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.