "reasonable probability" in the shorthand formulation. Use of the phrase reasonable probability "raises an unjustifiable risk of misleading courts into treating it as akin to the more demanding standard, 'more likely than not.'"[111] Clearly, a defendant does not have to show that a different outcome is more likely than not in order to show materiality for a *Brady* violation.[112]

Justice Souter traced the evolution of the *Bagley* standard to make his point. *Brady* itself did not define the term "material." The first case to attempt to define materiality in the context of a *Brady* violation was *United States v. Agurs*.[113] *Agurs* defined three situations which could constitute a *Brady* violation. The first was the knowing use of perjured testimony by a prosecutor. The Court noted that a conviction based on perjured testimony "must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury."[114] *Agurs*, like *Strickler*, did not involve perjured testimony. The second category consists of cases where the defense makes a specific discovery request and the prosecutor fails to disclose evidence favorable to the accused. The third category consists of cases where the defense makes a general request or no request for discovery and favorable information is not disclosed.[115]

The Court in *Agurs* never stated a specific standard for materiality for the second and third categories. The Court ruminated about what the standard should be, but at the end of the opinion all we know is what the standard is not. The Court rejected the standard that applies to motions for a new trial based on newly discovered evidence.[116] The Court reasoned that the standard for materiality should be less demanding on the defendant than the burden of demonstrating that newly discovered evidence probably would have resulted in acquittal.

> If the standard applied to the usual motion for a new trial based on newly discovered evidence were the same when the evidence was in the State's possession as when it was found in a neutral source, there would be no special significance to the prosecutor's obligation to serve the cause of justice.[117]

On the other hand, the Court determined that the standard is more demanding on the defendant than the usual harmless error analysis because the Court "rejected the suggestion that the prosecutor has a constitutional duty routinely to deliver his entire file to defense counsel."[118] After *Agurs* the defendant must show more than a "reasonable possibility" of a different result at trial, but the defendant does not have to show that the undisclosed evidence probably would have resulted in acquittal. The Court did not have to settle on a standard in *Agurs* because they found the nondisclosure to be harmless beyond a reasonable doubt.[119]

108. *Id.* at 1956.

109. *Id.*

110. *Id.*

111. *Id.*

112. *See infra* note 116 and accompanying text (discussing the burden on an appellant to establish a *Brady* violation).

113. 427 U.S. 97 (1976).

114. *Id.* at 103. This is the harmless beyond a reasonable doubt analysis.

115. *Id.* at 103-06. The *Strickler* opinion did not mention a defense request for discovery. The opinion discussed the prosecutor's open file discovery policy. *Id.* at 1945 n.11. Strickler's defense counsel may not have submitted a discovery request. *Strickler* appears to be a "no request" case.

116. "[T]he defendant should not have to satisfy the severe burden of demonstrating that newly discovered evidence probably would have resulted in acquittal." *Agurs*, 427 U.S. at 111. *See* MCM, *supra* note 7, R.C.M. 1210(f).

117. *Agurs*, 427 U.S. at 111.

118. *Id.* The harmless error analysis determines if a trial error is harmless beyond a reasonable doubt. "Harmless beyond a reasonable doubt" means there is no *reasonable possibility* that the trial error contributed to the verdict. *See* Brecht v. Abrahamson, 507 U.S. 619 (1993). Some formulations use the phrase *reasonable likelihood*. *Agurs*, 427 U.S. at 103. "Reasonable possibility" and "reasonable likelihood" are synonymous. *Strickler*, 119 S. Ct. at 1957.

119. *Agurs*, 427 U.S. at 114.

The shorthand "reasonable probability" formulation first appeared in *United States v. Bagley.*[120] *Bagley* decided the issue left open in *Agurs*: the standard for materiality when the prosecutor fails to disclose evidence favorable to the accused.[121] "The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome."[122] The Court in *Bagley* borrowed the phrase "reasonable probability" from *Strickland v. Washington.*[123] Justice Souter pointed out that *Strickland* based its formulation on two cases, *Agurs* and *United States v. Valenzuela-Bernal*.[124] Neither *Agurs* nor *Valenzuela-Bernal* used the phrase reasonable probability, but both used reasonable likelihood.[125]

The review of the circuitous path by which the Court adopted the "reasonable probability" standard for *Brady* violations brought Justice Souter to three conclusions. First, "reasonable likelihood" and "reasonable probability" are distinct levels of confidence in the validity of a trial result. Second, the gap between "more likely than not" and "reasonable probability" is greater than the gap between "reasonable likelihood" and "reasonable probability." Finally, because of the larger gap, the Court should not use "reasonable probability" because it "is naturally read as the cognate of 'probably' and thus confused with 'more likely than not.'"[126] Justice Souter proposed describing the *Brady* materiality standard as a "significant possibility" of a different result.[127]

Justice Souter would have vacated the sentence because the undisclosed evidence raised a significant possibility of a different sentence. Justice Souter made two points about Anne Stoltzfus's testimony. First, her testimony identified Strickler as the ringleader. The evidence of the brutal nature of the crime "must surely have been complemented by a certainty that without Strickler there would have been no abduction and no ensuing murder."[128] Stoltzfus alone described Strickler as the instigator.[129] Second, Stoltzfus's testimony presented a gripping story. Justice Souter emphasized that the story format is a powerful key to juror decision-making. The power of Stoltzfus's testimony came not only from the content of her testimony but also in the confident, compelling manner in which she presented it.[130] The undisclosed evidence would have exposed Stoltzfus's memory as uncertain and vague. Her memory was, in part, reconstructed by conversations with the police and the victim's boyfriend. An informed cross-examination could have annihilated her testimony. Without the vivid picture of Strickler as the dominate aggressor, at least one juror may have hesitated to impose the death penalty. Justice Souter noted that would have been all it took to change the result.[131]

Strickler illustrates that the standard for materiality is hard to define with precision. The facts in *Strickler* illustrate that the government can fail to disclose compelling impeachment evidence which is crucial to the defense without committing a constitutional error. This case will help counsel understand the three components of a *Brady* violation and the application of the *Bagley* materiality standard. The most salient point of *Strickler* is a fine one: there is a difference between a reasonable possibility and a reasonable probability. Although the

120. 473 U.S. 667 (1985).

121. The Court prescribes the same test for both the second and third categories defined in *Agurs*. The test announced in *Bagley* is "sufficiently flexible to cover the 'no request,' 'general request,' and 'specific request' cases of prosecutorial failure to disclose evidence favorable to the accused." *Id*. at 682. *But see* United States v. Hart, 29 M.J. 407 (C.M.A. 1990). The military courts afford accused soldiers more protection based on Article 46, UCMJ: "where prosecutorial misconduct is present or where the Government fails to disclose information pursuant to a specific discovery request, the evidence will be considered 'material unless failure to disclose' can be demonstrated to 'be harmless beyond a reasonable doubt.'" *Hart*, 29 M.J. at 410; *see also* United States v. Green, 37 M.J. 88 (1993); United States v. Stone, 37 M.J. 558 (A.C.M.R. 1993) (nondisclosure harmless beyond a reasonable doubt).

122. *Bagley*, 473 U.S. at 682.

123. 466 U.S. 668 (1984) (describing the level of prejudice needed to establish a claim of ineffective assistance of counsel).

124. 458 U.S. 858 (1982) (holding that sanctions against the government for deporting potential defense witnesses were appropriate if there was a *reasonable likelihood* that the lost testimony could have affected the outcome (emphasis added)).

125. United States v. Agurs, 427 U.S. 97, 103 (1976); *see Valenzuela-Bernal*, 458 U.S. at 873-74. "Reasonable possibility" and "reasonable likelihood" are synonymous. United States v. Strickler, 119 S. Ct. 1936, 1957 (1999).

126. *Strickler*, 119 S. Ct. at 1957.

127. *Id.*

128. *Id.* at 1960.

129. *Id.* at 1959.

130. *Id.*

131. *Id.*

court struggled to describe the difference, the iota of difference between these two standards made the difference in this case.

The only *Brady* case the CAAF decided in 1999 was *United States v. Morris.*[132] Lance Corporal (LCpl) Morris was charged with false official statement and indecent assault. The alleged victim of the indecent assault was a female cook who worked with LCpl Morris. Both LCpl Morris and the alleged victim described a relationship that was very close. Lance Corporal Morris contended that the relationship had a romantic and sexual component, which the alleged victim denied.[133]

The alleged indecent assault occurred in the barracks room of the alleged victim. The alleged victim's testimony and LCpl Morris's pretrial statements describe a similar sequence of events but they disagree about whether the alleged victim consensually participated in the events.[134]

Prior to trial, the defense requested all inpatient and outpatient psychological and medical records of the alleged victim. The government opposed production, and the military judge conducted an in camera review of the records. The judge disclosed one document that contained a statement which the alleged victim made to her counselor about the alleged assault. The judge determined that the records did not contain any other information material to the defense. After trial, the defense discovered the records contained records diagnosing the alleged victim with post traumatic stress disorder (PTSD) and other records describing her as having difficulty controlling her impulses. The defense claimed these records were material because they related to the alleged victim's credibility and her motive to fabricate.[135]

A *Brady* violation has three components.[136] Here, the judge did not disclose evidence favorable to the accused to the defense. The issue in the case was whether the undisclosed evidence was material. The standard for materiality depends on the specificity of the defense's discovery request.[137] In *United States v. Hart*,[138] the military courts found additional protection for accused soldiers based on Article 46, UCMJ.[139] The CAAF appears to have applied the proper standard in its materiality determination. The court's convoluted approach makes it hard to tell whether the court's analysis was stealthful or accidental.

Morris is a confusing opinion because the court did not analyze the case using the *Bagley-Hart* formulation. Under *Bagley*, the test for materiality is whether there is a reasonable probability of a different result at trial. A reasonable probability is "a probability sufficient to undermine confidence in the outcome."[140] However, *Hart* affords service members more protection than the constitutional minimum "where the government fails to disclose information pursuant to a specific discovery request, the evidence will be considered 'material unless failure to disclose' can be demonstrated to 'be harmless beyond a reasonable doubt.'"[141] The pretrial discovery request in *Morris* specifically identified the records that the defense sought.[142] One would expect the court to find the undisclosed evidence is material unless the failure to disclose is harmless beyond a reasonable doubt.

In *Morris*, a majority of the court depended on *United States v. Eshalomi*[143] for its materiality standard. "Where the defense has submitted 'a general request for exculpatory evidence or information' but no request for any 'particular item' of evidence or information, failure to disclose evidence 'is reversible error only if the omitted evidence creates a reasonable doubt

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132. 52 M.J. 193 (1999).

133. *Id.* at 194-96.

134. The defense counsel's opening statement included:

> [B]efore I tell you what evidence you are going to hear from the defense and the Government in this case . . . I want to make one thing absolutely clear. Lance Corporal Morris did kiss Lance Corporal [CM] on the neck, on the cheek, between the breasts. No dispute. He did suck on her breasts as well. No dispute. And he did pull her hand to his erect penis. This is all going to be clear. Not in dispute. The only issue in dispute, an issue that you're really going to have to focus on during this week is whether he did it against her will and without her consent, with unlawful force and violence.

Id. at 197.

135. *Id.* at 196-97.

136. *See supra* note 92 and accompanying text (identifying the components of a *Brady* violation).

137. *See supra* note 121 and accompanying text (discussing the standards for materiality).

138. United States v. Hart, 29 M.J. 407 (C.M.A. 1990).

139. "[W]here prosecutorial misconduct is present or where the government fails to disclose information pursuant to a specific discovery request, the evidence will be considered 'material unless failure to disclose' can be demonstrated to 'be harmless beyond a reasonable doubt.'" *Id.* at 410.

140. *See supra* note 122 and accompanying text.

141. *Hart*, 29 M.J. at 410; *see also* United States v. Green, 37 M.J. 88 (1993); United States v. Stone, 37 M.J. 558 (A.C.M.R. 1993).

that did not otherwise exist.'"[144] The court concluded that the undisclosed evidence did not create a reasonable doubt that did not otherwise exist. The court noted that the accused's second statement to investigators was inconsistent with the defense theory of the case at trial. Based on the entire record, the court had "no reasonable doubt [about] the validity of the proceedings."[145] The standard the court applied appears to be the same as the harmless beyond a reasonable doubt standard.

Under the *Bagley-Hart* formulation, the court will only apply the harmless beyond a reasonable doubt standard if the defense request is a specific request. However, the court characterized the defense's discovery request as a general request. The court did not explain the difference between a specific and a general request.[146] It is hard to imagine a request being any more specific than the one in *Morris*.[147]

The court may have applied the correct standard, however, the court's analysis raises two related issues. First, did the court commit the same error the Fourth Circuit committed in *Strickler*?[148] The Fourth Circuit approached the issue as "whether, after discounting the inculpatory evidence in light of the undisclosed evidence, the remaining evidence is sufficient to support the jury's conclusions."[149] In *Morris*, the court relied on the "compelling evidence of guilt" provided by the accused to find the error harmless beyond a reasonable doubt.[150] The court appears to be evaluating the evidence of guilt free of the taint from the disclosure problem to see if the untainted evidence is sufficient to sustain the conviction beyond a reasonable doubt. *Strickler* made clear that this is the wrong approach. The correct approach is whether "the [undisclosed] favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict."[151] This brings us to the second issue.

Regardless of whether the court's approach was correct or not, the court's conclusion that the accused provided compelling evidence of guilt is unconvincing. The court points to the accused's second statement to investigators as compelling evidence of guilt.[152] Lance Corporal Morris was tried by a panel of officer and enlisted members who heard this "compelling" evidence. The members apparently did not find the accused's statement all that compelling; they found him not guilty of the indecent assault. The accused was found guilty of the lesser included offense of assault consummated by a battery.[153] One would think that if LCpl Morris's statement was so damning, the members would have convicted him of the charged offense.

In dissent, Judge Effron approached the problem correctly. He considered the use the defense could have made of the undisclosed evidence to see if the failure to disclose put the case in such a different light as to undermine confidence in the ver-

142. The records the defense requested included:

> [A]ll psychological and medical records of the alleged victim in the subject case, to include inpatient and outpatient medical records, counseling records maintained by the Family Service Center at MCAS El Toro and all other Family Service Centers that rendered assistance to the alleged victim, and to include the personal notes of the counselors and Doctors and Psychologists who evaluated and/or provided treatment to the alleged victim.

United States v. Morris, 52 M.J. 193, 196 (1999). The records request was specific enough that when the military judge ordered an in camera inspection the trial counsel was able to produce the records. *Id.*

143. 23 M.J. 12 (1986).

144. *Morris*, 52 M.J. at 197-98 (citing *Eshalomi*, 23 M.J. at 22 (1986), quoting United States v. Agurs, 427 U.S. 97, 112 (1976)). A majority of the court seemed to think that the defense request was general. The dissent implicitly agreed by applying the *Bagley* standard for general requests. *Morris*, 52 M.J. at 198-200.

145. *Id.* at 198. If the court means the failure to disclose is reversible error only if the undisclosed evidence creates a reasonable possibility of a reasonable doubt, the court is applying the harmless beyond a reasonable doubt standard. If the court means the failure to disclose is reversible error only if the defense proves the undisclosed evidence creates a reasonable doubt, the court is applying a standard that is even more demanding than the reasonable probability standard.

146. *See Agurs*, 427 U.S. at 106. "In *Brady* the request was specific. It gave the prosecutor notice of exactly what the defense desired." *Id*.

147. *See supra* note 142 (enumerating the records requested by the defense).

148. *See supra* note 102 and accompanying text (characterizing the test erroneously applied by the Fourth Circuit Court of Appeals).

149. Strickler v. Greene, 119 S. Ct. 1936, 1952 (1999).

150. United States v. Morris, 52 M.J. 193, 198 (1999).

151. *Strickler*, 119 S. Ct. at 1952 (quoting Kyles v. Whitley, 514 U.S. 419, 435 (1995)).

152. *Morris*, 52 M.J. at 198. "Appellant provided compelling evidence of his guilt. His second statement totally undermined the defense theory that CM consented to his sexual advances." *Id.*

153. "A special court-martial composed of officer and enlisted members convicted appellant, contrary to his pleas, of making a false official statement . . . Appellant was also charged with indecent assault . . . but he was convicted only of the lesser-included offense of assault consummated by a battery." *Id.* at 194.

dict. The undisclosed evidence of PTSD would have been very useful to the defense.

> Appellant's version of the events in CM's apartment reflects her abrupt, unexplained, and seemingly unexplainable mood change—from sensual and consensual to a sharp demand to stop. Without the PTSD evidence, the members were left to wonder why a supposedly close and intimate friend would suddenly reverse moods in the midst of purportedly consensual sexual activity. With that information—and with expert testimony explaining PTSD and applying it to the events in the case—the members would have had the opportunity to consider a plausible explanation, which they could choose to accept or reject, for CM's conduct.[154]

Judge Effron noted the undisclosed evidence that the alleged victim had trouble controlling her impulses would have been equally helpful to the defense.

> Similarly, the psychological evidence that CM had "trouble controlling her impulses" would have provided the court members with an opportunity to consider a plausible explanation in support of the evidence that CM, while dating another man, permitted herself to be in a compromising position with appellant. The morning after the incident with appellant, CM's boyfriend inquired about marks on her neck, and she initially responded that she had been cheating on him, at which point he became enraged. This information would have set the stage for the members to consider whether CM fabricated the allegations of sexual [assault] to assuage the anger of her boyfriend.[155]

The undisclosed evidence was consistent with the defense's theory of consent. Moreover, the defense counsel could have used the undisclosed evidence to undermine the credibility of the alleged victim.

The case boiled down to the accused's word against the alleged victim's word. Both had credibility problems.[156] Clearly, the members had difficulty believing the alleged victim completely. If they believed her completely, they would have convicted LCpl Morris of indecent assault. However, the members must have believed that something happened; they compromised and found LCpl Morris guilty of a lesser included offense. Would the undisclosed information have been enough to cause the members to believe the accused, or to disbelieve the alleged victim? Does the undisclosed favorable evidence put the whole case in such a different light as to undermine confidence in the verdict? Judge Effron thought so; he presented the more persuasive argument.[157]

The Army court decided *United States v. Kelly*[158] on *Brady* grounds. Although the court found that the trial judge abused his discretion in failing to conduct an in camera inspection, the court granted no relief because the court found "no reasonable probability that the result of trial would have been different in this case if either the trial defense counsel or military judge had inspected SSG N's military personnel file."[159] This is a breathtaking conclusion given no one had reviewed the disputed record to see if it contained evidence favorable to the accused.

The court found a trial error but "mixed apples with oranges." The result denied the accused any possibility of receiving relief. Perhaps the proper disposition of this case would be to return the record to the trial judge to conduct the in camera inspection, which the judge should have done in the first place. If it turned out that the record contains evidence favorable to the accused, the court could conduct the *Brady* analysis knowing the magnitude of the impact of the nondisclosure. If the record contained no evidence favorable to the accused, the court could be confident in the trial result. The court conducted the *Brady* analysis before it could possibly know whether there was a *Brady* violation. Moreover, by disposing of this abuse of discretion by finding no *Brady* violation, the court is connecting two legal concepts which do not belong together.

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154. *Id.* at 199. To believe LCpl Morris's version, the members would have to believe that the alleged victim was capable of very erratic behavior. *See id.* at 196.

155. *Id.* at 199.

156. The accused had made inconsistent statements to investigators and was convicted of making a false official statement. *Id.* at 194-96. The alleged victim had initially told her boyfriend, who noticed marks on her neck that she had been cheating on him. This implies consensual sexual conduct. The alleged victim only claimed LCpl Morris sexually assaulted her after her boyfriend became angry. *Id.* at 195.

157. *Id.* at 199. The only curious part of Judge Effron's dissenting opinion is why he treated this discovery request as a general request and not a specific request. Judge Effron could have reached his decision based on statutory grounds instead of reaching the constitutional issue. If Judge Effron had treated the request as a specific request, he would have reached the same result, only he would have held the government to the more demanding harmless beyond a reasonable doubt standard. *See supra* note 138 and accompanying text.

158. No. 9600774, 1999 CCA LEXIS 332 (Army Ct. Crim. App. Sept. 29, 1999). *See supra* note 66 and accompanying text (discussing the court's conclusion that the military judge abused his discretion).

159. *Id.* at *10 (footnote omitted).

Not only did the court conduct the *Brady* analysis prematurely, the court conducted it badly. A *Brady* violation has three parts: evidence favorable to the accused, which is not disclosed to the defense, and causes prejudice to the accused.[160] The prejudice analysis is the materiality determination discussed above.[161] The standard applied to determine materiality depends on the specificity of the defense discovery request. If the defense made a general request for discovery, the undisclosed evidence is material if there is a reasonable probability of a different result at trial.[162] If the defense made a specific request, the undisclosed evidence is material unless the failure to disclose is harmless beyond a reasonable doubt.[163] To determine materiality "the omission must be evaluated in the context of the entire record."[164] To determine materiality, the court must know what the omission or undisclosed evidence is. In this case, the records were not disclosed to the defense, but no one knows if the records in question contained any evidence favorable to the accused. Because no one knows what the favorable evidence is (if any exists) how can the court possibly determine the impact (if any) the nondisclosure would have on the trial result?

Citing *Bagley*, the court found "no reasonable probability that the result of trial would have been different."[165] By using this standard, the court treated the defense's request as a general request. The court does not explain why the defense's request is not a specific request. The defense requested "the personnel and medical records of SSG N."[166] How much more specific could the defense counsel have been? The defense request made clear to the trial counsel what the defense wanted.[167] In addition to performing the *Brady* analysis prematurely, the court used the wrong standard for materiality. Of course, using the correct standard does not eliminate the problem of not knowing the contents of the undisclosed favorable evidence.

The Army court failed to act on the nondisclosure issue the first time the court reviewed this case. The CAAF directed the Army court to reconsider whether the trial judge abused his discretion by not conducting the in camera review.[168] The CAAF should return the case again and direct an in camera review of the contested records. If the record contains no evidence favorable to the accused, then no *Brady* violation occurred. If the record contains evidence favorable to the accused, then the court should determine if the failure to disclose is harmless beyond a reasonable doubt. The Army court may be right, but until someone reviews the records, the court is operating in the dark.

This year's *Brady* cases highlight the limitations of language to express ideas precisely. In *Strickler*, a man's life depended on the difference between a reasonable possibility and a reasonable probability. Justice Souter's review of the evolution of the reasonable probability standard reveals that the difference between the two standards is small. In *Morris*, the court's approach in conducting the materiality determination is crucial, but it is hard to conceptualize the difference between the approach the court applied[169] and the approach required.[170] *Kelly* demonstrates the peril of applying the *Brady* analysis prematurely. All of these nuances make the resolution of *Brady* issues unpredictable.

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160. *See supra* note 92 and accompanying text (discussing the components of a *Brady* violation).

161. *See supra* note 93 and accompanying text (discussing the materiality determination).

162. *See supra* notes 95-97 and accompanying text (discussing the standards for materiality).

163. "[W]here prosecutorial misconduct is present or where the government fails to disclose information pursuant to a specific discovery request, the evidence will be considered 'material unless failure to disclose' can be demonstrated to 'be harmless beyond a reasonable doubt.'" United States v. Hart, 29 M.J. 407, 410 (C.M.A. 1990); *see also* United States v. Green, 37 M.J. 88 (1993) (Wiss, J., concurring); United States v. Stone, 37 M.J. 558 (A.C.M.R. 1993) (finding the nondisclosure to be harmless beyond a reasonable doubt).

164. United States v. Agurs, 427 U.S. 97, 112 (1976).

165. United States v. Kelly, No. 9600774, 1999 CCA LEXIS 332, at *10 (Army Ct. Crim. App. Sept. 29, 1999).

166. *Id.* at *3.

167. "In *Brady* the request was specific. It gave the prosecutor notice of exactly what the defense desired." *Agurs*, 427 U.S. at 106.

168.

> On 29 April 1999, the Court of Appeals for the Armed Forces set aside our previous decision, and remanded the case . . . . Our superior court also asked that we give further consideration to the trial defense counsel's request to examine the personnel file of the alleged threat victim for impeachment material.

Kelly, 1999 CCA LEXIS 332, at **2-*3.

169. In *Morris*, the court relied on the "compelling evidence of guilt" provided by the accused to find the error did not raise a reasonable doubt that did not otherwise exist. This modified sufficiency of the evidence test is clearly wrong. *See supra* note 102 and accompanying text (discussing the appropriate test for a *Brady* materiality determination).

Conclusion

With language this malleable, the only certain way to prevail on a *Brady* issue is to avoid it. Trial counsel can avoid *Brady* issues by diligently reviewing the records he has a duty to inspect for evidence favorable to the accused. When a trial counsel is caught in the "no man's land" between a witness who demands that his privacy be respected by not disclosing his files, and the professional obligation to disclose the very same documents, the trial counsel can request that the military judge review the documents in camera and disclose any material information to the defense. Military judges can prevent *Brady* issues by liberally granting requests for in camera reviews. The adage, "an ounce of prevention is worth a pound of cure," may underestimate the value of prevention in the context of *Brady* violations.

170. In *Strickler*, the Court made clear that the test is not whether, after discounting the inculpatory evidence in light of the undisclosed evidence, the remaining evidence is sufficient to support the jury's conclusions. The proper approach is whether the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict. *See supra* note 104 and accompanying text (discussing the appropriate test for a *Brady* materiality determination).

New Developments in Evidence 1999

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Introduction

This past year's cases addressing the rules of evidence presented some very intriguing issues. This article focuses primarily on cases from the Court of Appeals for the Armed Forces (CAAF). The article also discusses significant federal circuit cases, one important Supreme Court case, and a few service court cases. Some of the most interesting trends this year focus on the relevance of uncharged misconduct in drug cases, the new psychotherapist-patient privilege, and the Supreme Courts framework for evaluating the reliability of nonscientific expert evidence. These cases and trends serve as a reminder that "evidence law" is a dynamic and ever-changing area of criminal law.

Relevancy and Uncharged Drug Use

Military Rule of Evidence (MRE) 401 sets out the definition for logical relevance as evidence that has any tendency to make the existence of any fact of consequence more or less probable than it would be without the evidence.[1] This is a low standard of admissibility.[2] In spite of this liberal standard, MRE 403 places some limits on relevant evidence by stating that even relevant evidence can be excluded if the probative value is substantially outweighed by the risk of unfair prejudice, confusion, delay, or cumulativeness.[3]

Three recent opinions, one from the CAAF, one from the Air Force Court of Criminal Appeals, and one from the Navy-Marine Court of Criminal Appeals address these concepts of logical and legal relevance in the context of the wrongful use of drugs. The outcome of these cases is that the CAAF seems to establish a higher standard of logical relevance for the admission of uncharged drug use than has been required in the past. Both the Air Force and Navy-Marine Corps courts seem to be resisting that trend.

Logical Relevance of a Past Positive Urinalysis

In *United States v. Graham*,[4] the CAAF held that evidence that the accused tested positive for marijuana four years earlier was not admissible in the accused's present trial for wrongful use. In this case, the accused was convicted of one specification of wrongful use of marijuana in violation of Article 112(a) Uniform Code of Military Justice (UCMJ)[5] based on a positive urinalysis.[6] At his trial, the accused put on a good soldier defense. To bolster his claim, the accused testified that there is no way he would knowingly use marijuana. He also testified that he was "shocked, upset, and flabbergasted" when he was notified of the urinalysis results.[7]

To rebut the accused's claims, the military judge allowed the trial counsel to ask the accused one question about a prior positive urinalysis four years earlier for marijuana. The accused had been tried and acquitted of the previous incident. In that case, the accused presented an innocent ingestion defense. The military judge did not allow the government to ask any questions about the prior case or introduce any testimony about the prior trial.[8] The trial counsel was only allowed to ask the accused if he had a previous positive urinalysis result.[9] The military judge ruled that the probative value of this question

1. Military Rule of Evidence 401 provides: "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 401 (1998) [hereinafter MCM].

2. STEPHEN A. SALTZBURG ET AL., MILITARY RULES OF EVIDENCE MANUAL § IV, at 473 (4th ed. 1997).

3. MCM, *supra* note 1, MIL. R. EVID. 403.

4. 50 M.J. 56 (1999).

5. UCMJ art. 112(a) (LEXIS 2000).

6. *Graham*, 50 M.J. at 57.

7. *Id.*

8. *Id.*

9. *Id.*

was not outweighed by the risk of unfair prejudice under MRE 403.[10]

The accused responded that he had previously tested positive and then spontaneously added that he had been acquitted of any misconduct.[11] The military judge followed up the question with a limiting instruction. The judge instructed the members that they could only consider this prior positive test result for the limited purpose of the likelihood that the accused would test positive twice for unknowing ingestion and for the likelihood that the accused was flabbergasted when he was told he tested positive a second time. The judge specifically instructed the members that this evidence was no indication that the accused knowingly used marijuana on either the occasion four years ago or the occasion for which the accused stood charged.[12]

The CAAF ruled that the military judge abused his discretion by allowing this question and reversed the conviction.[13] The court questioned the logical relevance of the prior positive urinalysis on the issues it was offered to rebut. The court looked at logical relevance through the rules they had established in an earlier line of cases[14] that allow the factfinders to infer knowing and wrongful use of a controlled substance from the mere presence of the substance in the accused's system. These cases set out three requirements. First, the seizure of the urine sample must be lawful. Second, the lab results must be admissible, including proof of the chain of custody. Third, there must be expert testimony or other evidence in the record providing a rational basis for inferring that the substance was knowingly used and that the use was wrongful.[15] Here the court said none of these requirements was met with regard to the four-year-old test result.[16] Because these foundational requirements were not met, the court intimates that the prior urinalysis was irrelevant and inadmissible.

The court also said that this evidence was not logically relevant on the likelihood that the accused would unknowingly test positive twice for marijuana. The CAAF said that there was simply no evidence on the record of such a statistical probability.[17] Without such evidence, perhaps in the form of expert testimony, this evidence is not relevant to rebut the accused's claim that he would never knowingly use marijuana. The court also said that there was no evidence to show the likelihood of someone testing positive twice in a four-year period because of innocent ingestion.[18] Absent any statistics, the evidence is not logically relevant.

The CAAF also rejected the government's claim that this evidence rebutted the accused's statement that he was "shocked, upset, and flabbergasted" when he got word of the test results. The CAAF said that while some may argue that if a person tested positive twice in a four-year period, he would not be surprised with the second positive result, the opposite is just as likely. The accused may be even more upset and surprised if he had innocently ingested marijuana on the first incident, and then come up positive yet again four years later.[19]

Finally, the court rejected the argument that this evidence is admissible to rebut the accused's claim of innocent ingestion. According to the court, the accused did not proffer an innocent ingestion defense. He offered a good soldier defense, coupled with a general denial of the charges. Because this was the thrust of the accused's defense, the court held that there is simply no fact of consequence that a positive result on a previous urinalysis could rebut.[20] In spite of a limiting instruction, the court was concerned that this evidence was really being offered to show the accused acted in conformity with a prior bad act, something that MRE 404(b) specifically precludes.[21]

Judges Sullivan and Crawford dissented from the majority opinion. In his dissent, Judge Sullivan attacks the weaknesses

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10. *Id*. at 58.

11. *Id*.

12. *Id*.

13. *Id*. at 60.

14. *See* United States v. Ford, 23 M.J. 331 (1987); United States v. Murphy, 23 M.J. 310 (1987); United States v. Harper, 22 M.J. 157 (1986).

15. *Graham*, 50 M.J. at 58.

16. *Id*. at 59.

17. *Id*.

18. *Id*.

19. *Id*.

20. *Id*.

21. Military Rule of Evidence 404(b) provides in part: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." MCM, *supra* note 1, MIL. R. EVID. 404(b).

of the majority opinion on both logical and legal relevancy grounds. According to Judge Sullivan, the accused's testimony raised an unknowing ingestion defense,[22] and the government's rebuttal evidence must be viewed in light of the purpose for which the evidence was offered. Questioning the accused about a prior positive test is fair rebuttal of the accused assertions that he never knowingly used drugs. The accused's unequivocal denial suggested a total non-involvement with illegal drugs. The government's rebuttal evidence was therefore relevant to show that the accused had tested positive not once, but twice during his claimed drug-free life.[23] This is the type of rebuttal evidence that the CAAF had previously approved.[24]

Judge Sullivan also said this evidence was relevant to rebut the accused's testimony that he was "shocked, upset, [and] flabbergasted." According to Judge Sullivan, the inference that the accused made with this claim is that his agitated state suggested that he had never tested positive before, and his current positive test should be attributed to an unknowing ingestion.[25] Here again, Judge Sullivan contends that the government's evidence was logically relevant to rebut this claim. The government is entitled to contradict this claim by showing that the accused had tested positive before and his testimony of agitation was either exaggerated or false.[26]

On the issue of legal relevance, Judge Sullivan contends that the majority's reliance on the *Murphy* line of cases is misplaced.[27] The *Murphy* line of cases applies when the government is trying to prove the accused guilty beyond a reasonable doubt. In this case, however, the government was introducing this as uncharged misconduct evidence for the specific purpose of rebutting the accused's testimony. The standard for uncharged misconduct evidence to be admitted is not proof beyond a reasonable doubt, but a far lower standard.[28] The majority, according to Judge Sullivan is creating a higher standard of proof for this type of uncharged misconduct evidence than the law requires.[29]

Judge Crawford joined in this dissent and also made the additional point that this evidence is relevant under the doctrine of chances. In other words, what are the odds of the same set of facts occurring more than once to the same person.[30] According to Judge Crawford, the panel members should have the opportunity to determine the accused's credibility, and whether he would mistakenly test positive twice for drugs in four years.[31]

One point not addressed in the dissenting opinion but perhaps another theory of admissibility is MRE 404(a)(1).[32] The majority stressed that the accused's defense was a good soldier defense. By putting on this defense, the accused opened the door to attack with relevant evidence of bad character. Under MRE 405(a),[33] specific instances can be inquired into on cross-examination. The prior positive urinalysis arguably falls under this type of rebuttal evidence.

Guidance

Graham has important implications in any drug case where the government is seeking to introduce evidence of an

22. *Graham*, 50 M.J. at 62 (Sullivan, J., dissenting).

23. *Id*. (Sullivan, J., dissenting).

24. *See* United States v. Trimper, 28 M.J. 460 (C.M.A. 1989). In *Trimper*, the accused, an Air Force judge advocate was charged with several specifications of wrongful use of marijuana and cocaine in violation of Article 112(a), UCMJ. In his defense, the accused testified that he had never used drugs. To rebut that claim, the government was allowed to introduce the test results of a urine sample submitted by the accused to a civilian hospital. The testing occurred outside of the charged incidents and it revealed that the accused urine tested positive for cocaine. The then Court of Military Appeals held that the accused, by his own testimony and sweeping denials, opened the way for the prosecution to use the test results, even though the results would have otherwise been inadmissible. *Trimper*, 28 M.J. at 461.

25. *Graham*, 50 M.J. at 63 (Sullivan, J., dissenting).

26. *Id*.

27. *Id*.

28. *Id*. (Sullivan, J., dissenting) (citing United States v. Reynolds, 29 M.J. 105, 109 (C.M.A. 1989) (holding that the standard of proof for uncharged misconduct evidence is whether the evidence reasonably supports a finding by the court members that the accused committed the prior acts).

29. *Id*. (Sullivan, J., dissenting).

30. *Id*. at 64 (Crawford, J., dissenting).

31. *Id.*

32. Military Rule of Evidence 404(a)(1) provides that the following character evidence is admissible: "Evidence of a pertinent trait of character of the accused offered by an accused, or by the prosecution to rebut the same." MCM, *supra* note 1, MIL. R. EVID. 404(a)(1).

33. Military Rule of Evidence 405(a) provides: "In all cases in which evidence of character or a trait of character of a person is admissible, proof my be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct." *Id*. at 405(a).

uncharged positive urinalysis. Although MRE 401 sets forth a low standard for admissibility, a majority of the CAAF believes that a past positive urinalysis may fail even this low standard of logical relevance when that evidence is offered in rebuttal of the accused's claims. The court clearly raises the bar for the admissibility for this type of evidence. The dissenting opinions do a good job of pointing out the weaknesses in the majority opinion as well as the majority's inconsistency with previous case law.

In light of these weaknesses, the majority would have been on stronger legal ground if they would have focused more on the legal relevance issues. Had the majority stressed more clearly that the probative value of this evidence was substantially outweighed by the risk of unfair prejudice confusion of the issues, misleading of the members, and the like, the dissent would have little to attack. But to hold that this evidence is not logically relevant, is difficult to understand.

Practitioners, however, should pay close attention to one of the concluding paragraphs of the majority opinion. It is very telling and clearly sets out how a majority of the court feels about urinalysis cases in general and the use of uncharged positive test results in particular. The court says:

> Our dissenting colleagues seem to forget, once again, that our service personnel, who are called upon to defend our Constitution with their very lives, are sometimes subject to searches and seizures of their bodies, without probable cause, for evidence of a crime. We should zealously guard the uses of these results and hold the Government to the highest standards of proof required by law.[34]

Logical Relevance of a Post Positive Urinalysis

The Air Force court decided a similar drug case just a week after *Graham*. In *United States v. Matthews*,[35] the Air Force court held that the military judge did not err in allowing the government to introduce evidence that the accused tested positive for marijuana twenty-three days after her initial sample detected the presence of marijuana. The court attempted to draft a very precise opinion to avoid the pitfalls that the majority identified in *Graham*. After *Graham*, however, *Matthews*' future is very much in doubt.[36]

In *Matthews*, the accused, an Air Force Office of Special Investigations (OSI) agent was randomly selected to provide a urine sample. She provided the sample on 29 April 1996.[37] That sample tested positive for marijuana. Twenty-three days after she submitted the first sample, the accused was tested again as part of a command directed urinalysis. She again tested positive for marijuana. The accused was charged with one specification of wrongfully using marijuana in violation of Article 112(a) UCMJ.[38] She was not charged with the second use. At trial, the government said that it would not introduce evidence of the second urinalysis unless the defense "opened the door."[39]

The accused began her defense with several affidavits from former commanders and supervisors who testified about her good duty performance and professionalism. The accused also testified in her own defense.[40] On direct examination, she testified that she had not used marijuana between 1 and 29 April. She also testified that at the time of the urinalysis, she was comfortable with the collection process of the first test. Finally, she testified that she had no idea how the sample could have tested positive for marijuana.[41] At the conclusion of the accused's direct testimony, the government moved to introduce the results of the command directed urinalysis.

The military judge first heard expert testimony that established that the second test result was from a separate incident of use. The military judge then allowed the government to introduce evidence of the second positive urinalysis. The judge admitted this evidence as rebuttal evidence under MRE 404(b)[42] to show the accused's knowledge and opportunity.[43]

At trial and on appeal, the defense contended that this was not proper rebuttal evidence because the accused had done nothing more than deny the elements of the offense. The Air Force court disagreed. First, the court said that the accused asserted an innocent ingestion defense by testifying that she had no qualms with the collection and testing procedure, and that she had no idea of how the marijuana got into her system.[44] Moreover, the court noted that by putting on a good solder defense, she opened the door under MRE 404(a) to allow the

34. *Graham*, 50 M.J. at 60.

35. 50 M.J. 584 (A.F. Ct. Crim. App. 1999).

36. The CAAF granted a petition for review, and oral arguments were heard on the case on 16 December 1999.

37. *Matthews*, 50 M.J. at 585.

38. UCMJ art. 112(a) (LEXIS 2000).

39. *Matthews*, 50 M.J. at 585.

40. *Id.*

41. *Id.*

government to introduce bad character evidence in rebuttal. The court analogized this case to *United States v. Trimper*[45] and held that a date specific denial coupled with a good soldier defense is analogous to a sweeping denial that allows the government to impeach with contradictory facts.[46]

The court also paused briefly to note that just because the uncharged misconduct occurred after the charged offense, that did not render the evidence inadmissible.[47] Consistent with the CAAF's opinion in *United States v. Brewer*,[48] the court rejected the notion that good military character should create a reasonable doubt "in your mind that [the accused] knowingly used marijuana between 1 and 29 April 1996, but all bets are off after that date."[49]

Ultimately, the court held that this evidence was admissible rebuttal evidence for two purposes. First, by putting on good soldier evidence from witnesses other than the accused, the command directed urinalysis was proper rebuttal evidence within the confines of MRE 405 and 608(b). Second, when the accused denied ingesting an illicit drug and also testified to her good military character, the results of a command directed urinalysis are admissible in rebuttal under MRE 404(b) and 403.[50]

Advice

In summing up its holding, the Air Force court used very precise language "so that this case [would not be] misapplied."[51] Unfortunately, the court's language at the end of the opinion creates some confusion and may serve as the basis for the CAAF to reverse. The confusion comes from the court's statement that good military character evidence offered by witnesses other than the accused, opens the door for the results of the command directed urinalysis under MRE 405 and 608(b).[52] It is unclear how MRE 608(b) applies to this situation.

Military Rule of Evidence 608(b) allows for inquiry into specific instances of conduct if probative of truthfulness or untruthfulness and prohibits the introduction of extrinsic evidence.[53] How then can the *results* of a command directed urinalysis be admitted under this rule? First, the results of a urinalysis are not particularly probative of truthfulness or untruthfulness. Second, the results of the urinalysis are extrinsic evidence, which the rule specifically excludes.

The summation of the opinion would have been more accurate if it had cited to MRE 404(a)(1) and 405. Military Rule of Evidence 404(a)(1) specifically allows the government to introduce character evidence to rebut the accused's evidence of a favorable pertinent character trait.[54] By putting on a good soldier defense, the accused opened the door to this rebuttal and MRE 405 permitted the government to both call character witnesses and cross-examine defense character witnesses with relevant specific instances of conduct. In this case, an uncharged positive urinalysis certainly rebuts the accused's good military character defense.

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42. Military Rule of Evidence 404(b) provides in part:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

MCM, *supra* note 1, MIL. R. EVID. 404(b).

43. *Matthews*, 50 M.J. at 586.

44. *Id*. at 588.

45. 28 M.J. 460 (C.M.A. 1989).

46. *Matthews*, 50 M.J. at 589.

47. *Id*.

48. 43 M.J. 43 (1995). In *Brewer* the CAAF held that the accused's conduct during the time between period underlying the witness's opinion on accused's character and the time of the offense was relevant to the question of whether the accused had the same character traits when the crime occurred.

49. *Matthews*, 50 M.J. at 589.

50. *Id.* at 591.

51. *Id*.

52. *Id*.

53. MCM, *supra* note 1, MIL R. EVID. 608(b).

54. *Id.* 404(a)(1).

The court's summation of their opinion may serve as the basis for the CAAF's reversal because the court held that when an accused denies ingesting an illegal substance and testifies to his good military character in support of that claim, the results of the command directed urinalysis are admissible under MRE 404(b). The CAAF did address this issue in *Graham* and reached the opposite result.

It is true that the cases can be distinguished factually on a couple of important points. First, in *Matthews* the accused conceded the accuracy of the test results and that the urine tested was hers. In *Graham*, there was no such concession and the innocent ingestion defense was less direct. Also in *Matthews*, the second test occurred twenty-three days after the first test, and an expert was able to testify that the second test result had to be from a separate use. In *Graham*, the test was four-years old and the accused had already been acquitted of that use. Finally, the second test in *Matthews* was a command directed urinalysis and there was little doubt about the source of the sample and the accuracy of the collection procedures. The Air Force court stressed this point in the summation of their opinion. In *Graham*, however, there was little or no evidence about how the prior test was conducted and whether the collection and chain of custody remained in tact.

In spite of these factual differences, the majority of the CAAF is likely to see them as distinctions without a difference because the majority of the CAAF believes that the uncharged urinalysis is simply not relevant to any issue at trial when the accused asserts a good soldier defense. While the Air Force court provided a better explanation of why this evidence is logically relevant, a majority of the CAAF is not likely to be persuaded.

Graham II

An even more difficult case to square with *Graham* is the Navy-Marine Corps court's opinion in *United States v. Tyndale*.[55] In *Tyndale* the accused was tried and found guilty of one specification of wrongful use of methamphetamine in violation of Article 112a, UCMJ.[56] On Monday, 7 October 1996, the accused submitted a urine sample as part of a random drug test and the sample tested positive.[57] In his defense, the accused testified and asserted an innocent ingestion defense. The accused claimed that he worked as a professional musician on the Saturday night before the drug test and that someone at the party where he was working may have slipped drugs into his drinks without his knowledge.[58]

In rebuttal, the government offered evidence that the accused had tested positive two years earlier for methanphetamine. This evidence was offered under MRE 404(b) to rebut the accused's claim of innocent ingestion because it showed the accused's knowledge and intent to wrongfully use illegal drugs. The accused was in fact tried and acquitted of this earlier use, and the government introduced evidence that in the prior court-martial the accused asserted a very similar innocent ingestion defense.[59]

At trial and on appeal, the defense objected to this evidence. The Navy-Marine Corps court held that the trial judge did not err in admitting this evidence.[60] First, the court said that by asserting an innocent ingestion defense the accused made knowledge and intent issues in controversy because this defense challenges the permissive inference of wrongfulness that arises from the positive urinalysis result.[61]

The court then looked to the question of whether the probative value of this evidence was substantially outweighed by the risk of unfair prejudice. The court discussed and differentiated the CAAF's opinion in *Graham* based on three reasons. First, in *Graham*, the uncharged misconduct was not admitted to show knowledge and intent, but only to show the accused lack of surprise. In *Tyndale*, the court said that knowledge and intent were in controversy because of the innocent ingestion defense, and this prior positive urinalysis was clearly relevant.

The Navy-Marine Corps court said the second point that makes this case different from *Graham* is that here the focus of the prior incident was really on the accused's story about a possible innocent ingestion. The witness who testified about the prior incident provided details about the accused explanation of how he could have innocently ingested drugs. Because that story was so similar to his defense in this case, "the significance of the evidence lies not so much in the urinalysis result itself, as in the comparison of the earlier story to the story that the appellant is now using."[62]

55. 51 M.J. 616 (N.M. Ct. Crim. App. 1999).

56. UCMJ art. 112(a) (LEXIS 2000).

57. *Tyndale*, 51 M.J. at 618.

58. *Id*.

59. *Id*. at 619-20.

60. *Id*. at 621.

61. *Id*. at 620.

62. *Id*. at 621.

Finally, the court said that this case was different than *Graham* because the accused testified that he was acquitted of the prior incident. The panel members were, therefore, able to put this evidence in proper context. The court concluded that the probative value of this evidence was not substantially outweighed by the risk of unfair prejudice, and the military judge did not abuse his discretion.[63]

Advice

It is doubtful whether the Navy-Marine Corps court's attempts to distinguish *Tyndale* from *Graham* will be successful, or whether this case will have much value as precedent. The court clearly tried to avoid the issue that the CAAF raised in *Graham* regarding the inadequacy of the foundation for the prior urinalysis. In *Tyndale*, as in *Graham*, there was no expert testimony that would allow the members to make a permissive inference of wrongfulness from the prior positive urinalysis. Nonetheless, the court tried to make a distinction by stressing that what was important about the prior use was the similarity of the accused's stories and not the test results themselves. This distinction may not be all that convincing since ultimately what was important was the positive test results. Otherwise, the prior incident would not have had any relevance. Whether this case will have much value depends on how the CAAF decides *Matthews*. If the CAAF reverses *Matthews*, then the courts holding in *Tyndale* will have little value. On the other hand, if *Matthews* is affirmed by the CAAF, then *Tyndale* will serve as a method for prior positive urinalysis to continue to be admitted in courts-martial.

Until CAAF decides *Matthews*, trial counsel should be wary of admitting uncharged positive urinalysis, even when the uncharged urinalysis was command directed and even when the evidence is offered in rebuttal to a good soldier defense. Defense counsel on the other hand, may be able to use *Graham* to exclude most uncharged positive urinalysis results from the trial, arguing that this evidence is neither logically nor legally relevant. Unless the government is willing to accept the high burden of proof that the majority in *Graham* seems to require, they are unlikely to get this evidence before the fact finder.

404(b) Evidence and Sexual Orientation

One CAAF case this term addressed MRE 404(b) evidence in the area of the accused's sexual orientation.[64] Military Rule of Evidence 404(b) allows uncharged misconduct or bad acts evidence to be admitted against a person, usually the accused, if there is a non-character use for the evidence.[65] The case is significant primarily because it highlights a trend that allows sexual orientation of the accused into court, even though MRE 412[66] may keep sexual orientation of the victim out of the courtroom.

In *Whitner*, the accused was convicted of consensual sodomy and indecent acts with another male soldier.[67] At trial, the government introduced homosexual magazines, videotapes and pamphlets found in the accused's room. The sexual material depicted men engaging in homosexual oral sex. Some of the sexual activity was portrayed in a military setting.[68] The trial judge admitted this evidence over defense objection. The judge found that the evidence was relevant to show the accused's sexual desire, motive, and intent under MRE 404(b). The military judge also ruled that the probative value of this evidence was not outweighed by the risk of unfair prejudice. The judge did order portions of the tape redacted that portrayed anal sex because they were unrelated to the type of misconduct alleged in this case.[69]

The CAAF affirmed the military judge's ruling. The court first looked at the question of relevance under MRE 401. Writing for the majority, Judge Sullivan said that the court has routinely held that magazines, videos, and other pornographic material concerning a particular sex partner or sexual act found near the scene of the alleged crime may be relevant evidence of the accused's intent or state of mind.[70] The court also stated that

63. *Id*.

64. United States v. Whitner, 51 M.J. 457 (1999).

65. MCM, *supra* note 1, MIL. R. EVID. 404(b).

66. Military Rule of Evidence 412 provides in part:

> (a) Evidence generally inadmissible. The following evidence is not admissible in any proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c):
>
> (1) Evidence offered to prove that any alleged victim engaged in other sexual behavior.
>
> (2) Evidence offered to prove any alleged victim's sexual predisposition.

MCM, *supra* note 1, MIL. R. EVID. 412(a).

67. *Whitner*, 51 M.J. at 458.

68. *Id*. at 459.

69. *Id*.

this evidence was relevant to show the accused's motive. According to the court, this evidence "reasonably suggests an emotional need for his committing the charged homosexual-related misconduct, [that is] his sexual desire for junior enlisted men."[71]

Next the CAAF analyzed the evidence for legal relevance under MRE 403. The defense claimed that this evidence had a low probative value because the accused's theory of the case was that he was a bi-sexual and any sexual contact was consensual.[72] The court rejected this argument for two reasons. First, the court said the defense's theory was not so much consent as a claim by the accused that he had no memory of what occurred on the night in question, coupled with an attack on the victim's credibility.[73] More importantly, the court held that simply because the defense did not specifically contest the intent elements of the offense, that did not relieve the government of the burden of proving intent.[74] Accordingly, the court ruled that the military judge did not abuse his discretion in admitting this evidence to prove intent.

Guidance

This case is interesting for two reasons. The court's statement that the government is not relieved of the burden of proving an element of the offense simply because the defense is not contesting that element is consistent with the Supreme Court's holding in *Old Chief v. United States*,[75] and other federal court cases.[76] However, in another opinion this term,[77] the CAAF muddies the water on this issue. This point is discussed in detail below.

The other significant aspect of the opinion is that it reveals the disparate way the rules and the court view the sexual orientation of the accused and the victim. In a case last term, *United States v. Grant*,[78] the accused was convicted of forcible sodomy and indecent assault of another male airman. In that case, the accused admitted to fondling the victim's genitals, but claimed that this was consensual.[79] The accused denied performing oral sodomy on the victim. At trial, the defense sought to elicit testimony from another witness that the victim was a homosexual. The defense contended that the victim's sexual orientation was relevant on the issue of consent in this case. The government objected and the military judge ruled that evidence of the victim's sexual orientation was inadmissible under MRE 412.[80]

On appeal, the defense argued that evidence of the victim's sexual orientation was constitutionally required as an exception to MRE 412.[81] The CAAF rejected that argument and affirmed the military judge's ruling. The court held that evidence of the victim's sexual orientation, without a showing that the conduct is so particularly unusual and distinctive as to verify the accused's version of the events, is not relevant.[82] According to the CAAF, a victim's homosexual orientation is not so unusual or distinctive that it would verify an accused's claim that the homosexual contact was consensual.[83]

Contrast the court's opinion in *Grant* with their holding this year in *Whitner*. It seems that if pornographic homosexual magazines are relevant to prove the accused's intent, and motive, in a forcible sodomy case, the sexual orientation of a victim is relevant to show that it is more likely that the victim consented to the homosexual conduct. Under the CAAF's jurisprudence, however, the same evidence may be relevant and admissible against the accused under MRE 404(b), but not admissible against the victim under MRE 412.

70. *Id*. at 460.

71. *Id*. at 461.

72. *Id*.

73. *Id*. at 462.

74. *Id*. at 461.

75. 519 U.S. 172 (1997).

76. United States v. Crowder, 87 F.3d 1405 (D.C. Cir. 1996).

77. United States v. Morrison, 52 M.J. 117 (1999).

78. 49 M.J. 295 (1998).

79. *Id*. at 296.

80. *Id*. at 297.

81. *Id*.

82. *Id*. (citing United States v. Sanchez, 44 M.J. 174 (1996)).

83. *Grant*, 49 M.J. at 297.

Whitner reminds counsel of the expansive nature of MRE 404(b). Provided the party offering the evidence can articulate a non-character theory of relevance, the evidence may be admitted, subject to a MRE 403 balancing. Comparing *Whitner* with *Grant* from last term also illustrates that evidence admissible against the accused, may not be admissible against the victim because of the provisions of MRE 412.

Defense Concessions

Whitner is also difficult to reconcile with another CAAF opinion this term on the question of defense concessions. Recall in *Whitner*, the court stated that the government is not relieved of the burden of proving an element of the offense simply because the defense is not contesting that element. Accordingly, the homosexual pornography was admissible against the accused under MRE 404(b) to prove intent, even though the defense did not contest intent.[84] In another opinion this term, [85] however, the CAAF held that because the issues of motive and intent were not in issue, the probative value of the government's 404(b) evidence was outweighed by the danger of unfair prejudice.

In *Morrison*, the accused was convicted, inter alia, of assault consummated by a battery with a child under the age of sixteen and indecent acts.[86] The government alleged that the accused on one occasion assaulted the eight-year old daughter of a friend by touching her vagina. The government also alleged that the accused fondled the breasts, placed his finger in the vagina, and french kissed his fourteen-year-old niece. To prove motive, intent, plan, opportunity, ability, and absence of mistake, the government introduced uncharged misconduct evidence involving numerous incidents of sexual abuse between the accused and his natural daughter.[87] The uncharged misconduct occurred when the accused's daughter was between the ages of six and thirteen. This alleged misconduct was at least eight years old.[88] The military judge admitted this evidence under MRE 404(b).

The CAAF held that it was an abuse of discretion for the military judge to admit this evidence for two reasons.[89] First, the court said that the uncharged misconduct was not so similar to the charged offenses that it was relevant to show the identity of the perpetrator.[90] The court also held that this evidence was not needed to prove motive and intent because these issues were not in dispute. According to the court, the accused's alleged assaults were so overtly sexual that motive and intent were not in issue.[91] The court, therefore, held that the probative value of the evidence to prove motive and intent was outweighed by the risk of unfair prejudice, and reversed the conviction.

Guidance

It is difficult to reconcile this case with *Whitner.* In both cases, the primary thrust of the defense's case was that the victims were untruthful. Both cases also involved alleged conduct that was overtly sexual. In *Whitner,* even though the alleged conduct was overtly sexual, the court said that motive and intent were in issue and the government was allowed to introduce MRE 404(b) evidence. In *Morrison*, however, the court said that because the acts were overtly sexual, motive and intent were not at issue and the government did not need the proffered MRE 404(b) evidence. It is difficult to reconcile these opinions. More importantly it is unclear now to practitioners how to determine when motive and intent are or are not in issue in sexual offenses.

Trial counsel seeking to admit MRE 404(b) evidence to prove motive and intent in sex crime cases should look to *Whitner.* Counsel can argue that simply because the defense is not contesting motive or intent, the government is not relieved of the burden of proof and the probative value of the uncharged misconduct is not substantially outweighed by the risk of unfair prejudice.

Defense counsel should use *Morrison* to keep this uncharged misconduct out. In almost any sex crime, motive and intent are clear from the charge and the probative value of the government's MRE 404(b) evidence is outweighed by the risk of unfair prejudice. The problem is that because both of these cases are from the CAAF, and are difficult to reconcile, they provide little guidance to trial judges on how to resolve this issue. However, because the military has adopted MRE 413 and 414,[92] this issue may become moot in most cases; the gov-

84. United States v. Whitner, 51 M.J. 457, 461 (1999).

85. United States v. Morrison, 52 M.J. 117 (1999).

86. *Id*. at 119.

87. *Id*. at 120.

88. This case was tried before MRE 414 came in to effect and the court expressed no opinion on the admissibility of this evidence under MRE 414. *Morrison*, 52 M.J. at 121 n.4.

89. *Id*. at 123.

90. *Id*.

91. *Id*.

ernment can now use uncharged misconduct to prove propensity in sexual offense cases without identifying the limitations of MRE 404(b).

Placing Limitations on Propensity Evidence

Military Rules of Evidence 413 and 414 represent a significant departure from the longstanding prohibition against using uncharged misconduct to show that the accused is a bad person or has the propensity to commit criminal misconduct. The language of both rules state that in a court-martial for sexual assault and child molestation offenses, evidence that an accused committed other acts of sexual assault or child molestation is admissible and may be considered for its bearing on any matter to which it is relevant.

Absent from these rules are the familiar limitations found in MRE 404(a) and (b) that specifically prohibit the government from using uncharged misconduct to prove that the accused has a bad character or has the propensity to commit the charged offenses. Last year, a number of federal and service court cases looked at the constitutionally of these new rules.[93] The courts uniformly held that these new rules of evidence did not violate the accused's due process rights because Federal Rule of Evidence (FRE) 403 still required the trial judge to weigh the probative value of this evidence against the risk of unfair prejudice. This term, several cases examined how the balancing test should be conducted.

The first case is from the Tenth Circuit and reviews the adequacy of the balancing test the trial judge must perform before admitting evidence under FRE 414.[94] In *United States v. Charley*,[95] the accused was convicted of seven counts of child abuse largely on the testimony of the two child victims. The government also introduced evidence under FRE 414 of the accused's prior conviction for child abuse.[96] Before admitting this evidence, the trial judge conducted a Rule 403 balancing to test the evidence for unfair prejudice.[97] In conducting the balancing, the judge noted the probative value of the evidence by citing to the discussion section of the rule. In fact, the judge simply quoted the discussion to the rule verbatim and then said, "[s]o I have conducted that balancing test."[98] There was no attempt to discuss the specifics of the case or how the prior incident was specifically probative to an issue at trial.

On appeal, the Tenth Circuit affirmed and held that these on-the-record findings are sufficient to explain the district court's reasons for admitting the evidence.[99] Moreover, the court said that by invoking the stated general reasons for the rule's enactment, the trial judge was implying that those reasons were particularly important in this case. The court held that the judge had not abused his discretion in admitting this evidence.[100]

Guidance

This case is significant because the court tacitly approves a very cursory Rule 403 balancing by the trial judge. Considering what this evidence can be used for and the likely impact it will have on the jury, it seems surprising that the court would sanction such a pro forma balancing. The appellate court inferred that the balancing was more fact specific than the record demonstrates, which could mean that the court was not entirely satisfied with this balancing and was inferring a more fact specific review in order to save the case. The fact remains, however, that the court approved of this minimal balancing. Most of the service courts that have looked at the military counterpart to these rules have looked to the Tenth Circuit for guidance.[101] The question then is whether the service courts or the CAAF will approve of such a cursory MRE 403 balancing.

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92. Military Rule of Evidence 413 states in part: "In a court-martial in which the accused is charged with an offense of sexual assault, evidence of the accused's commission of one or more offenses of sexual assault is admissible and my be considered for its bearing on any matter to which it is relevant." MCM, *supra* note 1, MIL. R. EVID. 413(a).

> Military Rule of Evidence 414 states in part: "In a court-martial in which the accused is charged with an offense of sexual child molestation, evidence of the accused's commission of one or more offenses of child molestation is admissible and may be considered for its bearing on any matter to which it is relevant." *Id.* MIL R. EVID. 414(a).

93. *See* United States v. Castillo, 140 F.3d 874 (10th Cir. 1998); United States v. Hughes, 48 M.J. 700 (A.F. Ct. Crim. App. 1998);United States v. Wright, 48 M.J. 896 (A.F. Ct. Crim. App. 1998).

94. Federal Rules of Evidence 413 and 414 are substantially the same as their military counterparts.

95. United States v. Charley, 189 F.3d 1251 (10th Cir. 1999).

96. *Id.* at 1258.

97. *Id*. at 1260.

98. *Id.*

99. *Id.*

100. *Id.*

The Balancing Act and 414

A recent Air Force case may provide the answer. In *United States v. Dewrell*,[102] the court grappled with the question of how the trial judge should conduct the balancing of evidence offered under MRE 414. In *Dewrell*, the accused was convicted of committing an indecent act upon a female under the age of sixteen by fondling her chest and placing her hands on his exposed penis.[103] The trial counsel sought to call a former neighbor of the accused to testify about three incidents that occurred several years prior to the charged offenses where the accused allegedly molested her when she was a young girl.[104] The government moved to admit this evidence under MRE 404(b) and MRE 414. The only theory of admissibility that the trial counsel articulated was propensity.[105]

The defense objected to this evidence. The trial judge allowed the evidence over defense objection ruling that the uncharged misconduct was so similar to the charged offenses that it was admissible under MRE 404(b), 413, and 414. The trial judge did not receive the evidence for any purpose other than propensity.[106]

On appeal the defense alleged that MRE 414 was unconstitutional, and it was an abuse of discretion for the military judge to admit this evidence.[107] Consistent with earlier opinions, the court quickly rejected the constitutional argument and noted that the primary focus for MRE 413 and 414 litigation is on the military judge's application of MRE 403.[108]

The court then looked at how MRE 403 should be applied in the context of MRE 413 and 414. The court said that there is a developing consensus among the federal courts to apply rule 403 in a very broad manner that favors admission.[109] According to the court, a broad application that favors admissibility is necessary to give MRE 413 and 414 any effect. If MRE 403 were applied in the traditional manner, these new rules would be eviscerated because the government would rarely be able to overcome the MRE 403 hurdle.[110]

The court announced the rule applicable to the Air Force. In the context of MRE 413 and 414, the trial judge will "test for whether the prior acts evidence will have a substantial tendency to cause the members to fail to hold the prosecution to its burden of proof beyond a reasonable doubt with respect to the charged offenses."[111] Only if admitting the evidence would run afoul of this test, should the trial judge exclude the evidence as unfairly prejudicial. The court then listed several factors to consider. These factors include: whether the evidence will contribute to the members arriving at a verdict on an improper basis, the potential for delay and confusion, the similarity of the uncharged misconduct to the charged offenses, and the clarity of the witness testimony about the uncharged incidents.[112] Applying the principles to this case, not surprisingly, the court held that the trial judge did not abuse his discretion when he admitted this evidence.[113]

Guidance

Although the court in *Dewrell* tried to clarify the proper relationship between MRE 403 and MRE 413 and 414, the opinion does not shed much new light on the matter. First, the court said that in the context of MRE 413 and 414, MRE 403 should be read in a manner that favors admissibility. The rule, however, already favors admissibility of all types of evidence. Only if the probative value of the evidence is *substantially* outweighed by

101. *See* United States v. Wright, 48 M.J. 896 (A.F. Ct. Crim. App. 1998).

102. 52 M.J. 601 (A.F. Ct. Crim. App. 1999).

103. *Id.* at 605.

104. *Id.* at 607.

105. *Id.* at 608.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* at 608-609 (citing United States v. Mound, 149 F.3d 799 (8th Cir. 1998); United States v. Enjady, 134 F.3d 1488 (10th Cir. 1998); United States v. LeCompte, 141 F.3d 767 (8th Cir. 1997)).

110. *Id.* at 609.

111. *Id.*

112. *Id.*

113. *Id.* at 609-610.

the danger of unfair prejudice, confusion, and the like, should the trial judge exclude that evidence.

The court also said that the rule should be applied differently and more broadly than with MRE 404(b) evidence. Unfortunately, the opinion does not clarify how trial courts apply MRE 403 in the 404(b) context or specifically how the balancing test for MRE 413 and 414 evidence should be different. Further, the opinion lists the factors that the trial judge should consider for MRE 413 and 414 evidence, which are the same factors that courts routinely consider in the context of MRE 404(b). It is unclear then, how this balancing test will differ or be any more liberal.

From a practical standpoint, the additional concern is that courts are applying MRE 403 differently depending on the rule under which the evidence is being offered. Practitioners will have difficulty knowing and articulating just what balancing test should be applied. This becomes even more confusing when the party offers the evidence under more than one theory. If, for example, the government is offering this evidence under both MRE 404(b) and 414, the judge will have to conduct two separate balancing tests for the same evidence because it is being offered for two different purposes.

The court goes to great lengths to point out to trial judges that MRE 403 should not be much of a hurdle for the government to overcome in admitting evidence under MRE 413 and MRE 414. Even if the court's logic is not clear, the message is undeniable: propensity evidence should be routinely admitted in child molestation and sexual assault cases. *Charley* reinforces that point, and the government should have a relatively easy time admitting evidence under this structure.

The defenses counsel's task, however, is more difficult. Under this structure, unless the defense can show that admission of the uncharged evidence would all but result in a conviction, the judge will admit it. Does this very limited protection sufficiently protect the accused's due process rights? If MRE 403 is the constitutional savior of these congressionally created rules, it seems that courts should not be minimizing the amount of protection that MRE 403 provides.

Your Secret is Safe With Me, Round III

Over the past two years, the military courts have struggled with the question of whether there existed a psychotherapist-patient privilege in the military after the Supreme Court's holding in *Jaffe v. Redmond*.[114] All of the service courts that have addressed the issue have held that until the President created such a privilege none existed.[115] On 7 October 1999, the President signed an executive order[116] implementing the new MRE 513, which recognizes a limited psychotherapist-patient privilege in the military.

A copy of the new rule and the drafter's analysis is at the Appendix. Counsel must understand that the privilege is limited. Military Rule of Evidence 513 establishes a psychotherapist-patient privilege for investigations or proceedings authorized under the UCMJ. There is no intent to apply MRE 513 in any proceeding other than those authorized under the UCMJ. Military Rule of Evidence 513 is not a physician-patient privilege; instead it is a separate rule based on the social benefit of confidential counseling. There is still no physician-patient privilege for members of the armed forces.[117]

Two specific exceptions are worth noting. First, there is no privilege when the communication is evidence of spouse abuse, child abuse, or neglect, or in a proceeding in which one spouse is charged with a crime against the other spouse or the child of either spouse. This is a significant exception given the number of domestic abuse cases tried in the military.[118]

The second exception of note states that communications are not privileged when necessary to ensure the safety and security of military personnel, dependants, property, classified information, or to protect the military mission accomplishment. This exception is intended to emphasize that military commanders are to have access to all information and that psychotherapists are to readily provide information necessary for the safety and

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114. 518 U.S. 1 (1996).

115. *See* United States v. Paaluhi, 50 M.J. 782 (N.M. Ct. Crim. App. 1999); United States v. Rodriguez, 49 M.J. 528 (Army Ct. Crim. App. 1998).

116. Exec. Order No. 13,140, 64 Fed. Reg. 55,115 (1999).

117. Military Rule of Evidence 501(d) states: "Notwithstanding any other provision of these rules, information not otherwise privileged does not become privileged on the basis that it was acquired by a medical officer or civilian physician in a professional capacity." MCM, *supra* note 1, MIL. R. EVID. 501(d).

118. *See, e.g., United States v. Paaluhi*, 50 M.J. 782 (N.M. Ct. Crim. App. 1999), decided a few months before the President signed the executive order. In that case, the accused was convicted of rape, sodomy with a child under sixteen, and two specifications of indecent acts with a child under sixteen. Before trial, the accused, on the advice of counsel, met with a military psychologist. The defense had not asked the convening authority to make the psychologist a part of the defense team before the accused went to see the psychologist. The accused admitted having sex with his daughter over a five-year period to the psychologist. The government introduced this evidence over defense objection. At trial and on appeal the defense argued that *Jaffee* created a privilege in the military. The appellate court rejected that argument. Citing the Army court's holding in a case last term the court was unwilling to create such a privilege absent presidential action. *See* United States v. Rodriguez, 49 M.J. 528 (Army Ct. Crim. App. 1998). The Navy-Marine Corps court, like the Army court held that a psychotherapist employed by the government is a "medical officer' within the meaning of MRE 501(d) and communications under that rule are expressly not privileged. The outcome of this case would be the same even with MRE 513, because of exception 2.

security of military personnel, operations, installations, and equipment. Again, because these terms and concepts are so broad, this exception is potentially very significant.

The privilege now gives the accused's communications some protections. It also allows defense counsel in many cases to refer their clients to a therapist without the danger that the communications will be disclosed to the government. The full impact of the privilege, the breadth of the exceptions, and how the exceptions will apply remains to be seen.

Witness Sequestration: Don't Jump the Gun!

Military Rule of Evidence 615[119] does not typically get much attention from the appellate courts. This year, however, the CAAF decided a case that is significant mainly because it reminds practitioners that the rules of witness sequestration are about to change. In *United States v. Spann*,[120] the accused was convicted of rape. During the rebuttal portion of the government's case, the victim, who had already testified, entered the courtroom.[121] The defense moved to sequester the victim, citing MRE 615. After determining that the victim would be a witness during sentencing, the military judge ruled that 42 U.S.C. § 10606[122] superceded MRE 615, and he allowed the victim to remain in the courtroom.[123] This section of the federal statute states that the government will make their best efforts to ensure that crime victims have the right to be present at all public court proceedings related to the offense.

The CAAF ruled that it was error (harmless) to allow the victim to remain in the courtroom over defense objection.[124] The CAAF held that 42 U.S.C. § 10606 does not clearly supercede MRE 615, as evidenced by additional legislation in the 1997 Victim Rights Clarification Act[125] and a subsequent amendment of FRE 615.[126] The court held that unless the President takes some type of action, FRE 615 amendments allowing victims to remain in the courtroom will not become effective in the military until 1 June 2000.[127]

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119. Military Rule of Evidence 615 provides in part: "At the request of the prosecution of defense the military judge shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and the military judge may make the *order sua sponte*." MCM, *supra*. note 1, MIL. R. EVID. 615.

120. 51 M.J. 89 (1999).

121. *Id.* at 90.

122. Section 10606 provides in pertinent part:

> (a) *Best efforts to accord rights*. Officers and employees of the Department of Justice and other departments and agencies of the United States engaged in the detection, investigation, or prosecution of crime shall make their best efforts to see that victims of crime are accorded the rights described in subsection (b) of his section.
> (b) *Rights of crime victims*. A crime victim has the following rights:
> (4) The right to be present at all public court proceedings related to the offense, unless the court determines that testimony by the victim would be materially affected if the victim heard other testimony at trial.

42 U.S.C.S. § 10606 (LEXIS 2000).

123. *Spann*, 51 M.J. at 90.

124. *Id.* at 93.

125. The Victim Rights Clarification Act was codified at 18 U.S.C. § 3510(a) and provides:

> Notwithstanding any statute, rule, or other provision of law, a United States district court shall not order any victim of an offense excluded from the trial of a defendant accused of that offense because such victim may, during the sentencing hearing, make a statement or present any information in relation to the sentence.

18 U.S.C.S. § 3510(a) (LEXIS 2000).

126. Federal Rule of Evidence 615 provides in part:

> At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's case, or (4) *a person whose presence is authorized by statute*.

FED. R. EVID. 615.

127. *See* MCM, *supra* note 1, MIL. R. EVID. 1102 which states: "Amendments to the Federal Rules of Evidence shall apply to the Military Rules of Evidence 18 months after the effective date of such amendments unless action to the contrary is taken by the President." MCM, *supra* note 1, MIL. R. EVID. 1102.

Guidance

The most important point about this case is the reminder that the change to MRE 615 will be coming in a few months unless the President takes some other action. This means that victim-witnesses will soon be allowed to remain in the courtroom even if they are likely to testify again during the sentencing proceedings. The statute, however, does not expressly allow the victim to remain in the courtroom throughout the entire trial. The language indicates that the trial judge can still exclude the victim-witness on the basis that he may be testifying later in the findings phase of the trial.

The Department of Defense is also considering a proposed amendment to MRE 615 that does not authorize exclusion for "any victim of an offense from the trial of an accused for that offense because such victim may testify or present any information in relation to the sentence of that offense during the courts-martial presentecing proceeding."[128] Whether the President signs this proposed amendment or not by 1 June of this year, victims will be allowed to remain in the courtroom if the only basis for exclusion is that they may be a sentencing witness.

The Supreme Court Clarifies Daubert

The most significant development in the rules of evidence this year came in the area of expert testimony, specifically, how trial judges should evaluate the reliability of nonscientific expert testimony. In 1993, the Supreme Court, in the case of *Daubert v. Merrill Dow*,[129] held that the *Frye*[130] test of general acceptance was no longer the "be-all end-all" test for evaluating the reliability of scientific evidence. According to the Court, FRE 702 superceded the *Frye* test as the standard for the admissibility of expert testimony.[131] To aid trial courts in conducting this evaluation, the court set out four criteria that trial judges should use to determine reliability. The four criteria are: (1) peer review/publication, (2) error rate, (3) acceptability in the relevant community, and (4) testability.[132] The Court also reiterated that the trial judge must serve as the gatekeeper in applying these factors in order to keep junk science out of the courtroom.[133]

The *Daubert* opinion was limited to scientific evidence or evidence developed using the scientific method.[134] In the years following *Daubert*, courts struggled about whether they could use the *Daubert* factors to evaluate the reliability of nonscientific expert testimony.[135] Some circuits held that the *Daubert* factors apply to all types of expert testimony. Other courts found that the *Daubert* factors do not work well in evaluating the reliability of nonscientific evidence. There was a great deal of confusion and inconsistency over these issues until March of last year when the Supreme Court resolved these questions in the case of *Kumho Tire v. Charmichael*.[136]

On 6 July 1993, the right rear tire of a minivan driven by the plaintiff, Patrick Carmichael, blew out. The minivan crashed and one passenger was killed and several others were injured. Following the accident, Carmichael sued the tire maker, Kumho Tire, alleging that the tire failed because of a design or manufacturing defect.[137]

The plaintiff based much of his case on the testimony of Dennis Carlson, Jr. Mr. Carlson worked for a litigation consulting firm that performs tire failure analysis. Mr. Carlson had a bachelor's and master's degree in mechanical engineering. Before becoming a litigation consultant, Carlson worked for several years at Michelin Tire Company.[138] Mr. Carlson was prepared to testify that, in his opinion, the cause of the tire failure was a manufacturing or design defect.[139] The defendants

128. Notice of Proposed Amendments to Manual for Courts, United States (1998 ed.) 64 Fed. Reg. 27,761 (1999) (proposed May 21, 1999).

129. 509 U.S. 579 (1993).

130. Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).

131. *Daubert*, 509 U.S. at 589.

132. *Id.* at 593.

133. *Id.* at 592.

134. *Id.* at 579 n.8.

135. *See, e.g.*, United States v. Plunk, 153 F.3d 1011 (9th Cir. 1998) (holding that *Daubert* factors did not apply in evaluating the reliability of an expert in drug dealer codes); United States v. Ruth, 42 M.J. 730 (Army Ct. Crim. App. 1995) (stating that *Daubert* factors do not apply in evaluating a questioned document examiner); Berry v. City of Detroit, 25 F.3d. 1342 (6th Cir. 1994) (applying the *Daubert* factors to evaluate the reliability of an expert on police practices).

136. 119 S. Ct. 1167 (1999). This case will be published in the United States reporter at 526 U.S. 137; however, the final published version has not been released. This article will cite to the Supreme Court reporter for all references to *Kumho Tire v. Carmichael*.

137. *Kumho Tire*, 119 S. Ct. at 1171.

138. Brief for Petitioner at 4-5, Kumho Tire v. Carmichael, 119 S. Ct. 1167 (1999).

disputed the cause of the separation and the method used by Carlson to reach his conclusions.[140]

Carlson claimed that separation of the tread from the inner carcass is caused by either a manufacturing or design defect or under-inflation of the tire. According to Carlson, under-inflation can be detected by looking at four physical symptoms of the tire. If at least two of those four symptoms are not present, Carlson would conclude that a manufacturing or design defect caused the separation.[141]

In this case, Carlson conducted a physical examination of the tire only an hour before he was deposed.[142] Despite finding some evidence of each of the four symptoms that could indicate under-inflation, Carlson did not change his initial opinion that a manufacturing or design defect caused the separation. Carlson testified that in his opinion, none of the symptoms were significant, and that a manufacturing or design defect caused the blowout.[143]

At trial, the defense argued that Mr. Carlson's testimony should be excluded because his methodology for determining the cause of tire separation failed the Rule 702 reliability requirement. The district court judge applied a *Daubert*-type reliability analysis to Carlson's testimony even though it was arguably "technical" rather than "scientific" evidence. Applying the *Daubert* factors, the district court excluded the evidence as unreliable.[144] The plaintiffs appealed the judge's order to the Eleventh Circuit.[145] The Eleventh Circuit held that the judge's decision to apply a *Daubert*-type analysis was legal error because the evidence was nonscientific and *Daubert* only applied to scientific evidence.[146]

The Supreme Court granted *certiorari*[147] to resolve the uncertainty between the lower courts. In its opinion, the Supreme Court addressed two key issues. First, does the trial judge's gatekeeping obligation under Rule 702 apply to all types of expert testimony?[148] Second, can the trial judge use the *Daubert* factors to evaluate the reliability of nonscientific expert testimony?[149] The Court answered yes to both questions.

On the first issue, the Court found that the language of the rule and evidentiary policy all require the judge to serve as a gatekeeper for all types of expert evidence. The Court said that the language of Rule 702 makes no relevant distinction between "scientific" knowledge and "technical" or "other specialized" knowledge. The rule, therefore, creates a reliability standard for all types of expert testimony, regardless of the form.[150]

The more difficult and contentious issue was whether a trial judge could or should use the *Daubert* factors to perform the gatekeeping function required by the rules to nonscientific expert evidence. The Court framed the issue as follows: "Whether a trial judge determining the admissibility of an engineering expert's testimony may consider several more specific factors that *Daubert* said might bear on a judge's gatekeeping determination."[151] The Court held: "Emphasizing the word 'may' in the question, we answer that question yes."[152] The Court then proceeded to make clear what after *Daubert* was very confusing.

First, the Court recognized that there are many different kinds of experts and many kinds of expertise. To account for these differences, the Rule 702 reliability inquiry must be flexible.[153] According to the Court, *Daubert* made clear that the factors they listed do not constitute a definitive list. If that point was not clear in *Daubert*, the Court went to great lengths to

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139. *Kumho Tire*, 119 S. Ct. at 1171.

140. *Id.* at 1172.

141. *Id.*

142. Brief for Petitioner at 6, Kumho Tire v. Carmichael, 119 S. Ct. 1167 (1999).

143. *Kumho Tire*, 119 S. Ct. at 1173.

144. *Id.*

145. Carmichael v. Samyang Tire, Inc., 131 F.3d 1433 (11th Cir. 1997).

146. *Id.* at 1436.

147. 118 S. Ct. 2339 (1998).

148. *Kumho Tire*, 119 S. Ct. at 1174.

149. *Id.*

150. *Id.*

151. *Id.* at 1175.

152. *Id.* at 1176.

make the point clear here. Specifically, the Court said they could not rule in or rule out for all cases and for all time the applicability of the *Daubert* factors.[154]

The last aspect of the opinion emphasized the discretion of the trial judge. In deciding whether to apply the *Daubert* factors to a particular type of evidence, what *Daubert* factors to apply, and whether to apply factors not listed in *Daubert*, the trial judge must have considerable leeway and broad latitude.[155] The trial judge's decision should be evaluated on an abuse of discretion standard. The short concurrence written by Justice Scalia further clarifies this point. He stated that the abuse of discretion standard is not discretion to perform the reliability determination inadequately. "Rather, it is discretion to choose among reasonable means of excluding expertise that is fausse and science that is junky."[156]

Guidance

The Court's opinion in *Kumho Tire* was a victory of common sense over formalistic application of evidence rules. The Court recognized the futility of trying to create an inflexible template or formula that can be used for all cases and all types of evidence. Instead, the Court noted that because the type of expert testimony varies widely, the trial judge must have a number of tools available to evaluate the evidence's reliability. Provided the judge uses factors designed to separate unreliable evidence from good evidence, the appellate courts should not second-guess that decision.

Because the military rules are patterned after the federal rules, *Kumho Tire* is an important case for military practitioners. Practitioners will feel the greatest impact in the area of nonscientific expert testimony.[157]

First, *Kumho Tire* means that trial judges should consider a number of facts and factors in evaluating the reliability of nonscientific experts. Trial courts often used a hands-off approach to evaluate the reliability of nonscientific experts. If the expert appeared to have the requisite qualifications and the testimony would be helpful, courts admitted it.[158] To make an adequate reliability determination, courts must use a more sophisticated method than merely looking at the expert's qualifications. The focus on the expert's qualifications simply does not go far enough and does not take into consideration that even though the expert may be qualified and the information may be helpful, it may not be reliable. Indeed, after *Kumho Tire*, counsel may have a strong argument to say that a trial judge has abused his discretion if the reliability focused on only these two prongs without considering other relevant factors.

On a closely related point, there may be a greater need for pre-trial motions and motions in limine to evaluate the admissibility of this testimony. Advocates will also have greater responsibility and greater freedom to provide the factors that the trial judge can use to evaluate the reliability of nonscientific expert evidence. Trial judges will also have greater freedom to rule on the admissibility or inadmissibility of nonscientific experts.

Finally, *Kumho Tire* may have the effect of actually precluding some nonscientific evidence that courts had routinely admitted. Many commentators see this as a likely consequence, particularly in the areas of handwriting analysis, fingerprints, arson investigations, psychological testing, accident reconstruction, and other areas of nonscientific expert evidence.[159] A closely related concern is that nonscientific experts may try to "phony up" their qualifications to get past the more rigorous scrutiny that the courts are likely to employ.[160]

This concern is understandable and somewhat justified. The argument is that before *Kumho Tire*, many courts were not performing a proper gatekeeping function for nonscientific expert testimony. *Kumho Tire* changed that and now "all bets are off" as to the reliability of any type of nonscientific expert evidence admitted pre-*Kumho Tire*.

The Court in *Kumho* recognized that a reexamination of the reliability of routinely admitted expert testimony might not be necessary. The Court said that trial judges have a great deal of discretionary authority on how to conduct the reliability analysis. This authority allows them to avoid "unnecessary reliability proceedings in ordinary cases where the reliability of the expert's method is properly taken for granted and to require appropriate proceedings in the less usual or more complex

153. *Id.* at 1175.

154. *Id.*

155. *Id.* at 1176.

156. *Id.* at 1179 (Scalia, J., concurring).

157. Hugh B. Kaplan, *Evidence Speakers Offer Guidance in Combating Bad Science, Misuse of Expert Testimony,* 13 THE CRIM. PRAC. REP. 219 (June 16, 1999) (quoting Prof. Paul C. Gianelli).

158. United States v. Mustafa, 22 M.J. 165 (C.M.A. 1986).

159. Kaplan, *supra* note 157.

160. *Id.*

cases where cause for questioning the expert's reliability arises."[161] The challenge for trial judges and counsel is determining those cases where the reliability of the expert's methods can be properly taken for granted.

One early post-*Kumho Tire* case shows that judges may indeed take a closer look at evidence routinely admitted before *Kumho Tire*. In *United States v. Hines*,[162] a federal district judge excluded portions of a handwriting expert's testimony because it failed the reliability test. In her ruling, the district judge noted that before *Kumho Tire*, this evidence would have been routinely admitted.[163] The judge said that applying *Daubert/ Kumho Tire* rigorously, however, the handwriting testimony has serious problems with such issues as empirical testing, and rate of error. The district judge did not exclude all of the expert's testimony, but she did prohibit the expert from testifying that in his opinion the defendant was the author of the questioned document.[164]

In other areas as well, courts may exclude evidence that would have been admitted prior to *Kumho Tire*. Some areas that are ripe for a closer examination include psychiatric testimony, psychological profiling, syndrome evidence, false identification testimony, and false confession testimony. Some of this testimony was not highly favored by courts even before *Kumho Tire*.[165] Now, trial judges may have more reasons to exclude it without concern over reversal on appeal.

The CAAF also dealt with a number of cases involving expert evidence and expert testimony this term. Some of these cases are significant and may serve as an indication of where the court is going with regard to particular types of expert testimony.

False Confession Experts

One case, *United States v. Griffin*,[166] addresses the admissibility of an expert in false confessions.[167] In *Griffin*, the accused was convicted of making false statements, taking indecent liberties and communicating a threat. In 1991, the accused's wife walked in on the accused and his two-year-old daughter who were in the bathtub and saw the accused's daughter playing with the accused's erect penis. The Air Force investigated the incident and ultimately closed the case as unsubstantiated.[168] Several years later, the accused underwent a security clearance update and he was interviewed about the incident in 1991. He denied the incident again and then was administered a polygraph. After the polygraph examination, the accused signed a statement admitting that his previous statements were not completely correct and that his daughter had in fact touched his erect penis.[169]

At trial, the defense's theory was that the confession was coerced and false. To support their theory, the defense sought to call Dr. Rex Frank a psychologist as an expert on false confessions.[170] At a UCMJ 39(a) session, Dr. Frank testified that he had studied false confessions for the past several years. His research included a study of 350 cases where suspects had confessed but later had been determined to be innocent based on other evidence. The study concluded that forty-nine of those cases involved coerced confessions. Dr. Frank also testified about factors that affect someone's vulnerability to falsely confess.[171] Based on interviews with the accused and his review of the case, Dr. Frank was willing to testify that the accused's confession is consistent with a coerced compliant type of confession.[172] Dr. Frank did acknowledge that he could not testify as to the veracity of the statement, only that the accused was vulnerable to coercion.[173] The military judge ruled that while Dr. Frank was a qualified expert, this was not a proper subject mat-

161. *Kumho Tire*, 119 S. Ct. at 1176.

162. 55 F. Supp. 2d 62 (D. Pa. 1999).

163. *Id.* at 64-65.

164. *Id.*

165. *See* United States v. Griffin, 50 M.J. 278 (1999); United States v. Brown, 49 M.J. 448 (1998); United States v. Rivers, 49 M.J. 232 (1998).

166. 50 M.J. 278 (1999).

167. For an excellent discussion of the admissibility of false confession expert testimony see, Major James R. Agar, II, *The Admissibility of False Confession Expert Testimony*, ARMY LAW., Aug. 1999, at 26.

168. *Griffin*, 50 M.J. at 279.

169. *Id.*

170. *Id.* at 281.

171. *Id.*

172. *Id.* at 282.

ter for expert testimony, and the testimony does not have the necessary reliability to assist the fact finders.[174]

The CAAF affirmed the military judge's ruling. The court found that the trial judge did not abuse his discretion for a number of reasons. First, the court rejected the defense claim that Dr. Frank's testimony would show that the accused's confession was false. The court noted that even Dr. Frank said he was unable to do this, and even if he claimed that he could have, that testimony would be inadmissible because it commented on the credibility of another witness and would therefore, not be helpful.[175]

Second, again in spite of defense counsel's claim, Dr. Frank could not testify that the accused's statement was coerced. According to the court, at best, Dr. Frank could testify that the confession was consistent with a coerced confession. The problem with that testimony was that it was based on the accused version of the events, a version that the trial judge expressly found unreliable based on other facts.[176]

Finally, the CAAF noted that the studies that Dr. Frank referenced involved British prisoners. There was no showing of how these studies could be related to American military personnel and the studies shed little light on whether the accused was coerced to confess.[177]

Guidance

This case is a good illustration of how case-specific the reliability determination should be. Here the court focused not only on the expert's credentials but also what the expert would testify about, what the basis of the expert's opinion was, and how closely tied the expert's studies were to the facts of the case. Although this case was decided before *Kumho Tire*, this is precisely the type of factual determination that the Court in *Kumho Tire* called for. This case is also a good indication of CAAF's view of this kind of expert testimony. While there is no per se exclusion of this type of testimony, it can run afoul of many of the same concerns courts have with polygraph evidence. Of particular concern is the claim that the expert is potentially commenting on the credibility or veracity of another witness.

Comments on Credibility

The problem of experts commenting on the credibility of other witnesses is a reoccurring issue that the CAAF seems to address in some form every year. Last term in *United States v. Birdsall*,[178] the CAAF reversed a conviction because two government experts opined about the credibility of the child victims. The case set out a clear explanation of the law and why this type of evidence is not helpful to the members. This year saw several cases dealing with this issue in a slightly different context, where the defense had opened the door to a witness's credibility, and now the government was introducing rebuttal opinion testimony. In these cases, the court allowed some limited opinion testimony on credibility.

The first case is *United States v. Eggan*.[179] In *Eggan*, the accused was convicted of forcible sodomy with another soldier. The defense theory was that the conduct was consensual and that the victim was lying to cover up his own homosexuality.[180] The victim sought counseling after the incident and the government called the counselor as a witness to testify that the victim had trouble coping after the charged incident, to rebut the defense claim that he was lying.[181] The defense cross-examined the expert about whether the victim could be faking his emotions. The expert said it was possible.[182] On re-direct the expert testified that she saw no evidence of faking.[183] The defense did not object to these question at trial.

On appeal, the defense claimed that this was error because the expert commented on the victim's credibility.[184] The CAAF rejected this argument. The court first said that the defense did not object to these questions at trial and placed in context, the

173. *Id.*

174. *Id.* at 283.

175. *Id.* at 284.

176. *Id*. at 285.

177. *Id*. at 285.

178. 47 M.J. 404 (1998).

179. 51 M.J. 159 (1999).

180. *Id*. at 160.

181. *Id.*

182. *Id.*

183. *Id*. at 161.

question did not amount to prejudicial error. The court also pointed out that the military judge gave cautionary instructions telling the members that they alone could determine the credibility of witnesses.[185] Finally, the court held that any error was invited by the defense based on their cross-examination of the expert and they could not now complain since they opened the door to otherwise inadmissible evidence.[186]

In a second case, *United States v. Schlamer*,[187] the CAAF reached a similar result. The accused was charged with premeditated murder of a female marine. The accused confessed to the crime.[188] At trial, the defense theory was to show that the confession was coerced and unreliable.[189] The government called the investigator who took the confession to testify about what the accused told him. On cross-examination, the defense asked the interrogator questions suggesting that he obtained a false confession because of the intimidating environment and the leading questions he used.[190] Specifically, the defense counsel asked the investigator if he knew what a false confession was and if certain interrogation techniques could lead to a false confession.[191] On re-direct, the trial counsel asked the interrogator if he thought the confession was false. The investigator said no.[192]

On appeal, the defense claimed that this question was improper because it elicited impermissible opinion evidence about the truthfulness of the accused.[193] The CAAF held that the defense opened the door to this questioning on cross-examination and the government's question was really asking whether the agent had employed any of the techniques suggested by the defense.[194]

Guidance

These two cases illustrate how counsel can walk into their own trap by trying to elicit opinion testimony or other information about whether the accused or a witness is telling the truth. While the general rule is that this evidence is inadmissible because it both usurps the role of the fact finder, and is not helpful to the members, there are exceptions. If the counsel push too hard, they may unwittingly open the door to opinion evidence on rebuttal that would otherwise be inadmissible.

Expert Assistance

A final area regarding experts that the CAAF addressed this year is the showing of necessity that the defense must make in order to get expert assistance to help prepare for trial. For the defense to get expert assistance, they must demonstrate why the assistance is necessary and why they cannot accomplish their representation without the help.[195] One case, *United States v. Short*[196] illustrates the importance of this showing.

The accused, Petty Officer, Darrin Short, was convicted of wrongful use of marijuana based on a positive urinalysis. Prior to trial, the defense requested expert assistance from someone not associated with the Navy Drug Lab to help the defense prepare its case.[197] In support of their motion, the defense counsel stated that she had no background in chemistry past high-school, she did not have a knowledge of the drug testing system, and the standard operating procedures from the drug lab are so voluminous and technical that the defense could not develop the required expertise independently.[198]

184. *Id.*

185. *Id.* at 162.

186. *Id.*

187. 52 M.J. 80 (1999).

188. *Id.* at 83.

189. *Id.* at 84.

190. *Id.* at 85.

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.* at 86.

195. *See* United States v. Gonzales, 39 M.J. 459 (1994); United States v. Garries, 22 M.J. 288 (C.M.A. 1986).

196. 50 M.J. 370 (1999).

197. *Id.* at 371.

The government agreed that the defense was entitled to expert assistance but claimed that Mr. Hall, the head of the Navy Drug Lab could provide the requested assistance.[199] During an Article 39(a) hearing, the military judge asked the defense counsel if she had consulted with the expert from the Navy lab. She replied that she had not, and did not intend to do so in the future because in her view he was not independent and could not provide the needed assistance.[200] The judge ruled that the expert from the government lab was available to assist the defense and the defense counsel had not demonstrated the need for an independent expert.[201]

The CAAF agreed with the military judge and held that the defense had failed to make an adequate showing of necessity.[202] The court noted that the defense counsel refused to talk to the government's expert witness, she did not seek help from more experienced counsel, and ultimately, at trial, she was successful on cross-examination in eliciting testimony from the government's expert that the urinalysis results were consistent with passive inhalation.[203] The CAAF said that while the government's expert was not an independent expert, he gave the defense the tools she needed to lay the foundation for demonstrating the necessity of an independent expert.[204] Because the defense counsel did not avail herself of these opportunities, she had failed to show why independent expert assistance was necessary.

Judge Sullivan and Judge Effron filed dissenting opinions. Both judges felt that the military judge had abused his discretion by requiring the defense counsel to consult with the head of the government lab.[205] Both judges viewed Mr. Hall as simply being too conflicted to assist the defense because he was ultimately responsible for the reports generated by the lab and it is unlikely that he or one of his subordinates would point out deficiencies in the testing procedures.[206]

Guidance

The majority opinion reaffirms the position that simply asking for an independent expert is not enough, particularly where the government expert is available to the defense for initial consultation. Of course, this requirement may put the defense "between a rock and a hard place." If the defense is forced to consult with the government expert to lay the foundation for their own independent expert, that consultation is not privileged and the government will have access to the information and perhaps be tipped off as to the defense's theory of the case. To prevent this, the defense must be very cautious about the type of information they disclose during these initial consultations. This, however, may prevent the defense from developing the information they need to demonstrate the need for an independent expert. According to a majority of the CAAF, this is simply a risk that the defense counsel must take if they hope to obtain independent assistance.

New Rules

Pursuant to Military Rule of Evidence (MRE) 1102,[207] Military Rules of Evidence 407, 801, 803, 804, and 807 are amended to reflect corresponding changes in the federal rules. The changes to the federal rules became effective on 1 December 1997. The changes to the military rules became effective 1 June 1999. The changes are set forth below with the new language underlined.

Rule 407. Subsequent Remedial Measures

> When, after an injury or harm allegedly caused by an event, measures are taken ~~which~~ that; if taken previously, would have made the ~~event~~ injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction ~~in connection with the event~~. This rule does not require the exclusion of

198. *Id.*

199. *Id.* at 372.

200. *Id.*

201. *Id.*

202. *Id.* at 373.

203. *Id.*

204. *Id.*

205. *Id.* at 379 (Effron, J., dissenting).

206. *Id.* (Effron, J., dissenting).

207. Military Rule of Evidence 1102 states "Amendments to the Federal Rules of Evidence shall apply to the Military Rules of Evidence 18 months after the effective date of such amendments, unless action to the contrary is take by the President." MCM, *supra* note 1, MIL. R. EVID. 1102.

evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

There is a typo in the last sentence of MRE 407 of the MCM 1998 Edition ("or feasibility or precautionary measures" should be "or feasibility of precautionary measures").

MRE 801(d)(2) now reads as follows:

(2) *Admission by party-opponent*. The statement is offered against a party and is (A) the party's own statement in either the party's individual or representative capacity, or (B) a statement of which the party has manifested the party's adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment of the agency or employment of the agent or servant, made during the existence of the relationship, or (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy. The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E).

This change responds to three issues raised in *Bourjaily v. United States*.[208] First, the amendment codifies the Court's holding by expressly allowing the trial court to consider the contents of the co-conspirator's statement to determine if a conspiracy existed and the nature of the declarant's involvement. Second, it resolves the issue left unresolved in *Bourjaily* by stating that the contents of the declarant's statement do not alone suffice to establish a conspiracy in which the declarant and the accused participated. Third, the amendment extends the rationale of *Bourjaily* to statements made under Rule 801(d)(2)(C) and (D).

MRE 803(24) now reads as follows:

(24) *[Transferred to Rule 807]*

The contents of Rule 803(24) and Rule 804(b)(5) have been combined and transferred to new Rule 807. This was done to facilitate additions to Rules 803 and 804. No change in meaning is intended.

MRE 804(b)(5) and (6) now read as follows:

(5) *[Transferred to Rule 807]*

(6) *Forfeiture by wrongdoing*. A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

804(b)(6) states that a party forfeits the right to object to hearsay when that party's wrongdoing caused the declarant to be unavailable.

MRE 807 is new and reads as follows:

A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

Conclusion

The diversity of issues covered in this year's installment of new developments in evidence, reminds practitioners that evidence is truly a challenging and interesting area of the law. The rules are not stagnant; counsel must establish and maintain a good understanding of these tools if they are to be effective advocates.

208. 483 U.S. 171 (1987).

Appendix

"Rule 513. Psychotherapist-patient privilege

(a) General rule of privilege. A patient has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made by between the patient to a psychotherapist or an assistant to the psychotherapist, in a case arising under the UCMJ, if such communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition.

(b) Definitions. As used in this rule of evidence:

(1) A "patient" is a person who consults with or is examined or interviewed by a psychotherapist for purposes of advice, diagnosis, or treatment of a mental or emotional condition.

(2) A "psychotherapist" is a psychiatrist, clinical psychologist, or clinical social worker who is licensed in any state, territory, possession, the District of Columbia or Puerto Rico to perform professional services as such, or who holds credentials to provide such services from any military health care facility, or is a person reasonably believed by the patient to have such license or credentials.

(3) An "assistant to a psychotherapist" is a person directed by or assigned to assist a psychotherapist in providing professional services, or is reasonably believed by the patient to be such.

(4) A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional services to the patient or those reasonably necessary for such transmission of the communication.

(5) "Evidence of a patient's records or communications" is testimony of a psychotherapist, or assistant to the same, or patient records that pertains to communications by a patient to a psychotherapist, or assistant to the same for the purposes of diagnosis or treatment of the patient's mental or emotional condition.

(c) Who may claim the privilege. The privilege may be claimed by the patient or the guardian or conservator of the patient. A person who may claim the privilege may authorize trial counsel or defense counsel to claim the privilege on his or her behalf. The psychotherapist or assistant to the psychotherapist who received the communication may claim the privilege on behalf of the patient. The authority of such a psychotherapist, assistant, guardian, or conservator to so assert the privilege is presumed in the absence of evidence to the contrary.

(d) Exceptions. There is no privilege under this rule under the following circumstances:

(1) Death of Patient. The patient is dead;

(2) Spouse abuse or child abuse or neglect. When the communication is evidence of spouse abuse, child abuse, or neglect or in a proceeding in which one spouse is charged with a crime against the person of the other spouse or a child of either spouse;

(3) Mandatory reports. When federal law, state law, or service regulation imposes a duty to report information contained in a communication;

(4) Patient is dangerous to self or others. When a psychotherapist or assistant to a psychotherapist has a belief believes that a patient's mental or emotional condition makes the patient a danger to any person, including the patient;

(5) Crime or fraud. If the communication clearly contemplated the future commission of a fraud or crime or if the services of the psychotherapist are sought or obtained to enable or aid anyone to commit or plan to commit what the patient knew or reasonably should have known to be a crime or fraud;

(6) Military necessity. When necessary to ensure the safety and security of military personnel, military dependents, military property, classified information, or the accomplishment of a military mission;

(7) Defense, mitigation, or extenuation. When an accused offers statements or other evidence concerning his mental condition in defense, extenuation, or mitigation, under circumstances not covered by R.C.M. 706 or M.R.E. 302, the military judge may,

upon motion, order disclosure of any statement made by the accused to a psychotherapist as may be necessary in the interests of justice; or

(8) Constitutionally required. When admission or disclosure of a communication is constitutionally required.

(e) Procedure to determine admissibility of patient records or communications.

(1) In any case in which the production or admission of records or communications of a patient other than the accused is a matter in dispute, a party may seek an interlocutory ruling by the military judge. In order to obtain such a ruling, the party shall:

(A) file a written motion at least 5 days prior to entry of pleas specifically describing the evidence and stating the purpose for which it is sought or offered, or objected to, unless the military judge, for good cause shown, requires a different time for filing or permits filing during trial; and

(B) serve the motion on the opposing party, the military judge and, if practical, notify the patient or the patient's guardian, conservator, or representative of that the filing of the motion has been filed and that the patient has an of the opportunity to be heard as set forth in subparagraph (e)(2).

(2) Before ordering the production or admission of evidence of a patient's records or communication, the military judge shall conduct a hearing. Upon the motion of counsel for either party and upon good cause shown, the military judge may order the hearing closed. At the hearing, the parties may call witnesses, including the patient, and offer other relevant evidence. The patient will shall be afforded a reasonable opportunity to attend the hearing and be heard at the patient's own expense unless the patient has been otherwise subpoenaed or ordered to appear at the hearing. However, the proceedings will not be unduly delayed for this purpose. In a case before a court-martial composed of a military judge and members, the military judge shall conduct the hearing outside the presence of the members.

(3) The military judge shall examine the evidence or a proffer thereof in camera, if such examination is necessary to rule on the motion.

(4) To prevent unnecessary disclosure of evidence of a patient's records or communications, the military judge may issue protective orders or may admit only portions of the evidence.

(5) The motion, related papers, and the record of the hearing shall be sealed and shall remain under seal unless the military judge or an appellate court orders otherwise."

b. M.R.E 513. The analysis to M.R.E 513 is created as follows:

"1999 Amendment: Military Rule of Evidence 513 establishes a psychotherapist-patient privilege for investigations or proceedings authorized under the Uniform Code of Military Justice. MRE Rule 513 clarifies military law in light of the Supreme Court decision in Jaffee v. Redmond, 518 U.S. 1, 116 S.Ct. 1923, 135 L.Ed.2d 337 (1996). Jaffee interpreted Federal Rule of Evidence 501 to create a federal psychotherapist-patient privilege in civil proceedings and refers federal courts to state laws to determine the extent of privileges. In deciding to adopt this privilege for courts-martial, the committee balanced the policy of following federal law and rules when practicable and not inconsistent with the UCMJ or MCM with the needs of commanders for knowledge of certain types of information affecting the military. The exceptions to the rule have been developed to address the specialized society of the military and separate concerns which that must be met to ensure military readiness and national security. See Parker v. Levy, 417 U.S. 733, 743 (1974); U.S. ex rel. Toth v. Quarles, 350 U.S. 11, 17 (1955); Dept. of the Navy v. Egan, 484 U.S. 518, 530 (1988). There is no intent to apply ~~the privilege~~ **MRE 513** in any proceeding other than those authorized under the UCMJ. MRE Rule 513 was based in part on proposed Fed. R. Evid. (not adopted) 504 and state rules of evidence.

MRE Rule 513 is not a physician-patient privilege, instead it is a separate rule based on the social benefit of confidential counseling recognized by Jaffee, and similar to the clergy-penitent privilege. In keeping with American military law since its inception, there is still no physician-patient privilege for members of the Armed Forces. See the analyses for Mil.R.Evid. 302 and Mil.R.Evid. 501.

(a) General rule of privilege. The words "under the UCMJ" in this rule mean that **~~this privilege~~ MRE 513** applies only to UCMJ proceedings, and does not limit the availability of such information internally to the services, for appropriate purposes.

(d) Exceptions. These exceptions are intended to emphasize that military commanders are to have access to all information and that psychotherapists are to readily provide information necessary for the safety and security of military personnel, operations, installations, and equipment."

The Oracle at CAAF: Clear Pronouncements on Manslaughter, and Ambiguous Utterances on the Defense of Necessity

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Introduction

In ancient Greece, humans sought divine communication about their public and private problems.[1] At oracles, or shrines, humans asked the gods for guidance.[2] The pronouncements of the gods were often helpful.[3] Sometimes, however, the gods refused to respond to the humans' requests for guidance.[4] Each year, military justice practitioners look to the United States Court of Appeals for the Armed Forces (CAAF) for guidance in the area of substantive criminal law.

During the 1999 term,[5] the CAAF decided four cases that gave clear guidance on different aspects of the crime of manslaughter. In two other cases, however, the CAAF provided ambiguous dicta on whether the defense of necessity exists in the military. This article analyzes those CAAF opinions dealing with manslaughter and necessity. This article also considers the new offense of reckless endangerment under Article 134. Finally, this article discusses two cases in which the Army Court of Criminal Appeals (ACCA) extended and overruled prior case law.

Manslaughter

In American criminal law, the crime of manslaughter includes "homicides which are not bad enough to be murder but which are too bad to be no crime whatever."[6] In Article 119, Uniform Code of Military Justice (UCMJ), Congress proscribed those homicides that are not bad enough to be considered murder, but involved enough culpability to warrant criminal punishment.[7] The first paragraph of Article 119 proscribes the crime of voluntary manslaughter; the second paragraph proscribes the crime of involuntary manslaughter. Under Article 119(b), involuntary manslaughter is an unlawful killing that either resulted from culpable negligence,[8] or occurred while perpetrating an offense against the person.[9]

United States v. Wells:[10] *The Hybrid Lesser-Included Offense (LIO) of Voluntary Manslaughter*

Under the UCMJ, voluntary manslaughter occurs when all the elements for premeditated or unpremeditated murder are met, but the accused unlawfully killed the victim "in the heat of sudden passion caused by adequate provocation."[11] The factual issues of "heat of sudden passion" and "adequate provocation" invite litigation.[12] The *Manual for Courts-Martial* (*MCM*) lists

1. Lewis Campbell, Religion in Greek Literature 24 (Books for Library Press 1971) (1898).

2. *See* Joseph Fontenrose, Python: A Study of Delphic Myth and Its Origins 44-45, 102, 105 (1959) (describing how the Delphians, the Temesians, and the Argonites, respectively, went to the Oracle at Delphi to ask Apollo for guidance).

3. *See* Lewis R. Farnell, The Higher Aspects of Greek Religion 97-98 (1912); *see also* Fontenrose, *supra* note 2, at 306-07 (explaining the myth that the city of Thebes was founded at its location because Kadmos, after consulting Apollo at the Oracle at Delphi about where he should settle down, followed the guidance he received, including that he should follow a cow that he would meet until she lie down).

4. *See* Fontenrose, *supra* note 2, at 401 (discussing how Herakles consulted Apollo at the Oracle at Delphi, but Apollo refused to give him a response).

5. The 1999 term began 1 October 1998 and ended 30 September 1999.

6. 2 Wayne R. LaFave & Austin W. Scott, Substantive Criminal Law § 7.9 at 251 (1986).

7. UCMJ art. 119 (LEXIS 2000). Note that the President has taken this one step further by enumerating negligent homicide as an offense under Article 134. Manual for Courts-Martial, United States, pt. IV, ¶ 85 (1998) [hereinafter MCM].

8. UCMJ art. 119(b)(1).

9. *Id*. art. 119(b)(2).

10. 52 M.J. 126 (1999).

11. UCMJ art. 119(a).

12. *See, e.g*., United States v. Henderson, 52 M.J. 14 (1999); United States v. Saulsberry, 43 M.J. 649 (Army Ct. Crim. App. 1995) (*en banc*), *aff'd*, 47 M.J. 493 (1998).

elements for voluntary manslaughter that are virtually identical to the elements for unpremeditated murder.[13] This is because the two proof requirements of "heat of sudden passion" and "adequate provocation" are not elements of voluntary manslaughter. To the contrary, once the evidence raises the lesser-included offense (LIO) of voluntary manslaughter, the prosecution must disprove it beyond a reasonable doubt to convict of the greater offense of either premeditated murder or unpremeditated murder.[14] If the evidence raises the issues of "heat of sudden passion" and "adequate provocation," the military judge has a sua sponte obligation to instruct on voluntary manslaughter.[15] The military judge's failure to give a sua sponte instruction was the issue in *United States v. Wells.*

Aviation Ordnanceman Third Class (AO3) Tyron L. Wells had a verbal altercation with his estranged wife. The victim, a man who AO3 Wells thought was having an affair with his wife, was present and got involved in the argument. Wells grabbed his wife's keys and left. The wife's boyfriend followed AO3 Wells to his car to try to get the keys back and displayed a pistol in his waistband. As AO3 Wells drove away, the boyfriend fired a shot into the air. Wells saw a police officer on the way to his apartment but did not report the incident. Within minutes, however, he did tell a friend about the incident, and he asked his friend to drive him back to his wife's apartment. Wells took his own pistol with him for protection.[16] The trip back to his wife's apartment took only minutes. Wells confronted and argued with his wife's boyfriend. The boyfriend started to back away and was making motions with his hands at chest and shoulder level. Wells claimed he thought the boyfriend was reaching for a pistol, and Wells shot him three times.[17]

The government charged AO3 Wells with premeditated murder. At trial, the defense theory was self-defense. The military judge gave instructions on premeditated murder, the LIO of unpremeditated murder, self-defense, and mutual combat. Neither party requested the instruction on voluntary manslaughter, and the military judge did not give it sua sponte.[18] The members found the accused guilty of premeditated murder.[19]

The Navy-Marine Corps Court of Criminal Appeals (NMCCA) found that the military judge erred by failing to sua sponte give the voluntary manslaughter instruction, but the Navy court affirmed the conviction because the error was harmless.[20] The CAAF agreed that the failure to give the instruction was legal error.[21] Military law requires a trial judge to give instructions on a LIO sua sponte when some evidence reasonably places the LIO in issue.[22] Although not the classic case of voluntary manslaughter, evidence of the heated domestic dispute, the presence of the victim whom the accused suspected of being involved with his estranged wife, the boyfriend's display and use of a pistol, and the final confrontation raised the issues of "heat of sudden passion" and "adequate provocation."[23]

The CAAF disagreed with the Navy court on the issue of prejudice. The Navy court focused on the fact that the members

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13. The elements for unpremeditated murder are:

> [1] That a certain named or described person is dead;
> [2] That the death resulted from the act or omission of the accused;
> [3] That the killing was unlawful; and
> [4] that, at the time of the killing, the accused had the intent to kill or inflict great bodily harm upon a person.

MCM, *supra* note 7, pt. IV, ¶ 43b(2). The only difference in the elements for voluntary manslaughter is that the last two words of the fourth element, "a person," are replaced with "the person killed." *Id*. ¶ 44b(1).

14. United States v. Schap, 49 M.J. 317, 320 (1998).

15. MCM, *supra* note 7, R.C.M. 920(e)(2).

16. United States v. Wells, 52 M.J. 126, 127 (1999).

17. *Id*. at 128.

18. *Id*.

19. *Id*. at 129. The adjudged sentence was a bad-conduct discharge, confinement for life, forfeiture of $400 pay per month for life, and reduction to E-1. *Id*. at 127. The reason for this unusual sentence is that premeditated murder has a mandatory minimum of imprisonment for life. MCM, *supra* note 7, pt. IV, ¶ 43e(1). The remainder of the sentence, however, is a matter within the discretion of the court-martial. *Id.* R.C.M. 1002.

20. *Wells*, 52 M.J. at 128.

21. *Id*. at 130.

22. *Id*. at 129.

23. *Id*. at 130.

received the instruction on the LIO of unpremeditated murder, which has the same elements as voluntary manslaughter, but the members still convicted him of the premeditated murder.[24] The CAAF rejected this argument for two reasons. First, although unpremeditated murder and voluntary manslaughter have the same elements, voluntary manslaughter is distinguished from both premeditated murder and unpremeditated murder by two additional proof requirements. The military judge never instructed the members on these two factual issues. The trier-of-fact did not consider whether AO3 Wells acted in the heat of sudden passion caused by adequate provocation.[25]

Second, the Navy court erroneously relied on the finding of premeditation and the minimal direct evidence of heat of sudden passion and adequate provocation to determine if the members would not have found the accused guilty of only the LIO of voluntary manslaughter.[26] The CAAF pointed out that the finding of premeditation did not logically preclude heat of sudden passion or adequate provocation. The military judge did not give the specific instruction in the Military Judges' Benchbook explaining the effect of sudden passion on premeditation,[27] which might permit a rational inference that the members rejected heat of sudden passion and adequate provocation.[28] Also, the CAAF stated that "[a]n appellate court does not normally evaluate the credibility of the evidence presented in a case to determine harmless error, especially in a case like appellant's, where evidence on the disputed matters is not overwhelming."[29] Also, the CAAF quickly rejected the argument that the self-defense instruction rendered the erroneous omission of the voluntary manslaughter instruction harmless, because the issues involved in the two instructions are different.[30]

The CAAF held that the Navy court did not use the correct standard for prejudice.[31] When the evidence at trial is such that a rational court-martial panel could acquit on the charged offense but convict on the LIO, then the appellate court must reverse the conviction.[32] In applying that standard, the CAAF found that there was "ample evidence in this case from which the members could reasonably find that appellant committed this lesser offense of manslaughter, but not the greater charged offense of premeditated murder."[33] Accordingly, the CAAF found that the error was not harmless and reversed the conviction of premeditated murder.[34]

Wells is significant to practitioners for two reasons. Of general significance, it provides the correct standard for prejudice when a military judge erroneously omits an instruction for a LIO. Also, the CAAF provided guidance on the definition of voluntary manslaughter. Lesser included offenses are usually quantitatively or qualitatively lesser than the greater offense.[35] With voluntary manslaughter, however, the LIO exists when two additional facts exist. Once the evidence raises those two factual issues, the prosecution has the burden to disprove the existence of those two facts beyond a reasonable doubt. That dynamic is similar to the prosecution's burden to disprove most special defenses raised by the evidence.[36] Practitioners should think of voluntary manslaughter as a hybrid between a LIO and a special defense to appreciate the unique nature of the offense.

United States v. Martinez:[37] *Involuntary Manslaughter for Failing to Provide Medical Assistance for a Child*

One theory of culpability under involuntary manslaughter is culpable negligence. In *United States v. Martinez*, the CAAF

24. *Id.*

25. *Id.* at 130-31.

26. *Id.* at 131.

27. U.S. DEP'T OF ARMY, PAM. 27-9, LEGAL SERVICES: MILITARY JUDGES' BENCHBOOK, ¶ 3-43-1, n.5 (30 Sept. 1996).

28. *Wells*, 52 M.J. at 131.

29. *Id.*

30. *Id.*

31. *Id.* at 130.

32. *Id.*

33. *Id.* at 131.

34. *Id.* The CAAF sent the case back to the Navy court, which could affirm a conviction of voluntary manslaughter or order a rehearing. *Id.* at 131-32.

35. *See* MCM, *supra* note 7, pt. IV, ¶ 3b(1) (providing the examples of larceny as a quantitatively lesser offense of robbery and wrongful appropriation as a qualitatively lesser offense of larceny).

36. *See id.* R.C.M. 916(b).

37. 52 M.J. 22 (1999).

provided clear guidance on the definition of "culpable negligence."

Sergeant (SGT) Jose M. Martinez was stationed at Fort Campbell, Kentucky. The victim, Niko Martinez, was born to SGT Martinez's wife, as the result of an affair she had while SGT Martinez was deployed overseas. Although SGT Martinez wanted to put the child up for adoption, Mrs. Martinez kept her son. Sergeant Martinez concealed Niko's status by claiming that Niko was his wife's nephew, and he never enrolled Niko as a dependent within the military benefits system.[38] At the age of sixteen months, Niko died as a result of severe physical abuse by his mother over a period of four months. Mrs. Martinez admitted hitting Niko and slamming his head into the wall so hard it left indentations in the wallboard. The child had bruises from head to foot.[39] Sergeant Martinez noticed the injuries and was "mad" at his wife. Niko started to show signs of physical distress—listlessness and a fever. Sergeant Martinez claimed that he counseled his wife to bring the child to the hospital and she assured him that she would, but she never did.[40] The next day, Niko died.[41]

A court-martial convicted SGT Martinez of involuntary manslaughter for failing to provide medical attention.[42] On appeal, SGT Martinez argued that the evidence was legally insufficient for a conviction of involuntary manslaughter. Specifically, he challenged the sufficiency of the evidence of culpable negligence. The CAAF held that the evidence was legally sufficient.[43]

Culpable negligence has two components: (1) negligent act or omission, and (2) culpable disregard for the foreseeable consequences to others.[44] The first component requires the existence of a legal duty and negligence in the performance of that duty.

Sergeant Martinez argued that the evidence did not show that he had a duty to take Niko to the hospital for injuries inflicted by his wife. According to the *MCM*, "[w]hen there is no legal duty to act there can be no neglect."[45] For example, suppose you go for a walk to clear your head, after reading this article. You walk past a lake and see a child drowning. You know you could save the child, but you decide against it because you do not want to wrinkle your clothes. Although you are morally challenged, you did not commit a crime, because you had no legal duty to act to save the drowning child.[46]

The CAAF agreed with this general proposition. Under the facts of this case, however, the CAAF found the accused did have a legal duty to provide medical care to Niko.[47] Under the law, parents have a duty to provide medical assistance to their children. In this case, Niko was the biological child of SGT Martinez's wife, lived with his family, and looked to SGT Martinez as his father. The birth certificate listed SGT Martinez as the father, and he assumed the responsibilities of being a parent to Niko.[48] The CAAF held, under those facts, the members could reasonably find that the accused had "a parental duty as co-head of household to provide medical assistance to this child."[49]

Sergeant Martinez also argued that there was no evidence of unreasonable or negligent conduct on his part in failing to provide medical care to Niko. He argued that he acted reasonably in counseling his wife to take the child to the hospital and relying on her assurances. He argued that his choice to trust his wife was the wrong choice, but it was not negligent.[50] The

38. *Id*. at 23.

39. *Id*.

40. *Id*.

41. The death was due to bleeding over the course of several days from the traumatic rupture of blood vessels connected to his digestive tract. *Id*.

42. The accused was charged with and convicted of accessory after the fact to assault, involuntary manslaughter, child neglect, and misprison of a serious offense. The members adjudged a sentence of a dishonorable discharge, confinement for 13 years, forfeiture of $854 pay per month for 156 months, and reduction to the lowest enlisted grade. The ACCA found the child neglect and misprison offenses to be multiplicious, set aside those convictions, and decreased the confinement and forfeitures by two years. *Id*. at 22.

43. *Id*. at 23.

44. MCM, *supra* note 7, pt. IV, ¶ 44c(2)(a)(i).

45. *Id*. ¶ 44c(2)(a)(ii).

46. *Id*.

47. *Martinez*, 52 M.J. at 24.

48. *Id*. at 25.

49. *Id*.

50. *Id*.

CAAF held, in light of the physical symptoms that the accused observed in the week prior to death, the members could reasonably find that SGT Martinez's "reliance on a suspected child abuser's assurances was an unreasonable response to his duty to provide medical care to this child."[51]

The second component of culpable negligence is recklessness—the culpable disregard for the foreseeable consequences to others. In an involuntary manslaughter case, death must be reasonably foreseeable. The standard is objective, and it is not a defense that the accused did not intend or foresee death.[52] Sergeant Martinez argued that there was no showing that a reasonable person would have foreseen death as a consequence of his failure to take Niko to the hospital.[53] The court disagreed and focused on the expert medical testimony about the symptoms Niko would have displayed between the time of his abdominal injury and his death. The evidence also showed that SGT Martinez was aware of the intentional battering. On this evidence, the court concluded that the members could find that a reasonable person would have foreseen the substantial danger of death in the absence of medical care.[54] Accordingly, the CAAF affirmed the conviction for involuntary manslaughter.[55]

Martinez has two important lessons for practitioners. First, the case provides guidance on the legal duty of a parent, or a person in the position of a parent, to provide medical assistance for his child. Holding the "nonabusing" parent who is aware of the abuse criminally liable may have a significant impact on child abuse. Second, the practitioner gains a clearer understanding of the definition of culpable negligence. Culpable negligence is comprised of the two components of negligence and recklessness. Negligence requires a legal duty and a breach of that duty. Disregard for the foreseeable consequences to others, also known as recklessness, is an objective standard—whether a reasonable person would have realized the substantial and unjustified danger of death.

United States v. Riley:[56] *Limitation on Appellate Courts in Affirming LIO*

Another case discussed involuntary manslaughter based on withholding of medical care. Whereas *Martinez* looks at the substantive definition of the crime of involuntary manslaughter, *United States v. Riley* looks at a procedural issue. Under military law, appellate courts have the authority to set aside a conviction and affirm a LIO.[57] The issue in *Riley* was whether the Air Force Court of Criminal Appeals, after setting aside the conviction for unpremeditated murder as factually insufficient,[58] could affirm the LIO of involuntary manslaughter on a theory not presented to the members. The facts of the case are important to understanding the CAAF's opinion.

In April, Airman Leslie D. Riley complained to her military supervisor about cramping, spotting, and the absence of menstrual cycle. She went to the emergency room (ER). The doctor conducted abdominal and pelvic exams and gave her a pain-reliever. Later that month, Airman Riley took a home pregnancy test, which indicated she was pregnant. A friend told her the result could be from stress or something she ate. Riley made an obstetrician/gynecologist appointment at the end of April, but she cancelled it after working late the night before.[59]

In the beginning of July, Airman Riley was in great pain after a racquetball game. Early the next morning, she went to the ER. She was holding her back and crying, and the pain was coming in waves.[60] A contract physician at the end of his shift examined Airman Riley. She told him that she hurt her back playing racquetball the day before. He gave her a pain-reliever and released her.[61] The ER technicians were concerned when they saw her doubled-over and crying. They asked the incoming doctor to look at her. He looked at her charts, asked questions, and ordered a pregnancy test.[62]

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51. *Id*.

52. *Id*. at 25-26.

53. *Id*. at 25.

54. *Id*. at 26.

55. *Id*.

56. 50 M.J. 410 (1999).

57. UCMJ art. 59(b) (LEXIS 2000).

58. The service courts have the mandate to review for factual sufficiency in addition to legal sufficiency. UCMJ art. 66(c).

59. *Riley*, 50 M.J. at 411-12.

60. *Id*. at 412.

61. *Id*.

62. *Id*.

After giving blood for the pregnancy test, Airman Riley went to the restroom. After she was in the restroom for a while, one of the technicians knocked on the door. Airman Riley said she would be out in a few minutes. Another technician knocked, and she said "yes, sir." The technician knocked again, and Airman Riley said she got sick and needed a mop.[63] After a total of about thirty to forty-five minutes in the restroom, Airman Riley walked out with blood on her leg, which she said was from her menstruating.[64] She was anxious to go home. The pregnancy test was positive. During a pelvic exam, the doctor saw fresh lacerations and hematomas, which Airman Riley stated were from a rollerblading accident.[65] While Airman Riley was in the examination room, a housekeeper found an infant girl among wads of paper towels in the ER restroom trash can.[66]

At trial, the prosecution theory was that Airman Riley killed her unwanted baby with premeditation.[67] The defense theory was that Airman Riley sat on the toilet and instinctively began to push. Due to no fault of the accused, the baby "squirted out" and suffered a fatal head injury from the fall to the floor. According to the defense, Airman Riley thought the baby was already dead when the technicians knocked on the door.[68]

The defense objected to an instruction on culpable negligence by a failure to act, because the failure to act was not alleged or implied in the specification. The prosecution stated that it did not intend to argue that Airman Riley's culpability stemmed from failure to summon medical assistance. The military judge deleted the reference to failure to summon medical assistance from the instruction on the LIO of involuntary manslaughter, but retained the description of culpable negligence by failing to prevent the fracture of the baby's skull.[69] The members found her guilty of premeditated murder. During the presentencing proceeding, however, they reconsidered and found her guilty of unpremeditated murder.[70]

The Air Force Court of Criminal Appeals found the evidence factually insufficient for unpremeditated murder. The Air Force court, however, held that the accused's refusing and impeding medical assistance was culpable negligence and was the proximate cause of the child's death.[71] The Air Force court acknowledged that the military judge did not instruct on failure to provide medical care, but it found that Airman Riley did more than fail to seek medical care—she obstructed it with a culpable disregard.[72] Thus, the Air Force court affirmed a conviction of the LIO of involuntary manslaughter.[73]

The CAAF considered whether the Air Force court erred by affirming a conviction of involuntary manslaughter on a theory of refusing medical assistance. Appellate courts have the authority to affirm a conviction on a LIO, even if the members were not instructed on the LIO.[74] The CAAF, however, focused on a due process limitation to that authority,[75] which the Supreme Court explained in *Dunn v. United States*.[76]

Although the CAAF did not discuss *Dunn* in detail, the facts and rationale of that case are helpful in appreciating the due process right involved. In June 1976, Robert Dunn testified before a grand jury implicating Phillip Musgrave in drug-related offenses. In September 1976, he recanted his testimony in an oral statement under oath in Musgrave's attorney's office.

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63. *Id*. at 412-13.

64. *Id*. at 413.

65. *Id*.

66. *Id*.

67. *Id*. at 414.

68. *Id*.

69. *Id*. As for the instruction on the LIO of negligent homicide, the military judge instructed on failure to act, but instructed that her failure to summon medical assistance may not, as a matter of law, constitute the negligent act or failure to act. *Id*.

70. *Id*. at 415. The adjudged and approved sentence was a dishonorable discharge, confinement for 25 years, total forfeitures, and reduction to the lowest enlisted grade. *Id*. at 411.

71. United States v. Riley, 47 M.J. 603, 608 (A.F. Ct. Crim. App. 1997).

72. *Id*.

73. *Id*. The Air Force court reassessed the sentence and affirmed a sentence that included 10 years instead of 25 years of confinement. *Id*. at 609.

74. United States v. LaFontant, 16 M.J. 236 (C.M.A. 1983) (holding that the appellate court could affirm LIO of attempted possession of LSD, even though members were never instructed thereon).

75. *Riley*, 50 M.J. at 415.

76. 442 U.S. 100 (1979). The CAAF also cited *Chiarella v. United States*, 445 U.S. 222, and *United States v. Standifer*, 40 M.J. 440, 445 (C.M.A. 1994).

In October, at an evidentiary hearing for Musgrave's motion to dismiss, Dunn adopted his September recantation and testified that only a small part of his grand jury testimony was true.[77]

Dunn was charged with violating 18 U.S.C. § 1623, which prohibits false declarations made under oath in any proceeding before or ancillary to any court or grand jury. The indictment mentioned the September statement under oath in the attorney's office.[78] During the trial, the testimony at the October evidentiary hearing was admitted into evidence.[79] The judge, however, instructed the jury to render its verdict on the charges alleged in the indictment, which specified the September statement.[80] The jury found him guilty. On appeal, Dunn argued that the statement under oath in the attorney's office was not "ancillary to any court or grand jury."[81] The Court of Appeals for the Tenth Circuit agreed that it was not an ancillary proceeding. The Court of Appeals affirmed, however, because Dunn adopted his September statement in his October testimony at the evidentiary hearing, which was a proceeding ancillary to a court. The Court of Appeals acknowledged that the indictment specified the September statement, but found it to be nonprejudicial variance between the indictment and proof at trial.[82]

The Supreme Court pointed out that "a variance arises when the evidence adduced at trial establishes facts different from those alleged in an indictment."[83] Instead of a discrepancy between the indictment and the proof at trial, this was a discrepancy between the basis on which the jury rendered its verdict and the basis on which the Court of Appeals sustained the conviction.[84] The Court discussed the firmly rooted right to be heard on the specific charges of which one is accused. "To uphold a conviction on a charge that was neither alleged in an indictment nor presented to a jury at trial offends the most basic notions of due process."[85] Although the jury might well have reached the same conclusion as the Court of Appeals, the appellate court is "not free to revise the basis on which a defendant is convicted simply because the same result would likely obtain on retrial."[86]

Relying on *Dunn*, the CAAF held that the Air Force court could not affirm Airman Riley's conviction for involuntary manslaughter on a theory of failure to summon medical assistance.[87] The government conceded that the Air Force court could not affirm a conviction based on failure to act, but it argued that the conviction was affirmed on a theory of intentional prevention of medical intervention rather than failure to summon medical assistance.[88] The CAAF pointed out, however, that neither theory was submitted to the members. Airman Riley did not have the opportunity to defend herself against the factual issues involved in those theories. Therefore, affirming the conviction on such a theory would violate due process.[89] Accordingly, the CAAF reversed the decision of the Air Force court and remanded the case for further consideration consistent with these principles of due process.[90]

The dissenting opinion stated that reversing the conviction for involuntary manslaughter would be a true "miscarriage" of justice.[91] The dissent focused on the law-of-the-case doctrine,[92]

77. *Dunn*, 442 U.S. at 102-03.

78. *Id*. at 103-04.

79. *Id*. at 104.

80. *Id*. at 106.

81. *Id*. at 104.

82. *Id*. at 104-05.

83. *Id*. at 105.

84. *Id*. at 106.

85. *Id*.

86. *Id*. at 107.

87. United States v. Riley, 50 M.J. 410 (1999).

88. *Id*. at 415-16.

89. *Id*. at 416.

90. *Id*. The Air Force court had already found the evidence factually insufficient for unpremeditated murder, but it could still consider whether the evidence is factually sufficient to support a conviction of a LIO based on negligent infliction of the fatal injuries to the baby. *Id*.

91. *Id*. at 416 (Crawford, J., dissenting). This apparent play on the word "miscarriage" is used not only in the first paragraph of the dissenting opinion but also in its last sentence. *Id*. at 425.

92. The practice that courts generally should not reopen what a court has already decided. *Id*. at 420.

and explained that it is a discretionary policy rather than a limitation on authority. Also, the egregious facts of this case warrant the "manifest injustice" exception to that doctrine.[93] The dissent would have applied the fatal variance test to determine if there was prejudice: (1) was the accused misled to the extent that she was unable to adequately prepare for trial; and (2) was the accused fully protected from another prosecution for the same offense.[94] According to the dissent, the variance in this case was not fatal. Airman Riley "was on notice of what misconduct she was charged with and she was able to prepare an adequate defense."[95] Also, the government could not prosecute her again for homicide after a conviction for involuntary manslaughter.[96]

The majority opinion is more persuasive than the dissenting opinion. The majority did not rely on the law-of-the-case doctrine discussed by the dissent. It focused on the due process right to present a defense before the trier-of-fact. The facts of *Riley* appear indistinguishable from the facts of *Dunn*. Also, the dissent's reliance on the fatal variance test is misdirected. As stated in *Dunn*, variance deals with a discrepancy between the pleadings and the proof at trial. Here, as in *Dunn*, the discrepancy is between the basis on which the trier-of-fact rendered its verdict and the basis on which the appellate court affirmed the conviction.

The *Riley* case is significant for practitioners, especially appellate counsel and judges. An appellate court may not affirm a conviction of a LIO on a theory of culpability never submitted to the trier-of-fact. As a matter of due process, the accused cannot be convicted of a charge against which she did not have the opportunity to defend herself.

United States v. Robbins:[97] *When is Involuntary Manslaughter Not Involuntary Manslaughter?*

In certain circumstances, a court-martial has subject-matter jurisdiction over violations of state criminal statutes. In areas within federal jurisdiction, the federal Assimilative Crimes Act (ACA) fills the gaps for offenses not covered by federal law by adopting offenses of the state in which the area of federal jurisdiction is situated.[98] Clause 3 of Article 134 of the UCMJ incorporates federal crimes into military criminal law.[99] The military uses a two-step process to acquire subject matter jurisdiction over state crimes. First, the ACA assimilates the state crime into federal law, and then Article 134 incorporates that federal law into the UCMJ. There are, however, significant limitations on both of those steps. The "preemption doctrine" precludes the application of Article 134 to conduct covered by Articles 80 through 132 of the UCMJ. Similarly, the ACA only assimilates state crimes if Congress has not already addressed the act or omission in a federal criminal statute. The applicability of those limitations, however, is often unclear.

The "preemption doctrine" is almost as old as the UCMJ. In 1953, the Court of Military Appeals (CMA) stated, in *United States v. Norris*,[100] that Article 134 is generally limited to offenses "not specifically delineated by the punitive articles."[101] In *Norris*, the court-martial convicted the accused of wrongful appropriation under Article 121, but the Army Board of Review changed the conviction to "wrongful taking" under Article 134.[102] The CMA found that there was no offense of "wrongful taking" under Article 134, because Congress had covered the entire field of criminal conversion in Article 121. The CMA stated that it could not "grant to the services unlimited authority to eliminate vital elements from common law crimes and offenses expressly defined by Congress and permit the remaining elements to be punished as an offense under Article 134."[103]

Five years later, the CMA created a two-part test for preemption. In *United States v. Wright*,[104] the court-martial convicted the accused for violating the Texas automobile burglary stat-

93. *Id*. at 420-22.

94. *Id*. at 423.

95. *Id*.

96. *Id*.

97. 52 M.J. 159 (1999).

98. 18 U.S.C.S. § 13(a) (LEXIS 2000).

99. UCMJ art. 134 (LEXIS 2000). The offense must occur in a place where the federal law in question applies. *See* United States v. Williams, 17 M.J. 207 (C.M.A. 1984). Also, the crime cannot be *punishable* by death. *See* United States v. French, 27 C.M.R. 245 (C.M.A. 1959).

100. 8 C.M.R. 36 (C.M.A. 1953).

101. *Id.* at 39.

102. *Id.* at 37-38.

103. *Id*.

104. 5 M.J. 106 (C.M.A. 1978).

ute.[105] The accused argued that Articles 129 and 130 for burglary and housebreaking preempted assimilation of the Texas statute. The CMA stated that preemption applied if: (1) Congress intended to limit prosecution for wrongful conduct within a particular field to offenses defined in specific articles of the UCMJ, and (2) the offense charged is composed of a "residuum of elements" of those specific articles.[106] The court found that Congress did not manifest an intent to limit the prosecution for unlawful entry with a criminal purpose to the offenses defined in Articles 129 and 130.[107] The court held that the preemption doctrine did not preclude assimilation of the Texas automobile burglary statute.[108]

In 1984, the President codified the "preemption doctrine" in the *MCM*.[109] Previously, the *MCM* had simply stated that if the "conduct is specifically made punishable by another article, it should be charged as a violation of that article."[110] The *1984 MCM* provided that "[t]he preemption doctrine prohibits application of Article 134 to conduct covered by Articles 80 through 132."[111] The language in the 1998 edition of the *MCM* is identical.[112]

The ACA has an even longer history. Congress enacted the ACA in the early nineteenth century to fill the gaps left by the federal criminal statutes for areas under exclusive or concurrent federal jurisdiction. The ACA has a limitation similar to the "preemption doctrine." The language of the ACA provides that for a state crime to be assimilated, the act or omission cannot be "made punishable by any enactment of Congress."[113] The purpose of the ACA, as interpreted by the Supreme Court, is to cover crimes on which Congress has not legislated and not to enlarge or otherwise redefine existing federal crimes.[114] The Supreme Court most recently analyzed the ACA in 1998, in *Lewis v. United States*.[115]

In *Lewis*, the defendant was the civilian wife of a soldier at Fort Polk, Louisiana. In federal district court, a jury convicted her of beating and killing her four-year-old daughter, under Louisiana's first-degree murder statute. The Louisiana statute, unlike the federal first-degree murder statute, did not require premeditation. Also, it included acts done with the specific intent to kill *or* to inflict great bodily harm, if the victim was under the age of twelve.[116] The defendant argued that the federal murder statute already punished the act as second-degree murder, so the ACA did not assimilate the Louisiana first-degree murder statute.

The Court used a two-step analysis to determine if the ACA assimilates a state criminal statute into federal law. First, is the defendant's act or omission made punishable by any enactment of Congress? If not, then assimilation is presumably proper. If so, then ask whether the federal statute precludes the application of state law.[117] A federal statute could preclude assimilation if, for example, the state statute would interfere with the achievement of a federal policy, the state statute would effectively rewrite an offense that Congress carefully defined, or the federal statute reveals a congressional intent to occupy the entire field of misconduct under consideration.[118]

The Court held that the federal murder statute precluded the assimilation of the child victim provision of Louisiana's first-degree murder statute.[119] Using the above two-step analysis, the Court answered the first question in the affirmative, because the act was made punishable by the federal murder statute, 18

105. *Id.* at 107.

106. *Id.* at 110-11.

107. *Id.* at 111.

108. *Id.*

109. MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. IV, ¶ 60c(5)(a) (1984).

110. MANUAL FOR COURTS-MARTIAL, UNITED STATES, ¶ 213a (1969).

111. MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. IV, ¶ 60c(5)(a) (1984).

112. MCM, *supra* note 7, pt. IV, ¶ 60c(5)(a).

113. 18 U.S.C.S. § 13(a) (LEXIS 2000).

114. United States v. Williams, 327 U.S. 711, 723 (1946).

115. 523 U.S. 155 (1998).

116. *Id.* at 167-68.

117. *Id.* at 164-65.

118. *Id.*

119. *Id.* at 171.

U.S.C. § 1111, as second-degree murder.[120] As for the second question, the federal statute demonstrated Congress's intent to cover all types of murder in areas under federal jurisdiction. The federal statutory framework was detailed, and the provisions covering first-degree and second-degree murder were "linguistically interwoven." Also, the federal statute contained a detailed first-degree list that is of the same level of generality as the Louisiana statute. In an area involving the death penalty, it is certain that Congress gave great consideration to the distinction between first-degree and second-degree murder.[121] The Court held that there was no gap to fill.[122]

The issue in *United States v. Robbins* was whether a provision in the Ohio involuntary manslaughter statute, which proscribed the unlawful termination of another's pregnancy as a result of a felony, was cognizable by a court-martial. At Wright-Patterson Air Force Base, Ohio, Airman Gregory L. Robbins severely beat his thirty-four-week pregnant wife with his fists. He broke her nose and gave her a black eye. His punches to her body ruptured her uterus and tore the placenta from the wall of the uterus. The trauma killed the otherwise healthy fetus.[123]

Airman Robbins pled guilty to assault consummated by a battery on his wife on divers occasions, aggravated assault with the intent to inflict grievous bodily harm on his wife on divers occasions, and involuntary manslaughter by terminating the pregnancy of his wife in violation of Ohio Revised Code § 2903.04.[124] The Ohio statute provided that whoever "shall cause the death of another or the unlawful termination of another's pregnancy as a proximate result of the offender's committing or attempting to commit a felony" is guilty of involuntary manslaughter.[125] The military judge sentenced Airman Robbins to a dishonorable discharge, confinement for eight years, and reduction to the lowest enlisted grade.[126] On appeal, Airman Robbins argued that his guilty plea was improvident because the "preemption doctrine" applied to the charge brought under the ACA.[127]

After providing a thorough background on the preemption doctrine and the ACA,[128] the court analyzed the relevant provision in the Ohio involuntary manslaughter statute.[129] The court stated that the Ohio legislature's decision to place the offense of unlawful termination of another's pregnancy within the general classification of involuntary manslaughter was not dispositive.[130] The court looked at the plain language of the Ohio statutory provision to determine the nature of the offense. Also, it found that both the UCMJ and the United States Code (U.S.C.) require an infant be "born alive" to be considered a "human being" and protected under the statute.[131]

The court applied the two-step ACA analysis and the two-step preemption test. For the *Lewis* analysis, the court answered the first question negatively.[132] Neither the UCMJ nor the U.S.C. proscribed the unlawful termination of another's pregnancy.[133] As stated in *Lewis*, that ended the analysis and assimilation was presumably proper. The court dealt with the preemption test in an equally swift manner. In one sentence, the

120. *Id.* at 168.

121. *Id.* at 169.

122. *Id.*

123. United States v. Robbins, 52 M.J. 159, 160 (1999).

124. OHIO REV. CODE ANN. § 2903.04 (Anderson 1999).

125. *Id.* Six days before the assault, an amendment to the Ohio statute took effect that added the language "or the unlawful termination of another's pregnancy." *Robbins*, 52 M.J. at 162.

126. *Robbins*, 52 M.J. at 159.

127. *Id.* at 160.

128. *Id.* at 160-62.

129. *Id.* at 162-63. Before getting into the merits of the appellant's preemption argument, the CAAF held that the accused's guilty plea did not waive the issue. As the court stated, if the preemption argument was correct, then the court-martial lacked subject-matter jurisdiction. *Id.* at 160. Jurisdiction is never waived by failure to raise the issue. MCM, *supra* note 7, R.C.M. 905(e). Lack of jurisdiction cannot even be affirmatively waived through bargaining in a pretrial agreement. *Id.* R.C.M. 705(c)(1)(B).

130. *Robbins*, 52 M.J. at 163.

131. *Id.*

132. *Id.*

133. In the Senate, there is currently a bill, which passed the House of Representatives on 30 September 1999, that would add Article 119a to the UCMJ. Article 119a would proscribe the killing or injury, during the commission of one of eight UCMJ offenses, of a child in utero. Unborn Victims of Violence Act of 1999, H.R. 2436, 106th Cong. § 3.

court skipped to the second prong and concluded that the offense to which the accused pled guilty was not a residuum of elements of a specific offense, "but instead [was] a separate offense proscribed by the Ohio Revised Code."[134]

The court supported its conclusion by discussing the other prong of both tests—congressional intent. The court explained how the Ohio statute did not conflict with the intent of Congress. Congress has traditionally left the area of termination of pregnancy to the states.[135]

The court addressed the argument that assimilation would effectively redefine "human being," which Congress already defined in its involuntary manslaughter statutes. In the same bill that had recently added unlawful termination of another's pregnancy to the involuntary manslaughter statute, the Ohio legislature also amended the separate statutory definition of "human being" to include *viable* fetuses. The state legislative history reflected that the statutory provision assimilated in this case did not attempt to redefine "human being," because it included *all* fetuses.[136] Instead of redefining "human being," it created a new offense distinct from assault against the mother and distinct from the homicide of a viable fetus. As the court noted, by drafting this statute in the disjunctive, the Ohio legislature clearly distinguished this offense from traditional manslaughter.[137] At the end of the opinion, the court made an interesting amendment to the specification. To clarify that the assimilated offense was not a "homicide," the court struck the words "involuntary manslaughter" from the specification.[138]

Judge Gierke did a masterful job in the opinion by making a very contentious issue look simple. He made two points that clarified the law. First, the focus is the act or omission prohibited in the assimilated statute rather than its title. Second, the preemption test under Article 134 and the analysis of whether existing federal law precludes assimilation under the ACA are distinct tests.

Critical to the CAAF's analysis was the observation that the classifications that *state* legislatures give offenses are not dispositive under either the ACA or the preemption doctrine. The Ohio legislature chose to place the offense of unlawful termination of another's pregnancy into § 2903.04 of the Ohio Revised Code and to classify it as involuntary manslaughter. The Ohio legislature could have chosen to place it into a different statute, such as the child abuse statute, or to place it by itself in a new statutory section. If the legislature had done so, as the Air Force court pointed out in its comprehensive opinion, "the question of assimilation would be almost rhetorical."[139] The Ohio legislature's decision of how to classify the offense was not relevant to the issue before the court.

The CAAF properly focused on the language of the statute. This freed the court to explain how the unlawful termination of another's pregnancy was, under military law, not considered within the category of involuntary manslaughter. It was neither a "residuum of elements" nor a redefinition of involuntary manslaughter. Instead, it was a different offense that filled a gap in military law. Fortunately, the court was alert to the misperception that its holding could create. Someone not reading the whole opinion might come away with the mistaken belief that all state involuntary manslaughter statutes are properly assimilated and not preempted by Article 119. To avoid this misunderstanding, the court took the extra precaution of amending the specification by deleting the words "involuntary manslaughter." The court did not consider this act a homicide.

The court also clarified that, despite the significant overlap, the tests under the preemption doctrine and the ACA are distinct. Analyzing these two issues separately assists in their proper application. It is possible that a state offense is properly assimilated under the ACA but precluded by the preemption doctrine[140] and vice-versa.[141]

As beneficial as the opinion is in clarifying this area of the law, the opinion's brief, one-sentence application of the preemption doctrine can be misleading. The court stated that the

134. *Robbins*, 52 M.J. at 163.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.* at 163-64.

139. United States v. Robbins, 48 M.J. 745, 752 (A.F. Ct. Crim. App. 1998).

140. For example, consider the hypothetical of a service member charged with violating a state larceny-type crime that requires only general intent rather than the specific intent required under Article 121. Under the *Lewis* analysis, the ACA assimilates the state crime, because the first question would be answered negatively. The act or omission is not punishable by any enactment of Congress. Article 121, however, would preempt the incorporation of the state crime under Article 134.

141. In the lower court's opinion, Senior Judge Snyder stated that *even if* the ACA did not assimilate the Ohio offense, the preemption doctrine did not preclude a conviction of the misconduct as a service disorder or discredit under clause 1 or 2 of Article 134. *Robbins*, 48 M.J. at 752-53. Similarly, in his concurring opinion, Judge Sullivan stated that he could not distinguish *Lewis*, because Article 119 covered involuntary manslaughter; but he would have sustained the conviction as a service disorder or discredit, without mention of the Ohio statute. *Robbins*, 52 M.J. at 164-65 (Sullivan, J. concurring).

offense was "not 'a residuum of elements of a specific offense,' but instead [was] a separate offense proscribed by the Ohio Revised Code."[142] This statement suggests that the two clauses are mutually exclusive.[143] The fact that an offense is charged as a violation of a specific state criminal statute does not necessarily mean that the offense is not a "residuum of elements" of one of the punitive articles.

The CAAF held that the Ohio offense of unlawfully terminating another's pregnancy was cognizable by a court-martial. Just as importantly, *Robbins* provides guidance to the practitioner in this contentious area of law. The court explicitly stated that classifications of offenses by state legislatures are not dispositive. Counsel should look at the underlying language of the statutes. Also, the court explained how counsel should analyze the preemption doctrine and the ACA separately. Although *Robbins* clarifies the law, the area still demands skillful advocacy by counsel. A court's ruling could depend on how broadly or narrowly the court defines the accused's "act or omission" and the "field" over which Congress has already legislated. The trial counsel should define the accused's act and the preempted field very narrowly. The defense counsel should define the accused's act and the preempted field very broadly. As state legislatures expand their criminal codes and trial counsel increasingly assimilate state crimes and incorporate them under Article 134, practitioners must understand the law and its rationale. Skillful advocacy can make a difference in the application of the analyses.

The Defense of Necessity

The defense of necessity is recognized in the common law. According to the Supreme Court, "the defense of necessity, or choice of evils, traditionally covered the situation where physical forces beyond the actor's control rendered illegal conduct the lesser of [two] evils."[144] The aim of the criminal law is to prevent harm to society.[145] Accordingly, the law ought to encourage, as a matter of public policy, conduct that is aimed at minimizing the overall harm to society.[146] When assessing criminal liability, some commentators focus on dangerousness and culpability, in addition to harm.[147] A person who, in accord with the moral norms of society, pursues higher values at the expense of lesser values is usually neither dangerous nor deserving of punishment.

The common law defense of necessity has several limitations. The accused must have acted with the intention of avoiding the greater harm.[148] The harm done by the accused's chosen course of action must be less than the harm that would have been done if he had chosen to obey the law.[149] If there is an alternative available that will cause less harm than violating the law, then the necessity defense does not apply.[150] If the accused was at fault in creating the dilemma, he may be criminally liable to some degree.[151] Lastly, if the legislature has already weighed the evils, the defense of necessity is "preempted."[152]

If you look for the special defense of necessity in R.C.M. 916, you will not find it. You will, however, find the somewhat similar defense of duress.[153] Traditionally, the courts have distinguished the defenses of duress and necessity by the fact that

142. *Robbins*, 52 M.J. at 163.

143. This language of the opinion is similar to language in a prior Court of Military Appeals opinion that is even more misleading. "The second question posed in *Wright* is likewise answered in the negative. Appellant was not charged with the 'residuum' of another punitive article but, rather, with a violation of a specific penal statute codified as 18 U.S.C. § 793(e)." United States v. McGuinness, 35 M.J. 149, 152 (C.M.A. 1992).

144. United States v. Bailey, 444 U.S. 394, 410 (1980).

145. 1 WAYNE R. LAFAVE & AUSTIN W. SCOTT, SUBSTANTIVE CRIMINAL LAW § 1.2(e), 14 (1986).

146. *Id.* § 5.4, at 629.

147. Arnold H. Loewy, *Culpability, Dangerousness, and Harm: Balancing the Factors on which Our Criminal Law Is Predicated*, 66 N.C. L. REV. 283 (1988).

148. 1 LAFAVE & SCOTT, *supra* note 141, § 5.4(d)(3), at 635.

149. *Id.* § 5.4(d)(4), at 636.

150. *Id.* § 5.4(d)(5), at 638-39.

151. *Id.* § 5.4(d)(6), at 640.

152. *Id.* § 5.4(a), at 629-30.

153. MCM, *supra* note 7, R.C.M. 916(h). This rule provides:

> It is a defense to any offense except killing an innocent person that the accused's participation in the offense was caused by a reasonable apprehension that the accused or another innocent person would be immediately killed or would immediately suffer serious bodily injury if the accused did not commit the act. . . . If the accused has any reasonable opportunity to avoid committing the act without subjecting the accused or another innocent person to the harm threatened, this defense shall not apply.

the situation is caused by another human being for duress, and the situation is caused by natural forces for necessity.[154]

Because R.C.M. 916 does not include necessity, does it mean that the military does not recognize necessity as a defense? No, the CAAF or the military courts may recognize a defense at common law.[155] In two cases this year, the CAAF addressed the issue of whether the defense of necessity exists in the military. Unfortunately, the court did not have to decide the issue, and we are left only with dicta. Furthermore, there appears to be a subtle shift in the CAAF's position from the dictum in the first case to the dictum in the second case. The first case, *United States v. Olinger*,[156] emphasized the dangers of a necessity defense in the military.

Quartermaster Second Class (QM2) Lester E. Olinger IV was scheduled to deploy for five months with his ship. On the day the deployment began, QM2 Olinger failed to return from authorized leave. He missed the movement, remained absent for over five months, and then surrendered to military authorities.[157] He pled guilty to unauthorized absence and missing movement. During his unsworn statement, he stated that his wife previously had an operation, which caused stress to be a risk to her health. A few months before the deployment, she learned that she could not have children. She suffered from depression and took the anti-depressant Prozac. At the time of the unauthorized absence, he "felt that her depression might kill her from the stress if [he] went on the UNITAS deployment."[158] On appeal, he argued that his guilty plea was improvident, because this statement reasonably raised the defense of necessity.[159]

This case raised the issue of whether duress applies only to situations in which the source of the threat is another human being. If duress is so limited, then the case raised the issue of whether military law should recognize the defense of necessity.[160] The CAAF acknowledged that federal and state courts generally recognize necessity, but military law has not yet recognized it. The CAAF noted that this issue addresses "some of the most fundamental principles in the military justice system."[161] It agreed with the lower court's assertion that the ramifications of a necessity defense in the military are drastically different from those in the civilian context. "In civilian life, innocent individuals may be adversely affected by the commission of the illegal act. In the military, however, the consequences may be much greater. Such a decision affects an individual's shipmates, the safety and efficiency of the ship, as well as the effectiveness of the mission."[162] The CAAF also quoted even stronger language from an Army Court opinion. "[R]ejecting the necessity defense goes to the core of discipline within a military organization. In no other segment of our society is it more important to have a single enforceable set of standards."[163]

The court, however, decided the case without resolving the contentious necessity issue. The court saw the ultimate issue as whether there was a substantial basis in law and fact to reject the plea of guilty. It found that, even if either duress or necessity applied to this type of situation in the military, the appellant did not provide enough details to support immediate threat of death or serious bodily harm or the lack of alternative sources of assistance for his wife.[164] Therefore, it would be inappropriate to resolve these weighty questions on the basis of the record before the court. Although only dictum, the opinion indicates a reluctance to recognize the necessity defense in the military.[165]

In his concurring opinion, Judge Sullivan states, in his view, that military law recognizes the defense of necessity.[166] He points out that R.C.M. 916(h) "does not limit the defense to instances where the source of the threat is a third person as opposed to other natural or physical occurrences."[167] Therefore, despite the label of "duress," the rule permits a defense of necessity. Judge Sullivan joined in affirming the conviction,

154. United States v. Bailey, 444 U.S. 394, 409-10 (1980). One commentator has asserted that this is not universally true, and the more salient distinction is that necessity "is a justification and not merely an excuse." ARNOLD H. LOEWY, CRIMINAL LAW: CASES AND MATERIALS 491 (2000). Although this distinction of justification versus excuse may have jurisprudential ramifications, it is not significant at the practical level.

155. United States v. Byrd, 24 M.J. 286 (C.M.A. 1987) (recognizing the special defense of voluntary abandonment, which was not included in the MCM).

156. 50 M.J. 365 (1999).

157. *Id.* at 366.

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.* (quoting United States v. Olinger, 47 M.J. 545 (N.M. Ct. Crim. App. 1997)).

163. *Id.* at 367 (quoting United States v. Banks, 37 M.J. 700, 702 (A.C.M.R. 1993)).

164. *Id.* at 367.

because the evidence in the record was insufficient to trigger the necessity defense after a guilty plea.[168]

After *Olinger*, it appeared that if the CAAF had to decide whether the necessity defense applies in the military, the court probably would refuse to recognize it. The next CAAF opinion that addressed the issue, however, indicated a subtle shift in that position. In dictum in *United States v. Rockwood*,[169] the CAAF indicated that it would consider the necessity defense, under the appropriate circumstances.

Captain (CPT) Rockwood deployed with the 10th Mountain Division for the peaceful entry into Haiti, during Operation Uphold Democracy. He was a counter-intelligence officer. He was concerned that the deplorable conditions at the penitentiary in Port Au Prince violated human rights. He attempted to raise the issue to superiors so that the joint task force (JTF) would inspect the penitentiary, but the command's focus at the time was force protection. He disagreed with the command's priorities. He thought the President's intent and international law required the JTF to intervene. Captain Rockwood decided to conduct the inspection on his own. Instead of going to his appointed place of duty, he went without authorization to inspect the penitentiary.[170]

At his court-martial, CPT Rockwood's defenses included justification,[171] duress, and necessity. At trial, the military judge assessed that the evidence did not raise duress in its traditional sense, but he tailored the duress instruction to the facts of the case. The instruction did not limit the defense to human agency sources.[172] The court-martial found CPT Rockwood guilty of failure to go to his appointed place of duty and conduct unbecoming an officer for his unauthorized trip to the penitentiary, along with other military offenses for later misconduct.[173]

On appeal, one of CPT Rockwood's arguments was that the military judge erred by not giving a necessity instruction. The CAAF found, however, that the military judge's tailored instruction adequately covered the necessity defense, as recognized in civilian criminal law.[174] Therefore, the court found that the court-martial members received an adequate necessity instruction, and the issue of whether such a defense exists in the military was moot.[175] The members rejected the necessity defense. The evidence showed no immediate threat of death or grievous bodily harm to innocent civilians. The court found that, under the circumstances, the members' rejection of the defense was rational.[176] The CAAF affirmed the conviction.[177]

Although the issue was moot, the court did discuss whether military law recognized the defense of necessity. First, the opinion quoted one commentator as saying that necessity has never been recognized in the military, possibly because of a concern that "private moral codes" will override the rule of law.[178] In a footnote, Chief Judge Cox stated:

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165. The reluctance was even more evident in the earlier case of *United States v. Rankins*, 34 M.J. 326 (C.M.A. 1992). "Military courts, likewise, have been reluctant to apply the necessity defense by judicial fiat. As with the case at bar, military courts have instead analyzed such criminal acts under the rubric of the duress defense." In *Rankins*, the appellant alleged that she missed movement because she feared her husband might suffer a heart attack. *Id.* at 327. The court, left open the issue of whether R.C.M. 916(h) is limited to coercion from third party agencies or whether it includes pressure from any physical or natural forces, because the injury that she feared was neither reasonable nor imminent. *Rankins*, 34 M.J. at 329-30. In *Rankins*, two judges opined that the necessity defense does not exist in the military; two judges opined that it does; and one judge reserved judgement. *Olinger*, 50 M.J. at 368 (Sullivan, J. concurring).

166. *Olinger*, 50 M.J. at 367 (Sullivan, J. concurring).

167. *Id.* at 368 (Sullivan, J. concurring).

168. *Id.* at 368-9 (Sullivan, J. concurring) (distinguishing triggering the defense after a guilty plea versus during a contested case; if this had a been a contested case before members, the evidence might have been sufficient to warrant an instruction on the defense).

169. 52 M.J. 98 (1999).

170. *Id.* at 100-01. Later in the opinion, the CAAF notes that a senior military police officer later inspected the penitentiary and found the conditions terrible. He did not, however, report any torture or physical abuse. *Id.* at 109-11.

171. *See* Major Edward J. O'Brien, *The Nuremberg Principles, Command Responsibility, and the Defense of Captain Rockwood*, 149 MIL. L. REV. 275 (1995) (explaining why the justification defense did not apply under the facts of the case).

172. *Rockwood*, 52 M.J. at 113. The standard duress instruction does not limit the source of the threat to human agency. U.S. DEP'T OF ARMY, PAM. 27-9, LEGAL SERVICES: MILITARY JUDGES' BENCHBOOK, ¶ 5-5 (30 Sept. 1996). Likewise, the language of R.C.M. 916(h) does not contain that common law limitation.

173. *Rockwood*, 52 M.J. at 102. The other charges were unlawfully departing a combat support hospital, disrespect, and disobedience after the initial incident. The convening authority disapproved the finding of guilty on the Article 133 charge. *Id.*

174. *Id.* at 114.

175. *Id.*

176. *Id.*

177. *Id.*

> To the extent [the commentator] is referring to situations not involving the flouting of military authority, he surely goes too far. There is, for example, no reason why the [trespassing to save a drowning person] situation would not provide a defense. However, "it was necessary for me to leave my post or disobey your lawful order in order to perform some more important function" could be another matter, one which the instant facts do not require us to resolve.[179]

Also, towards the end of the opinion, Chief Judge Cox commented further on the possibility of a necessity defense in military law. "There may be unusual situations in which an assigned military duty is so mundane, and the threat of death or grievous bodily harm to civilians is so clearly defined and immediate, that consideration might be given to a duress or necessity defense."[180]

For military justice practitioners, the dicta in *Rockwood* suggests that a limited necessity defense, or an extended duress defense, might apply in the military. Defense counsel can refer to this dicta, together with the rationale for the defense in common law, to support its application in the military. Trial counsel, on the other hand, can refer to the strong language in *Olinger* and other cases to support the argument that the unique needs of the military require the military to reject the necessity defense. If recognized in the military, the necessity defense clearly should not permit the second-guessing of military authority. In such a case, the need for military discipline would weigh heavily when the opposing evils are balanced.

New Article 134 Offense: Reckless Endangerment

In 1999, the President added paragraph 100a to part IV of the *MCM*.[181] This paragraph enumerates "reckless endangerment" as an offense under Article 134.[182] As defined by the President, reckless endangerment has four elements: (1) the accused engaged in conduct; (2) the conduct was wrongful and reckless or wanton; (3) the conduct was likely to produce death or grievous bodily harm to another person; and (4) under the circumstances, the conduct was prejudicial to good order and discipline or service-discrediting.[183] The new *MCM* paragraph also provides practitioners with an explanation of the offense and a model specification.[184] The maximum punishment includes a bad-conduct discharge, total forfeitures of all pay and allowances, and confinement for one year.[185]

The addition of reckless endangerment as an enumerated offense under Article 134 assists the government in prosecuting crimes against persons. This offense is unique in that it requires neither specific intent nor consummated harm. The prosecution must prove, however, that the conduct was reckless and likely to produce death or grievous bodily harm. This offense is an effort to deter misconduct before injury or death actually occurs. The offense may apply in different types of cases, such as child neglect and unprotected sex by an HIV-positive service member. In cases involving the operation of vehicles, aircraft, and vessels, however, Article 111 will preempt a charge under Article 134.[186]

ACCA Extends the *Mincey* Rule to Forged-Checks "Mega-Spec"

When dealing with property offenses, the value of property is often important because, besides being an element, it can also be an aggravating factor that enhances the maximum punishment.[187] Trial counsel, therefore, may want to charge several stolen items in one specification and aggregate their values to get a higher maximum punishment. This practice is permissible if the items were taken at substantially the same time and place, which would constitute a single larceny.[188] If the items were not stolen at substantially the same time and place, then the maximum punishment for the specification is the maximum punishment for the greatest offense in the specification.[189]

178. *Id.* at 113.

179. *Id.* at 113 n.17.

180. *Id.* at 114.

181. Exec. Order No. 13,140, 64 Fed. Reg. 55,115, 55,119 (1999).

182. *Id.* The basis of this addition is *United States v. Woods*, 28 M.J. 318 (C.M.A. 1989), in which the CMA held that unprotected sexual intercourse with another service member, while HIV-positive and after being counseled that the virus is deadly and can be transmitted sexually, stated an offense under article 134. Changes to the Analysis Accompanying the Manual for Courts-Martial, United States, 64 Fed. Reg. 55,115, 55,123 (1999).

183. Exec. Order No. 13,140, 64 Fed. Reg. 55,115, 55,119.

184. *Id.*

185. *Id.*

186. *See* MCM, *supra* note 7, pt. IV, ¶ 60c(5)(a) (explaining the preemption doctrine).

187. *See id.* pt. IV, ¶ 46e (providing a significantly greater maximum punishment if stolen property is of a value of more than $100).

A specification should allege only one offense.[190] If a specification alleges two or more offenses, it is duplicitous. The defense may object to a duplicitous specification; the remedy is severance into separate specifications.[191] Trial counsel commonly draft intentionally duplicitous specifications, and the defense often does not object. For example, if the accused allegedly wrote twenty-four bad checks over a two month period, the trial counsel may charge all twenty-four checks in one specification to make the case more manageable. This type of specification is commonly known as a "mega-spec." Typically, the defense counsel does not object because the remedy of severance only increases the number of possible convictions for the accused. If the defense does not object, what is the maximum punishment for a "mega-spec"? In *United States v. Mincey*,[192] the CAAF set forth the rule for bad-check "mega-specs."

Airman Mincey wrote, at different times and places, seventeen bad checks for $100 or less. Ten of the checks were charged in the first specification.[193] During the accused's guilty plea, the military judge calculated the maximum punishment for the first specification by aggregating the value of the checks. Because the aggregate value of the checks was over $100, he calculated its maximum punishment to include a dishonorable discharge and five years confinement.[194] On appeal, the defense argued that the maximum punishment for that specification should have included only a bad-conduct discharge (BCD) and six months confinement.[195] The CAAF reasoned that the *Manual* authorizes punishment "for each *offense*, not for each specification," and in reality the appellant was convicted of seventeen offenses.[196] The maximum punishment for each of the charged bad-check offenses included a BCD and six months confinement. Therefore, the maximum punishment for that specification was a BCD and five years (10 x 6 months) confinement.[197] At the end of its opinion, the CAAF emphasized that its holding was limited to bad-check offenses:

> We now only hold that in bad-check cases, the maximum punishment is calculated by the number and amount of the checks as if they had been charged separately, regardless whether the Government correctly pleads only one offense in each specification or whether the Government joins them in a single specification as they have here.[198]

In *United States v. Dawkins*,[199] the ACCA applied the *Mincey* rule to a forged-check case. Specialist Daryl J. Dawkins forged seven checks in a check-kiting scheme.[200] He pled guilty to forgery and other offenses. All seven forgeries were in one specification, a "mega-spec." During the providency inquiry, the military judge informed the accused that the maximum punishment included thirty-five years of confinement for the forgery specification. The military judge calculated the maximum punishment for the "mega-spec" by multiplying the maximum punishment for forgery (five years) by the number of forgeries in the "mega-spec."[201] On appeal, SPC Dawkins argued that his plea was improvident because the maximum punishment for the forgery specification included only five years.[202]

The ACCA followed the CAAF's "well-reasoned analysis in *Mincey.*"[203] The *MCM*'s maximum punishments are for each

188. *Id.* pt. IV, ¶ 46c(1)(h)(ii).

189. United States v. Rupert, 25 M.J. 531, 532 (A.C.M.R. 1987).

190. MCM, *supra* note 7, R.C.M. 307(c)(4).

191. *Id.* R.C.M. 906(b)(5).

192. 42 M.J. 376 (1995).

193. *Id.* at 377.

194. *Id.* The maximum punishment for a bad check for $100 or less, under Article 123a, includes a bad-conduct discharge and six months confinement. MCM, *supra* note 7, pt. IV, ¶ 49e(1)(a). If the face amount of the check is over $100, however, the maximum punishment includes a dishonorable discharge and five years confinement. *Id.* pt. IV, ¶ 49e(1)(b).

195. *Mincey*, 42 M.J. at 377.

196. *Id.* at 378 (quoting MCM, *supra* note 7, R.C.M. 1003(c)(1)(a)(i)) (emphasis in original).

197. *Id.*

198. *Id.*

199. 51 M.J. 601 (Army Ct. Crim. App. 1999).

200. Specialist Dawkins's friend, PFC Brittenum, had some stolen checks and devised the plan. Specialist Dawkins opened a savings account with $110, deposited two forged checks, cashed five forged checks for a total of $2750, and then withdrew $2400 of the $2410 left in the account. *Id.* at 602-03.

201. *Id.* at 603.

offense, not each specification. With respect to calculating maximum punishment for a "mega-spec," the court found no logical basis on which to distinguish multiple forgeries of checks from multiple bad checks. The ACCA held that the military judge properly applied the *Mincey* rule in calculating the maximum punishment of the forged-check specification.[204]

The trend is to extend the *Mincey* rule. By applying it to check forgery cases, the Army Court joined the Air Force Court, which made a similar extension two years prior.[205] Therefore, in the Air Force and the Army, practitioners should calculate the maximum punishment for a forged-check "mega-spec" as if each of the forged checks had been charged in a separate specification.

ACCA: Conspiracy Requires Meeting of the *Criminal* Minds

Congress prohibited criminal conspiracy in Article 81.[206] There are two elements of conspiracy: (1) agreement with one or more person to commit an offense under the UCMJ, and (2) an overt act by any co-conspirator in furtherance of the conspiracy.[207] There are two recognized purposes for the crime of conspiracy. First, as an anticipatory offense, it punishes persons who have the evil intent to commit an offense and agree to its commission, even if they do not complete the offense nor take a substantial step toward its completion.[208] The other purpose is the inherent, increased danger to society of concerted criminal activity.[209]

Conspiracy provides prosecutors some powerful tools. Substantively, as an inchoate crime, the overt act required is much less than that required for the crime of attempt. Also, a court-martial may convict and punish an accused for both the conspiracy and the consummated offense.[210] Furthermore, co-conspirators are vicariously liable for the foreseeable crimes committed by their co-conspirators in furtherance of the conspiracy.[211] Conspiracy also puts several procedural arrows in the prosecutor's quiver. Statements in furtherance of a conspiracy to co-conspirators are exempted from the hearsay rule.[212] Therefore, the definition of conspiracy carries great significance in criminal law. In *United States v. Valigura*, the ACCA delineated the parameters of the crime of conspiracy. The Army Court overruled one of its prior decisions and held that an "agreement" with an undercover agent is not sufficient for conspiracy.

The agreement is the gravamen of the offense. The agreement is the actus reus. The mens rea, which is the intent to accomplish the substantive offense, is also part of the agreement. Traditionally, the co-conspirators must share in the criminal purpose of the conspiracy. At least one other person must have a culpable mind.[213] This is called the "bilateral" theory of conspiracy. A recent trend, seen in the Model Penal Code and a number of states, is toward a "unilateral" theory of conspiracy, in which the culpability of the other parties to the "agreement" is not relevant.[214] The issue in *Valigura* was whether the military followed the traditional "bilateral" theory or the modern "unilateral" theory.

To understand *Valigura*, a review of two CAAF opinions and one ACCA opinion is necessary. In 1983, the CAAF decided the case of *United States v. Garcia*.[215] A court-martial convicted Garcia of conspiracy to commit larceny and several other offenses. One month later, a different court-martial acquitted

202. *Id.* at 602.

203. *Id.* at 604.

204. *Id.*

205. United States v. Towery, 47 M.J. 515 (A.F. Ct. Crim. App. 1997).

206. "Any person subject to this chapter who conspires with any other person to commit an offense under this chapter shall, if one or more of the conspirators does an act to effect the object of the conspiracy, be punished as a court-martial may direct." UCMJ art. 81 (LEXIS 2000).

207. MCM, *supra* note 7, pt. IV, ¶ 5b.

208. 2 LaFave & Scott, *supra* note 6, § 6.4 at 60.

209. *Id.*

210. MCM, *supra* note 7, pt. IV, ¶ 5c(8).

211. *Id.* pt. IV, ¶ 5c(5).

212. *Id.* Mil. R. Evid. 801(d)(2)(E).

213. 2 LaFave & Scott, *supra* note 6, § 6.5 at 85; Rollin M. Perkins & Ronald N. Boyce, Criminal Law 693 (3d ed. 1982).

214. 2 LaFave & Scott, *supra* note 6, § 6.5 at 85; Perkins & Boyce, *supra* note 213, at 694.

215. 16 M.J. 52 (C.M.A. 1983).

his only co-conspirator of the same conspiracy charge. Under the common law doctrine of "consistency of verdicts," the acquittal of one of two co-conspirators required the acquittal of the other.[216] The CAAF discussed the doctrine's history and rationale, and found that the law does not require such "foolish consistency." The CAAF held that the military does not follow the "consistency of verdicts" doctrine.[217] In its opinion, the CAAF discussed the trend from the "bilateral" to the "unilateral" theory of conspiracy.[218]

In 1989, the ACCA relied on *Garcia* in *United States v. Tuck*.[219] Tuck argued that, because his co-conspirator was insane and incapable to enter into an agreement, his plea of guilty to conspiracy was improvident.[220] The court rejected the argument, because it interpreted *Garcia* as adopting the "unilateral theory" of conspiracy, in which the culpability of the other alleged conspirators is of no consequence.[221] In *Tuck*, the ACCA held that you need two persons, but not two criminals, to conspire.[222]

In 1995, in *United States v. Anzalone*,[223] the CAAF held that an agreement with an undercover agent to commit an offense could constitute the offense of attempted conspiracy.[224] In the opinion, Judge Crawford stated: "In *Garcia* we adopted the American Law Institute's Model Penal Code 'Unilateral Approach' to conspiracy."[225] That pronouncement was only dictum, and a majority of the judges took issue with it. Judge Wiss stated that it was wrong, because a meeting of the minds is required for conspiracy.[226] Judge Gierke, joined by Judge Cox, indicated that he would not invalidate the "bilateral theory" of conspiracy, especially when the issue had not yet been briefed and argued before the court.[227]

In *Valigura*, an undercover agent approached and arranged to purchase marijuana from Private (PV2) Valigura, and they exchanged money for drugs.[228] A court-martial convicted PV2 Valigura of, inter alia, conspiracy to distribute marijuana.[229] The ACCA, however, reversed the conspiracy conviction and affirmed the LIO of attempted conspiracy.[230]

The ACCA acknowledged that, in *Tuck*, it misinterpreted the CAAF opinion in *Garcia* as meaning more than it did.[231] In *Garcia*, the CMA rejected the "consistency of verdicts" doctrine, but it did not adopt the "unilateral theory" of conspiracy. Also, the concurring opinions in *Anzalone* demonstrate that the issue of whether the military still follows the "bilateral theory" of conspiracy is, at most, an open question.[232]

The ACCA explained why the *Tuck* decision was improper judicial activism. "The power to define criminal offenses is entirely legislative."[233] As mentioned above, the gravamen of conspiracy is the agreement. Congress based Article 81 on a federal statute[234] that was, and still is, based on the "bilateral theory" of conspiracy.[235] Also, at the time Congress drafted

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216. 2 LaFave & Scott, *supra* note 6, § 6.5(g)(1) at 112; Perkins & Boyce, *supra* note 213, at 693-94.

217. *Garcia*, 16 M.J. at 57.

218. *Id.* at 54-55.

219. 28 M.J. 520 (A.C.M.R. 1989).

220. *Id.* at 521.

221. *Id.*

222. *Id.*

223. 43 M.J. 322 (1995).

224. *Id.* at 323.

225. *Id.* at 325.

226. *Id.* at 328 (Wiss, J. concurring).

227. *Id.* at 326 (Gierke, J. concurring).

228. United States v. Valigura, 50 M.J. 844, 845 (Army Ct. Crim. App. 1999).

229. *Id.*

230. *Id.* at 849.

231. *Id.* at 848.

232. *Id.* at 847.

233. *Id.*

Article 81, the "unilateral theory" had not yet been formulated, so Congress must have intended that conspiracy was a crime only under the bilateral theory.[236]

The ACCA supported its decision by looking at the purposes of the crime of conspiracy. The anticipatory purpose is satisfied by other offenses, such as solicitation or attempted conspiracy.[237] Also, concerted criminal activity is not a concern in this situation, "because when there is only a solo conspirator, there is perforce no 'group' criminal activity."[238] In this type of scenario, instead of greater danger of success and difficulty of detection, the involvement of an undercover agent makes success unlikely and detection very easy.[239]

The ACCA closed its majority opinion with the now routine preaching against the proliferation of conspiracy charges. This "darling of prosecutors" poses a serious threat to the fairness of the military justice system. The court pointed out that a "unilateral theory" of conspiracy will only encourage overzealous prosecution, at the sacrifice of justice and proportionality.[240]

The lesson for military justice practitioners is clear. Conspiracy requires a "meeting of the criminal minds." Although *Valigura* is binding precedent only in the Army, its impact is wider. In *United States v. Jiles*,[241] the Navy court cited *Valigura* with approval. "We concur with our sister court's holding, adopt it as our own, and conclude that the evidence in this case was legally insufficient to find that the appellant entered into an agreement with another to commit an offense and thereby engaged in a conspiracy."[242] The CAAF heard oral arguments in the *Valigura* case on 16 December 1999, and the court should be issuing its decision this year. The ACCA opinion is well-written and logical. It is very likely that the CAAF will reach the same conclusion.

Conclusion

Practitioners in the Army have the two new cases of *Dawkins* and *Valigura* to apply at courts-martial. All military justice practitioners have the new Article 134 offense of reckless endangerment. Also, military justice practitioners have the latest pronouncements from the oracle at CAAF to ponder. There is a watershed of guidance on manslaughter, both substantive definitions and procedural standards. Judge advocates are left pondering, however, whether the defense of necessity exists in the military and, if it does, to what extent.

234. 18 U.S.C. § 371 (1948).

235. *Valigura*, 50 M.J. at 847-48.

236. *Id.* at 848.

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.* at 848-49.

241. 51 M.J. 583 (N.M. Ct. Crim. App. 1999) (holding that accused could not be convicted of conspiracy to distribute marijuana when his sole co-conspirator was a government informant).

242. *Id.* at 586.

Relations Among the Ranks: Observations of and Comparisons Among the Service Policies and Fraternization Case Law, 1999

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Introduction

> The information gathered by the Task Force . . . revealed . . . that the Services defined, regulated and responded to relationships between service members differently. Such differences in treatment are antithetical to good order and discipline, and are corrosive to morale, *particularly so as we move towards an increasingly joint environment.*[1]

It is the spring of 2000 and, on a fine Balkan morning at Camp Cohen, you, as the task force legal advisor, are hailed into the commander's office to discuss certain "situations." Task Force Deep Purple is truly joint: it is comprised of members of all the services and is commanded by a senior Army officer. The commander greets you with a gruff "Dobro dan"[2] and explains the problems he now faces.

The first involves two second lieutenants (one Army and one Air Force) who have apparently developed potentially problematic personal relationships with an Air Force master sergeant (E-7). The Army officer has also begun to date a senior noncommissioned (NCO) from one of the troop contributing nations. The last problem involves a Navy chief petty officer (E-7) who has also developed a potentially problematic personal relationship with an Air Force sergeant (E-5). With the exception of the foreign soldier, all involved parties are assigned to the headquarters element of this joint task force and all perform duties within the camp.

Separate informal investigations have established the following facts concerning each of the relationships. The Army officer has on occasion, but no more than three times, loaned small amounts of money to the Air Force NCO to help him assist his family with an emergency at home. Each time, the loan is non-interest bearing and the understanding is the enlisted man will pay it back as soon as he is able. No one knew about this debtor-creditor relationship until the officer commented to her supervisor that she was "helping out a friend." Her supervisor informed her that she was out of compliance with Army policy and that she needed to refrain from future acts of borrowing and lending with enlisted personnel. On hearing this, the Air Force lieutenant, believing himself not to be subject to such a strict rule, declared "well then I'll be the one to lend the money to the master sergeant until he gets through these hard times."

The Army lieutenant has also begun a romantic relationship with a foreign enlisted soldier deployed as a member of the multinational brigade that is part of the task force. Their relationship began pursuant to the officer's duties as a liaison officer and interpreter. On occasion, the pair has been seen together at various locations in the camp and they are often seen together at official functions. In every instance, they are discreet and observe military customs, but they also appear to be on very friendly terms.

The chief petty officer has also found love in this desperate land and is dating the Air Force sergeant. Much like the officer-enlisted couple above, this pair is discreet and has kept the relationship fairly under cover. No one knows of any sexual liaisons and it appears that the two NCOs limit the relationship to spending as much time together as they can outside of their sleeping areas. The two are assigned to the same company but work in separate sections, thus they have no direct senior-subordinate supervisory relationship. When on-duty and in public places they display all the requisite courtesies and respect inherent to superior-subordinate relations. However, it is common knowledge that the couple is "an item."

The task force commander is feverishly preparing to chair a major trilateral meeting to be attended by the various ethnic faction leaders and has limited time to discuss resolving the situations. He asks you for advice and wonders if he's dealing simultaneously with unprofessional, unduly familiar, prohibited relationships, and fraternization. Should he, must he, can he punish the respective parties and why? How can he prevent such relationships from occurring again? Oh and by the way, he has heard that the Army lieutenant and the foreign NCO are to be married next week while on mid-tour leave—does that have any bearing on this issue?

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1. Memorandum, Secretary of Defense, to Service Secretaries, Chairman of the Joint Chiefs of Staff, Under Secretaries of Defense, subject: Good Order and Discipline (29 July 98) [hereinafter SECDEF Memo] (emphasis added).

2. Serbo-Croatian for "Good Day."

Background

On 2 March 1999, the Army changed its policy with regard to relationships among the ranks.[3] This change, effected by a Department of the Army message,[4] has since been incorporated into the revised Army regulation governing command policy.[5] The revised policy reflects a response to a mandate issued by Secretary of Defense (SECDEF) William Cohen on 29 July 1998.[6] That mandate, prompted by findings of a task force that had spent the previous year examining, inter alia, breaches of good order and discipline and the responses thereto by the different services, required the services to establish policies that prohibit certain relationships among the ranks and, specifically, between officer and enlisted members.[7]

One of the compelling reasons behind the SECDEF's mandate is the perceived need "to eliminate as many differences in disciplinary standards as possible and to adopt uniform, clear and readily understandable policies."[8] It is apparent that the SECDEF perceives that adopting and enforcing uniform policies is critically necessary to successful contemporary military operations, and the men and women who serve today are owed nothing less than an even playing field concerning permissible relations among the ranks.[9]

During a press conference, conducted on 29 July 1998, Under Secretary of Defense for Personnel and Readiness, the Honorable Rudy de Leon,[10] fielded several questions regarding the former Army policy and reiterated the SECDEF's jointness concerns.[11] During this press briefing, the perception emerged that the Army's policy would require the most revision and that changes with regard to relationships among the ranks would involve a requisite "transition question."[12] Perhaps in response to the issue of a transition period the Army policy tempered its policy with a one-year grace period for certain previously authorized relationships.[13]

From the inception of the Army's new policy, observers have mused on its comparison and contrast to its former self and to other service policies. During the grace period com-

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3. *See generally* Major Michael J. Hargis, *The Password is "Common Sense": The Army's New Policy on Senior-Subordinate Relationships*, ARMY LAW., Mar. 3, 1999, at 12 (providing an excellent background discussion and analysis of the changed policy). In addition, that the changed policy has been in effect now for nearly one year should not surprise anyone in DA as a vigorous training regimen has also been in effect during this same period of time.

4. Message, 020804Z Mar 99, Headquarters, Dep't of Army, DAPE-HR-L, subject: Revised Policy on Relationships Between Soldiers of Different Ranks (2 Mar. 1999).

5. U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY, paras. 4-14 through 4-16 (15 July 1999) [hereinafter AR 600-20].

6. SECDEF Memo, *supra* note 1.

7. *Id*.

8. *Id*.

9. *Id*. "In order to support our national objective, the military Services task organize, deploy and fight predominantly as a unified force. In today's military environment, we owe it to our forces to eliminate as many differences in disciplinary standards as possible and to adopt uniform, clear and readily understandable policies." The services were given thirty days to draft implementing plans and to provide the SECDEF their respective training materials within sixty days.

10. Mr. de Leon chaired the task force convened by the SECDEF to examine the issue of resolution of breaches of good order and discipline.

11. The following exchange occurred:

> Question: Did you find any problems with the way the Army policy has operated? Did you find a greater instance of punishment being meted out or lesser punishment or more cases that had to be brought for adjudication on the issue of fraternization? I mean, was there anything wrong with the way the Army policy, aside from the way it didn't mesh with the other Services, was operating?
>
> Under Secretary de Leon: I think the key issue is really the joint environment. There were pluses and minuses of the policy as it existed. But I think in the end, we really are a joint operation around the world. And it was essentially the fact that Services, members of different Services are out there side by side and you really can't have [sic] different set, [sic] of rules governing their conduct.

Remarks to the Press regarding the Secretary of Defense's Policy on Good Order and Discipline (29 July 1998) *available at* <www.defenselink.mil> [hereinafter DOD News Briefing] (providing a transcript of the entire news briefing).

12. *Id*. at transcript 6. In response to a question concerning the impact that changed policies would have on the National Guard and Reserve personnel, DOD General Counsel Judith Miller responded "the other Services have had this policy apply in the Guard and Reserve. And at least according to the testimony that we heard in the task force on good order and discipline, that worked pretty well for them. So I think it's mostly a transition question." *Id*.

13. *See, e.g.*, AR 600-20, *supra* note 5, para. 4-14c(1). "Business relationships which exist at the time this policy becomes effective, and that were authorized under previously existing rules and regulations, are exempt until March 1, 2000." Certainly, it can also be said that the grace period eases the transition from the former effects-based policy to the new status-based, bright-line policy. "Grace period" is defined as "a period of time after a payment becomes due, as of a loan or life insurance premium, before one is subject to penalties or late charges or before the loan or policy is canceled." RANDOM HOUSE WEBSTER'S UNABRIDGED DICTIONARY (2d ed. 1998).

manders, soldiers, judge advocates, and many others have analyzed the new changes to ascertain whether the over-arching goal of consistency has been achieved. This article reveals that, while all the current service policies afford the respective commanders the ability to arrive at a conclusion that is ultimately consistent with other policies, there remain minor, yet important, differences that dilute the final conclusion of consistency. The article generally compares the various service policies, discusses the hypothetical situation faced by a deployed task force commander, offers suggested approaches to resolving situations that cross service lines, and concludes with a discussion of select cases involving fraternization reported the previous year.

Different Strokes for Different Folks? The Services' Policies Compared

The Current ("New") Army Policy[14]

The new policy (as distinguished from the former one) is punitive and begins with a list of prohibited relationships among the ranks.[15] In accordance with paragraph 4-14b of *Army Regulation (AR) 600-20*, relationships among the ranks (specific rank is immaterial) are prohibited if they exhibit any of five adverse effects.[16] The regulation then lists those relationships between officer and enlisted personnel that are prohibited.[17] These status-based prohibitions are "bright-line" but also include several exceptions. Prohibited business relationships are off-limits if they can be described as "on-going," yet several exceptions allow for limited relationships and for one-time transactions.[18] The borrowing or lending of money is prohibited and the regulation lists no exigent circumstances or excuses for a debtor-creditor relationship, of any degree, to exist between officers and enlisted.[19] Commercial solicitation and any other financial relationship are similarly disallowed.[20]

In the realm of personal relationships, "dating, shared living accommodations other than those directed by operational requirements, and intimate or sexual relationships between officers and enlisted personnel" are prohibited.[21] Again, several exceptions exist that serve to keep a relationship within policy compliance.[22] Officers and enlisted members are further prohibited from gambling with each other, without exception under the new policy.[23]

The "grace period" previously mentioned provides a twelve-month transition period for officers and enlisted to bring their relationships (business or personal) into compliance with the policy.[24] While this grace period is not found within any of the other services' policies it is apparent that the Army policy, inasmuch as it establishes a new bright-line approach to officer-enlisted relationships, needed such a probationary time period to ease the burdens on those personnel involved in prohibited relationships.[25] During this period of adjustment some discussion has focused on whether one year's time is sufficient to allow for problem-free transition. Empirical data, while limited, suggests that the grace period is long enough.[26]

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14. Nottwithstanding previous published discussion and analysis of the new Army policy (*see generally* Hargis, *supra* note 3), as well as training sessions and other instruction that Department of the Army (DA) personnel are to have received by now, it is important to describe the current Army policy herein. Informal input solicited from the field as well as from students attending The Judge Advocate General's School, U.S. Army (TJAGSA) Continuing Legal Education and other courses, consistently reveals that not all DA personnel have received official training (formal or informal) on the policy. When polled, students attending recent senior officers legal orientation courses report that nearly 60% have not previously received instruction on the policy. Students in other courses also report an approximate 30% that have not received the instruction. By attending TJAGSA short courses, these personnel in fact receive the required instruction, but the input from attendees suggests that perhaps the troops in the field are not getting the message. Especially now that the one-year transition period has expired, it is critical that commanders obtain an idea as to how many of their troops and other personnel have been instructed on the policy. One suggestion is to include in Fiscal Year 2000 third quarter training calendars a block of instruction on the policy with special emphasis on the end of the transition period. Consistent with past "chain teaching" methodologies, commanders (down to the company level) must instruct their subordinate officers and senior noncommissioned officers (down to the first sergeant level) must so instruct their unit personnel. Judge advocates understandably play a critical role in this instruction.

15. AR 600-20, *supra* note 5, para. 4-16. "[V]iolations of paragraphs 4-14b, 4-14c, and 4-15 may be punished under Article 92, UCMJ, as a violation of a lawful general regulation."

16. The five adverse effects under the regulation are if the relationships (1) compromise, or appear to compromise, the integrity of supervisory authority or the chain of command; (2) cause actual or perceived partiality or unfairness; (3) involve, or appear to involve, the improper use of rank or position for personal gain; (4) are, or are perceived to be, exploitative or coercive in nature; (5) create an actual or clearly predictable adverse impact on discipline, authority, morale, or the ability of the command to accomplish its mission. AR 600-20, *supra* note 5, para. 4-16b. These effects-based prohibitions include two additional prohibited relationships that were not listed under the former policy—relationships covered by numbers (1) and (4).

17. AR 600-20, *supra* note 5, para. 4-14c(1).

18. These include landlord-tenant relationships and the one-time sale of an automobile or a house.

19. AR 600-20, *supra* note 5, para. 4-14c(1).

20. *Id.* Army National Guard and Reserve personnel are not subject to the provisions of this prohibition provided their business or financial relationship exists "due to their civilian occupation or employment." *Id.*

21. *Id.* para. 4-14c(2).

Two additional types of relationships are strictly prohibited by the new Army policy. Now, "any relationship between permanent party personnel and initial entry trainees not required by the training mission" is off-limits.[27] Additionally, any relationship "not required by the recruiting mission" is prohibited as between members of the U.S. Army Recruiting Command and "potential prospects, applicants, members of the delayed entry program (DEP), or members of the delayed training program (DTP)."[28] The recruiter-recruit and trainer-trainee prohibited relationships, the officer-enlisted relationships covered by AR 600-20, paragraph 4-14c, and the prohibited relationships regardless of rank found in AR 600-20, paragraph 4-14b show that the new Army policy has merged a previous effects-based approach with the SECDEF's status-based mandate to create a hybrid designed to be more consistent with the other service policies.

The United States Air Force Policy[29]

Prior to the SECDEF mandate, the Air Force policy already included a status-based approach with respect to officer-enlisted relationships and prohibited many of those relationships now seen in the new Army policy.[30] The new Air Force policy continues to prohibit many officer-enlisted relationships and continues to analyze all ranks relationships under the rubric of "unprofessional relationships."[31] The policy, as distinguished from its Army counterpart, is punitive in application only to officers.[32] Enlisted personnel who violate the policy are punished through a variety of other means and, without having received some other order or additional duty from a superior, cannot be punished solely under the policy.[33]

Air Reserve Component personnel (ARC), like their Army counterparts with respect to the Army policy, are subject to the provisions of the Air Force policy. Paragraph 3.8 advises Air

22. *Id.* paras. 4-14c(2)(A)-(C). These include marriages that predate 2 March 1999 or are entered into prior to 1 March 2000; personal relationships outside of marriage that predate 2 March 1999, but are brought into compliance before 1 March 2000; and those relationships that move into noncompliance by virtue of a change in status of one of the parties (e.g., through commissioning, the *marital* relationship formerly between two enlisted soldiers now involves an officer and an enlisted). Note that this latter exception would not insulate a couple that is merely dating. After the change in status of one of the parties, that couple would have to take some affirmative step to bring the relationship into compliance. They could not continue a dating relationship and would also have to observe the other rules concerning prohibited officer-enlisted relationships. On the issue of officer-enlisted marriage, the policy is silent with regard to marriages that occur after 1 March 2000. A commander who learns of such a marriage must ascertain if the requisite predicate relationship before the marriage violated the policy. Additional exceptions are listed to cover situations involving relationships within the Guard and Reserves and relationships between active duty soldiers and members of the Guard and Reserves. If the relationship "primarily exists due to civilian acquaintanceships" (relationships within the Guard or Reserves) or "primarily exists due to civilian association and the reserve component member is not on active duty" (relationships between active and reserve component members), then it is not out of compliance with the policy. AR 600-20, *supra* note 5, para. 4-14c(2)(d), (e). Note that in both situations, the exception does not apply if the reserve component member is on active duty (defined by the regulation as "other than annual training" *id.* para 4-14c(2)(d) and (e)).

23. *Id.* para. 4-14c(3).

24. *See, e.g., id.* paras. 4-14c(1), (2)(B).

25. *See* DOD News Briefing, *supra* note 11. The following question was posed to Undersecretary de Leon:

> Question: "If I'm a young person in the military and I'm dating another person in the military, do I need to find a chaplain and rush to the altar? I mean, how are the troops supposed to take this?
>
> Secretary de Leon: "I think we'll go through a transition period with respect to the Army but our goal was to make the policy clear and fair."

Id. at transcript 8.

26. The grace period has witnessed very little activity with regard to requests for exceptions to the end date of 1 March 2000. To date, there have been four requests for exceptions to policy, each of which involves active duty soldiers seeking exceptions because of scheduled wedding dates that will occur beyond the grace period's termination. Electronic Interview with Chaplain (MAJ) B. Duncan Baugh, Command Policy Officer (Feb. 10, 2000). Chaplain Baugh is also the current point of contact for the proponent of the policy (Office of the Deputy Chief of Staff, Personnel (ODCSPER)). Exceptions to policy should be analyzed by judge advocates but ultimately can be forwarded through personnel channels to Chaplain Baugh.

27. AR 600-20, *supra* note 5, para. 4-15a. The prohibition extends beyond the actual situs of the relationship between the trainer and the trainee: "[T]his prohibition applies to permanent party personnel without regard to the installation of assignment of the permanent party member or the trainee." *Id.*

28. *Id.* para. 4-15b.

29. U.S. DEP'T OF AIR FORCE, SECRETARY OF THE AIR FORCE INSTR. 36-2909 (1 May 1999). [hereinafter AFI, 1 May 1999].

30. *See generally* U.S. DEP'T OF AIR FORCE, SECRETARY OF THE AIR FORCE INSTR. 36-2909, para. 5 (1 May 1996).

31. Unprofessional relationships are "those interpersonal relationships that erode good order, discipline, respect for authority, unit cohesion and, ultimately, mission accomplishment." *See* AFI, 1 May 1999, *supra* note 29, preamble.

32. *Id.* Even then, only the prohibitions listed in paragraph 5.1 subject the officer to possible punitive sanctions. The remaining provisions of the policy are not punitive with regard either to officers or enlisted personnel.

Force commanders and supervisors to "tailor the application and enforcement of the principles [of the policy] to appropriately address unique situations that may arise from part time service."[34] However, unlike the Army's policy, the reach of the Air Force policy goes a bit further. Whereas Army Guard and Reserve personnel are only subject to the policy while on active duty or full-time National Guard duty, ARC personnel are subject to the AF policy during periods of active duty, full-time National Guard duty, *and* during inactive duty training.[35] Army personnel feel the reach of the policy, at least with respect to personal relationships outside of marriage, only during periods of active duty or full-time National Guard duty.[366] Periods of duty described as "annual training" are not covered by the Army policy. Thus, in the case of personal relationships, the Army reserve or guard soldier performing weekend or annual training is exempt from coverage but his Air Force reserve component peer, also on inactive duty training, is not.[37]

The Air Force policy delineates the same prohibitions regarding officer-enlisted relationships as does the Army policy but provides further explanation regarding marriages and, at least in one instance, an exception not found in the Army counterpart. "With reasonable accommodation for married members and members related by blood or marriage,"[38] officers may not gamble with enlisted members, engage in sexual relations or date enlisted members, share living accommodations with enlisted members (except when reasonably required by military operations), or engage in (on a personal basis) business enterprises with or solicit or make solicited sales to enlisted members ("except as permitted by the Joint Ethics Regulation").[39] With regard to borrowing or lending money, officers may not enter into such a relationship with enlisted members and may not "otherwise become indebted to enlisted members."[40] An exception, however, is available that distinguishes this policy from the Army's stricter prohibition. Air Force officers may borrow from or lend money to enlisted members "to meet exigent circumstances."[41] Provided the amount is small and that the debtor-creditor relationship is infrequent and that the loan is of a non interest-bearing nature then this activity is permitted.[42]

Like its Army counterpart, the Air Force policy holds all military members accountable for their conduct but notes that the senior member "bears primary responsibility for maintaining the professionalism of [a] relationship."[43] On the issue of what effect marriage has on policy compliance, the Air Force policy, unlike the Army's, specifically notes that subsequent marriage "does not preclude appropriate command action based

33. *See id.* para. 4. "Relationship of Unprofessional Conduct to Other Provisions of the UCMJ," observes that military members who have been ordered to cease an unprofessional relationship or to refrain from certain conduct may be punished for violating the order. Thus, Articles 90 and 91 are potential sources of resolution for enlisted participation in unprofessional relationships. UCMJ arts. 90, 91 (LEXIS 2000). Additionally, paragraph 3.5.4 affords commands providing recruiting, training and education functions with the ability to "consistent with this instruction, publish supplemental directives, to include punitive provisions." AFI, 1 May 1999, *supra* note 29, para. 3.5.4. Thus, enlisted Air Force personnel, out of compliance with the Air Force prohibitions against personal relationships between recruiter-recruit, trainer-trainee, or faculty-student, cannot be punished under the policy itself. While only officers may be punished for a violation of Article 92, UCMJ (note: officers and enlisted may both be punished under the Army policy), enlisted personnel could be issued "no-contact orders" and could also be punished under a variety of other UCMJ provisions, to include fraternization or conduct prejudicial to good order and discipline, Article 134. Of course, a host of administrative sanctions are also available for resolution.

34. *See* AFI, 1 May 1999, *supra* note 29, para. 3.8.

35. *Id*.

36. AR 600-20, *supra* note 5, para. 4-14c(2)(d).

37. *Id*. The prohibitions concerning officer-enlisted relationships does not apply to "[p]ersonal relationships outside of marriage between members of the National Guard or Army Reserve, when the relationship primarily exists due to civilian acquaintanceships, unless the individuals are on active duty (*other than annual training*) or full-time National Guard duty (*other than annual training*)." AR 600-20, *supra* note 5, para. 4-14c(2)(d). (emphasis added). An additional twist, not covered in the Air Force policy, concerns personal relationships outside of marriage between active component personnel and reserve component personnel. An Army officer could have such a relationship with a Guard or Reserve enlisted soldier provided that relationship "primarily exists due to civilian association and the Reserve component member is not on active duty (other than annual training) or full-time National Guard duty (other than annual training). *Id*. para. 4-14c(2)(e). Essentially, the relationship could exist at all times except when the enlisted soldier was ordered onto active duty. The Army officer could also have such a relationship with an Air Force reserve component airman but that relationship could not exist during the airman's weekend drill, annual training, full-time National Guard duty, and active duty. Recall that the Army policy, like the Air Force policy, applies across service lines. *Id*. para. 4-14a; AFI, 1 May 1999, *supra* note 29, para. 3.1.

38. *See* AFI, 1 May 1999, *supra* note 29, para. 5.1. No such language is found within the new Army policy. Presumably, married Army personnel and Army personnel linked through blood or marital ties are equally subject to the specific prohibitions regarding officer-enlisted relationships and must therefore exercise caution, prudence, and discretion while on-duty and performing military duties together. The Air Force policy expands on this theme even further: "[r]egardless of how the officer-enlisted marriage came to be, married members are expected to respect all customs and courtesies observed by members of different grades when they are on duty, in uniform in public, or at official social functions." *Id.* para. 5.1.3.1.

39. *See id.* paras. 5.1.1, 5.1.3 – 5.1.5.

40. *Id.* para. 5.1.2.

41. *Id*. No additional clarification or explanation is provided to define "exigent circumstances."

42. *Id*.

on the prior fraternization."[44] Finally, the policy outlines those actions that may be taken to resolve instances of noncompliance and notes that the commander's response "should normally be the least severe necessary to terminate the unprofessional aspects of the relationship."[45]

The United States Navy and United States Marine Corps Policies

Both the Navy and the Marine Corps policies include the overarching prohibition against personal relationships between officers and enlisted members that are "unduly familiar and that do not respect differences in rank and grade."[46] This approach is not new but was part of the former policies employed by these services.[47] The current policies, like the Army one, are punitive and apply equally to officers and enlisted members.[48] Likewise, the reach of the policies extends across service lines,[49] is gender-neutral,[50] and includes analysis of prohibited adverse effects of all ranks relationships.[51] The policies also include specific prohibitions against unduly familiar relationships between certain noncommissioned officers and junior personnel assigned to the same command.[52]

The specifically prohibited officer-enlisted relationships basically mirror those of the Army policy and are per se unduly familiar.[53] However, no exceptions (such as those found in the Army policy) are included and prohibited business relationships are termed "private business partnerships."[54] Subsequent marriage does not insulate the officer-enlisted couple from sanctions for an impermissible predicate relationship,[55] and service members (regardless of rank) who are married to other service members (or have some family tie) must "maintain the requisite respect and decorum attending the official relationship while either is on duty or in uniform in public."[56] Finally, unduly familiar personal relationships in the trainer-trainee and recruiter-recruit arena are prohibited.[57]

The United States Coast Guard Policy[58]

Coast Guard personnel may participate in "acceptable" relationships that do not jeopardize the members' impartiality, undermine inherent respect for authority, result in improper use of the relationship for gain or favor, or violate the UCMJ.[599] Officers and enlisted may not have "romantic relationships outside of marriage"[60] but may be married, provided the marriage occurred before the officer received the commission.[61] Other

43. *Id.* para. 6.

44. *Id.* para. 5.1.3.1.

45. *Id.* para. 8.

46. CHIEF OF NAVAL OPERATIONS INSTR. 5370.2B, para. 3. (27 May 1999) [hereinafter OPNAVINST 5370.2B]; *see also* MARINE CORPS MANUAL, para. 1100.4 (C3, 13 May 1996) [hereinafter MARCORMAN].

47. *See* CHIEF OF NAVAL OPERATIONS INSTR. 5370.2A (14 Mar. 1994).

48. OPNAVINST 5370.2B, *supra* note 46, para. 3.

49. *Id*. para. 6b.

50. *Id*. para. 4c.

51. *Id*. paras. 5c, 6c.

52. *Id*. para. 5b ("[P]ersonal relationships between chief petty officers (E-7 to E-9) and junior personnel (E-1 to E-6), who are assigned to the same command, that are unduly familiar and that do not respect differences in grade or rank are prohibited."); MARCORMAN, *supra* note 46, para. 1100.5 ("[T]he provisions of paragraphs 1100.3 and 1100.4 above apply to the relationship of noncommissioned officers with their subordinates and apply specifically to noncommissioned officers who may be exercising supervisory authority or leadership roles over junior marines.").

53. OPNAVINST 5370.2B, *supra* note 46, para. 6b.

54. *Id*.

55. *Id*. para. 6e.

56. *Id*. para. 6f.

57. *Id*. para. 5b. The prohibition extends only to those unduly relationships "that do not respect differences in grade, rank, or the staff/student relationship." *Id.*

58. As an element of the Department of Transportation, the Coast Guard was not impacted by the SECDEF's mandate.

59. U.S. COAST GUARD PERSONNEL MANUAL, ch 8.H.2.c (C26, 3 Feb. 1997).

60. *Id*. ch 8.H.4.c.

unacceptable romantic relationships include those between members in a superior-subordinate relationship, members assigned to the same shore unit comprised of less than sixty members, members assigned to the same cutter, those where the relationship is between a chief petty officer (in the grades of E-7 to E-9) and junior enlisted personnel (E-4 and below), or those that "disrupt the effective conduct of daily business."[62] Regardless of rank or position, Coast Guard personnel may not engage in "sexually intimate behavior" on board any Coast Guard vessel or in any Coast Guard controlled work place, and instructors at training commands may not engage in personal or romantic relationships with students.[63] These two types of relationships, as well as romantic relationships outside of marriage between officers and enlisted, are punished as violations of a lawful general regulation.[64] However, unacceptable relationships, as described above, are normally resolved in an administrative fashion.[65]

On the Cusp of Jointness: Cross-Service Relationships in a Deployed Setting

Analysis

Back in the legal office of Task Force Deep Purple you have researched and compared the respective policies. Under the Army policy regarding relationships amongst the ranks, the Army and Air Force lieutenants improperly loaned money to the Air Force master sergeant, regardless of the laudable reasons for the loan.[66] If the Army policy applied to the joint task force, and the commander had UCMJ authority over all task force members, then the commander could take punitive action against both officers and the master sergeant.[67] However, under the mitigated facts, the commander could consider the reasons for the loans, and take lesser administrative action (for example, counseling, reprimand) that would comport with the needs of good order and discipline.[68]

If the Air Force policy applied, the above results would be different. First, the Air Force policy recognizes an exception for borrower-lender relationships amongst officers and enlisted when the basis for the loan is exigency.[69] On our facts, the emergency nature of the loans (also considering that the loans are small, infrequent, and non-interest bearing) likely constitutes exigency. Therefore, there would not be a violation of the Air Force policy. Furthermore, if exigency was not found, then only the officers could be given UCMJ punishment; unlike the Army policy where punitive action may be taken against all soldiers, regardless of rank, the Air Force policy is only punitive with respect to the officer member of a prohibited relationship. Finally, the Air Force policy also requires that the commander's response be the least severe necessary to stop the unprofessional relationship;[70] based on the facts in the scenario, this would likely preclude UCMJ action and result in resolution by administrative action.[71]

The dilemma for the Task Force commander is whether, by virtue of their assignment to the task force, the Air Force personnel are subject to the stricter provisions of the Army policy. If they are not, then they escape punishment because their conduct passes muster under Air Force rules. Meanwhile, the Army officer, whose conduct is not in compliance with the Army rules, is subject to a variety of sanctions. This scenario highlights a discrepancy between the two policies that creates the differences in treatment that the SECDEF finds to be "antithetical to good order and discipline" in a joint environment.[72]

The lieutenant's dating relationship with the foreign enlisted soldier also presents a challenging issue. The SECDEF's man-

61. *Id*. ch. 8.H.4.d. Note also that "misconduct, including fraternization, is neither excused not mitigated by subsequent marriage." *Id.*

62. *Id*. ch. 8.H.2.f.

63. *Id*. ch. 8.H.2.g.

64. *Id*.

65. *Id*. ch. 8.H.2.d.3.d. Other unacceptable relationships and conduct include: supervisors and subordinates in private business together; supervisors and subordinates in a romantic relationship; supervisors and subordinates gambling together; supervisors and subordinates giving or receiving gifts on an other that infrequent basis; changing duty rosters or work schedules to benefit parties to the relationship when others in the command do not receive the same benefit. *Id.* ch 8.H.3.b. and c.

66. AR 600-20, *supra* note 5, para. 4-14c(1).

67. *Id.* para. 4-16.

68. *Id.* para. 4-14f.

69. AFI, 1 May 1999, *supra* note 29, para. 5.1.2.

70. *Id.* para. 5.1

71. *Id.* para. 8.

72. SECDEF Memo, *supra* note 1.

date, meant to address relationships among DOD personnel, prohibits officer-enlisted dating "regardless of their Service."[73] The Army policy conforms to this provision and applies to relationships "between Army personnel and personnel of other military services."[74] The problem lies in an expansive interpretation of these words, which would support the conclusion that the lieutenant is not in compliance with the policy and could be ordered to end the relationship with her foreign friend.[75] But as to punishment, in spite of the conclusion that this relationship is in the strictly prohibited category of the new policy and a violation of Article 92 of the UCMJ, the apparent absence of adverse effects would seem to mitigate against anything more than a mild administrative sanction. Recall that the couple is discreet and both soldiers appear to observe all the courtesies and respect required among officers and enlisted. Therefore, the scenario seems to present, if anything at all, a "victimless" violation of the code.

Additional support for this international application of the reach of the policies comes from the central focus of each service's policy: the strict prohibition of certain relationships between officer and enlisted personnel. Although none of the policies address the international aspect presented by this hypothetical situation, each includes as a foundation that romantic relationships outside of marriage between officers and enlisted service members is prohibited. The core issue lies in the status of the parties as military members and not in their respective citizenship.[76] The Army lieutenant is involved in an intimate relationship with an enlisted soldier. Such a relationship is prohibited by Army policy.

That the couple intends to marry next week whilst away on mid-tour leave should be irrelevant to the analysis of the relationship's compliance with policy and should, instead, be relevant only as to punishment. Recall that the Army policy is silent as to the effect of officer-enlisted marriages that occur after 1 March 2000.[77] The other service policies note that marriage does not excuse or justify the predicate relationship that was itself out of compliance with policy. The only option is for the Task Force commander to conclude that the relationship is one strictly prohibited by policy and the intent of the two lovers to marry has no bearing on that conclusion.

The chief petty officer (an E-7) and the Air Force sergeant appear not to be out of compliance with the Army policy. No adverse effects have been shown that would subject the pair to sanctions for violations of *AR 600-20*, paragraph 4-14b. There is no other strictly prohibited category of which they run afoul. An Army couple, similarly situated, would not be out of compliance with Army policy. However, recall that the Navy policy specifically prohibits unduly familiar relationships between chief petty officers and junior personnel "who are assigned to the same command."[78] If the relationship is unduly familiar and does not respect differences in rank or grade then it is out of compliance.

The first question for the Task Force commander under the Navy policy is whether this couple is "assigned to the same command." If so, and if the determination is made that the open display of the relationship involves actual, or apparent, lack of respect for differences in rank or grade, then the relationship is problematic. Both enlisted parties would be subject to administrative and punitive sanctions. However, under an Air Force policy application, neither party would be subject to anything more severe than an administrative sanction. The Task Force commander can punish the chief petty officer for a violation of Article 92 for noncompliance with the Navy policy. He cannot, however, similarly punish the Air Force sergeant because she has *not* violated the Air Force policy and, even if she had, her noncompliance would be addressed via administrative measures.

Resolution

The scenarios show members of different services deployed together in a joint task force and involved in personal relationships that yield different analyses and resolutions under the various service policies. The minor inconsistencies within the reach and application of the various policies leave a task force commander with a familiar problem: how to address activities

73. *Id.*

74. AR 600-20, *supra* note 5, para. 4-14a. The Air Force policy notes the need to avoid unprofessional relationships "between members of different services, particularly in joint service operations" (AFI, 1 May 1999, *supra* note 29, para. 3.1) and notes that the custom against fraternization "extends to all officer/enlisted relationships." *Id.* para. 5.0. The Navy and Marine Corps policies sanction certain officer-enlisted relationships "regardless of Service." OPNAVINST 5370.2B, *supra* note 46, para. 6b. Certainly in the context of American forces' joint operations the presumption is that the policies are limited in application *only to American personnel*.

75. Query: could a fraternizing relationship between an American military officer and a foreign enlisted soldier support a specification under Article 134?

76. Electronic interview with Chaplain (MAJ) B. Duncan Baugh, Command Policy Officer, ODCSPER, February 22, 2000. According to Chaplain Baugh, the language "intimate or sexual relations between officers and enlisted personnel" (AR 600-20, para 4-4c(2)) is considered by the proponent of the Army policy to include all intimate relationships among officer/enlisted personnel even though the policy does not specifically identify foreign military personnel.

77. Recall also that only those relationships that were in existence prior to 2 March 1999 were afforded the protection of the one-year grace period. Such relationships had to be brought into compliance or ended as of 1 March 2000.

78. OPNAVINST 5370.2B, *supra* note 46, para. 5b.

to be prohibited during the tenure of the task force and how to apply the prohibitions consistently to all members assigned to the task force.

A tried and true approach lies within the publication of a general order. Past practices on various deployments met with success with regard to such orders. Many examples included general prohibitions against activities that, while the troops are in garrison, are addressed in disparate ways. The commander of the task force involved in the scenarios of this article might wish to consider such a general order and also consider expanding the reach of the paragraph entitled "prohibited activities." That paragraph could include either a synopsis of the strictly prohibited relationships of the Army policy, as well as the generally prohibited all ranks relationships, or it could include, by reference, the entire policy. All members assigned to the task force would be subject to the general order and their violations of that order could be addressed in a more consistent manner. Within this general order, the commander would also prohibit certain relations among American and foreign personnel.

Even if the general order route is unpalatable to the commander or its application to all Department of Defense members problematic, many offenses under the UCMJ remain as viable options to address relations among the ranks. As is illustrated by the following cases, decided the previous year, fraternization remains as one specific example.

Fraternization or Conduct Unbecoming: Charge One or the Other but not Both?

In *United States v. Sanchez*,[79] the Air Force Court of Criminal Appeals examined several issues springing from an officer's court-martial and conviction for fraternization and conduct unbecoming an officer and gentleman. The court, relying on *United States v. Harwood*,[80] set aside and dismissed two specifications from two separate charges—one alleging fraternization and the other conduct unbecoming an officer—wherein the misconduct was charged to a greater degree of specificity in other companion specifications.

Lieutenant Colonel Sanchez, a married man, developed personal, unprofessional relationships with two female senior airmen while stationed at McConnell Air Base. In the first relationship, the couple danced and drank together at the combined ranks club and at other clubs, visited each other's quarters, kissed, and had sexual intercourse.[81] The relationship was well known throughout the community. The couple was seen so much at the combined ranks club that the base senior enlisted advisor was compelled to warn the accused that he was "wearing out his welcome" at that club.[82]

In his other problematic relationship, the accused danced with his airman paramour at a unit party, kissed her passionately in the presence of others at the party, and danced with her on other occasions at the combined ranks club and at other clubs.[83] The relationship also involved the couple sitting together in the accused's van while parked outside the subordinate's dormitory and in the view of several witnesses.[84]

The government charged the accused with two specifications each of fraternization and conduct unbecoming an officer with respect to each of the airmen. Regarding the relationship with the first airman the specifications alleged the same conduct. As to the second airman, the fraternization specification contained more allegations of specific misconduct that did the specification alleging conduct unbecoming an officer. The Air Force court found this charging scheme to be violative of the rule in *Harwood* and dismissed the fraternization specification regarding the first airman as well as the specification alleging conduct unbecoming an officer regarding the second airman.[85]

When Compared to Smoking Dope, Off-duty Fraternization is Down in the Weeds

In *United States v. Hawes*,[86] the Court of Appeals for the Armed Forces (CAAF) affirmed the Air Force court's sentence reassessment that yielded no relief to the appellant. The military judge convicted Lieutenant (LT) Hawes for fraternizing with several airmen while off-duty. He allegedly allowed the enlisted men to address him by his first name on several occasions.[87] Lieutenant Hawes was a close friend with one of

79. 50 M.J. 506 (A.F. Ct. Crim. App. 1998).

80. 46 M.J. 26 (1997).

81. *Sanchez*, 50 M.J at 508.

82. *Id*. at 512.

83. *Id*. at 508.

84. *Id*.

85. *Id*. at 513. Further, the court affirmed the sentence.

86. 51 M.J. 258 (1999).

87. *Id*. at 259.

the men, and their friendship extended as far back as kindergarten.[88] On appeal, the Air Force court set aside the fraternization conviction, being "not convinced . . . that appellant's conduct amounted to fraternization."[89] The court was convinced, however, as to LT Hawes's conviction for smoking marijuana with his childhood friend, and affirmed the sentence.[90]

The CAAF affirmed, finding no abuse of discretion in the lower court's sentence reassessment. In his dissent, Judge Sullivan disagreed, believing that it was "highly unlikely" that LT Hawes would have received the same sentence at a rehearing that focused only on the drug use offense.[91] In Judge Sullivan's view, because LT Hawes contested the fraternization charge and pled guilty to drug use, the ultimate findings that include only the pled offense "clearly puts him in a more favorable posture before the sentencing court."[92] Additionally, that both offenses carried the same maximum punishment provides more support for the contention that it is highly unlikely LT Hawes got "the exact same sentence if he had been tried for one felony crime rather than two."[93] In Judge Sullivan's view, the offense of off-duty fraternization cannot be regarded as so trivial that dismissal of such charge renders no benefit to the accused.

What Do You Mean, "I order you to stay away from your girlfriend?"

In *United States v. Mann*,[94] the Air Force court examined an unprofessional relationship, charged as fraternization, between a male major and a female master sergeant that included "dining alone with her, traveling alone with her, spending off-duty time with her, exercising together, and frequently speaking on the phone."[95] The pair's military duties required them to work occasionally in close proximity and Mann's appeal argued, inter alia, that because the members excepted out the allegations involving sex and back rubs that the remaining evidence was insufficient to show he had treated the master sergeant on terms of military equality.[96] Mindful that "a sexual relationship is not a prerequisite for conviction of fraternization,"[97] the Air Force court disagreed and held the members' finding to be legally and factually sufficient.[98]

At trial and on appeal, Mann also challenged the legality of an order, given to him by his mission support commander not to contact the master sergeant, as an unlawful one that amounted to unlawful command influence and that restricted his constitutional right to confront witnesses.[99] The commander issued this order, which did not restrict Mann's attorney from contacting the master sergeant, because she "felt it was appropriate."[100] The military judge ruled that the order furthered military needs and did not otherwise prejudice Mann and the Air Force court agreed.[101] The order, designed to stop any additional impropriety between the two service members, "served a legitimate military purpose, thus maintaining good order and discipline within the military community."[102]

88. *Id*.

89. *Id*.

90. *Id*. "The fraternization offense was relatively trivial in comparison to appellant's drug use with an airman." *Id.* (citing United States v. Dawes, No. 98-0199, unpub. op. at 4 (A.F. Ct. Crim. App. Oct. 24, 1997) *available in* 1997 CCA LEXIS 522, at *8).

91. 51 M.J. at 261 (citing United States v. Davis, 48 M.J. 494, 496 (1998) (Sullivan, J., dissenting); United States v. Sales, 22 M.J. 305 (CMA 1986); United States v. Jones, 39 M.J. 315, 317 (CMA 1994) ("[R]eassessment appropriate where 'the accused's sentence would have been at least of a certain magnitude.'").

92. *Id*.

93. *Id*.

94. 50 M.J. 689 (A.F. Ct. Crim. App. 1999).

95. *Id*. at 692. The members found MAJ Mann guilty of the charge by excepting out language alleging that he had engaged in sexual intercourse with and had received back rubs from the master sergeant. Both Mann and the master sergeant were married to other Air Force personnel during this time.

96. *Id*. at 696. Mann's argument contended factual and legal insufficiency "because there is 'no clear line between what conduct is or is not considered professional and appropriate with respect to officers and enlisted personnel who are required to work as a team or in a mentoring relationship.'" *Id.* at 692.

97. *Id*. at 696 (citing United States v. McCreight, 43 M.J. 483 (1996); United States v. Nunes, 39 M.J. 889 (A.F.C.M.R. 1994)).

98. *Id*. The information before the members was sufficient to show that "appellant's conduct with MSgt SDP negatively affected good order and discipline and compromised the appellant's authority as an officer." *Id.*

99. *Id*. at 698.

100. *Id.* The order compelled Mann to "cease and refrain from any and all contact of any nature" with the MSG, included language rendering it a punitive order, and also mentioned that Mann's counsel could have unrestricted access to the witness. *Id*. at 700.

101. *Id*. at 701.

"But I Don't Wanna Redeploy, I'm Having too Much Fun!"

In *United States v. Rogers*,[103] the Air Force court examined a specification, charged under Article 133, UCMJ, that alleged an unprofessional relationship "of inappropriate familiarity" between a squadron commander and a subordinate officer.[104] The appellant contended that such specification failed to state an offense inasmuch as it failed to allege a violation of a custom of the service and failed to specify those acts alleged to have amounted to "inappropriate familiarity."[105] The court disagreed and found that proof of a custom or of a regulation prohibiting the type of conduct committed by the appellant is not required by Article 133 and that, in the final analysis, "[I]t is for the members to determine, under all the circumstances of the case, whether the accused's conduct fell below the acceptable level" of conduct expected of officers.[106]

While deployed to Italy with his squadron, LTC Rogers, the squadron commander, developed an unprofessional relationship with a female lieutenant also in his squadron. Over a period of nearly a month, the pair spent, what several other officers in the squadron believed, "an inordinate amount of time together."[107] The appellant inappropriately pursued the very intoxicated lieutenant at a squadron Thanksgiving party, changed his weekend travel plans so that he could be "in the mountains with a beautiful woman,"[108] traveled back and forth between the squadron and his hotel with the subordinate officer, worked out at the gym with her, and ate with her at local restaurants.[109] At the end of the deployment, the appellant informed another officer that Mrs. Rogers had planned a "romantic rendezvous" in Hawaii with her husband but despite missing his family appellant did not want to go because "he was having too much fun."[110]

At the time of appellant's misconduct, the Air Force defined "unprofessional relationships" pursuant to its former senior-subordinate relationships policy, one that was not punitive but that alerted Air Force personnel to the possibility of punitive sanctions for noncompliance.[111] Air Force authorities did not, therefore, have the option of charging an Article 92 offense and instead looked to Article 133 for resolution of appellant's case. The Air Force court noted that the specification did not fail to state an offense, that the appellant had adequate notice of the offense against which he had to defend, and that the government neither was required to prove a violation of a custom of the Air Force nor to prove the existence of a regulation prohibiting the misconduct. The court concluded that appellant's role in the relationship at issue in fact "fell below the standards established for Air Force officers."[112]

Conclusion

Improper relationships among the ranks may now be analyzed under policies that uniformly, if by varying degrees, arrive at conclusions that are consistent among the services. There are minor but important distinctions among the respective policies that judge advocates, especially those practicing in joint environments, must understand and apply. At least with respect to officer personnel in all services, the policies now provide a potential sanction under Article 92, UCMJ, for noncompliance. Yet there also remain several other viable alternatives that provide additional options when the situation does not fit neatly in a given policy analysis or, in the case involving personnel from different services, requires a cross-policy comparison. With increasing jointness, practitioners of military law are well advised to know the ground rules of all the various service policies that reach relations among the ranks.

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102. *Id.*

103. 50 M.J. 805 (A.F. Ct. Crim. App. 1999).

104. *Id.* at 806.

105. *Id.*

106. *Id*. at 812.

107. *Id*. at 811. This is the Air Force court's recitation of those facts it believed rose to the level of legal sufficiency required to affirm the findings.

108. *Id*. at 812.

109. *Id*. at 811.

110. *Id*. at 812.

111. *Id*. at 808. That policy relied on Air Force Instruction 36-2909, *Fraternization and Professional Relationships* (20 Feb. 95), wherein unprofessional relationships were defined as "[p]ersonal relationships [regardless of rank or status] which result in inappropriate familiarity or create the appearance of favoritism, preferential treatment, or impropriety." *Rogers*, 50 M.J. at 809.

112. *Rogers*, 50 M.J. at 812.

Annual Review of Developments in Instructions–1999[1]

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Introduction

This article reviews and covers cases decided in fiscal year 1999.[2] The intended audience is the trial practitioner and anyone with an interest in jury instructions. Counsel are reminded, however, that the primary resource for drafting instructions remains the *Military Judges Benchbook (Benchbook)*.[3]

Instructions on Offenses

How Many Lesser-Included Offenses?

The Court of Appeals for the Armed Forces (CAAF) decided several cases this year where the issue was not the accuracy of the judge's instructions but the exclusion of an instruction. *United States v. Wells*[4] was one such case. Wells was charged with premeditated murder, assault, and communicating a threat[5] in an incident arising out of an argument with his estranged wife and her boyfriend. A brief recitation of the facts is necessary to understand the instructional issues in the case.

At trial, evidence was presented that the accused and his wife's boyfriend (Mr. Powell) argued in the parking lot of the wife's apartment after the accused had taken his wife's keys. Mr. Powell followed the accused to his car and fired a forty-five caliber pistol into the air as the accused drove away. The accused went to his apartment, secured his own gun, a thirty-eight caliber pistol, and called a friend to accompany him back to the wife's apartment.

In the parking lot, they encountered Mr. Powell who approached the passenger side of the car, where the accused was seated. The accused had his gun loaded, with the safety off and the hammer cocked.[6] He held the gun out of sight. Mr. Powell and the accused again argued. Witnesses testified that Mr. Powell backed away from the car and was making hand motions at chest and shoulder level for emphasis. The accused testified that he saw Mr. Powell reach for a gun in the waistband of his trousers and was afraid Powell would use the gun again. The accused got out of the car and shot Powell three times, killing him.[7] Other witnesses testified that after hearing gunshots, they saw Mr. Powell struggling with a pistol as if to clear the weapon. A forty-five caliber pistol was found near the victim's body with a shell jammed in it.

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1. This article is one in a series of annual articles reviewing instructional issues. The authors gratefully acknowledge the assistance of Captain Kenneth Chason in editing this article. Captain Chason is a reservist serving as legal liaison officer with the 150th Legal Support Organization (Military Judge). The 150th LSO is a newly created unit to which all USAR military judges are expected to be assigned.

2. *See, e.g.*, Lieutenant Colonel Stephen R. Henley & Lieutenant Colonel Donna M. Wright, *Annual Review of Developments in Instructions–1998*, ARMY LAW., Mar. 1998, at 1.

3. U.S. DEP'T OF ARMY, PAM. 27-9, LEGAL SERVICES: MILITARY JUDGES' BENCHBOOK (30 Sept. 1996) (C1, 30 Jan. 1998; C2 15 Oct. 1999) [hereinafter BENCHBOOK].

4. 52 M.J. 126 (1999).

5. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. IV, ¶¶ 43a, 54a, 110 (1998) [hereinafter MCM].

6. *Wells*, 52 M.J. at 128.

7. *Id*. Mr. Powell was shot in the left arm, neck, and chest. *Id*.

The judge instructed the members on premeditated murder, unpremeditated murder, self-defense, and mutual combat. He did not instruct on voluntary manslaughter, adequate provocation, heat of passion and ability to premeditate.[8] The defense did not object to any of the judge's instructions nor did it request any others.

The members found the accused guilty of premeditated murder. On appeal, the accused argued that the judge erred by failing, sua sponte, to give an instruction on voluntary manslaughter as a lesser-included offense.[9] The Navy-Marine Corps Court of Criminal Appeals agreed but found it to be harmless error.[10] The court found that the members rejection of self-defense suggested that voluntary manslaughter would have likewise been rejected.[11]

The CAAF ruled otherwise.[12] Judge Sullivan, writing for the majority, first pointed out that, under federal law, an instruction on a lesser-included offense does not require a request by the defense.[13] Further, military law provides that an instruction on a lesser-included offense must be given sua sponte if there is "some evidence which reasonably places the lesser-included offense in issue."[14] Judge Sullivan agreed with the lower court that the facts of the case raised the issues of heat of passion and adequate provocation based on the earlier firing of a gun by Mr. Powell, the relatively short length of time between the two confrontations, and the accused's belief that Powell still had the gun and would use it.[15]

Judge Sullivan then addressed the lower court's finding of harmless error. First, he noted that the unpremeditated murder instruction has different proof requirements than the voluntary manslaughter instruction; thus, its inclusion did not adequately inform the members of the effect of heat of passion and adequate provocation.[16] Next, to the extent that the lower court found little direct evidence of heat of passion, Judge Sullivan held that an appellate court "does not normally evaluate credibility of evidence" to determine harmless error.[17] Judge Sullivan also criticized the lower court's conclusion that the finding of premeditation and rejection of self-defense "logically precluded" findings of heat of passion and adequate provocation, pointing out the members were not told about "cool-minded reflection" which would have allowed them to understand this issue.[18] The case was reversed.

Judge Crawford wrote a dissenting opinion stating that the defense waived the issue by not requesting the instruction. She further noted that the members' rejected the defense of self-defense, which was based on an instruction that Judge Crawford characterized as more favorable than a lesser-included offense instruction on voluntary manslaughter.[19]

How Many Lesser-Included Offenses?–Part Two

In another case involving the absence of instructions on lesser-included offenses, the CAAF reached a different result. *United States v. Griffin*[20] resulted from a barracks assault in which the accused had a knife in his hand when his squad leader

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8. *Id*.

9. *Id*. at 129.

10. *Id*. at 127. The lower court did so on several grounds. First, it noted that that the members rejected the lesser-included offense of unpremeditated murder, a similar charge to voluntary manslaughter, so the court reasoned that the members would have probably rejected voluntary manslaughter as well. Further, the Navy court pointed out that there was little evidence of heat of passion and provocation. *Id.* at 131.

11. *Id.* at 130.

12. *Id*. at 131.

13. *Id*. at 129 (citing 2 CHARLES ALAN WRIGHT, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL § 498 (2d ed. 1982)).

14. *Id*. (citing United States v. Staten, 6 M.J. 275, 277 (C.M.A. 1979); MCM, *supra* note 5, R.C.M. 920(e)(2) and discussion).

15. *Id*. at 130. The dissent pointed out that there was actually a thirty-minute span of time between the encounters, which Judge Crawford used to support the trial judge's decision not to give the provocation instruction. *See id.* at 130 n.14 (Crawford, J., dissenting).

16. *Id*. at 130-31.

17. *Id*. at 131 (citing Stevenson v. United States, 162 U.S. 313 (1896) (finding that the credibility of evidence is for jury to decide and therefore, jury should have been instructed on manslaughter in murder case where shooting occurred after victim shot at accused and the two had threatened each other short time earlier).

18. *Id. Compare* BENCHBOOK, *supra* note 3, para. 3-43-1 (pertaining to premeditated murder) and para. 5-2-1 (pertaining to self-defense and making no reference to "cool reflection") *with* BENCHBOOK, *supra* note 3, para. 3-43-2 n.2 (discussing voluntary manslaughter as lesser-included offense of murder and stating, in part, that "passion means a degree of anger, rage, pain, or fear which prevents cool reflection.").

19. *Wells*, 52 M.J. at 132-35 (Crawford, J., dissenting).

20. 50 M.J. 480 (1999). Judge Effron authored the unanimous opinion.

(Specialist (SPC) Lane) entered the accused's room to discuss a debt owed to another soldier. The two soldiers argued and then traded blows. After the fight, SPC Lane realized he had been stabbed in the arm. The accused was charged with assault in which grievous bodily harm is intentionally inflicted.[21]

During the trial, the accused admitted that he was holding the knife but said he must have accidentally stabbed Lane during the fight. The accused denied intending to stab anyone. During a discussion on instructions, the defense requested that the members be instructed on the lesser-included offenses of simple assault and assault consummated by a battery.[22] The judge declined, stating that the evidence did not raise those offenses. She did instruct the panel on the lesser-included offense of assault with a dangerous weapon.[23] The accused was convicted of assault with a dangerous weapon.

On appeal, the CAAF determined that the critical issue in the case, whether the accused intended to stab the other soldier, did not distinguish assault with a dangerous weapon from a battery because neither offense requires any intent to harm.[24] The court pointed out that when a weapon is used in an assault, the "weapon" element of the offense of assault with a dangerous weapon is satisfied, regardless of the accused's intent.[25] Under these facts, where there was no dispute that the accused "knowingly assaulted the victim while knowingly holding" the knife, an instruction on the lesser-included offense of battery was not required.[26]

A Mixed Plea and Lesser-Included Offenses

United States v. Smith[27] discusses instructions in a mixed plea case where the accused pled guilty to indecent acts with his seven-year-old stepdaughter and not guilty to rape and sodomy of the same child. The case was ultimately decided on waiver grounds but is important in emphasizing the need for all parties to be clear and unambiguous when discussing proposed instructions.

After providency in *Smith*, the judge and the defense counsel agreed that the judge would instruct the members that the elements of the offense to which the accused had pled guilty could be used to establish common elements of the other charged offenses (rape and sodomy).[28] Later, during an Article 39(a)[29] session on instructions, the judge discussed the issue more fully. She said that she planned to instruct "on Charge III and how it relates—the accused's guilty plea and how it relates to Charges I and II."[30] She also said that she would instruct on the lesser-included offenses of carnal knowledge and attempted sodomy. The judge specifically said that although indecent acts would normally be a lesser-included offense of both rape and sodomy, it was not in this case because the indecent acts charge the accused had already pled to would then be multiplicious with such a lesser-included offense finding. The defense counsel indicated his general agreement with the proposed instructions by saying: "That's not exactly what I wanted, but it's close." The members convicted the accused of rape and attempted sodomy.[31]

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21. *See* MCM, *supra* note 5, pt. IV, ¶ 54b(4)(b). The elements of this offense are: "[T]hat the accused assaulted a certain person; that grievous bodily harm was thereby inflicted upon such person; that the grievous bodily harm was done with unlawful force or violence; and that the accused, at the time, had the specific intent to inflict grievous bodily harm." *Id.*

22. *See* MCM, *supra* note 5, pt. IV., ¶¶ 54b(1), 54b(2).

23. *See id*. ¶ 54b(4)(a). The elements of this offense are

> that the accused . . . did bodily harm to a certain person; that the accused did so with a certain weapon, means, or force; that the . . . bodily harm was done with unlawful force or violence; and that the weapon, means or force was used in a manner likely to produce death or grievous bodily harm.

Id. The members were also instructed on the defenses of accident and self-defense. *Griffin*, 50 M.J. at 481.

24. *Griffin*, 50 M.J. at 482.

25. *Id*.

26. *Id.*

27. 50 M.J. 451 (1999).

28. *Id*. at 453-54. *See* United States v. Ramelb, 44 M.J. 625 (Army Ct. Crim. App. 1996) (holding that when accused pleads to lesser-included offense, members should only be advised of common elements to greater charged offense, not what accused actually said during providency).

29. UCMJ art. 39(a) (LEXIS 2000).

30. *Smith*, 50 M.J. at 454.

31. *Id*. at 452.

On appeal to the CAAF, the appellant claimed that the instructions were wrong because additional lesser-included offenses should have been given under rape and sodomy and the instruction on how the guilty plea to indecent acts could be used was incorrect.[32] The majority opinion, authored by Judge Crawford, addressed waiver and stated that there must be some "affirmative action" by the defense to show waiver, not just failure to object.[33] The majority found that the counsel's comments reflected his conscious choice to accept the judge's proposed instructions on any other lesser-included offenses.[34] As to the judge's instruction on how the accused's plea to indecent acts could be used as proof of the contested charges, defense counsel likewise accepted this statement on the law and its consistency with his trial strategy, which was that the accused admitted what he had actually done.[35]

After discussing waiver, the court went on to explain that waiver will not be found if there is plain error in the instructions. The court concluded that the evidence in the case was overwhelming. In doing so, it pointed out that the members rejected the accused's theory that he only committed certain acts, that interviewers suggested things to the stepdaughter, and that she was confused about parts of the anatomy. Thus, there was no plain error.[36]

As mentioned above, the case illustrates the importance for counsel to state their positions on proposed instructions clearly and unambiguously. If counsel do not agree with the judge, they should propose the exact language they desire. Most judges will be quite willing to read the instruction during the Article 39(a) session exactly as it will be read to the members. But if not, counsel may always object after the instructions are given, ideally before the members close for deliberations. What counsel cannot do is to sit back and accept the instructions and count on appellate courts to save the day for them by reading their minds.

Ignorance is Bliss

Rather than the absence of instructions on lesser-included offenses, the next two cases involve the accuracy of instructions on an element of the charged offense. In *United States v. Brown*,[37] the defense challenged the judge's instruction at trial and on appeal on "deliberate avoidance" in connection with the accused's alleged use of amphetamines. The deliberate avoidance instruction is based on the theory that a defendant cannot avoid culpability for his crimes by intentionally avoiding knowledge of a fact necessary for a crime.[38]

In *Brown*, the accused attended a party hosted by a person he had never met before. He had been told ahead of time that some of those at the party used drugs. Before leaving the party he asked the host for some "No-Doz" so he could stay awake for his drive back to base. The host provided him with a bottle labeled "No-Doz," gave the accused two pills out of the bottle and said they would wake him up.[39] The accused testified that he took the pills, which made him feel "peppy" and that he could not sleep that morning when he returned to base. Four days later he tested positive for amphetamines/methamphetamines during a unit urinalysis.[40] Evidence was presented at trial that a single dose of amphetamines taken four days before a urinalysis did not support the level of concentration found in the accused's urine.[41]

Judge Sullivan's majority opinion started by observing that the deliberate avoidance instruction should only be given if warranted by the evidence.[42] He then pointed out that the accused did not know that the host of the party was a drug user, only that some attendees might be, that he did not see any drugs consumed that evening, and that no drugs were discussed at the party. Judge Sullivan concluded that the evidence did not warrant the deliberate avoidance instruction.[43]

Judge Sullivan, however, then went on to discuss the effect of the error. First, he noted that the real danger of such an instruction is if it allows the members to convict on the basis of

32. *Id*.

33. *Id*. at 455-56 (citing United States v. Strachan, 35 M.J. 362, 364 (C.M.A. 1992); United States v. Munday, 9 C.M.R. 130, 132 (1953)).

34. *Id*. at 456.

35. *Id.*

36. *Id*. at 457. Judge Gierke dissented, contending that the defense counsel's comments were ambiguous at best and did not reflect a calculated course of action. Further, Judge Gierke disagreed with the majority's characterization of the evidence as overwhelming. Finally, he pointed out the possibility that the members convicted the accused of multiple offenses for the same acts. *Id*. at 458 (Gierke, J., dissenting).

37. 50 M.J. 262 (1999).

38. *Id.* at 265 (citing United States v. Adeniji, 31 F.3d 58, 62 (2d Cir. 1994); 1 E. Devitt et al., Federal Jury Practice and Instruction § 17.09, at 670 (4th ed. 1992)).

39. *Id*. at 263.

40. *Id.* at 264.

41. *Id.*

negligence.[44] In this case, the judge had specifically instructed the members that the accused's negligence, foolishness, or even stupidity was not sufficient to establish his knowledge of the substance he consumed.[45] Judge Sullivan relied on this language to hold that the inclusion of the deliberate avoidance instruction did not prejudice the accused.[46]

Two other opinions were filed in the case. Judge Cox concurred in the result but opined that the judge properly gave the instruction because there was evidence to suggest that the accused took one pill at the party and took the other one days later, shortly before the urinalysis. Such a scenario could have permitted the members to conclude that the accused's failure to explore the drug further after its initial effect was "willful, deliberate and reckless."[47] Judge Crawford also concurred in the result but took the position that one can avoid knowledge even "negligently." In support of her position she cited the American Law Institute Model Penal Code.[48]

Wrongful: We Know it When We See it

In *United States v. Glover*,[49] the judge failed to define the term "wrongful" in a charge of wrongful use of an inhalant under Article 134.[50] In addressing this omission, Judge Effron's majority opinion first noted that had the judge not mentioned "wrongfulness" at all, the instruction would have been fatal because wrongfulness is an element of the offense.[51] Here, however, the judge told the members that the accused's use must have been wrongful and the failure to define wrongful further was not a "clear or obvious error."

Judge Effron pointed out that no model instruction exists for this offense, a violation of the general article under Article 134.[52] He rejected the accused's reliance on the definition for wrongfulness under Article 112a because the inhalant charged here was not a controlled substance. Judge Effron further noted that the *Benchbook* instruction for another offense that requires wrongfulness does not further define the term.[53] Judge Effron also noted that during the sentencing proceedings, the accused distinguished his use of an inhalant from that of a controlled substance and was subject to a lower maximum punishment than that for drug use. Finally, in the absence of any precedent requiring a more detailed instruction on wrongfulness, Judge Effron found that the instructions were clear in light of the issues and the evidence in the case.[54]

Born Alive

In *United States v. Nelson*,[55] the Navy-Marine Corps Court reviewed an instruction on whether the alleged victim, a newborn infant, had been "born alive." The accused was a sailor who kept her pregnancy hidden from her shipmates. After returning to her ship one night, she delivered a full-term baby girl. She heard the baby whimper and then cut the umbilical

42. *Id*. at 265.

43. *Id.* at 266.

44. *Id*. at 267.

45. *Id.*

46. *Id.* Judge Sullivan also relied on the expert testimony that the urinalysis level four days later was inconsistent with accused's version of events.

47. *Id.* at 269 (Cox, C.J., dissenting in part and concurring in result).

48. *Id.* at 269-70 (Crawford, J., concurring). "When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist." *Id.* (quoting MODEL PENAL CODE AND COMMENTARIES, § 2.02(7) (1985)).

49. 50 M.J. 476 (1999).

50. The judge instructed the members that the elements of the offense were: "Staff Sergeant Glover did a certain act; that is, he inhaled—he wrongfully inhaled chlorodifluoromethane or some hazardous substance; and that under the circumstances his conduct was to the prejudice of good order and discipline in the Army, or was of a nature to bring discredit upon the Army." *Id.* at 477-78.

51. *Id.* at 478 (citing MCM, *supra* note 5, R.C.M. 920(e)(1); United States v. Mance, 26 M.J. 244, 255 (C.M.A. 1988) (holding that if an instruction entirely omits an element of the charged offense, it is not harmless error)).

52. *See* BENCHBOOK, *supra* note 3, para. 3-60-2A (Disorders and Neglects to the Prejudice of Good Order and Discipline or of a Nature to Bring Discredit Upon the Armed Forces—Offense Not listed in the MCM (Article 134, Clauses 1 and 2.).

53. *Id.* (citing BENCHBOOK, *supra* note 3, para. 3-76-1 (Drunkenness-Incapacitation for Performance of Duties Through Prior Indulgence in Intoxicating Liquors or Any Drug)).

54. *Id*. Judge Sullivan observed that "wrongfulness" was surplus to the charge.

55. 52 M.J. 516 (N.M. Ct. Crim. App. 1999).

cord. She then cleaned up around the area, put some sheets in a plastic garbage bag and placed the baby inside the bag, poking some holes in the bag. She arrived at a civilian hospital twelve hours later and the baby was pronounced dead on arrival. The accused was convicted of involuntary manslaughter and false official statement to naval criminal investigators.[56]

The first issue on appeal was the factual and legal sufficiency of the involuntary manslaughter finding. The appellant argued that the child was not born alive and so the conviction should be thrown out.[57] The court first took an exhaustive look at the definitions for a "human being" and being "born alive." The court held that the proper standard is whether the infant has been fully expelled from the mother and has the ability to exist independent from the mother's circulatory system. Whether or not a child takes its full breath is not controlling.[58] The appellant also complained of the judge's instruction to the members that if the child was capable of breathing on her own, she should be considered born alive.[59] The Navy court also rejected this challenge, concluding that the instruction reflected the proper legal standard as discussed earlier.[60]

This case contributes to the growing body of law in which the accused is charged with the death of a child during or immediately after delivery[61] and counsel should review the opinion in any case involving a newborn and whether it has been born alive.

Instructions on Defenses

The Triumvirate: Justification, Duress, and Necessity

In September 1999, CAAF issued its decision in one of the military's high profile cases, *United States v. Rockwood*.[62] The case arose out of Captain Rockwood's actions at the National Penitentiary in Haiti while he was deployed with Operation Uphold Democracy. Captain Rockwood was assigned as a counterintelligence officer with the Tenth Mountain Division G2 staff when he deployed with the division to Haiti on 23 September 1994.[63] Concerned with human rights conditions at the National Penitentiary in Port au Prince, Captain Rockwood embarked on his own inspection of the prison when he perceived that the joint task force was ignoring the problem. His actions resulted in charges against him for failure to be at and leaving his place of duty, disrespect to his superior commissioned officer, disobeying the same officer, and conduct unbecoming an officer by surreptitiously leaving his headquarters and visiting the penitentiary without authorization.[64]

On appeal, among several issues discussed was the adequacy of instructions on certain defenses. The appellant claimed that the judge erred in failing to give instructions on the defenses of justification and necessity, and that the instruction on duress was confusing.[65] Essentially, the accused presented a defense at trial that he was justified under international law to publicize and investigate human rights violations at the prison that were being ignored by his chain of command.

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56. *Id.* at 517-18.

57. *Id*. Manslaughter requires an "unlawful killing of a human being." UCMJ art. 119 (LEXIS 2000). The appellant argued that a baby is only born alive and thus is a human being if the child is capable of "carrying on its being without the help of the mother's circulation," "if it takes a breath of air" and if it "cries." *Nelson*, 52 M.J. at 519-20. The government argued that the standard is whether the child is "capable of existence by means of circulation independent of the mother." *Id*. at 520.

58. *Id.* at 521 (citing United States v. Gibson, 17 C.M.R. 911, 935 (A.F.B.R. 1954)). This was important because the autopsy results indicated that the baby never took an "efficient breath of air." *Id.* at 519. The autopsy results also indicated that the baby was alive when it passed through the birth canal and that the baby had no congenital defects. *Id*.

59. The judge instructed the members that the child should be considered born alive if "the child had been wholly expelled from the mother's body and possessed or was capable of existence by means of circulation independent of the mother's. Included in the term 'circulation' is the child's breathing or capability of breathing from its own lungs." *Id.* at 527.

60. *Id.* The court relied in part on waiver. The record reflected that after proposing her own instruction, the defense counsel stated that her proposal "was fairly covered by instructions that were hammered out" by the judge and counsel. *Id.*

61. *See* United States v. Riley, 47 M.J. 603 (A.F. Ct. Crim. App. 1997), *rev'd*, 50 M.J. 410 (1999) (holding that the lower court erred in affirming a conviction of involuntary manslaughter in place of unpremeditated murder when theory of culpable negligence was not presented to the members).

62. 52 M.J. 98 (1999). Former Attorney General Ramsey Clark represented Captain Rockwood at trial and on appeal.

63. *Id.* at 100.

64. *Id.* at 102. He was convicted of failing to go to his place of duty at the joint task force (JTF) headquarters when he instead went to the penitentiary; engaging in conduct unbecoming an officer by breaching the JTF headquarters' fences, demanding entry to the penitentiary without authorization, thereby endangering himself, a fellow officer and classified information he had as an intelligence officer; leaving his place of duty at the combat support hospital where he had been assigned pending evacuation from Haiti; disrespect towards his supervisor, Lieutenant Colonel (LTC) Bragg; and disobeying LTC Bragg's orders. The convening authority ultimately disapproved the conduct unbecoming charge and approved the other findings. *Id.*

65. *Id*. at 100 n.1.

In the majority opinion addressing these claims, Chief Judge Cox did an excellent job of distinguishing the three defenses, which are often blurred. He then explained their applicability to the facts present before upholding the instructions as a whole.

Chief Judge Cox began with the justification defense that excuses a "death, injury, or other act caused or done in the proper performance of a legal duty."[66] Chief Judge Cox quickly dismissed this defense, concluding that no domestic or international law, personal orders, or observations would have created such a duty for the accused. Thus, the judge did not err in declining to give a justification instruction.

Next, Chief Judge Cox turned to the defenses of duress and necessity. He observed that duress is a defense when one commits a crime only in the face of some serious imminent harm to himself or another, which harm has been created by a human agency.[67] The crime must be less serious than the threatened harm and the accused must have a reasonable fear of immediate death or grievous bodily harm. Further, necessity results from a situation offering a "choice of evils."[68] Again, the accused's actions must be reasonable and there must be no alternative to the criminal act.

As Chief Judge Cox pointed out, while the *Manual* provides for the "duress or coercion defense,"[69] it does not specifically mention the "necessity" defense. In examining the instruction actually given by the judge in *Rockwood*, Chief Judge Cox concluded that the judge properly merged elements of both duress and necessity, telling the members:

> To be a defense, Captain Rockwood's participation in the offense must have been caused by a well-grounded apprehension that a prisoner in, or prisoners in, the National Penitentiary would immediately die or would immediately suffer serious bodily harm if Captain Rockwood did not commit the charged act. The amount of compulsion, coercion or force must have been sufficient to have caused an officer who was faced with the same situation and who was of normal strength and courage to act. The fear which caused Captain Rockwood to commit the offense must have been fear of death or serious bodily injury and not simply fear of injury to reputation or property, or to bodily injury less severe than serious bodily harm.[70]

Chief Judge Cox agreed with the judge's determination that a classic duress defense was not raised because the conditions were not the result of human agency. Chief Judge Cox also rejected appellant's claim that the use of the objective standard (an officer of normal strength and courage) was legally incorrect. He held that the instructions were proper.[71]

This case is helpful in sorting out the often-overlapping defenses of justification, duress, and necessity. Counsel may find it helpful to merge aspects of the defense when proposing instructions for the judge when a particular defense may not be totally on point. Here, the trial judge did a good job of weeding out what was not a "classic defense" while ensuring that the members were able to consider the accused's actions in light of the law.

Uniforms and United Nations Deployments

The Army Court of Criminal Appeals also decided several cases in the last year involving instructions. Like *Rockwood*, *United States v. New*,[72] was a high-profile case where the accused was tried for his refusal to wear United Nations accouterments on his battle dress uniform. The uniform was to be worn during a United Nations deployment to Macedonia in 1995. Specialist New believed that the uniform change represented an allegiance to the United Nations rather than to the United States and that President Clinton had unlawfully

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66. *Id.* at 112 (citing MCM, *supra* note 5, R.C.M. 916(c); WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW 641-43 (1986)).

67. *Id.* (citing LAFAVE & SCOTT, *supra* note 66, 614-27; ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 1059-65 (3d ed. 1982)).

68. *Id*. Chief Judge Cox's examples are helpful in understanding the distinction: compare "Help me rob this bank or I will kill you" (duress) with "I must trespass to save a drowning person" (necessity). *Id*.

69. *See* MCM, *supra* note 5, R.C.M. 916(h).

> It is a defense to any offense except killing an innocent person that the accused's participation in the offense was caused by a reasonable apprehension that the accused or another innocent person would be immediately killed or would immediately suffer serious bodily injury if the accused did not commit the act.

Id.

70. *Rockwoo*d, 52 M.J. at 113. The judge told the members that this defense was a complete defense and that it applied to all the charges. *Id.*

71. *Id*. at 114.

72. 50 M.J. 729 (Army Ct. Crim App. 1999).

ordered the mission without congressional approval. Over defense objection, the judge decided the lawfulness of the order as an interlocutory matter and found the order to be lawful.[73]

On appeal, among other things, Specialist New challenged the judge's instructions on the defenses of mistake, obedience to orders, and inability to carry out the order.[74] At trial, the defense had requested separate instructions on mistake and obedience to orders, but the judge gave a merged instruction. Although not requested at trial, on appeal, the appellant also argued that the judge should sua sponte have given an inability instruction.

The judge instructed the members in part that if the accused mistakenly believed he would violate *Army Regulation (AR) 670-1*[75] by wearing the United Nations patch and if his belief was reasonable, he would not be guilty of violating the order. He further stated that "the accused would not have violated *AR 670-1* by obeying the order in this case . . . if in fact there was such an order."[76]

On appeal, the Army court first addressed the appellant's contention that the judge erred in failing to give an obedience of order instruction. The court rejected that contention, citing testimony that the accused testified he only read *AR 670-1* in a cursory fashion, only relied upon portions which supported his position, and declined to seek clarification of the orders. The court concluded that such evidence did not reasonably raise the defense of obedience to orders.[77]

The Army court then looked at the judge's instruction that the accused's mistaken belief must have been both honest and reasonable. First, the court noted that it was unclear whether the defense was one of mistake of fact, law, or both. Further, the court noted that the accused was charged with violating an "other lawful order."[78] Such an offense only requires that the accused have knowledge of the order; there is no specific intent requirement, which would then only require his mistake be honest.[79] Whether the mistake was one of law, fact, or both, the court found that the appropriate standard for the defense of mistake in violating an other lawful order requires the defense to be honest and reasonable. Thus, the judge's instruction on this defense was correct.[80]

Finally, the court addressed the inability defense. Here, the appellant argued that since the accused was told to leave the company formation because he was not in the proper uniform, he was entitled to an instruction on his inability to attend the later battalion formation through no fault of his own. After observing that the defense had not requested such an instruction, the court went on to note that if raised, such a defense instruction must be given regardless of whether requested.[81] The court found that the evidence did not raise the defense because the accused "intentionally failed to take preparatory steps necessary" to attend the later formation in the proper uniform.[82] He knew he would not have time to change and admitted he did not intend to wear the patch.[83]

Like *Rockwood*, *United States v. New* reflects that the crafting of instructions is a delicate business, and often portions of various defenses must be combined to reflect the issues raised in the case. Counsel must be attentive during discussions on instructions and would be well advised to draft out requested instructions ahead of time. During the course of a hotly contested case, it is folly to try to sort through these often complex nuances during a thirty minute Article 39(a) session.

73. *Id.* at 737. In his findings of fact on the issue of the order's lawfulness, the judge summarized the accused challenges to the order as: the deployment itself was unlawful, the order required an unlawful modification to the Army uniform, it subjected the accused to involuntary servitude as a United Nations soldier, and it breached his enlistment contract. *Id.*

74. *Id*. at 733 n.1.

75. U.S. Dep't of Army, Reg. 670-1, Wear and Appearance of Army Uniforms and Insignia (1 Sept. 1992).

76. *New*, 50 M.J. at 740 n.15. He also reminded the members that the accused did not have the benefit of the court's ruling that the order was lawful at the time of the charged offense. *Id.*

77. *Id*. at 742. The appellant also claimed this defense with respect to his failure to attend a later battalion formation after his company commander ordered him from the company formation. The Army court also dismissed this contention, finding that the accused knew he would not have enough time to change in between formations and that he never intended to don the appropriate uniform for the battalion formation. *Id.* at 742-43.

78. MCM, *supra* note 5, pt. IV, ¶ 92b(2).

79. *Id*. R.C.M. 916(j)(1) ("[I]f the ignorance or mistake goes to any other element requiring only general intent or knowledge, the ignorance or mistake must have existed in the mind of the accused and must have been reasonable.").

80. *New*, 50 M.J. at 744.

81. *Id.* at 745 (citing United States v. McMonagle, 38 M.J. 53, 58 (C.M.A. 1993); United States v. Stenruck, 11 M.J. 322, 324 (C.M.A. 1981)).

82. *Id.* at 746.

83. *Id.*

Comrades in Arms: Self-Defense and Defense of Another

In *United States v. Lanier*,[84] the Army Court of Criminal Appeals reviewed instructions on self-defense and defense of another in an aggravated assault scenario where the accused fired a weapon while his friend was being attacked by a mob. The defense presented evidence that the accused got a gun from his car and fired rounds in the general area where a group of up to fifty people was attacking his friend. During the discussion on instructions, the defense counsel requested the defense of another instruction and asked that self-defense not be given. The judge instructed the members on defense of another, orienting the instruction through the eyes of the accused, as well as self-defense. All of the self-defense instruction was tailored in terms of the friend's knowledge and belief.[85]

In reviewing the instructions for abuse of discretion, the Army court began by setting out the various standards for using force when defending another.[86] It noted that the accused is limited to the amount of force the other can use regardless of the accused's belief as to the situation.[87] The court found that the judge's use of the self-defense instruction was not an abuse of discretion because it addressed several factual issues as to the friend's ability to defend himself. The court went on to note that the judge's instruction on self-defense involving deadly force[88] was unnecessary and that the judge should have given the self-defense instruction on use of excessive force to deter.[89] The court relied on defense's failure to object to these particular instructions[90] and the absence of any request for clarification by the members to dismiss these errors as neither obvious nor substantial.

The court also addressed the refusal of the judge to instruct that defense of another also applied to a charge of willful discharge of a firearm. The court noted that the theory that the accused's use of a weapon in such a circumstance may have been justified was adequately covered by the element of wrongfulness under the elements of willful discharge and by the other instructions in the case.[91] No instruction on a separate defense was required because the members clearly rejected the defense of another theory.[92]

The Broken Engagement

The Army court had occasion to review instructions on "Claim of Right" as a defense to larceny in *United States v. Jackson*.[93] The case arose from a broken engagement and the accused's actions in entering his ex-fiancée's quarters to retrieve certain property, including an engagement ring and an exercise bike, which had been placed in her quarters earlier in the courtship. At trial, the defense counsel requested the judge instruct on mistake of fact and claim of right. The judge declined, stating that the accused's intent to permanently keep the property rendered the mistake of fact defense inapplicable. Further, she ruled that in the absence of any previous agreement on the recovery of property, self-help under claim of right had not been raised.[94]

The Army court began its discussion by explaining that the claim of right defenses cover two different scenarios: the first is a mistake of fact defense where the individual believes he actually owns the property and is merely retrieving it, while the second is a seizure under claim of right where the individual erroneously believes the property may be taken as security or in satisfaction of a debt.[95] Under either scenario, however, the court pointed out that the accused's belief need be only honest to rebut criminal intent.[96]

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84. 50 M.J. 772 (Army Ct. Crim. App. 1999).

85. *Id.* at 776, n.5.

86. *Id*. at 777-78.

87. *Id*. at 778.

88. BENCHBOOK, *supra* note 3, para. 5-2-1.

89. *Id*. para. 5-2-5.

90. *Lanier*, 52 M.J. at 779. The court noted that by objecting to the self-defense instruction in its entirety, the defense strategy clearly wanted to avoid mention of the excessive force to deter portion. *Id*. at 779-80.

91. *Id*. at 780.

92. *Id. See* BENCHBOOK, *supra* note 3, para. 3-81-1 (noting that one of the elements of willful discharge of a firearm under circumstances to endanger human life is that the discharge was willful and wrongful; an act is done willfully if done intentionally or on purpose).

93. 50 M.J. 868 (Army Ct. Crim App. 1999).

94. *Id.* at 870.

95. *Id*. (comparing United States v. Mack, 6 M.J. 598, 599 (A.C.M.R. 1978) with United States v. Gunter, 42 M.J. 292, 295 (1995)).

The court looked at the facts presented and found that there was a genuine issue as to ownership of the ring and bicycle based on the actions of the two parties. The court then looked at the judge's rationale for refusing to give the mistake of fact instruction where she focused exclusively on the accused's intent to *permanently* keep the items. Such a focus ignored the requirement that the taking is wrongful as well and the accused's mistaken belief that he owned the property would negate that element.

The court then criticized the standard *Benchbook* instruction on claim of right,[97] pointing out that the language is limited to seizures made for purposes of obtaining security or satisfying a debt and ignores the situation where one mistakenly believes he is recapturing property he actually owns. The court concluded that the instructions were inadequate to properly educate the members on the defenses and overturned the larceny findings.[98]

Evidentiary Instructions

Variations on an Old Theme

An officer is charged with fraternizing with two enlisted subordinates; the specifications detail three separate acts as the means by which he accomplished the offenses. At trial, there is a genuine dispute whether he committed all the acts. What voting procedures should the military judge tell the members to use in making their findings? In *United States v. Sanchez*,[99] the Air Force court addressed this recurring problem and recommended an outstanding variance instruction to use in such cases.[100] Lieutenant Colonel David Sanchez engaged in ongoing romantic relationships with two enlisted service members and was ultimately charged with fraternization. The specifications alleged several different acts as the means by which he fraternized. At trial, and over defense objection, the military judge instructed the court members that, if they found the accused not guilty, they could then vote on the lesser included offenses created by excepting out the selected acts in the specification until the required concurrence was reached.[101]

This instruction apparently confused the members as the judge subsequently discussed the issue again with counsel and ultimately told the members to first decide the core issue of the accused's guilt. If they found him guilty of fraternization, they could then go back and except out the specific acts which the members concluded had not been proven.[102] On appeal, the Air Force Court of Criminal Appeals affirmed the case, finding that both of the methods used by the military judge were acceptable. The court stated the key is that the court members understand they can make findings by exceptions and substitutions and that the necessary number of members agree to the specific acts of which they find the accused guilty.[103]

Charging a number of distinct acts in a single specification is a common trial strategy.[104] When there is a genuine dispute whether the accused committed all the acts alleged, the *Benchbook* already provides a variance instruction advising the court members they can find the accused guilty by exceptions, with or without substitutions.[105] This instruction, however, gives lit-

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96. *Id*. The court also described a third situation, where an accused actually does own the property, either outright or as security for a debt, in which case, there may be a failure of proof as to ownership of the property rather than a mistake defense. *Id.* (citing MCM, *supra* note 5, ¶ 46b(1)(a), (d); United States v. Smith, 8 C.M.R. 112 (1953)).

97. The instruction currently reads in part:

> The defense of self-help exists when three situations co-exist: (1) the accused has an honest belief that (he) (she) had a claim of right entitling the accused to (take) (withhold) (obtain) the ((money) (property) (_____)) (because the accused was the rightful owner) (as security for a debt owed to the accused); (2) the accused and (state the name of the alleged victim) had a prior agreement which permitted the accused to (take) (withhold) (obtain) the (money) (property) (_____) (to satisfy the debt) (as security for the debt); and (3) the (taking) (withholding) (obtaining) by the accused was done in the open, not surreptitiously. All three criteria must exist before the defense of self-help is applicable.

BENCHBOOK, *supra* note 3, para 5-18.

98. *Jackson*, 50 M.J. at 783.

99. 50 M.J. 506 (A.F. Ct. Crim. App. 1999).

100. *Id.* at 511.

101. *Id.* at 510.

102. *Id.*

103. *Id.* at 511.

104. This is especially true where the same maximum punishment applies. *See, e.g.*, United States v. Mincey, 42 M.J. 376 (1995) (holding that in bad-check cases, the maximum punishment is calculated by the number and amount of the checks as if they were charged separately, regardless of whether the government pleads only one offense in each specification or whether the government joins them in a single specification). *See also* United States v. Dawkins, 51 M.J. 601 (Army Ct. Crim. App. 1999) (extending *Mincey* analysis to forgery cases under Article 123).

tle guidance on the voting procedures that the court members should use to make those findings and judge and counsel are generally left to their own devices to fashion an appropriate instructional remedy; that is until now. Senior Judge Young and the Air Force court's efforts in proposing an instruction addressing this problem are greatly appreciated.[106]

Silence is Golden

Private First Class Jonathan Sidwell was charged with, inter alia, auto theft. At his court-martial, the trial counsel called Special Agent McGunagle, ostensibly to testify about a spontaneous post-invocation question asked by the accused.[107] During McGunagle's testimony, however, he inadvertently mentioned the accused's rights invocation.[108] While the military judge denied the defense's subsequent mistrial motion, he ultimately struck McGunagle's testimony, refused to allow him to further testify for any purpose, and gave a limiting instruction to the court members.[109] In *United States v. Sidwell*,[110] the CAAF agreed there was error.[111] The court nonetheless affirmed the conviction, focusing on the nature of the comment and the curative instruction given to the court members.[112]

This case reminds counsel of several important lessons. First, during pretrial preparation, do not leave anything to chance and assume nothing. Take the time to remind your witnesses that, when testifying, they should not reference or comment on the accused's rights invocation. Second, a mistrial is a drastic remedy that should be granted only under the most extraordinary of circumstances.[113] Third, in the event there is a comment on the accused's invocation of a constitutional right, ask for an immediate Article 39(a) session to address the error. In most cases,[114] a curative instruction will be the preferred remedy and should suffice.[115]

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105. This standard variance instruction currently provides:

> You are advised that as to (the) Specification (_____) of (the) (additional) Charge (_____), if you have doubt that _____, you may still reach a finding of guilty so long as all the elements of the offense (or a lesser included offense) are proved beyond a reasonable doubt, but you must modify the specification to correctly reflect your findings.

BENCHBOOK, *supra* note 3, para. 7-15.

106. Judge Young suggested that an appropriate instruction would be:

> You are advised that as to (the) specification ( ) of (the) (Additional) Charge ( ), if you believe beyond a reasonable doubt that the accused committed the offense of _____, but you have a reasonable doubt that (he) (she) committed each of the distinct acts alleged in the specification, you may still reach a finding of guilty as to the acts which you find beyond a reasonable doubt the accused did commit. If this becomes an issue in your deliberations, you may take a straw ballot to determine which, if any, distinct acts the accused committed. Once you have made such a determination, you should then vote by secret written ballot to determine whether or not the accused is guilty of the offense beyond a reasonable doubt.

Sanchez, 50 M.J. at 511.

107. The accused asked McGunagle "how much time can I get for auto theft?" The question was offered as evidence of a guilty conscience. United States v. Sidwell, 51 M.J. 262, 263 (1999).

108. The direct examination went as follows:

TC:	Okay, could you explain–at some point, did you interview the accused?
W:	Ah–yes.
TC:	Did he make any statements to you?
W:	Subsequent to invoking his rights, he made–
DC:	Sir, objection at this time. We need a 39(a).
MJ:	Sustained.

Id.

109. *Id.* at 264.

110. 51 M.J. 262 (1999).

111. *Id.* at 263.

112. *Id.* at 265. Here, the court noted the single invocation reference was extremely brief. There were no details as to the rights invoked or the offenses for which they were invoked. The military judge granted an immediate Article 39(a) session and gave a prompt curative instruction unequivocally instructing the members to disregard the testimony on this matter for all purposes and [individually] voir dired them on their understanding of the instruction. *Id.*

113. *See* United States v. Barron, 52 M.J. 1 (1999).

Multiple Offenses, Spillover, and Propensity Evidence

In *United States v. Myers*,[116] the accused was charged with raping and forcibly sodomizing two different women, though under similar circumstances.[117] The primary contested issue was whether the victims had consented to the sexual acts engaged in with the accused.[118] Recognizing the danger that the officer members would consider the evidence offered on one victim and infer the accused must be guilty of both,[119] the defense sought to sever the offenses.[120] While denying the defense motion, the trial judge acknowledged that some affirmative measures would be necessary to prevent prejudice to the accused, to include providing a spillover instruction.[121] After initially agreeing to give the instruction, the judge reversed himself and, over defense objection,[122] ultimately refused to do so.[123] Finding prejudicial error, the Navy Marine Corps court set aside the findings.

The court noted that, in military practice, unitary sentencing favors joinder of all known offenses at one trial and severance is rarely granted.[124] Further, properly drafted instructions are generally sufficient to prevent court members from cumulating evidence and avoiding improper spillover, when they are delivered.[125] However, in this case, without such an instruction, the court believed the danger was just too great that one set of alleged sexual assault offenses spilled over and served as proof

114. *Compare* United States v. Riley, 47 M.J. 276 (1997) (referencing three invocations of rights by counsel and finding error) *with* United States v. Garrett, 24 M.J. 413 (C.M.A. 1987) (referencing a single invocation and finding no error).

115. A proposed instruction being considered for inclusion in the *Benchbook* provides:

> (You have heard) (A question by counsel may have implied) that the accused exercised (his) (her) constitutional right to (remain silent) (right to an attorney). It is highly improper and unconstitutional for this (question) (testimony) (statement) to have been brought before you. Under our legal system, every citizen has certain constitutional rights which must be honored. All Americans, to include members of United States Armed Forces, when suspected or accused of a criminal offense, have an absolute legal and moral right to exercise their constitutional (right to remain silent) (right to an attorney). That the accused may have exercised (his) (her) constitutional rights in this case must not be held against (him) (her) in any way. Moreover, you may not draw any inference adverse to the accused in this case because (he) (she) may have exercised a constitutional right. The exercise of this right by the accused may not enter into your deliberations in any way. In fact, you must disregard entirely the (testimony) (statement) (question) that the accused may have invoked his constitutional right. Will each of you follow this instruction?

BENCHBOOK, *supra* note 3 (proposed C3 2000).

116. 51 M.J. 570 (N.M. Ct. Crim. App. 1999).

117. Both incidents involved "acquaintance rape" scenarios. *Id*. at 571-75.

118. *Id*.

119. A concern best described by Judge Learned Hand when he said:

> [T]here is indeed always a danger when several crimes are tried together, that the jury may use the evidence cumulatively; that is, although so much as would be admissible upon any one of the charges might not have persuaded them of the accused's guilt, the sum of it will convince them as to all.

United States v. Lotsch, 102 F.2d 35, 36 (2d Cir. 1939) *cited in Myers*, 51 M.J. at 576.

120. *Myers*, 51 M.J. at 576.

121. *Id.* at 577.

122. Defense counsel must ordinarily request evidentiary instructions, or, absent plain error, they are waived. MCM, *supra* note 5, R.C.M. 920(e), (f).

123. The judge's ruling was based on Military Rule of Evidence (MRE) 413. *See id*. at 578 (citing MCM, *supra* note 5, MIL. R. EVID. 413). Effective since 6 January 1996, the rule provides for a more liberal admissibility of other acts evidence in sexual assault cases, evidence which arguably can now be used to demonstrate the accused's propensity to commit these types of offenses. The judge reasoned:

> It seems to me that the most logical application of Military Rule of Evidence 413 to this case is that no spill-over instruction should be given at all because the Government can argue from the offenses involving Corporal [D] that they tend to show guilt on the part of the accused as to the sexual assaults perpetrated against Ms. [H] and vice versa.

He later declared:

> [W]hat I intend to do is simply not instruct on spill-over at all since, as I perceive it, the purpose of the spill-over instruction is to provide a limitation to the jury on the use of the evidence, and my interpretation of [MRE] 413 is simply that there is not a limit on the use of that evidence.

Id. at 578.

of the other set of offenses against the accused.[126] As such, when unrelated offenses are joined for trial, the court members should always be instructed to keep the evidence admitted on each alleged offense separate, even when submitted under a theory appropriate for both, and that they cannot convict on one offense merely because they find the accused guilty of another.[127]

Sentencing Instructions

To Tell or Not to Tell, That is the Accused's Choice

Seaman Recruit Jason Gammons was convicted of several drug use and distribution offenses and sentenced by a military judge to a bad conduct discharge, confinement for three months, and forfeiture of one-third pay per month for three months.[128] Gammons had previously received Article 15[129] punishment for one of the drug use offenses. In *United States v. Gammons*,[130] the CAAF addressed the relationship between nonjudicial punishment and a court-martial for the same offense and provided some useful guidelines on how to reflect the specific credit an accused will receive.

The court first acknowledged the general rule that the defense, not the prosecution, determines whether and under what circumstances a prior nonjudicial punishment record involving the same or similar act should be presented at sentencing.[131] The court concluded that this gatekeeper role identifies several options for the accused. The accused may: (1) introduce the record of the prior nonjudicial punishment for consideration by the court-martial during sentencing; (2) introduce the record of the prior nonjudicial punishment during an Article 39(a) session for purposes of adjudicating the credit to be applied against the adjudged sentence; (3) defer introduction of the record of the prior nonjudicial punishment during trial and present it to the convening authority prior to action on the sentence; or (4) choose not to bring the record of the prior nonjudicial punishment to the attention of the sentencing authority.[132] Thus, it is clear that only when the accused brings the nonjudicial punishment to the attention of the court-martial may the prosecution offer fair comment.[133] Otherwise, the accused has not opened the door for the trial counsel to present rebuttal evidence or argument.

The court then emphasized that "an accused must be given complete credit for any and all nonjudicial punishment suffered: day for day, dollar for dollar, stripe for stripe."[134] In this regard, the CAAF offered the following guidance: (1) if the accused offers the prior nonjudicial punishment during sentencing for consideration by the members in mitigation, the military judge must instruct the members on the specific credit to be given for the prior punishment,[135] unless the defense requests an instruction that the members simply give consideration to the prior punishment;[136] in a judge alone trial, the military judge must state on the record the specific credit awarded for the prior punishment; (2) if the accused chooses to raise the credit issue at an Article 39(a) session, the judge will adjudicate the specific credit to be applied by the convening authority against the adjudged sentence; and (3) if the accused chooses to raise the

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124. *Id.* at 579. *See also* MCM, *supra* note 5, R.C.M. 307(c)(4) ("[C]harges and specifications alleging all known offenses by an accused may be preferred at the same time.").

125. The standard spill-over instruction in the *Benchbook* reads:

> Each offense must stand on its own and you must keep the evidence of each offense separate. The burden is on the prosecution to prove each and every element of each offense beyond a reasonable doubt. Proof of one offense carries with it no inference that the accused is guilty of any other offense.

BENCHBOOK, *supra* note 3, para. 7-17.

126. In fact, the court could not envision a scenario where a rule allowing for the admissibility of other acts evidence would ever obviate the need to give a defense requested spillover instruction. *Myers*, 51 M.J. at 582.

127. The court perceptively noted that, even where MRE 413 evidence is properly admitted, proof of one sexual assault offense still carries no *inference* that the accused committed another sexual assault offense, it only demonstrates the accused's *propensity* to engage in that type of behavior. *Id.* at 583.

128. A reminder for practitioners, partial forfeitures must be stated in a whole dollar amount for a specific number of months. *See, e.g.*, United States v. Stevens, 46 M.J. 515 (Army Ct. Crim. App. 1997).

129. UCMJ art. 15 (LEXIS 2000).

130. 51 M.J. 169 (1999).

131. *See, e.g.*, United States v. Pierce, 27 M.J. 367 (C.M.A. 1989).

132. *Gammons*, 51 M.J. at 183.

133. *Id.*

134. *Id.* (citing United States v. Pierce, 27 M.J. at 369).

credit issue before the convening authority, the convening authority must identify any credit against the sentence provided on the basis of the prior punishment.[137]

The accused clearly possesses the gatekeeper role regarding the consideration of a prior nonjudicial punishment for the same or similar offense at or after trial. If the accused decides to offer the prior nonjudicial punishment for the court members' consideration, the judge, with counsel input, has the duty to fashion appropriate instructions, such as the ones provided here.

It's Called "the Script" for a Reason

Contrary to his pleas, Private Charles Rush was convicted by court members of breach of the peace, two specifications of aggravated assault, and communicating a threat. At sentencing, the military judge read the standard bad-conduct discharge instruction contained in the *Benchbook*.[138] However, he refused defense counsel's requested instruction describing the ineradicable stigma of a punitive discharge,[139] also contained in the *Benchbook*.[140] In *United States v. Rush*, the Army court found the judge's action an abuse of discretion,[141] unequivocally stating that "the ineradicable stigma instruction is a required sentencing instruction" and "an individual military judge should not deviate significantly from these [*Benchbook*] instructions without explaining his or her reasons on the record."[142] There-

135. A proposed instruction being considered for inclusion in the *Benchbook* provides:

> You are advised that when you decide upon a sentence in this case, you must give consideration to the fact that punishment has already been imposed upon the accused under the provisions of Article 15, UCMJ, for the offense(s) of _____ of which (s)he has also been convicted at this court-martial. Under the law, the accused will receive specific credit for the prior nonjudicial punishment which was imposed and approved. Therefore, I advise you that after this trial is over and when the case is presented for action, the convening authority must credit the accused for the punishment from the prior article 15 proceeding against any sentence you may adjudge. Therefore, the convening authority must: *[the judge states the specific credit to be given by stating words to the effect*] disapprove any adjudged reprimand (and) reduce any adjudged forfeiture of pay by $_____per month for _____month(s) (and) credit the accused with already being reduced in grade to E-_____) (and) reduce any adjudged restriction by _____days or reduce any hard labor without confinement by _____days or reduce any confinement by _____days.

BENCHBOOK, *supra* note 3 (proposed C3 2000).

136. A proposed instruction being considered for inclusion in the *Benchbook* provides:

> You are advised that when you decide upon a sentence in this case, you must give consideration to the fact that punishment has already been imposed upon the accused under the provisions of Article 15, UCMJ, for the offense(s) of _____ of which (s)he has been convicted at this court-martial. This prior punishment is a matter in mitigation which you must consider.

BENCHBOOK, *supra* note 3 (proposed C3 2000).

137. *Gammons*, 51 M.J. at 184.

138. The military judge instructed the court members:

> You are advised that a bad conduct discharge deprives a soldier of virtually all benefits administered by the Veterans' Administration and the Army establishment. A bad-conduct discharge is a severe punishment, and may be adjudged for one who, in the discretion of the court, warrants more severe punishment for bad conduct, even though the bad conduct may not constitute commission of serious offenses of a military or civil nature. In this case, if you determine to adjudge a punitive discharge, you may sentence Private Rush to a bad-conduct discharge; no other type of discharge may be ordered in this case.

United States v. Rush, 51 M.J. 605 (Army Ct. Crim. App. 1999). This quote is directly from the *Benchbook*. BENCHBOOK, *supra* note 3, at 98.1.

139. At an Article 39(a) session to discuss his proposed sentencing instruction, the military judge asked whether either counsel wanted additional sentencing instructions. The defense counsel replied, "Defense would request the ineradicable stigma instruction, Your Honor." Without explanation, the military judge responded, "I'm not going to give that instruction, Captain." United States v. Rush, 51 M.J. 605, 607 (Army Ct. Crim. App. 1999).

140. This instruction provides:

> You are advised that the ineradicable stigma of a punitive discharge is commonly recognized by our society. A punitive discharge will place limitations on employment opportunities and will deny the accused other advantages which are enjoyed by one whose discharge characterization indicates that (he)(she) has served honorably. A punitive discharge will affect an accused's future with regard to (his)(her) legal rights, economic opportunities and social acceptability.

BENCHBOOK, *supra* note 3, at 97-98.

141. Former Chief Judge Everett has opined that "[e]limination from the service by sentence of a court-martial is such a serious matter that the failure to charge the members as to its effect is error." United States v. Cross, 21 M.J. 87, 88 (C.M.A. 1985).

fore, even though the ineradicable stigma instruction is not uniformly given at courts-martial,[143] in Army practice, it is considered part of the standard advice given to court members[144] and should be given in all cases.

Conclusion

Last year was notable for courts-martial instructions. This article represents three judges' review of the significant instructions cases decided last year and their impact on trial practice. Counsel are reminded, however, that simply reading this article is no substitute for an individual, analytical examination of the decisions themselves. Further, as these cases demonstrate, counsel must remain diligent and involved in the process of drafting proper instructions for the court members.

142. *Rush*, 51 M.J. at 609.

143. For example, the Navy and Marine Corps guidelines do not include any reference to ineradicable stigma. *See* TRIAL GUIDE 1999, 90-91 (1 May 1999). The Air Force and Coast Guard Trial judiciaries do not publish a separate guide.

144. The court recognized two distinct consequences of a punitive discharge: (1) it deprives an accused of substantially all benefits from the government establishment, and (2) it bears significant impact on an accused's return to the civilian community. *Rush*, 51 M.J. at 609.

Guard and Reserve Affairs Items

Guard and Reserve Affairs Division
Office of The Judge Advocate General, U.S. Army

USAR/ARNG Applications for JAGC Appointment

Effective 14 June 1999, the Judge Advocate Recruiting Office (JARO) began processing all applications for USAR and ARNG appointments as commissioned and warrant officers in the JAGC. Inquiries and requests for applications, previously handled by the Guard and Reserve Affairs, will be directed to JARO.

Judge Advocate Recruiting Office
901 North Stuart Street, Suite 700
Arlington, Virginia 22203-837

(800) 336-3315

Applicants should also be directed to the JAGC recruiting web site at <www.jagcnet.army.mil/recruit.nsf>.

At this web site they can obtain a description of the JAGC and the application process. Individuals can also request an application through the web site. A future option will allow individuals to download application forms.

1999-2000 Academic Year On-Site Continuing Legal Education Training

The following is the current schedule of The Judge Advocate General's Reserve Component (on-site) Continuing Legal Education Program. *Army Regulation 27-1, Judge Advocate Legal Services*, paragraph 10-10a, requires all United States Army Reserve (USAR) judge advocates assigned to Judge Advocate General Service Organization units or other troop program units to attend on-site training within their geographic area each year. All other USAR and Army National Guard judge advocates are encouraged to attend on-site training. Additionally, active duty judge advocates, judge advocates of other services, retired judge advocates, and federal civilian attorneys are cordially invited to attend any on-site training session.

On-site instruction provides updates in various topics of concern to military practitioners as well as an excellent opportunity to obtain CLE credit. In addition to receiving instruction provided by two professors from The Judge Advocate General's School, United States Army, participants will have the opportunity to obtain career information from the Guard and Reserve Affairs Division, Forces Command, and the United States Army Reserve Command. Legal automation instruction provided by personnel from the Legal Automation Army-Wide System Office and enlisted training provided by qualified instructors from Fort Jackson will also be available during the on-sites. Most on-site locations supplement these offerings with excellent local instructors or other individuals from within the Department of the Army.

Additional information concerning attending instructors, GRA representatives, general officers, and updates to the schedule will be provided as soon as it becomes available.

If you have any questions about this year's continuing legal education program, please contact the local action officer listed below or call Dr. Foley, Guard and Reserve Affairs Division, Office of The Judge Advocate General, (804) 972-6382 or (800) 552-3978, ext. 382. You may also contact Dr. Foley on the Internet at Mark.Foley@hqda.army.mil. Dr. Foley.

THE JUDGE ADVOCATE GENERAL'S SCHOOL RESERVE COMPONENT (ON-SITE) CONTINUING LEGAL EDUCATION TRAINING SCHEDULE 1999-2000 ACADEMIC YEAR

DATE	CITY, HOST UNIT, AND TRAINING SITE	AC GO/RC GO SUBJECT/INSTRUCTOR/GRA REP*		ACTION OFFICER
1-2 Apr	Orlando, FL FLARNG	AC GO BG Romig RC GO BG O'Meara Criminal Law Int'l & Op Law GRA Rep TBD	Administrative & Civil Law Contract Law	Ms. Cathy Tringali (904) 823-0132 Host: COL Henry Swann (904) 823-0132
16-20 Apr	Spring Workshop GRA			
29-30 Apr	Newport, RI 94th RSC	AC GO MG Huffman RC GO BG O'Meara GRA Rep TBD	International & Operational Law: ROE Criminal Law: New Developments requested. (But a possible substitution by CLAMO was discussed with a focus on Domestic Operations)	MAJ Jerry Hunter (978) 796-2140 1-800-554-7813
5-7 May	Omaha, NE 89th RSC	AC GO BG Romig RC GO COL (P) Walker	Contract Law Administrative & Civil Law	LTC Jim Rupper (316) 681-1759, ext. 1397 Host: COL Mark Ellis (402) 231-8744
6-7 May	Gulf Shores, AL 81st RSC/ALARNG	AC GO BG Barnes RC GO BG DePue GRA Rep TBD	Criminal Law Administrative & Civil Law	CPT Lance W. Von Ah (205) 795-1511 fax (205) 795-1505 lance.vonah@usarc-emh2.army.mil

*Topics and attendees listed are subject to change without notice.

Please notify Dr. Foley if any changes are required, telephone (804) 972-6382.

Reserve Promotion Update

Promotions

Army Regulation 135-155[1] contains policy and procedures about Reserve Component promotions. The current Reserve Component promotion system does not differ significantly from the active component promotion system. Both boards use the *best qualified*[2] standard for evaluating officers before the boards. There are two types of Reserve Component promotion boards: mandatory selection boards and position or unit vacancy selection boards.

To be eligible for promotion, officers must have minimum time in grade, and meet the educational requirements shown below:

Time in Grade			
Promotion to	**Education**	**Mandatory Board**	**Unit Vacancy Board**
Captain	Basic Course	5	2
Major	Advance Course	7	4
Lieutenant Colonel	Phase II, CGSC	7	4
Colonel	Phase IV, CGSC	**	3

** Announced annually by Headquarters, Department of the Army, usually five years.

There are exceptions to the educational requirements. Officers leaving active duty are considered to be educationally qualified for promotion for three years after the date of their separation, unless they were non-selected for promotion for the next higher grade while on active duty.[3] Officers who received conditional appointments requiring completion of educational courses within a specified time are considered to be educationally qualified for promotion if making satisfactory progress with the course.[4]

An officer is first considered for promotion by a mandatory board in advance of the date in which the officer meets time in grade requirements. Therefore, officers must ensure that they are prepared to be considered for promotion about one year before they reach eligibility. As this may change in the future, officers should pay close attention to promotion zone announcements.

Promotion Consideration File (PCF)

Total Army Personnel Command Promotions Directorate prepares the PCF for use by the Reserve Component selection boards. It should contain the following:

(1) All academic and performance evaluation reports.
(2) An Officer Record Brief (Individual Mobilization Augmentee (IMA)/Individual Ready Reserve (IRR) judge advocate officers) or Department of the Army Form 2-1[5] (United States Army Reserve Troop Program Unit (TPU) judge advocate officers). These documents have necessary entries pertaining to personal data, military and civilian education, and duty assignment history.

1. U.S. Dep't of Army, Reg. 135-155, Promotion of Commissioned Officers and Warrant Officers Other Than General Officers (1 Oct. 1994) [hereinafter AR 135-155].

2. *See Promotion Boards* section, *infra.*

3. AR 135-155, *supra* note 1, para. 2-6.

4. Contact the Guard and Reserve Affairs Division, Office of The Judge Advocate General, (804) 972-6381 or (800) 552-3978, ext. 381 or via e-mail at Mark.Foley@hqda.army.mil concerning a certificate of satisfactory progress.

5. U.S. Dep't of Army, DA Form 2-1, Personnel Qualification Record (Jan. 1973).

(3) A color photograph taken within the past three years, which reflects insignia authorized at the time the promotion packet is submitted to the board. Height and weight data, and a signature must be entered on the reverse side of the photograph.[6] Refer to *Army Regulation 670-1* for correct wear and appearance of Army uniforms and insignia.[7]
(4) A one page letter to the board is strongly encouraged.

Promotion Consideration File					
	IRR/IMA	**AGR**	**TPU**	**NG**	****Remarks**
OMPF-P-Fiche	X	X	X	X	1
DA Form 2-1			X	X	2
ORB	X	X		X	3
Photograph	X	X	X	X	4
Letter to Board President	X	X	X	X	5
Loose Papers	X	X	X	X	6

** Remarks

1. Provided by the U.S. Army Reserve Personnel Command (AR-PERSCOM)/NGB ARNG Readiness Center as appropriate.

2. Provided by the officer's servicing personnel administration section.

3. To be provided by the officer for the board's use or by the personnel management officer if a current copy is available in the career management file. The photo must be current within three years.

4. Opitional, but encouraged.

5. Includes Official Military Personnel File (OMP) documents received too late to be microfiched on the OMPF (Performance-fiche).

6. OMPF performance documents required to be included in the PCF include (listed in order of precedence):

Academic Evaluation Reports
Officer Evaluation Reports
Letter Reports
Resident and nonresident course completion certificates
Any record of adverse action
Award orders
Letters of appreciation or commendation

Officers in the zone of promotion are responsible for the following:

(1) Reviewing their OMPF and providing the state adjutant general or the Chief, Office of Promotions, Reserve Components, with copies of any documents missing from the file.
(2) Auditing their DA Form 2-1, when requested by the unit personnel clerk.
(3) Ensuring they have a current photograph on file at Army Reserve, Personnel Command (AR-PERSCOM) or National Guard Bureau (NGB) Army Reserve National Guard Readiness Center.

6. AR 135-155, *supra* note 1, para. 3-3a(4).

7. U.S. Dep't of Army, Reg. 670-1, Wear and Appearance of Army Uniforms and Insignia (1 Oct. 1992).

(4) Taking a military physical every five years in accordance with *Army Regulation 40-501*.[8] If overweight, ensuring their status in the weight control program is reported to United States Army Reserve Personnel Command (AR-PERSCOM) in accordance with *Army Regulation 600-9*.[9] An officer whose physical is out of date or who is overweight will not be issued promotion orders.[10]
(5) Following up with unit support personnel to ensure that evaluation reports, the DA Form 2-1, and other relevant information is submitted to AR-PERSCOM in time to be presented to the board.

Officer's Letter to the Board

Letters to the board are optional, but strongly encouraged. In some cases, letters detract from the file because of poor grammar, spelling errors, superfluous enclosures, and inadequate preparation. Communications to the board that contain criticism or reflect adversely on the character, conduct, or motives of any officer will not be given to the board. Also, the selection board will not be given any third party communications.

Any letter should be no more than one page, provide relevant information not contained in the OMPF, and be signed and dated. The letter should be a professional document in appearance, style, and content.

The following examples are good enclosures to letters: Officer Evaluation Reports (OERs) missing from OMPF; letters of appreciation or commendation not in OMPF; and newly acquired diplomas, degrees and documents about professional qualifications. The letter should reference all enclosures.

Promotion Boards

The promotion board uses the "whole person concept" when rating officers.[11] The list below indicates some items that are considered by the board (on the left) and where the board looks to find information about that characteristic (on the right).

Job performance	OERs
Leadership	Command/Staff Assignments
Breath of Experience	Where/What/When (Assignments)
Job Responsibility	Scope of Assignment and Risk
Professional Military Education	Level and Utilization of Military Education
Academic Education	Level and Utilization of Civilian Education
Specific Achievements	Awards
Military Bearing	Photograph/OER/Height-Weight data

Scoring Criteria

All promotion boards will be convened under a *best qualified* criteria and will give each file a numerical rating from one to six (+ or -). When all files have been voted, an average score will be calculated for each individual before the board. The officers will be rank ordered (highest to lowest). The board will be told how many can be selected and they will count down the list until they reach

8. U.S. DEP'T OF ARMY, REG. 40-501, STANDARDS OF MEDICAL FITNESS (27 Feb. 1998).

9. U.S. DEP'T OF ARMY, REG. 600-9, THE ARMY WEIGHT CONTROL PROGRAM (1 Sept. 1986).

10. *Id.* para. 20d(1).

11. *See generally* U.S. DEP'T OF ARMY, REG. 600-8-29, OFFICER PROMOTIONS (30 Nov. 1994).

that number. If the last person selected is a 4+, then the board will revote all 4+ files and again rank order the files–creating the final list. The scoring criteria is listed below:

6+/-	Top Few—Must Select
5+/-	Above Contemporaries—Clearly Select
4+/-	Solid Performer—Deserves Selection
3+/-	Qualified—Select if There is Room
2+/-	Not Qualified—Too Many Weaknesses
1+/-	Absolutely Not Qualified—Show Cause Board

Best Qualified officers have demonstrated a strong performance, steady participation, possess good military bearing, have succeeded at a variety of jobs (especially those which exposed them to risk of failure), and have completed the required military education. Dr. Foley.

CLE News

1. Resident Course Quotas

Attendance at resident continuing legal education (CLE) courses at The Judge Advocate General's School, United States Army (TJAGSA), is restricted to students who have confirmed reservations. Reservations for TJAGSA CLE courses are managed by the Army Training Requirements and Resources System (ATRRS), the Army-wide automated training system. If you do not have a confirmed reservation in ATRRS, you do not have a reservation for a TJAGSA CLE course.

Active duty service members and civilian employees must obtain reservations through their directorates of training or through equivalent agencies. Reservists must obtain reservations through their unit training offices or, if they are nonunit reservists, through the United States Army Personnel Center (ARPERCEN), ATTN: ARPC-ZJA-P, 9700 Page Avenue, St. Louis, MO 63132-5200. Army National Guard personnel must request reservations through their unit training offices.

When requesting a reservation, you should know the following:

TJAGSA School Code—181

Course Name—133d Contract Attorneys Course 5F-F10

Course Number—133d Contract Attorney's Course 5F-F10

Class Number—133d Contract Attorney's Course 5F-F10

To verify a confirmed reservation, ask your training office to provide a screen print of the ATRRS R1 screen, showing by-name reservations.

The Judge Advocate General's School is an approved sponsor of CLE courses in all states that require mandatory continuing legal education. These states include: AL, AR, AZ, CA, CO, CT, DE, FL, GA, ID, IN, IA, KS, KY, LA, MN, MS, MO, MT, NV, NC, ND, NH, OH, OK, OR, PA, RH, SC, TN, TX, UT, VT, VA, WA, WV, WI, and WY.

2. TJAGSA CLE Course Schedule

April 2000

10-14 April	2nd Basics for Ethics Counselors Workshop (5F-F202).
10-14 April	11th Law for Legal NCOs Course (512-71D/20/30).
12-14 April	2nd Advanced Ethics Counselors Workshop (5F-F203).
17-20 April	2000 Reserve Component Judge Advocate Workshop (5F-F56).

May 2000

1-5 May	56th Fiscal Law Course (5F-F12).
1-19 May	43rd Military Judge Course (5F-F33).
7-12 May	1st JA Warrant Officer Advanced Course (Phase II, Active Duty) (7A-550A-A2).
8-12 May	57th Fiscal Law Course (5F-F12).
31 May-2 June	4th Procurement Fraud Course (5F-F101).

June 2000

5-9 June	3rd National Security Crime & Intelligence Law Workshop (5F-F401).
5-9 June	160th Senior Officers Legal Orientation Course (5F-F1).
7-9 June	Professional Recruiting Training Seminar.
5-14 June	7th JA Warrant Officer Basic Course (7A-550A0).
5-16 June	5th RC Warrant Officer Basic Course (Phase I) (7A-550A0-RC).
12-16 June	30th Staff Judge Advocate Course (5F-F52).
19-23 June	4th Chief Legal NCO Course (512-71D-CLNCO).
19-23 June	11th Senior Legal NCO Management Course (512-71D/40/50).
19-30 June	5th RC Warrant Officer Basic Course (Phase II) (7A-550A0-RC).
21-23 June	Career Services Directors Conference.
26 June-14 July	152d Basic Course (Phase I, Fort Lee) (5-27-C20).

July 2000

10-11 July	31st Methods of Instruction Course (Phase I) (5F-F70).
10-14 July	11th Legal Administrators Course (7A-550A1).
10-14 July	74th Law of War Workshop (5F-F42).
14 July-22 September	152d Basic Course (Phase II, TJAGSA) (5-27-C20).
17 July-1 September	2d Court Reporter Course (512-71DC5).
31 July-11 August	145th Contract Attorneys Course (5F-F10).

August 2000

7-11 August	18th Federal Litigation Course (5F-F29).
14 -18 August	161st Senior Officers Legal Orientation Course (5F-F1).
14 August-24 May 2001	49th Graduate Course (5-27-C22).
21-25 August	6th Military Justice Managers Course (5F-F31).
21 August-1 September	34th Operational Law Seminar (5F-F47).

September 2000

6-8 September	2000 USAREUR Legal Assistance CLE (5F-F23E).
11-15 September	2000 USAREUR Administrative Law CLE (5F-F24E).
11-22 September	14th Criminal Law Advocacy Course (5F-F34).
25 September-13 October	153d Officer Basic Course (Phase I, Fort Lee) (5-27-C20).
27-28 September	31st Methods of Instruction (Phase II) (5F-F70).

October 2000

2 October-21 November	3d Court Reporter Course (512-71DC5).
2-6 October	2000 JAG Annual CLE Workshop (5F-JAG).
23-27 October	47th Legal Assistance Course (5F-F23).
13 October-22 December	153d Officer Basic Course (Phase II, (TJAGSA) (5-27-C20).
30 October-3 November	58th Fiscal Law Course (5F-F12).
30 October-3 November	162d Senior Officers Legal Orientation Course (5F-F1).

November 2000

13-17 November	24th Criminal Law New Developments Course (5F-F35).
13-17 November	54th Federal Labor Relations Course (5F-F22).
27 November-1 December	163d Senior Officers Legal Orientation Course (5F-F1).
27 November-1 December	2000 USAREUR Operational Law CLE (5F-F47E).

December 2000

4-8 December	2000 Government Contract Law Symposium (5F-F11).
4-8 December	2000 USAREUR Criminal Law Advocacy CLE (5F-F35E).
11-15 December	4th Tax Law for Attorneys Course (5F-F28).

2001

January 2001

2-5 January	2001 USAREUR Tax CLE (5F-F28E).
7-19 January	2001 JAOAC (Phase II) (5F-F55).
8-12 January	2001 PACOM Tax CLE (5F-F28P).
8-12 January	2001 USAREUR Contract & Fiscal Law CLE (5F-F15E).
8-26 January	154th Officer Basic Course (Phase I, Fort Lee) (5-27-C20).

8 January-27 February	4th Court Reporter Course (512-71DC5).
16-19 January	2001 Hawaii Tax Course (5F-F28H).
24-26 January	7th RC General Officers Legal Orientation Course (5F-F3).
26 January-6 April	154th Basic Course (Phase II, TJAGSA) (5-27-C20).
29 January-2 February	164th Senior Officers Legal Orientation Course (5F-F1).

February 2001

5-9 February	75th Law of War Workshop (5F-F42).
5-9 February	2001 Maxwell AFB Fiscal Law Course (5F-F13A).
12-16 February	25th Admin Law for Military Installations Course (5F-F24).
26 February-9 March	35th Operational Law Seminar (5F-F47).
26 February-9 March	146th Contract Attorneys Course (5F-F10).

March 2001

12-16 March	48th Legal Assistance Course (5F-F23).
19-30 March	15th Criminal Law Advocacy Course (5F-F34).
26-30 March	3d Advanced Contract Law Course (5F-F103).
26-30 March	165th Senior Officers Legal Orientation Course (5F-F1).

April 2001

16-20 April	3d Basics for Ethics Counselors Workshop (5F-F202).
16-20 April	12th Law for Legal NCOs Course (512-71D/20/30).
18-20 April	3d Advanced Ethics Counselors Workshop (5F-F203).
23-26 April	2001 Reserve Component Judge Advocate Workshop (5F-F56).
29 April-4 May	59th Fiscal Law Course (5F-F12).
30 April-18 May	44th Military Judge Course (5F-F33).

May 2001

7-11 May	60th Fiscal Law Course (5F-F12).

June 2001

4-8 June	4th National Security Crime & Intelligence Law Workshop (5F-F401).
4-8 June	166th Senior Officers Legal Orientation Course (5F-F1).
4 June - 13 July	8th JA Warrant Officer Basic Course (7A-550A0).
4-15 June	6th RC Warrant Officer Basic Course (Phase I) (7A-550A0-RC).
11-15 June	31st Staff Judge Advocate Course (5F-F52).
18-22 June	5th Chief Legal NCO Course (512-71D-CLNCO).
18-22 June	12th Senior Legal NCO Management Course (512-71D/40/50).
18-29 June	6th RC Warrant Officer Basic Course (Phase II) (7A-550A0-RC).
25-27 June	Career Services Directors Conference.

July 2001

2-4 July	Professional Recruiting Training Seminar.
2-20 July	155th Officer Basic Course (Phase I, Fort Lee) (5-27-C20).
8-13 July	12th Legal Administrators Course (7A-550A1).
9-10 July	32d Methods of Instruction Course (Phase II) (5F-F70).
16-20 July	76th Law of War Workshop (5F-F42).

20 July- 28 September	155th Officer Basic Course (Phase II, TJAGSA) (5-27-C20).

3. Civilian-Sponsored CLE Courses

7 April ICLE	Child Abuse: Issues & Evidence Sheraton Colony Square Hotel Peachtree and 14th Streets Atlanta, Georgia
7 April ICLE	Writing to Persuade Marriott Gwinnett Place Hotel Atlanta, Georgia
13 April ICLE	Discovery: Scaling the Stone Walls How to Formulate and Implement a Practical Discovery Plan Marriott Century Center Hotel Atlanta, Georgia

4. Mandatory Continuing Legal Education Jurisdiction and Reporting Dates

Jurisdiction	**Reporting Month**
Alabama**	31 December annually
Arizona	15 September annually
Arkansas	30 June annually
California*	1 February annually
Colorado	Anytime within three-year period
Delaware	31 July biennially
Florida**	Assigned month triennially
Georgia	31 January annually
Idaho	Admission date triennially
Indiana	31 December annually
Iowa	1 March annually
Kansas	30 days after program
Kentucky	30 June annually
Louisiana**	31 January annually
Michigan	31 March annually
Minnesota	30 August
Mississippi**	1 August annually
Missouri	31 July annually
Montana	1 March annually
Nevada	1 March annually
New Hampshire**	1 July annually
New Mexico	prior to 1 April annually
New York*	Every two years within thirty days after the attorney's birthday
North Carolina**	28 February annually
North Dakota	30 June annually
Ohio*	31 January biennially
Oklahoma**	15 February annually
Oregon	Anniversary of date of birth—new admittees and reinstated members report after an initial one-year period; thereafter triennially
Pennsylvania**	Group 1: 30 April Group 2: 31 August Group 3: 31 December
Rhode Island	30 June annually
South Carolina**	15 January annually
Tennessee*	1 March annually
Texas	Minimum credits must be completed by last day of birth month each year
Utah	End of two-year compliance period
Vermont	15 July annually
Virginia	30 June annually
Washington	31 January triennially
West Virginia	30 June biennially

Wisconsin*	1 February biennially
Wyoming	30 January annually

* Military Exempt
** Military Must Declare Exemption

For addresses and detailed information, see the February 1998 issue of *The Army Lawyer.*

5. Phase I (Correspondence Phase), RC-JAOAC Deadline

The suspense for first submission of all RC-JAOAC Phase I (Correspondence Phase) materials is ***NLT 2400, 1 November 2000***, for those judge advocates who desire to attend Phase II (Resident Phase) at The Judge Advocate General's School (TJAGSA) in the year 2001 (hereafter "2001 JAOAC"). This requirement includes submission of all JA 151, Fundamentals of Military Writing, exercises.

Any judge advocate who is required to retake any subcourse examinations or "re-do" any writing exercises must submit the examination or writing exercise to the Non-Resident Instruction Branch, TJAGSA, for grading with a postmark or electronic transmission date-time-group ***NLT 2400, 30 November 2000***. Examinations and writing exercises will be expeditiously returned to students to allow them to meet this suspense.

Judge advocates who fail to complete Phase I correspondence courses and writing exercises by these suspenses will not be allowed to attend the 2001 JAOAC. To provide clarity, all judge advocates who are authorized to attend the 2001 JAOAC will receive written notification. Conversely, judge advocates who fail to complete Phase I correspondence courses and writing exercises by the established suspenses will receive written notification of their ineligibility to attend the 2001 JAOAC.

If you have any further questions, contact LTC Karl Goetzke, (800) 552-3978, extension 352, or e-mail Karl.Goetzke@hqda.army.mil. LTC Goetzke.

Current Materials of Interest

1. TJAGSA Materials Available through the Defense Technical Information Center (DTIC)

For a complete listing of the TJAGSA Materials Available Through DTIC, see the March 2000 issue of *The Army Lawyer.*

2. Regulations and Pamphlets

For detailed information, see the March 2000 issue of *The Army Lawyer.*

3. Article

The following information may be useful to judge advocates:

Lieutenant W.G. "Scotch" Perdue, *Weighing the Scales of Discipline: A Perspective on the Commanding Officer's Prosecutorial Discretion*, 46 NAVAL L. REV. 69 (1999).

Lieutenant Command Gregory P. Noone & Douglas William Moore, *An Introduction to the International Criminal Court*, 46 NAVAL L. REV. 112 (January 1999).

4. TJAGSA Legal Technology Management Office (LTMO)

The Judge Advocate General's School, United States Army, continues to improve capabilities for faculty and staff. We have installed new projectors in the primary classrooms and Pentium PCs in the computer learning center. We have also completed the transition to Win95 and Lotus Notes. We have migrated to Microsoft Office 97 throughout the school.

The TJAGSA faculty and staff are available through the MILNET and the Internet. Addresses for TJAGSA personnel are available by e-mail at jagsch@hqda.army.mil or by calling the LTMO.

Personnel desiring to call TJAGSA can dial via DSN 934-7115 or provided the telephone call is for official business only, use our toll free number, 800-552-3978; the receptionist will connect you with the appropriate department or directorate. For additional information, please contact our Information Management Office at extension 378. Mr. Al Costa.

5. The Army Law Library Service

With the closure and realignment of many Army installations, the Army Law Library Service (ALLS) has become the point of contact for redistribution of materials purchased by ALLS which are contained in law libraries on those installations. *The Army Lawyer* will continue to publish lists of law library materials made available as a result of base closures.

Law librarians having resources purchased by ALLS which are available for redistribution should contact Ms. Nelda Lull, JAGS-DDS, The Judge Advocate General's School, United States Army, 600 Massie Road, Charlottesville, Virginia 22903-1781. Telephone numbers are DSN: 934-7115, ext. 394, commercial: (804) 972-6394, or facsimile: (804) 972-6386.