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Recent Developments in Appellate Review of Unlawful Command Influence

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In this case, the military judge forcefully and effectively discharged his duties as the last "last sentinel" to protect the court-martial from unlawful command influence.[1]

Unlawful command influence can take many shape and forms, and can arise at any stage of the court-martial process.[2] Because of the unique role of commanders, the rank structure, and the normal methods by which information and guidance is transmitted within the military, there will always be the potential for conduct which runs counter to the protections afforded by Article 37 of the Uniform Code of Military Justice (UCMJ).[3] From preferral of charges to post-trial review, the "mortal enemy of military justice"[4] is always a threat to a fair trial. When allegations of unlawful command influence arise, the command and trial participants at the trial level have the first and, perhaps, best opportunity to take remedial measures to ensure a fair trial. Since this is such a contentious issue, however, it is often left to the appellate courts to determine if the intent of Article 37 has been carried out. Even more important is the guidance that the appellate courts provide for dealing with unlawful command influence issues in the future.

In this past year, the Court of Appeals for the Armed Forces (CAAF) and the service appellate courts had several opportunities to determine if various types of conduct violated Article 37. There are examples of many of the faces of unlawful command influence. For the most part, there are no new developments, with one notable exception. In the most significant opinion of the year, the CAAF further clarified the burden on the government in litigating unlawful command influence motions at the trial level. The courts continued the trend of past years of putting the accused and defense counsel to the test in substantiating allegations of unlawful command influence. By continuing to emphasize the importance of a complete record and applauding the efforts of proactive trial judges, the courts also sent a clear message that allegations of unlawful command influence are best addressed and resolved at the trial level.

The Burden of Proof in Litigation of Unlawful Command Influence Allegations

Perhaps the most significant unlawful command influence decision in the past year was *United States v. Biagase*,[5] not so much because of the conduct which led to the allegations of unlawful command influence–the basic allegation was whether certain conduct by the chain of command amounted to witness intimidation, resolved at trial and on appeal against the appellant. Rather, *Biagase* is significant because it gave the CAAF another opportunity to underscore the importance of a conducting a complete inquiry, preparing a complete record for review, and implementing remedial measures at the trial level. In *Biagase*, the court also definitively answered one critical question that will always arise in the litigation of unlawful command issues at the trial level.

1. United States v. Biagase, 50 M.J. 143, 152 (1999).

2. *See* DAVID A. SCHLEUTER, MILITARY CRIMINAL JUSTICE, PRACTICE AND PROCEDURE § 6-3 (5th ed. 1999) (summarizing how unlawful command influence can arise at any stage of the court-martial process).

3. *Id. See also* UCMJ art. 37 (LEXIS 2000) which provides, in part:

> (a) No authority convening a general, special, or summary court-martial, nor any other commanding officer, may censure, reprimand, or admonish the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercises of its or his functions in the conduct of the proceedings. No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts. The foregoing provisions of the subsection shall not apply with respect to
>
> (1) general instructional or informational courses in military justice if such courses are designed solely for the purpose of instructing members of a command in the substantive and procedural aspects of courts-martial, or (2) to statements and instructions given in open court by the military judge, president of a special court-martial, or counsel.

4. *See* United States v. Thomas, 22 M.J. 388, 393 (C.M.A. 1986).

5. 50 M.J. at 14.

Lance Corporal (LCpl) Biagase was charged with attempted robbery, conspiracy to commit robbery, robbery, and assault consummated by battery. In his confession to the Naval Investigative Service, LCpl Biagase described in detail how he and some of his friends "jacked people . . . beat them up, kicked them, and took their money . . . ."[6] A copy of LCpl Biagase's confession was given to his company commander, who in turn gave it to his first sergeant with the directive to use it to teach other [noncommissioned officers] about "what's going on with our Marines."[7] He told his first sergeant to get the word out that "this type of behavior will not be tolerated within the command."[8] The company commander also told the company at a weekly formation that "we had a Marine do something that Marines do not do, and we will not tolerate this type of behavior."[9] He expressed ". . . that he was appalled and disgusted . . . and that any Marine who portrayed this type of behavior does not deserve to wear the uniform."[10]

The first sergeant, convinced there was a void of leadership in the unit, made copies of the confession and gave them to LCpl Biagase's section chief.[11] He also told the non-commissioned officers (NCOs) in the unit that he did not understand how this type of incident could happen, and that it was their obligation to set the record straight–"good Marines did not do these types of things."[12] Another senior NCO told the unit "that the military really couldn't tolerate situations like that because it was unbecoming."[13]

At trial, the accused made a motion to dismiss all charges based on unlawful command influence, asserting that the circulation of his confession in the unit, and the various lectures to unit formations had a chilling effect on potential witnesses who could testify as to his good character.[14] During the motion, the trial judge heard testimony from two NCOs who stated that they did not feel intimidated or prevented from testifying. One stated that he did think that testifying for LCpl Biagase might affect how some people thought of him as a person and staff NCO.[15] The other testified that he was initially reluctant to testify because he thought it might be "harder for him in the unit . . . or maybe his leave might be canceled."[16] The second NCO also stated that other Marines in the section "don't want to have anything [to do] with it just because of the way the statement was read out and the things they read."[17] On examination by the military judge, the second NCO testified that when the statement was disclosed, he thought the command would look unfavorably on anyone who testified on behalf of the accused . . . that the command would think he just wants to be like him."[18] Both NCOs testified that, notwithstanding their initial reluctance, they were willing to testify on behalf of the accused.[19]

The trial judge *sua sponte* directed that the company commander, first sergeant, section officer-in-charge (OIC), and the other senior NCO involved in publishing and distributing the accused's confession be brought into court to testify.[20] After hearing their testimony, the military judge asked the defense

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6. *Id.* at 144. The exact language used by Biagase was:

> When I say "jack people" I mean that we beat them up, kick them or whatever we have to do until they are hurt pretty bad and do not resist us any more. After the people are down, laying on the ground and cannot resist because we hurt them, we take their money or whatever else we want to take.

Id.

7. *Id.* at 146.

8. *Id.*

9. *Id.*

10. *Id.* at 147.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.* at 144-45.

15. *Id.* at 145.

16. *Id.*

17. *Id.*

18. *Id.* at 146.

19. *Id.*

20. *Id.*

counsel if any witnesses had refused to testify. Defense counsel agreed that no witnesses had refused to testify, but argued that dissemination of the statement "definitely had an impact on them by painting the accused as a bad character, even before the trial began."[21]

The trial judge, in ruling on the motion, expressed displeasure and concern with the series of events that led up to the motion for dismissal.[22] He found that the defense had met its initial burden of presenting some evidence of unlawful command influence, but also found that the government had met its burden "by clear and convincing evidence"[23] that there was no unlawful command influence in this case. He also stated that he was convinced beyond a reasonable doubt that there was no unlawful command influence in this case.[24] Even though the military judge found no unlawful command influence, he felt it appropriate to take remedial measures. In open court, with very strong language, he chastised the company commander, first sergeant, section OIC, and senior NCOs for distributing and commenting on the accused's confession.[25]

The trial judge then directed that the first sergeant be removed from the reporting chain of anyone who testified for the accused; directed that if the evaluation of anyone who testified for the accused is lower than their last rating, that written justification be attached; allowed the defense great latitude during voir dire of members; agreed to grant liberal challenges for cause; and offered to issue a blanket order to produce any defense witnesses that were otherwise reluctant to testify out of fear or concern for their well-being.[26] It is noteworthy that these are the types of remedial measures normally put into place after a finding of unlawful command influence.[27]

On review by the CAAF, the court faced two basic issues: first, whether the trial judge applied the correct legal test in concluding that there was no unlawful command influence, and second, whether there was unlawful command influence in this case which would have entitled the accused to relief.

The court took this opportunity to trace the development of the standard of proof once an accused raises the issue of unlawful command influence in a court-martial. The court traces the "clear and positive evidence" standard back to *United States v. Adamiak*,[28] and *United States v. Rosser*,[29] cases where the facts were not in dispute. The only issue in *Adamiak* and *Rosser* was whether the government had rebutted the presumption of prejudice by clear and convincing evidence once the accused had sufficiently raised unlawful command influence as an issue. In essence, the government was only required to show that unlawful command influence had not tainted the proceedings.

The first appearance of proof beyond a reasonable doubt as the standard for unlawful command influence allegations was in *United States v. Thomas*,[30] one of the 3d Armored Division's unlawful command influence cases. It was at this point that the court began to treat unlawful command influence as "an error of constitutional dimension,"[31] thus mandating proof beyond a reasonable doubt as the appropriate standard of review at the

21. *Id.* at 148.

22. *Id.* The military judge stated:

> Certainly, I do not deem it appropriate that a statement of an accused be Xeroxed, somehow reproduced, and provided to various members of the command, even though it may have been with good intentions; that is, even though it may have been for the purpose, as expressed here, to teach others of the kind of conduct that should not be tolerated . . . .

Id.

23. *Id.*

24. *Id.*

25. *Id.* The military judge later stated:

> Ladies and gentlemen, I have, after a lot of searching, denied a defense motion for unlawful command influence. I do not believe that there has been unlawful command influence. That is not to say that I believe things were done properly. I believe that you have come carelessly close to compromising the judicial integrity of these proceeding, and I want to make sure that all of you understand that this is a Federal Court of the United States, and I will not under any circumstances tolerate anybody that even remotely attempts to compromise the integrity of these proceedings . . . .

26. *Id.*

27. *See, e.g.*, United States v. Rivers, 49 M.J. 434 (1998).

28. 15 C.M.R. 412 (C.M.A.1954).

29. 6 M.J. 267 (C.M.A. 1979).

30. 22 M.J. 388, 394 (C.M.A. 1986).

31. *Biagase*, 50 M.J. at 150.

appellate level. In a series of cases, the court further clarified the burden of proof on the defense to raise the issue, and the government to rebut the presumption of prejudice once the issue was raised.[32] All of these cases, however, involved appellate review of a completed trial and described the burden of proof for affirming a conviction in a case where defense counsel had shown unlawful command influence did, in fact, exist. These cases did not address the appropriate standard of proof that the military judge must apply at trial. In only one previous case had the court even raised the question of whether there should be a distinction between the standard of proof applied in determining whether there is a presumption of command influence and the presumption of prejudice to an accused.[33]

In *Biagase*, the court definitively answers that question. All determinations associated with the litigation of unlawful command influence allegations are exceptions to the Rule for Court-Martial (R.C.M.) 905(c)(1)[34] preponderance of the evidence standard normally applicable to the resolution of factual issues necessary to decide a motion. The beyond a reasonable doubt standard applies to all determinations at both the trial and appellate level.[35] The initial burden to present some evidence of unlawful command influence still rests with the accused and defense counsel. Once that burden is met, the onus shifts to the government which must prove beyond a reasonable doubt that either: (1) the predicate facts do not exist; (2) the facts do not constitute unlawful command influence; or (3) that the unlawful command influence will not prejudice the proceedings or affect the findings and sentence.[36]

Turning to the facts of *Biagase*, the court refused to disturb the trial judge's ruling that there was no unlawful command influence, even though it was based on the incorrect legal test. What is key in this case is that, even though the trial judge found no unlawful command influence, he treated the case as if he had. The court noted that there are steps that the government and trial judge can take to protect the proceedings from any adverse effects from unlawful command influence.[37] As noted above, the trial judge took the same types of remedial measures in this case. The military judge conducted an exhaustive examination of the facts, chastised the entire chain of command in open court, removed the first sergeant from the rating chain of anyone who testified, required written justification for any downward turn in rating, and required that any witness who indicated reluctance to testify be produced. Further, all members of the chain of command who knew the accused testified favorably during both phases of the trial. Finally, the defense counsel stated on the record that no witnesses refused to testify. Under these circumstances, the court found beyond a reasonable doubt that the court-martial was not affected by unlawful command influence.

This decision is instructive for both trial counsel and defense counsel. The key for the government is that there will be a higher burden of proof once unlawful command influence is raised, and that burden applies to all three steps in the *Ayala-Stombaugh* test.[38] This opinion also underscores the importance of conducting a complete examination and creating a complete record once defense counsel adequately raises the issue. Finally, the importance of preventive measures cannot be overstated, even where the trial judge finds no unlawful command influence. Arguably, the court's opinion includes an implicit finding of unlawful command influence. Judge Sullivan criticizes the majority for not stating as much.[39] Were it not for the remedial measures put in place by the trial judge, the court's conclusion that the proceedings were not tainted by unlawful command influence would have been significantly more difficult, if not impossible.

Commander's Independent Discretion

Article 37 also protects a commander's independent discretion to dispose of misconduct in whatever manner that commander deems appropriate. Except in certain limited circumstances,[40] when a commander directs a subordinate to dispose of misconduct in a certain way, or otherwise limits the discretion of a subordinate, another face of unlawful command

32. *See* United v. Ayala, 43 M.J. 296 (1995); United States v. Stombaugh, 40 M.J. 208 (C.M.A. 1994); United States v. Reynolds, 40 M.J. 198 (C.M.A. 1994); United States v. Levite, 25 M.J. 334 (C.M.A. 1987). The defense must show (1) facts, which, if true, constitute unlawful command influence; (2) that the proceedings were unfair; and (3) that unlawful command influence was the cause of the unfairness. To show unfairness, the defense must produce evidence of proximate cause between the unlawful command influence and the outcome of the court-martial.

33. *Biagase*, 50 M.J. at 150; *see* United States v. Gerlich, 45 M.J. 309 (1996).

34. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 905(C)(1)(1998) [hereinafter MCM].

35. *Biagase*, 50 M.J. at 150-51.

36. *Id. See supra* note 32.

37. *See* United States v. Rivers, 49 M.J. 434 (1998).

38. *See supra* note 32 and accompanying text.

39. *Biagase*, 50 M.J. at 152-53.

40. *See* MCM, *supra* note 34, R.C.M. 306(a), (b).

influence appears. The CAAF addressed this aspect of unlawful command influence in two cases this last year.

In *United States v. Haagenson*,[41] the circumstances under which the convening authority withdrew charges from a special court-martial and later referred them to a general court-martial led to allegations of unlawful command influence. The case also involved several sub-issues normally associated with unlawful command influence allegations–the adequacy of the record and the battle of affidavits, the mantle of authority,[42] and the waiver of accusative stage unlawful command influence.[43]

A special court-martial convening authority (SPCMCA) originally referred charges of fraternization against Chief Warrant Officer (CW2) Haagenson to a special court-martial. After a discussion with his legal advisor, the SPCMCA withdrew the charges and referred them for a pretrial investigation under UCMJ Article 32(b). The fraternization charges and two additional charges were subsequently referred to a general court-martial. Chief Warrant Officer Haagenson challenged the decision to withdraw and re-refer the charges as being the result of unlawful command influence.

Chief Warrant Officer Haagenson's evidence of unlawful command influence on appeal consisted of an affidavit from the SPCMCA's executive officer, which described a meeting between the SPCMCA and the chief of staff for the base commander around the time of referral and withdrawal of the charges.[44] According to the executive officer, the chief of staff was "very angry, yelling, enraged, and showed anger beyond normal, professional irritation."[45] The chief of staff allegedly told the SPCMCA that CW2 Haagenson should not be in the Marine Corps any more, and stated, "I want her out of the Marine Corps."[46] In the executive officer's opinion, it was as if the chief of staff had something personal against the accused, and described his level of hostility as irrational and unprofessional. According to the executive officer, the chief of staff stated that "this is going to be the last nail in her coffin."[47]

The SPCMCA, through an affidavit, responded that he could not specifically recall why he withdraw the charges, except that it was on the advice of counsel.[48] He further stated that there was "absolutely no command influence associated with this decision," and that the chief of staff never said anything in his presence regarding any personal animosity toward CW2 Haagenson.[49]

The Navy-Marine Corps court found that there was nothing in the record of trial to support the allegation that the SPCMCA had been subjected to unlawful command influence.[50] The CAAF disagreed. Applying the standard of producing some evidence of unlawful command influence,[51] the court found the affidavit of the executive officer sufficient to raise unlawful command influence as an issue. In light of the SPCMCA's affidavit, however, it deemed the record insufficient to resolve the issue.[52] The trial counsel misinformed the court about the existence of the prior referral, and there was no other explanation for the withdrawal in the record as required by the *Manual for Courts-Martial*.[53] Consequently, the CAAF was left with no alternative but to return the record for additional fact-finding proceedings.[54] The court offered the alternative of setting aside the findings and sentence and returning the case to the SPCMCA for appropriate disposition.[55]

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41. 52 M.J. 34 (1999).

42. United States v. Stombaugh, 40 M.J. 208 (C.M.A. 1994).

43. *See* United States v. Hamilton, 41 M.J. 32 (CMA 1994).

44. *Haagenson*, 52 M.J. at 36. The SPCMCA was a subordinate commander of the base commander.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* There is some indication that the commander was not aware that a special court-martial could not impose confinement or a punitive discharge on a warrant officer. It appears that was first brought to his attention by his legal advisor. Additional charges were preferred against CW2 Haagenson between the time of withdrawal and re-referral to general court-martial.

49. *Id.*

50. *Id.*

51. *See* United States v. Johnston, 39 M.J. 242, 244 (C.M.A. 1994); *see also* United States v. Ayala, 43 M.J. 296, 300 (1995).

52. *Haagenson*, 52 M.J. at 37.

53. *See* MCM, *supra* note 34, R.C.M. 604(b).

54. *Haagenson*, 52 M.J. at 37.

Chief Judge Crawford and Judge Gierke dissented from the majority on two grounds. The court has distinguished between unlawful command influence which occurs during the accusative stage of a court martial–preferral and forwarding of charges–and that which occurs during the adjudicative stage, after referral.[56] For the dissenting judges, the decisions to withdraw charges, prefer additional charges, and order an Article 32(b) investigation all fall within the accusative stage. As such, the court's holding in *Hamilton* requires that the accused raise the issue at trial to avoid waiver. The dissenting judges went on to test for plain error, and found none. They also implicitly applied the "mantle of authority" test enunciated in *United States v. Ayala*.[57] The dissenting judges concluded that since the chief of staff was not in the chain of command, was of equal military grade, and there was no rating relationship, there was no unlawful command influence. There was no plain error, a requirement to overcome the waiver rule announced in *Hamilton*.[58]

Because the case was being returned for additional fact-finding, the majority did not directly address the analysis offered by Chief Judge Crawford and Judge Gierke. Judge Effron, writing for the majority, does propose in a footnote, however, that the accusative stage includes only the preferral and forwarding of charges, not the referral. Consequently, the waiver rule announced in *Hamilton* did not apply.[59] His rationale is that since withdrawal necessarily follows referral, and the *Manual for Courts-Martial* requires some explanation of withdrawal in the record of trial, withdrawal and re-referral falls within the adjudicative stage of a court-martial.[60] Judge Effron also cites other cases which suggest that referral is a judicial act[61] and, as such, would most logically be considered part of the adjudicative stage of trial.

For the practitioner, until the CAAF decides this issue, perhaps the safest approach is to treat withdrawal and re-referral as part of the accusative stage. Certainly, to the extent that this distinction may affect tactical decisions, this is the best approach. Practitioners should also note the dissenting opinion, particularly the discussion of whether a chief of staff can actually influence the decisions of a subordinate commander in that command. Is the court signaling a more restrictive view of the mantle of authority? That question remains for another day, maybe after additional fact-finding in this case.

The effect of a conversation between a superior and a subordinate was also at issue in *United States v. Villareal*.[62] The circumstances surrounding the convening authority's unilateral withdrawal from the agreement, and transfer of the case to another convening authority, was the basis for the allegation of unlawful command influence.

Aviation Ordnanceman Airman (AOA)Villareal was charged with murder and various weapons charges. Early in the trial process, he entered into a pretrial agreement with the original convening authority that would allow him to plead guilty to involuntary manslaughter and some of the other charges. In exchange, the convening authority agreed to approve no confinement in excess of five years, and also agreed to limit forfeitures to one-half of his pay for sixty months.[63] Responding to pressure from the victim's family who was dissatisfied that the pretrial agreement allowed AOA Villereal to plead guilty to manslaughter instead of murder, the convening authority sought the advice of an "old friend and shipmate," who happened to be his acting superior convening authority at the time.[64] The superior simply asked, "What would it hurt to send the issue to trial?"[65] Against the advice of his staff judge advocate, the convening authority withdrew from the pretrial agreement and transferred the case to a third convening authority.[66] Aviation Ordnanceman Airman Villareal was subsequently convicted of involuntary manslaughter and other charges, and sentenced to ten years confinement.

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55. *Id.*

56. United States v. Hamilton, 41 M.J. 32 (C.M.A. 1994).

57. 43 M.J. 296, 300 (1995).

58. *See supra* note 56 and accompanying text.

59. *Haagenson*, 52 M.J. at 36, n.3.

60. *Id.*

61. *Id.*

62. 52 M.J. 27 (1999).

63. *Id.* at 29.

64. *Id.*

65. *Id.*

66. *Id.*

Aviation Ordnanceman Airman Villareal viewed the statement by the superior convening authority as unlawful command influence and sought either dismissal of the charges, or specific performance of his original pretrial agreement. Even though the military judge concluded that the telephone call created the appearance of unlawful command influence, the CAAF disagreed. Emphasizing that the subordinate initiated the call, the majority concluded that there was no violation of R.C.M. 104.[67] The court did not address whether the conversation between the commanders created an appearance of unlawful command influence. In dicta, the court held that even if there was an appearance of unlawful command influence, as found by the military judge, the transfer of the case to a new convening authority removed any possibility of prejudice.[68]

Judge Effron wrote a strong dissent in this case, taking issue with the majority's focus on who initiated the conversation. His approach was simple–when reviewing this type of allegation of unlawful command influence, it should not matter who initiates a conversation.[69] Once an accused presents evidence of unlawful command influence, the burden shifts to the government to disprove the facts or prove that there was no prejudice to the accused. The original convening authority's testimony that the advice caused him to reexamine his position and ultimately withdraw from the pretrial agreement satisfies the first step.[70] Judge Effron opined that the military judge correctly concluded there was unlawful command influence in this case. Further, he and Judge Sullivan agreed that transfer of the case to a different convening authority is an inadequate remedy. Judge Effron proposed a novel solution–transfer the case with the pretrial agreement intact, and let the new convening authority decide.[71] That would be the only way to remove the taint of unlawful command influence from the original convening authority's decision to withdraw from the pretrial agreement.

Convening Authority as Accuser

An accuser, as defined in UCMJ, Article 1(9) is disqualified from referring charges to a special or general court-martial.[72] The convening of a court-martial by an officer who is also an accuser is generally considered to be a form of unlawful command influence.[73] The CAAF addressed the issue of disqualification as an accuser in two cases last year, the first of which is *United States v. Voorhees*.[74]

Pursuant to a pretrial agreement, Lance Corporal (LCpl) Voorhees pled guilty to introduction, distribution, and use of LSD.[75] During the providency inquiry, in response to questions from the military judge regarding whether anyone had threatened or forced him to plead guilty, LCpl Voorhees revealed that both his company commander and battalion commander had approached him about his case.[76] His company commander told him that his civilian defense counsel would be more of a hindrance than help in his court-martial. His battalion commander, who was also the convening authority, asked him if he had signed the pretrial agreement. When Voorhees responded that he and his defense counsel still had questions, his battalion commander told him that if he did not accept the pretrial agreement, he was "going to burn him."[77]

On appeal, LCpl Voorhees alleged that the battalion commander, based on their conversation and his threat to "burn him," was an accuser and was therefore disqualified from further involvement in the case.[78] More specifically, LCpl Voorhees' position was that, if the battalion commander (the convening authority) was an accuser, his involvement in the pretrial agreement process invalidated the findings and sentence.[79] The CAAF applied the Article 1(9) and Article 23(b)[80] tests for determining whether the convening authority was an

67. *Id.* at 30. The majority distinguished *United States v. Gerlich*, 45 M.J. 309 (1996), where the court emphasized that "a subordinate is in a tenuous position when it comes to evaluating the effects of unlawful command influence being exerted on him or her." In *Gerlich*, there was no curative action.

68. *Id.*

69. *Id.* at 32. Judges Effron and Sullivan agree that *Gerlich* controls.

70. *Id.*

71. *Id.* at 33.

72. UCMJ, art. 1(9) (LEXIS 2000). Article 1(9) provides: The term "accuser" means a person who signs and swears to harges, any person who directs that charges nominally be signed and sworn to by another, and any other person who has an interest other than an official interest in the prosecution of the accused.

73. *Id.* arts. 1(9), 22, 23. These articles combine to disqualify an accuser from referring charges to a special court-martial or general court-martial.

74. 50 M.J. 494 (1999).

75. *Id.* at 495.

76. *Id.*

77. *Id.* at 496-97.

78. *Id.* at 498. This argument was based on the CAAF's decision in *United States v. Nix*, 40 M.J. 6 (1994), in which the court held that a commander who was an accuser was disqualified from making a disposition recommendation. The *Nix* court set aside the findings and sentence.

accuser–"so closely connected to the offense that a reasonable person would conclude that he had a personal interest in the matter"–and concluded that there was no evidence in the record of personal interest in this case.[81] Since LCpl Voorhees and his defense counsel were fully aware of the issue at trial and chose not to fully litigate it, the court did not feel any obligation to do more to resolve the complaint about the validity of the pretrial agreement.[82] Further, since LCpl Voorhees and his defense counsel chose not to raise the disqualification issue as it may have impacted post-trial action, and actually sought clemency from the convening authority, there was no plain error nor ineffectiveness assistance of counsel which would warrant granting relief to LCpl Voorhees.[83]

This decision offers guidance on how to apply the definition of accuser to a given set of facts. It also shows the reluctance of the court to intervene where all the facts are known to the accused and defense counsel at the time of trial, and the issue is not raised. The court never specifically applied waiver,[84] but the analysis and the end result would have been the same. Lance Corporal Voorhees got the benefit of his bargain in a case where it appears that was his and his defense counsel's ultimate goal.

Another case this past year in which the accused sought disqualification of the convening authority based on personal interest in the case was *United States v. Rockwood*.[85] A general court-martial convicted Captain (CPT) Rockwood of failure to repair, conduct unbecoming an officer, leaving his appointed place of duty, disrespect toward a superior commissioned officer, and willful disobedience of a superior commissioned officer.[86] Captain Rockwood, a counter-intelligence officer, deployed with his unit to Haiti as part of Joint Task Force 190 for Operation Uphold Democracy. He was personally concerned about the conditions in the national penitentiary in Haiti, so much so that he attempted to initiate an inspection of the prison. Dissatisfied with the division commander's decision to increase operational security instead of ordering an inspection, he took matters into his own hands.[87] Captain Rockwood went to the prison, without authority, to conduct his own inspection. When he returned to his unit, he was ordered into the local hospital for psychiatric evaluation.[88] He left the hospital without permission and later became involved in a heated exchange with his supervisor over his going to the prison and leaving the hospital without authority. Based on his conduct, CPT Rockwood was offered non-judicial punishment, which he refused.[89]

One of several issues raised at trial and on appeal was that the convening authority was disqualified based on a conflict of interest.[90] Captain Rockwood's theory was that since he had disobeyed the commander's orders and had continued to criticize the conduct of the entire operation, the entire command was put in the position of defending its own conduct and, therefore, had a personal interest in the outcome of his court-martial.[91]

The court again noted that under Article 1(9), a convening authority who is an accuser–has an interest other than an official interest in the prosecution of an accused–is disqualified and cannot refer charges to trial by special or general court-martial.[92] The court found nothing in the record, however, to support the allegation that the convening authority in this case had

79. *Id.*

80. Article 23(b) of the UCMJ provides: "If such officer is an accuser, the court shall be convened by superior competent authority, and may in any case be convened by such authority if considered advisable by him." UCMJ art. 23(b) (LEXIS 2000).

81. *Voorhees*, 50 M.J. at 494.

82. *Id.*

83. *Id.* at 494-96.

84. *See supra* note 56 and accompanying text. Application of the *Hamilton* waiver rules to this case would have been problematic. The pretrial agreement negotiation process and, certainly, the conversation between Voorhees and the convening authority occurred after referral and, based on the *Hamilton* and *Drayton* analyses, would not have been waived.

85. 52 M.J. 98 (1999).

86. *Id.* at 102. The convening authority disapproved the finding of guilty of conduct unbecoming an officer.

87. *Id.* at 100-01.

88. *Id.*

89. *See id.* at 100-102 for a complete recitation of the facts.

90. *Id.* at 102.

91. *Id.*

92. *Id.* at 103; *see* UCMJ art. 1(9) (LEXIS 2000).

a personal interest in the outcome.[93] Further, with regard to the challenge to the military judge, panel members, and witnesses, the court noted the procedural safeguards available to any accused to ensure that these parties are not biased or improperly influenced in carrying out their duties.[94] Although the court noted the protection against unlawful command influence afforded an accused under Article 37 and the relationship between unlawful command influence and disqualification of an accuser, it chose to treat the issue in this case as one of bias. The court noted that, except for challenge of the military judge, CPT Rockwood and his defense counsel employed all available safeguards in this case.[95] Further, the court noted that to disqualify a command from acting on misconduct based on public criticism of operational decisions would make the military justice system virtually useless in an operational setting.[96] Judge Sullivan, in a concurring opinion, felt that the trial court should have called the commander for the limited purpose of determining whether his interest was personal or official.[97] He concluded that the error was harmless because, in his opinion, any commander would have referred charges under these circumstances.[98]

The lesson for the practitioner from *Voorhees* and *Rockwood* is that something more than a bare allegation of personal interest is required before an accused can avail himself of the accuser disqualification rules. Lance Corporal Voorhees could not convince the court that his commander had interest other than normally attributed to a convening authority. Similarly, CPT Rockwood and his defense counsel could not convince the trial or appellate courts that the procedural safeguards available were not sufficient to insure a fair trial.

Inflexible Attitude Toward Punishment

A commander who exhibits an inflexible attitude toward clemency may also be challenged under the umbrella of unlawful command influence.[99] The theory is that a commander who has an inflexible attitude towards punishment will not apply the appropriate legal standards during the post-trial review process.[100] In *United States v. Vasquez,*[101] the appellant made that argument to the Navy-Marine Corps Court of Criminal Appeals. After his conviction and sentencing for larceny, Gunner's Mate Vasquez submitted a request for deferment of his forfeitures and reduction in rank, as well as a waiver of all automatic forfeitures.[102] In his written denial of the requests, the convening authority stated "Any request for deferment, regardless of the circumstances, would not be *considered* [emphasis added]."[103]

The Navy-Marine Corps court found that the convening authority had not abandoned his impartial role, thus becoming disqualified to take final action on the court-martial.[104] In essence, the court interpreted the convening authority's response as an unfortunate choice of words, and accepted, as evidence that the convening authority did consider the appellant's requests, the fact that the convening authority's response was specific and detailed.[105] The court simply refused to place form over substance.

Court Member Selection

The manner in which court-martial members are selected can also lead to allegations of unlawful command influence, where there is evidence that the convening authority improperly selected the members or selected them to achieve a certain

93. *Id.*

94. *Id.* The military judge may be challenged under R.C.M. 902(a) and (b); the court members are subject to examination, challenges for cause, and preemptory challenges under R.C.M. 912; and witnesses are subject to cross-examination.

95. *Id.*

96. *Id.* The court placed special emphasis on the established means of directing criticism that already exist within the armed forces, such as UCMJ Article 138 and inspector general channels.

97. *Id.* at 116.

98. *Id.*

99. *See* United States v. Howard, 48 C.M.R. 939, 944 (C.M.A. 1974); *see also* United States v. Fernandez, 24 M.J. 77, 79 (C.M.A. 1987).

100. *Id.*

101. 52 M.J. 597 (N.M. Ct. Crim. App. 1999).

102. *Id.* at 600.

103. *Id.*

104. *Id.*

105. *Id.*

result. The courts dealt with several such cases this past year, three of which are summarized below.

In *United States v. Roland*,[106] the method chosen for narrowing the list of potential members created the problem, and emphasized the risks associated with attempts to streamline the nomination process. The precise question was whether a process that excluded members based on rank was contrary to Article 25. The court offered very specific guidance on what is permissible in this process.[107]

The staff judge advocate (SJA) in Airman Roland's command routinely sent a quarterly letter to subordinate commanders requesting nominations for court-martial members, specifically asking for qualified nominees between the pay grades of E-5 and 0-6.[108] Two subordinate commands interpreted this guidance to preclude nomination of members below the pay grade of E-5.[109] The SPCMCA compiled the lists and sent them forward to the general court-martial convening authority (GCMCA). The SPCMCA testified by stipulation that he compiled the list from the nominees from subordinate commands, understood the Article 25[110] criteria, and also understood that he was not limited to those names submitted by subordinate commanders.[111] More importantly, he testified that he was not aware of the SJA's guidance and would have considered nominating members below the pay grade of E-5 if he deemed them qualified.[112] In addition, the SJA's memorandum transmitting the final nomination list to the GCMCA contained the standard guidance that he was not limited to the names on the list, but could select anyone assigned to his command.[113]

At trial, there was no evidence of bad faith on the part of the convening authority or the staff judge advocate. Even though the trial judge found that the method of selecting the members was "within the legally allowable system of Article 25,"[114] and denied the challenge at trial, he recommended that the command change their system for selecting members.[115]

The court took this opportunity to review the various rights and court composition options afforded a military accused. The majority opinion reemphasized that while the military accused does not enjoy all of the rights afforded an accused under the Sixth Amendment, he is entitled to a fair and impartial panel, defined as a panel selected in accordance with Article 25 and one not subjected to unlawful command influence.[116] The CAAF has refined this definition in a series of opinions,[117] but the bottom line is that while exclusion of junior members based on Article 25 criteria is permissible, exclusion based solely on rank is not.[118] The majority also endorsed what is likely standard practice in most commands of soliciting nominations to assist the commander in the panel selection process. However, this process of assisting the commander must also comply with Article 25–it cannot systematically include or exclude certain categories of service members. More importantly, the convening authority's duty to personally select court members does not automatically correct errors and improprieties in the nomination process.[119]

Turning to the facts of *Roland*, the court, by implication, held that there was evidence of improper selection, which shifted the burden to the government to show there was no impropriety. The testimony of the staff judge advocate and the special court-martial convening authority was sufficient to sat-

106. 50 M.J. 66 (1999).

107. The criteria for selecting court members is found in UCMJ art. 25(d)(2) which provides, in part: "When convening a court-martial, the convening authority shall detail as members thereof such members of the armed forces as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament." UCMJ art.25(d)(2) (LEXIS 2000).

108. *Id.* at 67.

109. *Id.*

110. *See* UCMJ art. 25 (defining the criteria that a convening authority can use in selecting court-martial panel members).

111. *Roland*, 50 M.J. at 67.

112. *Id.*

113. *Id.* at 68.

114. *Id.* at 68.

115. *Id.*

116. *Id.*

117. *Id.* (citations omitted).

118. *Id.*

119. *Id.* at 69.

isfy the court that the government carried its burden at trial. The court held that, even though there were no members below the pay grade of E-5 selected, there was no impropriety in this case–the selection process was not sufficiently tainted to amount to unlawful command influence.[120] What was critical to the decision in this case was the SPCMCA's testimony that he understood he could nominate members below pay grade E-5, as well as the written guidance to the general court-martial convening authority that he could select anyone from his command.

A word of caution is appropriate, however. The exclusion of certain ranks still "troubled" Judge Sullivan. He joined in the majority opinion based on his conclusion that the staff judge advocate's letter was mere guidance, the convening authority was advised that he was free to select anyone in the command, and there was no evidence of any improper motive.[121] Also noteworthy is Judge Gierke's dissent, as it traces the history of the CAAF in addressing allegations of improper selection of panel members. His conclusion is simple–intentional systematic exclusion of pay grades other than E-1 and E-2[122] is per se improper and cannot be tested for prejudice.[123]

The message in *Roland* for practitioners is that staff assistance in soliciting nominations for court members remains an acceptable practice. However, systematic exclusion, based on other than UCMJ Article 25 criteria, is not. Further, for staff judge advocates, an alternative is to have the appropriate convening authority sign the request for nominations. This approach eliminates the unpleasant challenge of the motives or intentions of the staff judge advocate and anyone else involved in the nomination process. Finally, any written guidance to the convening authority on the selection process must include, with emphasis, the UCMJ authority and mandate to consider and select any service member assigned to the command.

Another case that focuses on the manner in which court members were selected was *United States v. Bertie*.[124] A general court-martial composed of officer and enlisted members convicted Specialist (SPC) Bertie of assault with a dangerous weapon. One of the issues raised in this case was whether the convening authority improperly stacked the court-martial with senior officers and noncommissioned officers.[125] At trial and on appeal, SPC Bertie asserted that the composition of his court-martial panel and others in the command over time created a presumption that the commander improperly considered grade and rank as criteria for selecting court members.[126] His defense counsel noted that there was a consistent absence of junior officers and noncommissioned officers below the pay grade of E-7 on courts-martial panels in this particular command, and those facts alone established improper court-stacking.[127]

The court, citing prior precedents, again noted that a military accused is not entitled to a court-martial panel that is a representative cross-section of the military community. By the same token, however, systematic exclusion of lower grades and ranks is not permitted in the court-martial system.[128] That said, the court declined to grant relief to SPC Bertie, primarily because there is no precedent for the presumption of irregularity relied on by the defense.[129] While the court did not close the door on a statistical analysis as partial proof of improper exclusion of court-martial panel members based on rank, it made it quite clear that something more is required. This type of statistical evidence must be combined with other evidence of improper intent.[130] Further, where there is evidence that the staff judge advocate properly advised the convening authority that he must rely on the Article 25 criteria only[131] and the convening authority acknowledges using that criteria, as was done in this case, a court-stacking claim is not established.[132]

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120. *Id.*

121. *Id.* at 70.

122. United States v. Yager, 7 M.J. 171 (C.M.A. 1979).

123. *Roland*, 50 M.J. at 70-71.

124. 50 M.J. 489 (1999).

125. *Id.* at 490.

126. *Id.* at 490-91.

127. *Id.* The argument, specifically, was that the convening authority was using rank as a criteria for selection of panel members, contrary to Article 25.

128. *Id.* at 492. *See supra* notes 114-115 and accompanying text (citations omitted).

129. *Id.*

130. *Id.*

131. *Id.* The SJA advised the convening authority, in writing, that "neither rank, race, gender, duty position, or any other factor may be used for the deliberate or systematic exclusion of qualified persons for court-martial membership." *Id.*

The *Bertie* court did not close the door on the use of statistical analysis as part of a challenge to court-martial panel composition, nor did it repudiate the "appearance of impropriety" language in earlier precedents.[133] The court did make clear, however, that a bare allegation is not enough.

A third decision dealing with the nomination and selection process, *United States v. Tanksley*,[134] comes from the Navy-Marine Corps Court of Criminal Appeals. Captain (Capt) Tanksley was charged and convicted of making false official statements, taking indecent liberties with a female under the age of sixteen, communicating a threat, and false swearing.[135] Because of the seniority of the accused, the staff judge advocate recognized the need for additional panel members and asked subordinate commands for nominees. Due to other personnel moves, the trial counsel in Capt Tanksley's court-martial was involved in obtaining a list of officers from one of the subordinate commands.[136] Normally, a trial counsel should avoid involvement in the nomination and selection of court-members.[137] What created the issue in this case was the trial counsel providing additional information on three of the nominees to the superior staff judge advocate who, in turn, passed that information on to the convening authority.[138]

Captain Tanksley alleged that the court-martial panel was improperly selected because of the improper participation of the trial counsel. The Navy-Marine Corps court considered every possible approach to this issue in concluding that Capt Tanksley was not entitled to relief. First, the court found that there was no violation of UCMJ Article 25 or Article 37. Second, the court applied waiver because the issue was not raised at trial. Third, the court found that Capt Tanksley had not met his burden of providing sufficient facts to raise unlawful command influence. Finally, the court found that the information relayed from the trial counsel to the convening authority did not prejudice Capt Tanksley's right to a fair trial.

While the court made relatively short shrift of this issue, one of several raised by the accused on appeal, it is worthy of further discussion. Application of waiver to this set of facts is problematic for two reasons. First, Capt Tanksley and his defense counsel were not made aware of the information on the third nominee until after trial. Second, it is questionable whether the selection of court-martial panel members can be considered part of the accusative stage of trial to which waiver applies.[139] Further, while an accused must offer more than mere speculation regarding unlawful command influence, the threshold is still low. In this case, the government did provide information on a potential panel member to the convening authority under circumstances where that information would not be available to the accused and his defense counsel.[140] Ultimately, the most solid basis for denying relief to Capt Tanksley may be that there was no prejudice to his substantial rights; applying the three-step analysis, the proceedings were fair.

Unlawful Command Influence in the Deliberation Room

Another way that unlawful command influence can manifest itself in the military justice system is the improper use of rank in the deliberation room.[141] In *United States v. Mahler*[142] the court was faced with precisely that allegation.

In a hotly contested trial, a general court-martial convicted Corporal (CPL) Mahler of assault consummated by battery and murder of his seventeen-month old son, and sentenced him to life in prison, a dishonorable discharge, total forfeitures, and reduction to the pay grade of E-1.[143] Corporal Mahler asserted

132. *Id.*

133. *Id.* at 493; *see* United States v. Nixon, 33 M.J. 433 (C.M.A. 1991).

134. 50 M.J. 609 (N.M. Ct. Crim. App. 1999).

135. *Id.* at 611.

136. *Id.* at 614-15.

137. *See* United States v. Marsh, 21 M.J. 445 (C.M.A. 1986); *see also* United States v. Cherry, 14 M.J. 251 (C.M.A. 1982).

138. *Tanksley*, 50 M.J. at 615. The trial counsel informed the SJA that one of the members was Tanksley's officer-in-charge and a possible witness; a second nominee was pending disciplinary action; and a third had "an inventive flair with military uniforms, creating inter-service ensembles which had caused the trial counsel to question whether the nominee was actually a Naval officer, or was, instead an impostor . . ." The information on the third nominee was not disclosed until after trial, during post-trial litigation.

139. *See* United States v. Drayton, 45 M.J. 180 (1996); *see also* United States v. Hamilton, 41 M.J. 32 (C.M.A. 1994).

140. *Tanksley*, 50 M.J. at 616. The author agrees with the Navy-Marine Corps court that R.C.M. 502(f) requires that disqualifying information be brought to the attention of the proper authority. The additional question, however, is whether this must always be done as a matter of record, as was apparently done with the other two members in this case.

141. *See* United States v. Accordino, 20 M.J. 102 (C.M.A. 1985) (holding that it is improper for senior ranking members to use rank to influence the vote within the deliberation room).

142. 49 M.J. 558 (1998).

on appeal that the President of the court-martial panel improperly influenced the deliberation process during his court-martial.[144] In support of his claim, he offered an affidavit from his civilian defense counsel, which asserted that the sister of one of the panel members at the appellant's trial contacted him. The defense counsel asserted that the sister told him that her brother told her that there was division among the members and that the President pressured other members to change their verdict from not guilty to guilty.[145] He further asserted that the sister stated that her brother was uncomfortable with this but was a career Marine and concerned about what the panel President could do to him.[146] Appellate defense counsel talked to the panel member, who disagreed completely with the statements attributed to him. Although appellate defense counsel indicated that they would obtain an affidavit from the member, in light of the other evidence of record, the CAAF did not deem it necessary.[147]

Relying on the general rule that panel members are presumed to follow the military judge's instructions, including the charge that superiority of rank cannot be used to attempt to control the independence of members,[148] the court framed the issue as one of sufficiency of the evidence to raise unlawful command influence and rebut the presumption that the members followed the instructions. Applying the test from *Ayala-Stombaugh* the court concluded that the appellant had not come close to reaching the low threshold for triggering an inquiry into allegations of unlawful command influence.[149] In the words of the court, "hearsay several times removed . . . inherently untrustworthy and unreliable" does not meet the requirement.[150] Most damaging to the appellant, however, was the fact that no other member submitted affidavits, and the member to whom the statements were attributed specifically disagreed with the defense counsel's recitation of the facts. The court concluded that there simply was not enough evidence of outside pressure on court members to warrant a *Dubay*[151] hearing. The message for trial defense counsel is clear–you must support this type of allegation with the strongest, most credible evidence.

Staff and Subordinate Unlawful Command Influence

Unlawful command influence committed by staff members also poses a problem for the military justice system.[152] In *United States v. Richter*,[153] in addressing allegations of staff unlawful command influence, the court was again faced with two recurring issues: sufficiency of the evidence to raise unlawful command influence; and circumstances under which the issue is waived.

A general court-martial convicted Technical Sergeant (TSgt) Richter of larceny and wrongful disposition of government property.[154] Although not raised at trial, one of the issues raised by TSgt Richter on appeal was that the legal office pressured his commander into preferring charges.[155] Specifically, TSgt Richter alleged that his commander stated that he was threatened with removal from TSgt Richter's command if he did not prefer charges.[156] In support of his allegation, TSgt Richter offered his own affidavit, an affidavit from another airman pending charges related to his own, and an affidavit from that airman's wife. According to Tsgt Richter, his commander told him that he had been pressured into preferring charges. He also referred to a similar statement allegedly made by his former first sergeant to his co-accused.[157] Technical Sergeant Richter

143. *Id.* at 560.

144. *Id.* at 565.

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.* (citations omitted).

149. United States v. Mahler, 49 M.J. 558, 565 (1998). *See* United States v. Ayala, 43 M.J. 296, 299 (1995); United States v. Stombaugh, 40 M.J. 208, 213 (C.M.A. 1994); and United States v. Levite, 25 M.J. 334, 341 (C.M.A. 1987).

150. *Mahler*, 49 M.J. at 566.

151. United States v. DuBay, 37 C.M.R. 411 (C.M.A. 1967).

152. *See* United States v. Hamilton, 41 M.J. 32 (1994) (communicating directive to prefer charges); United States v. Hilow, 32 M.J. 439 (C.M.A. 1991)(showing staff officer's compilation of list of nominees who were supporters of "harsh discipline").

153. 51 M.J. 213 (1999).

154. *Id.* at 214.

155. *Id*. at 223. Technical Sergeant Richter stated in his affidavit that he first became of the information after his court-martial, but before convening authority action.

156. *Id.*

did not submit affidavits from his commander or former first sergeant.

The issue in this case–an allegation after trial that someone coerced a commander into preferring charges–is not new.[158] In light of past precedents, the result in this case was predictable. The Air Force court, in an unpublished opinion, held that the affidavits were insufficient to raise the issue of unlawful command influence.[159] Citing *Hamilton*, the CAAF held that, even if raised, the accused waived the issue since it was not raised at trial.[160] This decision is noteworthy, however, for a couple of reasons. First, it does underscore the substantial burden on an accused and defense counsel in successfully raising and obtaining relief on an unlawful command influence allegation at the appellate level. Implicit in the rationale for the Air Force court's decision is the conclusion that the quality and quantity of the evidence submitted by Richter was not up to par. Certainly, the absence of statements from his former commander and first sergeant doomed any chance for success in this case. More importantly, though, is what has become a consistent trend since the CAAF recognized in *Hamilton* and reinforced in *Drayton* a distinction between the accusative stage–preferral and forwarding of charges–and the adjudicative stage of trial. If an allegation of unlawful command influence in the accusative stage is not raised at trial, in the absence of unlawful command influence that precludes the accused from raising the issue, or concealment of evidence by the government, the issue is waived.[161] Judge Sullivan, dissenting from this portion of the decision, restated his position from *Hamilton*–any waiver of this issue must be clear and knowing, and on the record.[162] If the court had accepted TSgt Richter's assertion that he did not become aware of this information until after trial, a clear and knowing waiver would have been impossible in this case. Nevertheless, the court concluded that he was not entitled to relief. The practical point for defense counsel is that they must marshal as much evidence as possible to support this type of allegation. The practical impact of this decision, however, is that it will continue to be extremely difficult to overcome waiver if the issue of unlawful command influence during the accusative stage is first raised after trial.

In *United States v. Bradley*[163] the CAAF faced an allegation that the staff judge advocate had committed several violations of Article 37.[164] The court's opinion, however, reemphasized the importance of providing facts to support allegations of unlawful command influence, and being able to show actual prejudice.

A general court-martial convicted Staff Sergeant Bradley of rape and indecent assault. On appeal, he alleged that the staff judge advocate had improperly influenced his court-martial in four ways: (1) by pressuring a witness not to testify, (2) by engaging in an ex parte conversation with a panel member, (3) by publishing an article in the post newspaper which prejudiced his chance for clemency, and (4) by dissuading a panel member from providing a letter in support of his request for clemency.[165]

On the first allegation, while Bradley characterized the staff judge advocate's conduct as "blatantly improper, causing the witness to be less than enthusiastic," the CAAF agreed with the service court's conclusion that there was nothing improper about the conversation between the staff judge advocate and the witness.[166] Further, the court held that, since the witness did testify and there is no authority for the proposition that loss of enthusiasm equals prejudice, the accused is not entitled to relief under these circumstances.[167] Similarly, the court relied on the Air Force court's conclusion that any conversation between the staff judge advocate and a panel member was totally unrelated to Bradley's court-martial and, therefore, held that there was no unlawful command influence in fact or law.[168] Further, the court held that an unsigned newspaper article that does no more than report the results of a court-martial to the military commu-

157. *Id.* at 223.

158. *See* United States v. Hamilton, 41 M.J. 32 (1994); *see also* United States v. Drayton, 45 M.J. 180 (1996).

159. *Richter*, 51 M.J. at 224.

160. *Id.*

161. *Id.*

162. *Id.*

163. 51 M.J. 437 (1999).

164. UCMJ art. 37 (LEXIS 2000).

165. *Bradley*, 51 M.J. at 442.

166. *Id.*

167. *Id.* at 442. *See United States v. Bradley*, 47 M.J. 715 (A.F. Ct. Crim. App. 1997) (reciting the facts of the case); *see also* United States v. Bradley, 48 M.J. 777, 779 (A.F. Ct. Crim. App 1998). The *Dubay* hearing in this case disclosed that the witness initiated the call, seeking general information about Bradley's pending trial. When the SJA discovered that he was a potential defense witness and might be reluctant to testify, he informed her that she had no choice and should not be influenced by anything that he might have said.

nity does not violate Article 37.[169] Finally, on the allegation that the staff judge advocate dissuaded a panel member from submitting a recommendation for clemency, the court departed slightly from the lower court's approach to resolution.

The Air Force court, relying on testimony from the *Dubay* hearing in this case, held that Bradley's complaint was without merit.[170] The CAAF, after noting the incomplete findings of fact in this case, concluded that, in any event, Bradley had not alleged sufficient facts to show a legal claim.[171] Central to the CAAF's conclusion on this issue was its view that the content of any clemency letter was speculative.[172] The court also pointed out that there was a possibility that the letter would contain statements that would be contrary to the protections afforded by Military Rule of Evidence 606(b).[173] Finally, the court expressed its view that even if Bradley had the benefit of the member's recommendation for clemency, the convening authority would not have changed his action. The court's conclusion on the fourth allegation makes sense as a matter of judicial economy.[174]

There are some valuable lessons for practitioners in this case. In addition to reinforcing the importance of obtaining affidavits to obviate the need for *Dubay* hearings,[175] the facts of this case underscore that there is a limit to how involved a staff judge advocate should be in the processing of a particular court-martial. While the government was successful in rebutting all allegations lodged against the staff judge advocate, this type of involvement will almost always result in unnecessary litigation.

Miscellaneous

In *United States v. Calhoun*,[176] the CAAF addressed what, in most respects, has become a novel issue in the military justice system: how independent is the trial defense service. More specifically, the court addressed the issue of whether the head of trial defense services in the Air Force's involvement in the search of a defense counsel's office created the "objectively reasonable concern that all other government defense counsel would be subject to unlawful command influence."[177]

A brief recitation of the facts is necessary to frame precisely the issue addressed by the CAAF. The government obtained a copy of a letter from a defense counsel to a civilian defense counsel, which suggested that the military defense counsel was aware of their mutual client's intent to use a false alibi.[178] Even though the letter indicated that the accused had changed his mind about the alibi witness, that witness ultimately testified at trial. The base staff judge advocate asked the Air Force Office of Special Investigations to investigate the defense counsel on suspicion of subornation of perjury and conspiracy to commit perjury.[179] As required by an Air Force policy letter, the staff judge advocate notified the Air Force Legal Services Agency of their intent to search defense counsel's office for additional evidence.[180] In executing the search, the local authorities went to great lengths to protect any evidence found, and to protect the attorney-client privilege of other clients. The evidence recovered in the search indicated that the defense counsel had no

168. *Bradley*, 51 M.J. at 443.

169. *Id.*

170. *Id*. at 444. *See* United States v. Bradley, 48 M.J. 777, 780 (A.F. Ct. Crim. App. 1998). At the *Dubay* hearing, the military judge simply held that the staff judge advocate's testimony that he remembered a conversation with the panel member, but denied dissuading him from submitting a clemency recommendation, was more credible.

171. *Bradley*, 51 M.J. 444.

172. *Id.*

173. *Id.*

174. Recall that two opinions by the Air Force court were sandwiched around a *Dubay* hearing in this case. Further, while MRE 606(b) does protect the deliberative process, it does not preclude panel members from recommending clemency in a given case. The court appropriately notes that R.C.M. 1105 specifically allows an accused to submit recommendations for clemency from any member.

175. *See* Lieutenant Colonel James Kevin Lovejoy, *Watchdog or Pitbull?: Recent Developments in Judicial Review of Unlawful Command Influence*, ARMY LAW., May 1999, at 25.

176. 49 M.J. 485 (1998).

177. *Id.* at 488.

178. *Id.* at 487-87.

179. *Id.*

180. Air Force defense counsel are independent in that they report up a chain of command separate from the base legal office. Nonetheless, the Air Force Legal Services Agency commander is at the top of the chain of command for Air Force defense counsel and circuit prosecutors. United States v. Calhoun, 47 M.J. 520, 528 (A.F. Ct. Crim. App. 1997).

knowledge of what really happened, and the defense counsel was cleared of any wrongdoing.[181]

The appellant obtained the services of a second civilian defense counsel for his pending Article 32. He was also offered a new military defense counsel from another base because there was thought to be a potential conflict of interest between him and his first trial defense counsel.[182] The appellant refused the military defense counsel on the basis that all government defense counsel were subject to unlawful command influence and searches of their offices.[183] He demanded that the Air Force provide funds so that he could obtain civilian defense counsel for his pending court-martial. The Air Force Court of Criminal Appeals held that, under the circumstances of this case, where the government takes the extraordinary measure of searching a military defense counsel's office, it was not unreasonable for an accused to fear that a defense counsel in that chain of command might be inhibited in presenting arguments to a court-martial which might impugn the judgment of his superiors.[184]

The CAAF disagreed. Analogizing to the resolution of requests for specific expert witnesses, where the accused's position is that government-funded experts would not provide unbiased and objective evidence, the court held that there is no right to private civilian counsel paid for by the government. The government should not be obligated to pay for private counsel unless an objective, disinterested observer, with knowledge of all the facts, could reasonably conclude that there was at least an appearance of unlawful command influence over all military and other government defense counsel.[185] In other words, the key inquiry is whether the process would seem unfair or compromised to an outsider.[186] The court concluded that the threshold was not met in this case because the commander's role was limited to being notified of the search and discussing it with the SJA.[187] The Air Force Legal Services Agency commander was not involved in authorizing the search. Further, the search was conducted in a manner so as to protect other defense counsel and their clients. Finally, the personnel who conducted the search and reviewed the materials were independent of the base SJA office. Under the circumstances, the court concluded that the "sole target of the investigation was the appellant's prior defense counsel."[188] There was no reason, under these facts, to conclude that any other Air Force lawyers, or any other government lawyers, should be disqualified.[189]

Conclusion

The many faces of unlawful command influence remains a concern for the appellate courts, as evidenced by their decisions this past year. While there were not any truly new developments this past year, the CAAF's opinion in *Biagase* should be read closely by anyone dealing with an unlawful command influence issue. The clarification of the burden of proof on the government once the issue is raised, and the emphasis on the remedial measures employed by the military judge make it clear that this is an issue that is best resolved at the trial level. If there were ever any doubt, that doubt has been removed. Further, it is clear that defense counsel must present evidence of improper motive to succeed on an unlawful command influence motion. Finally, all practitioners should note that the appellate courts are consistently applying waiver to unlawful command influence during the accusative stage if not raised at trial.

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181. *Id.* at 486-87

182. *Id.*

183. *Id.*

184. *Calhoun*, 47 M.J. 520, 528.

185. United States v. Calhoun, 49 M.J. 485, 488 (A.F. Ct. Crim. App 1998).

186. *See* United States v. Allen, 31 M.J. 572 (N.M.C.M.R. 1990), *aff'd* 33 M.J. 209 (C.M.A. 1991); United States v. Cruz, 20 M.J. 873 (A.C.M.R. 1985), *rev'd on other grounds*, 25 M.J. 326 (C.M.A. 1987).

187. *Calhoun*, 49 M.J. at 489.

188. *Id.*

189. *Id.*

The Fourth Amendment and Urinalysis: Facts (and More Facts) Make Cases

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During 1999, the United States Court of Appeals for the Armed Forces (CAAF)–and the service courts–have issued several Fourth Amendment opinions, including a few dealing specifically with urinalysis. These opinions deal with a variety of search and seizure doctrines. Moreover, many comprehensively detail the facts–obviously based upon the extensive findings of facts military judges made at the trial level. Facts, very detailed facts, often decide Fourth Amendment cases. As these cases illustrate, the often very generic and even amorphous standards applied under search and seizure law require very specific facts to give those standards real meaning.

Computers: Privacy and Warrants

United States v. Tanksley

In *United States v. Tanksley*,[1] the accused, a Navy Captain, was convicted of, among other things, taking indecent liberties with a minor and was sentenced to thirty-eight months confinement and a dismissal. The Navy court dealt with many issues in *Tanksley*, but the relevant Fourth Amendment issue concerned the seizure of a computer and computer diskettes from his office.[2]

Tanksley, while being investigated for child abuse, was given an office and a "stash billet" away from his normal duty station.[3] He was allowed to use this office and a computer to help prepare his legal case.[4] However, while using the computer apparently to edit a document, he was called away from his office, subsequently apprehended, and sent to pretrial confinement.[5] Following his apprehension, the command duty officer and two Naval Criminal Investigative Service agents searched Tanksley's office and saw a document on the computer screen entitled, "Confidential Background Information on Accusations Made Against Me in Regards to Child Abuse ICO P While my Family and I Were House Guest (sic) of MP Aug 25 & 26."[6] Believing this to be relevant to the investigation of Tanksley, the agents seized the diskette that apparently contained what was being shown on the screen from the computer.[7]

At trial, the military judge held that Tanksley had no reasonable expectation of privacy in the information that was on the computer screen.[8] Alternatively he said that the command duty officer had probable cause to seize the diskette, because he observed the information on screen in "plain view."[9]

The Navy-Marine Corps Court of Criminal Appeals held that the judge ruled appropriately.[10] Tanksley's office and computer were made available for performance of official duties, regardless of whether the office and computer were capable of being secured and regardless of Tanksley's status.[11] Alternatively, the "plain view" doctrine would also justify the seizure of the diskette, because the command duty officer was in the office "in the logical and legitimate process of securing the office used by the appellant."[12]

1. United States v. Tanksley, 50 M.J. 609 (N.M. Ct. Crim. App. 1999).

2. *Id*. at 620. There was also discussion about seizure of documents from the accused's briefcase. The Navy-Marine Corps Court of Criminal Appeals held that the seizure of the documents from the briefcase was valid because the accused provided valid consent. Alternatively, the court held that the documents would have been inevitably discovered. *Id.* at 621.

3. *Id.* at 620.

4. *Id*.

5. *Id.*

6. *Id.*

7. *Id*.

8. *Id.*

9. *Id*.

10. *Id.*

11. *Id*.

This Fourth Amendment question had some overlap with Sixth Amendment concerns as well, because Tanksley was apparently already represented by counsel, and the document that was seized was part of his defense.[13] However, because the exculpatory document was not used at trial–though apparently other documents taken from the diskette were–the Sixth Amendment was not implicated.[14] In dealing with the Fourth Amendment issues, according to the court, there are four issues to examine in determining a government intrusion: (1) was evidence used at trial directly or indirectly produced by intrusion, (2) was the intrusion intentional, (3) did the prosecution receive otherwise confidential information, and (4) was the information used in any other way that might be detrimental to client.[15] In this case there was no prejudice, because the document was not used at trial, no charges were preferred as the result of the discovered document, and no otherwise discoverable evidence found.[16]

Tanksley reaffirms that reasonable expectation of privacy in government property for official purposes is very limited. One has an extremely limited reasonable expectation of privacy in things issued for official use. Obviously, a defense counsel should certainly advise a client not to use the government computer at his workstation to prepare his case. Not only is there a very diminished expectation of privacy in such government computers, they are also frequently subject to monitoring by systems administrators who are not gathering evidence, but simply performing administrative duties, and therefore not very likely subject to Fourth Amendment search requirements.[17]

At the same time, both sides need to be aware of circumstances in which the Fourth Amendment may overlap with other constitutional protections–as in this case, the Sixth Amendment. Once the prosecutorial phase of a case has begun–normally after the preferral of charges–Sixth Amendment counsel rights attach as well, and certain documents might attain a protected status because they are prepared in furtherance of a defense. This is perhaps one more reason for government counsel to make sure that preferral is not done too quickly. Although one should not unnecessarily linger in attempting to "perfect a case" before preferral, preferring does trigger a new set of possible constitutional considerations when determining whether and how searches and seizures of evidence should be conducted.

United States v. Monroe

The second significant service court opinion regarding the Fourth Amendment and computers was the Air Force court opinion in *United States v. Monroe.*[18] In *Monroe*, the accused made a conditional plea of guilty for violating a lawful general regulation, wrongfully possessing three or more depictions of child pornography in violation of 18 U.S.C. § 2252(a), and using a common carrier to transmit such images in violation of 18 U.S.C. § 1462, which proscribes "introduction of obscene, lewd, lascivious, filthy or other matter of indecent character."[19] The plea preserved his ability to contest the search of his computer at appellate level.[20]

After the Air Force court held that the acceptance of this conditional plea was proper, it then discussed the legality of the search of Monroe's personal computer, basing its discussion on a very detailed set of findings of fact made by the military judge.[21] In the fall of 1995 at Osan Air Base in the Republic of Korea, the base had an electronic mail (e-mail) host (EMH), which allowed a user, through a log-on and private password to access the Defense Data Network and the Internet. Though meant primarily for official business, users could use it to send and receive text messages to friends and family.[22]

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12. *Id.*

13. *Id.* at 621.

14. The opinion does not clearly indicate that *other* documents taken from the diskette were used as evidence. It does indicate that the "contents of the disk" were admitted into evidence, whereas the exculpatory document was not. *Id.* at 620-21.

15. *Id.* at 621 (citing United States v. Kelly, 790 F.2d 130, 137 (D.C. Cir. 1986); United States v. Brugman, 655 F.2d 540, 546 (4th Cir. 1981); United States v. Walker, 38 M.J. 678 (A.F.C.M.R. 1993)).

16. *Tanksley*, 50 M.J. at 621.

17. This is best illustrated by the case to be discussed next, *United States v. Monroe*, 50 M.J. 550 (A.F. Ct. Crim. App. 1999). The CAAF issued an opinion in late March on *Monroe*, affirming the Air Force court's holding. *See* United States v. Monroe, 52 M.J. 326 (2000).

18. *Id.* The CAAF issued an opinion in late March 2000 on *Monroe*, affirming the Air Force court's holding. *See* United States v. Monroe, 52 M.J. 326 (2000).

19. *Monroe*, 50 M.J. at 552.

20. *Id.* at 552-53.

21. *Id.* at 554-56.

22. *Id.* at 554.

All incoming emails would be sent to a directory on the EMH. Approximately every fifteen minutes, a program would read and sort through these files, and send them to the e-mail account of the individual addressed. If the files were too large or defective, they would stay in the directory on the EMH, which was supposed to delete them automatically after seventy-two hours.[23]

In this particular case, however, the EMH administrator found that fifty-nine files had been "stuck" in the directory for over seventy-two hours. To determine why, he opened several of the files, and looking at the header on the files, he saw that they were addressed to Monroe, and had sexually oriented names such as "erotica" and "sex."[24] After moving the files to another directory, the administrator determined that thirty-three of the files had graphic images of adult women in sexually explicit poses.[25] After further determining that Monroe had requested the files, the administrator reported this information to the chain of command and Office of Special Investigations (OSI).[26]

Office of Special Investigations agents further determined that Monroe did not have access to government computers in his office but that he did have a computer in his dormitory room. They then received authorization from the Osan base commander to search Monroe's quarters for "all computer related data media suspected to contain pornography or child pornography," though, up to that date, no child pornography had been found on any of the searched images.[27] All items were subsequently seized in the room, including 218 floppy discs, and other equipment. As a result, child pornographic images were found in the seized items.[28]

In analyzing the facts of the case, the Air Force court first established the appropriate standard of review. It reviews the military judge's findings of fact on a "clearly erroneous" standard and the findings of law on a de novo standard. Thus, a military judge abuses his discretion on a motion to suppress if his factual findings are clearly erroneous of if he applies the law erroneously.[29]

Applying these standards, the Air Force court adopted the military judge's finding that the administrator's initial review of the files "stuck" in the directory was not a criminal search but a legitimate government activity pursuant to his duties.[30] The court also held that the government system acted as a gateway between users and the Internet with known limitations and that the system was subject to monitoring each time the person logged on.[31] The Air Force court ultimately compared the EMH to an unsecured file cabinet in a superior's work area.[32] For these and other reasons, it concluded that Monroe had no subjective reasonable expectation of privacy in the files that the administrator searched.[33]

Furthermore, the search authorization was properly issued. While the base commander authorized a search for "child pornography" even though none had been discovered at that time, this was not fatal to the authorization, because "child pornography" would naturally be included in any definition of "pornography."[34]

Additionally, the commander who issued the search authorization had probable cause to do so on the basis of a possible violation of 18 U.S.C. § 1462 (transmitting obscene materials using a common carrier). The image files contained pornographic information–pictures of adult women in sexually explicit poses.[35] The fact that the commander did not define "obscenity" in authorizing the search was not fatal to the authorization.[36]

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23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* at 555.

27. *Id.*

28. *Id.*

29. *Id.* at 557 (citing United States v. Ayala, 43 M.J. 296, 298 (1995); United States v. Burriss, 21 M.J. 140, 144 (C.M.A. 1985)).

30. *Id.* at 558.

31. *Id.*

32. *Id.* at 559.

33. *Id.*

34. *Id.* at 560.

35. *Id.* at 561.

What about making the determination that the adult pornographic images were obscene and thus violative of 18 U.S.C. § 1462? Was the First Amendment violated because the affidavit contained only a conclusory allegation that the adult pornographic images were obscene? The key case for analyzing this determination was *New York v. P.J. Video Inc.*,[37] a 1986 Supreme Court case.

The Supreme Court in *P.J. Video* held that when making determinations whether to issue warrants, the threshold for materials presumptively protected by the First Amendment is no higher or lower than those for warrant applications generally.[38] As in any warrant application, a magistrate must be provided evidence to make an independent determination under the totality of circumstances. If the appropriate search authority is informed of what the alleged obscene material is, he can make a common sense determination based upon the totality of the circumstances that the material is obscene and thus illegal.[39]

In *Monroe*, the base commander did not actually view the photographs himself before making the determination of obscenity. The chief of military justice at Osan Air Base, however, had reviewed the files and opined that probable cause existed.[40] The EMH administrator had opened files and said they contained "graphic pornographic images."[41] The base commander relied on this information, and this was considered sufficient for his determination that the adult pornography was "obscene." However, the Air Force court cautioned that this case was "borderline" and suggested any doubt as to the legality of the search could have been avoided by "simply attaching a couple of graphic images."[42] Doing so "would have averted any issue regarding the obscene nature of the images."[43]

There are several interesting points raised in *Monroe* for practitioners. The case clearly shows the necessity for a military judge to make extensive findings of fact. It also points out that it is unlikely a service member will have a reasonable expectation of privacy in a government computer system if the system is monitored on a routine basis by a systems administrator. It is also the first military case to adopt the Supreme Court standard in *P.J. Video* concerning magistrate review of materials potentially protected under the First Amendment, but issues a cautionary note to government officials seeking search authorizations or warrants to ensure that they are explicit in describing what is meant by obscene. The simplest way to do this is to attach any graphic images themselves to the affidavit or application for authorization or warrant.

Third Parties at Searches: *Wilson v. Layne*

During the 1990s, the Supreme Court scrutinized not just the basis for searches, but the way the searches were conducted.[44] The Court has held that not only do searches of private areas have to be based on probable cause supported by a proper search warrant or authorization (unless an exception applies), they also have to be conducted in a reasonable fashion. Thus, for example, it is a general requirement that law enforcement officials first "knock and announce" their presence before executing the warrant, unless the specific facts allow that requirement to be dispensed with.[45]

In *Wilson v. Layne*, the Supreme Court issued an opinion on who can be present during a search.[46] In that case, the Supreme Court held that allowing media representatives to enter private dwellings along with the officers during the execution of arrest or search warrants violated the Fourth Amendment.[47]

In *Wilson*, a photographer and reporter from the *Washington Post* accompanied federal marshals on a "ride-along" under a program known as "Operation Gunsmoke," which focused on apprehending dangerous felons.[48] One such felon, Dominic

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36. *Id.*

37. *Id.* at 560 (citing New York v. P.J. Video, Inc., 475 U.S. 868 (1986)).

38. *P.J. Video*, 475 U.S. at 876-77.

39. *Id.*

40. *Monroe*, 50 M.J. at 550, 561.

41. *Id.*

42. *Id.*

43. *Id.*

44. *See, e.g.*, United States v. Ramirez, 523 U.S. 65 (1998); Richards v. Wisconsin, 520 U.S. 385 (1997); Wilson v. Arkansas, 514 U.S. 927 (1995).

45. The common law requirement that police officers "knock and announce" their presence is part of the "reasonableness clause of the Fourth Amendment. *See Wilson*, 514 U.S. at 927. Every exception to this requirement must be evaluated on a case-by-case basis. *See also Richards*, 520 U.S. at 385.

46. Wilson v. Layne, 526 U.S. 603 (1999). As this opinion is not yet paginated, pinpoint cites will use the 119 S. Ct. 1692 (1999) version of the opinion.

47. *Id.* at 1695.

Wilson, was listed as living at 909 North Stone Street Avenue in Rockville, Maryland.[49] This, however, was not Wilson's home, but his parents' home. A warrant was applied for and issued for Wilson's arrest, though the presence of media officials was not mentioned in the warrant application.[50]

In the early morning, federal marshals, with photographer and reporter in tow, entered the home of Charles and Geraldine Wilson, who were still in bed.[51] Charles, dressed only in his briefs, discovered five men in street clothes with guns in his living room. His wife Geraldine, wearing only a nightgown, entered shortly afterwards, to discover her husband being physically restrained by five plain clothed, armed men.[52] As the marshals made a protective sweep of the house, the *Washington Post* reporter witnessed the unfolding event as the photographer snapped pictures, though no photos or story were ever published.[53]

Charles and Geraldine Wilson sued the law enforcement officials in their personal capacities as allowed under 42 U.S.C. § 1983 and *Bivens v. Six Unknown Federal Narcotics Agents*,[54] asserting a Fourth Amendment violation. The Supreme Court ruled that the right of residential privacy is "at the core of the Fourth Amendment."[55] Therefore police actions involved in the execution of a warrant must be related to the objectives of the authorized intrusion–in this case, the apprehension of Dominic Wilson.[56]

The presence of the news reporter and photographer was not so related to those objectives.[57] The rationales offered by the government to justify the presence of the media representatives–publicizing activities, minimizing police abuses, and protecting police or third parties–were insufficient to justify the media presence at the Wilson household,[58] though third parties might be justified in certain circumstances.[59]

While the Supreme Court held that the officers violated the Wilsons' Fourth Amendment protections by bringing the media representatives with them, it further held that because the law was not clearly established at the time, the officers were entitled to qualified immunity from suit.[60] The Court did not make any sort of ruling as to whether the exclusionary rule would apply, because no criminal evidence was recovered as a result of the attempted apprehension. In a footnote it said that the Fourth Amendment violation is "the presence of the media and not the presence of the police."[61] The Court thus perhaps left open the possibility that what would be potentially excludable would be evidence discovered by the third parties and not by the law enforcement officials themselves.[62]

While *Wilson* does not resolve exclusionary rule questions, it clearly sends a cautionary signal to law enforcement regarding who may accompany officers during the execution of a warrant. Government attorneys should inquire if a third party will accompany officers during the execution of a search warrant or authorization. If there are to be third parties present, their presence must have a directly related purpose to the search or seizure at hand, and not a more abstract purpose such as "educating the public" or "publicizing police activity." While media representatives are clearly prohibited, law enforcement could, for example, bring an expert to search computer data that was encrypted or "booby-trapped" to automatically erase.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.* at 1696.

52. *Id.*

53. *Id.*

54. *Id.* (citing Rev. Stat. § 1979, 42 U.S.C. § 1983; Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971)). Both the statute (known as the "1983" statute) and the holding in *Bivens* allows persons to sue law enforcement officials in their personal capacities for money damages for constitutional violations.

55. *Id.* at 1698.

56. *Id.*

57. *Id.*

58. *Id.* at 1698-99.

59. *Id.* at 1699.

60. *Id.* at 1699-1700.

61. *Id.* at 1699 n.2.

62. *Id.*

Freezing the Scene: *United States v. Hall*

The CAAF issued an opinion as well in a case dealing with the manner in which a search is conducted, *United States v. Hall*.[63] In *Hall*, the unit staff duty non-commissioned officer (SDNCO) was checking barracks rooms when he smelled what he knew to be marijuana coming from Hall's room. He opened the door, saw Hall, and noticed an even stronger smell of marijuana. The SDNCO then ordered Hall to "get that marijuana out of the barracks," to which Hall replied, in soldierly fashion, "Roger, Sergeant."[64]

The SDNCO then called the company executive officer. The executive officer, who was the acting commander as well, came to Hall's room along with some military police. A military policeman confirmed the marijuana smell. After the executive officer left to contact the company commander, who was on leave, the SDNCO "froze the room" in the interim and detained anyone who tried to leave. At one point, he saw Hall moving across the room with a green backpack and told him to stop and put it on the ground.[65] While the room was thus being "frozen," the executive officer contacted the company commander, who authorized the search of Hall's room. When the search was conducted, marijuana was discovered in the green backpack.[66]

Judge Crawford, writing for the court, held that the executive officer's entry into the room before authorizing the search did not cause him to lose his neutral and detached status. Nevertheless, while he could have authorized the search, the company commander could resume command at any time and himself authorize the search, as he did, without the necessity of any sort of revocation of assumption of command orders.[67]

Additionally, the court endorsed the concept of impoundment, or "freezing a scene"–securing a premises from within to preserve the status quo while other law enforcement officials are getting a warrant. "Impoundment" as a kind of "seizure" of an entire dwelling has been held permissible by the Supreme Court in the case *Segura v. United States*.[68] *Segura* held that if officers have probable cause to enter a premises and to arrest people inside, they can secure it from within to preserve the status quo, while other law enforcement officers are getting a search warrant for the premises themselves.[69]

Judge Effron, upholding the search and seizure, but disagreeing with the "impoundment" concept under the facts of this case, argued that the facts in *Hall* did not fit the impoundment doctrine.[70] According to Judge Effron, external impoundment deals with securing unoccupied premises and prohibiting *entry* to remove or destroy evidence while authorities seek to obtain a warrant or authorization.[71] Here, the impoundment involved persons not being allowed to *exit* as well.

The question then is whether Judge Crawford's application of *Segura* is an unwarranted extension of it. Can law enforcement "freeze" people in a room whom they do not yet have probable cause to believe committed criminal acts? This is highly doubtful: reasonable suspicion of criminal activity–or some specified exception to lawful arrest–must be articulated before any sort of detention occurs, and any impoundment of persons will probably have to be analyzed to determine if that standard was met.[72]

In *Hall*, both the reasonable suspicion and more stringent probable cause requirements were met: the detained soldiers were in a barracks room where marijuana was being smoked, and one can have reasonable suspicion and even probable cause

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63. 50 M.J. 247 (1999).

64. *Id.* at 248.

65. *Id.*

66. *Id*. at 249.

67. *Id*. at 251.

68. 468 U.S. 796 (1984).

69. *Id*. at 798.

> [W]here officers, having probable cause, enter premises, and with probable cause, arrest the occupants who have legitimate possessory interests in its contents and take them into custody and, for no more than the period here involved secure the premises from within to preserve the status quo while others, in good faith, are in the process of obtaining a warrant, they do not violate the Fourth Amendment[ ] . . . .

Id.

70. *Hall*, 50 M.J. at 252.

71. *Id.*

72. Military Rule of Evidence 314(f)(1) allows law enforcement officials to "stop another person temporarily" if the stop is investigatory in nature and if the official observes "criminal activity may be afoot." MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 314(f)(1) (1998) [hereinafter MCM].

that the soldiers were involved in illegal drug activity. But certainly, a different scenario could be envisioned–what about a larger and much more crowded area? Could persons be detained in such a room to "freeze the scene" if there is no reasonable suspicion or probable cause to believe those persons have committed a crime? This seems a very broad reading of Segura. Prudent government counsel understand *Hall* as indicating that the impoundment doctrine applies, but it would be cautious in extending the impoundment doctrine from property to persons.

Terry Stops and Arrests: *United States v. Marine*

A case dealing with a scenario in which several people were "stopped" as defined by Military Rule of Evidence (MRE) 314(f)(1) was *United States v. Marine*.[73] This case dealt with a variety of Fourth Amendment issues, most importantly with two Fourth Amendment warrant and probable cause exceptions: the so-called "*Terry* stop" and the search incident to apprehension, and the relationship between the two.[74]

In December 1995, Marine was present at the "21 Area Enlisted Club." During the evening, an unidentified black male, wearing a striped rugby type shirt, assaulted one of the members of the 21 Area Guard patrolling the club.[75] The unidentified person ran to another section of the club, and the guard on that side rounded up several people who met that description and brought them to the area of the club where the assault took place. When the group got there, the suspect (not Marine) was immediately identified, and the others, to include Marine were left standing there, unsure if they could leave or not.[76]

At that point, the head of the guard detail, Lieutenant Moore, came over to talk to the group. Marine then said something to Moore, who was in uniform, which by its "tone, content, and absence of typical military courtesy, or of use of sir" was disrespectful. Moore identified himself, and another member of the guard told Marine that he was addressing a lieutenant. Marine then leaned over as if to check Moore's rank, which Moore again took this as disrespectful. Finally, Marine said "yes sir" in a manner Moore found mocking.[77] Moore thus apprehended Marine for disrespect and the subsequent search of his person revealed he possessed a half smoked marijuana cigarette.[78]

Judge Sullivan, writing for the court, did not determine the outcome of the case based on Marine's assertion that the initial stop and detention of Marine was based on race and thus an unlawful *Terry* stop.[79] Instead, Sullivan stated: "We need not decide appellant's claim that his initial investigative stop was illegal, because we hold that his subsequent arrest was lawful and a sufficient intervening circumstance to remove any taint from a purported illegal *Terry* stop."[80]

How can a court determine whether the taint of an initial illegal activity has been purged? As in many Fourth Amendment cases, the Supreme Court has indicated that no *per se* rule applies. Instead, factors to be considered are the temporal proximity between the illegal action and the seizure of evidence, the "presence of intervening circumstances" and the "flagrancy of the official misconduct."[81]

Marine, however, argued that there were no "intervening" circumstances, because the search took place *during* the *Terry* stop.[82] Furthermore, Marine argued that if the disrespect was such an intervening circumstance he should have been charged and prosecuted for it (he was only prosecuted for the marijuana possession).[83] Finally, he argued that the misconduct of the law enforcement officials was in fact flagrant, as it was a race-based *Terry* stop.[84]

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73. 51 M.J. 425 (1999).

74. The famous "*Terry* stop" (from Terry v. Ohio, 392 U.S. 1 (1968)) is codified in military practice as MRE 314(f)(1). MCM, *supra* note 72, MIL. R. EVID. 314(f)(1). The search incident to apprehension exception to the probable cause requirement of the Fourth Amendment is codified in MRE 314(g). *Id.* MIL. R. EVID. 314(g).

75. *Marine*, 51 M.J. at 426.

76. *Id.*

77. *Id.* at 427.

78. *Id.*

79. *Id.* at 428.

80. *Id.*

81. *Id.* at 428-29 (citing Brown v. Illinois, 422 U.S. 590, 603-04 (1975)).

82. *Id.* at 429.

83. *Id.*

84. *Id.*

Relying on federal court case law, the court swept these arguments aside. The intervening event–Marine's disrespect–was significant enough. While several persons were initially stopped, only one, Marine, was searched, because of his disrespectful conduct.[85] That Marine was not charged for the disrespect offense did not create an impediment as far as an earlier police action, since prosecutorial decisions and police actions are not synonymous.[86] Finally, the actions of the law enforcement officials were not flagrant; the evidence suggested more of a communication mix-up and confusion than deliberate misconduct.[87]

Marine applies the intervening circumstance principle in federal law to the military, thus making it highly difficult, if a search is based upon an appropriate apprehension, to argue that an initial stop's illegality that may have given rise to the apprehension should result in suppression. Marine is thus an extremely "pro-government" opinion. *Terry* stops quite frequently lead to arrests or apprehensions and searches. Marine indicates that it will be very difficult to invalidate a search from a lawful arrest or apprehension, regardless of a previous Terry stop. Thus, the only circumstance in which one could reasonably expect a successful defense result would involve "flagrant" misconduct, for example, a *Terry* stop based both exclusively and deliberately on racially motivated reasons.

Terry Stops and Flight: *Illinois v. Wardlow*

Is flight from law enforcement enough to justify reasonable suspicion and therefore a *Terry* stop? In *Illinois v. Wardlow*, the Supreme Court decided that unprovoked, headlong flight, along with the fact that the defendant was in an area of "expected criminal activity," was enough to satisfy the reasonable suspicion standard.[88]

While all the members of the Court rejected a "bright line rule on either side"–that flight alone is always sufficient for *Terry* stop, or conversely, never sufficient–the Court split five to four on the outcome of this particular case.

The respondent Wardlow had fled after seeing police officers patrolling in an area that was known for narcotics trafficking. He was subsequently stopped, and while stopped, police officers conducted a protective pat-down search of a bag he was holding. The officer conducting the frisk felt a heavy, hard object that was similar to a gun. Removing the object from the bag, he discovered it was a .38 caliber handgun. Wardlow was arrested and convicted for unlawful use of a weapon by a felon.[89]

While the Illinois trial court denied the motion to suppress, the Illinois Appellate Court reversed, as did the Illinois Supreme Court, the latter court holding that sudden flight in such an area did not create the requisite reasonable suspicion to justify the stop.[90]

The Supreme Court reversed the Illinois Supreme Court's holding. Chief Justice Rehnquist, writing for the majority, stated that the case "is governed by the analysis first applied in *Terry.*"[91] The Court also cited *United States v. Sokolow* in holding that reasonable suspicion requires "a showing considerably less than preponderance of the evidence, [though] the Fourth Amendment requires at least a minimal level of objective justification for making the stop."[92]

In *Wardlow*, a four-car police caravan had converged on an area known for heavy drug trafficking, and the respondent had apparently fled as the vehicles approached him.[93] The Court held that "standing alone" in a high crime area is insufficient to justify a *Terry* stop, but "unprovoked flight" from such an area provided adequate justification.[94] Indeed, Chief Justice Rehnquist asserted that "[h]eadlong flight–wherever it occurs–is the consummate act of evasion: it is not necessarily indicative of wrongdoing, but it is certainly suggestive of such."[95] While acknowledging that there may be innocent reasons for such

85. *Id.*

86. *Id.*

87. *Id.* at 429-30.

88. 120 S. Ct. 673 (2000).

89. *Id.* at 674.

90. *Id.* at 675. The Illinois Appellate and Supreme Courts disagreed whether Wardlow was in a high crime area. The appellate court held he was not. The Illinois Supreme Court held that he was. *Id.*

91. *Id.*

92. *Id.* at 676 (citing United States v. Sokolow, 490 U.S. 1 (1989)).

93. *Id.*

94. *Id.*

95. *Id.*

flight, such reasons do not establish a Fourth Amendment violation. "*Terry* accepts the risk that officers may stop innocent people."[96]

Justice Stevens, writing for the dissent, stated that he concurred in the majority's rejection of a "bright line" rule regarding flight.[97] However, he asserted that the testimony of the officer who made the *Terry* stop provided insufficient justification for the stop.[98] Justice Stevens noted that even though a *Terry* stop is brief, it may nevertheless be an "annoying, frightening, and perhaps humiliating experience,"[99] and that there may be a variety of innocent reasons why people may run,[100] especially minorities and those who reside in high crime areas, who may believe that contact with police might be dangerous.[101]

Because of such concerns, and based on the "totality of the circumstances," Justice Stevens rejected the idea that the officer had reasonable suspicion to stop Wardlow. There was insufficient testimony as to how exactly the stop took place. It was unclear whether the officer was in a marked or unmarked car, nor was he asked if the other cars in the caravan were marked, or whether any of the other police officers were uniformed (though he himself was).[102] The officer's testimony did not reveal how fast the caravan was travelling, or whether he saw Wardlow actually notice the other patrol cars in the caravan, or whether the caravan, or part of it, had passed Wardlow before he started to run.[103]

Wardlow, while not necessarily a groundbreaking case[104] does at least establish that flight, more specifically "headlong" flight, is a very important factor in establishing reasonable suspicion. Yet exactly *how* important is difficult to determine. Despite the language of Justice Stevens's dissent, the majority opinion seems to indicate that headlong flight, in and of itself, comes close to establishing reasonable suspicion. Justice Stevens's opinion is much more cautious, given its discussion of the nature of *Terry* stops, the possibility of innocent motive for flight, and most importantly, the lack of factual detail. Given the narrow majority, it is probably safer for the government to develop fully any factors, in addition to the flight itself, to justify the stop, which means developing a full factual record for the appellate courts.

The Supreme Court and The "Automobile Exception"

Maryland v. Dyson

The Supreme Court dealt with "automobile exception" searches in two decisions this year. One of them, *Maryland v. Dyson*, was a brief per curiam opinion.[105] It is nonetheless important, however, because the Supreme Court reiterated that the automobile exception does not require any additional exigent circumstances to search a vehicle without a warrant.[106] In *Dyson*, Maryland police developed probable cause that Dyson would be returning to the state with a load of drugs in his car. The police never attempted to obtain a warrant. Rather, they

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96. *Id.* Chief Justice Rehnquist used the facts in the *Terry* case as an illustration of potentially innocent conduct. In *Terry*, an officer observed two individuals "pacing back and forth in front of a store, peering into the window, and periodically conferring." *Id*. (citing Terry v. Ohio, 392 U.S. 1, 5-6 (1968)). Rehnquist stated that "[a]ll of this conduct was by itself lawful, but it also suggested that the individuals were casing the store for a planned robbery. *Terry* recognized that the officers could detain the individuals to resolve the ambiguity." *Id.*

97. *Id*. at 677 (J. Stevens, dissenting). It should be pointed out, however, that the majority opinion never explicitly announces that headlong flight *alone* is insufficient for reasonable suspicion. Indeed, Chief Justice Rehnquist's assertion–"Headlong flight–wherever it occurs–is the consummate act of evasion; it is not necessarily indicative of wrongdoing, but it is certainly suggestive of such"–arguably comes close to establishing such a "bright line" rule. *Id*. at 676.

98. *Id.* at 677.

99. *Id.* at 678 (citing *Terry*, 392 U.S. at 24-25).

100. *Id.*

> A pedestrian may break into a run for a variety of reasons–to catch up with a friend a block or two away, to seek shelter from an impending storm, to arrive at a bus stop before the bus leaves, to get home in time for dinner, to resume jogging after a pause for rest–any of which might coincide with the arrival of an officer in the vicinity.

Id.

101. *Id.* at 681.

102. *Id.* at 683.

103. *Id.* at 683-84.

104. The case does not deal at all with the second component of *Terry v. Ohio*, the "frisk." In a footnote in the lead opinion, Chief Justice Rehnquist stated: "We granted certiorari solely on the question of whether the initial stop was supported by reasonable suspicion. Therefore, we express no opinion as to the lawfulness of the frisk independently of the stop." *Id.* at 676 n.2.

105. 527 U.S. 465 (1999). As this opinion is not yet paginated, pinpoint cites will use the 119 S. Ct. 2013 (1999) version of the opinion.

waited thirteen hours for the defendant to drive into their jurisdiction, stopped his car, searched it, and seized a bag of crack cocaine.[107]

The state appellate court stated that there were no exigent circumstances that prevented the Maryland police from obtaining a warrant while waiting, and held the search of the automobile violated the Fourth Amendment.[108] But a majority of the Supreme Court reversed without even ordering a brief or oral argument.[109] Clearly, the message sent by this brief opinion is that there is indeed a bright line rule established for automobile searches: the automobile exception requires no separate finding of exigency.[110]

Maryland v. Dyson highlights this bright line rule and also is an indication of the modern rationale for the exception. The initial rationale for the automobile exception was the automobile's inherent mobility and thus its ability to transport evidence away quickly. Because of this rationale, the exception would dispense with the time delay in obtaining a search warrant, which could be fatal in an investigation. However, a second rationale for justifying the exception has since developed: the reduced expectation of privacy one has in a motor vehicle. As a result, the two reasons taken together, mobility and reduced privacy, now make it very difficult for defense to argue the necessity of a warrant for a search, if police have probable cause.

Florida v. White

In a second Supreme Court case dealing with the automobile exception, *Florida v. White*, the Supreme Court decided that the exception applies not only to the search and seizure of items within the automobile but to the seizure of the automobile itself, at least for purposes of a civil forfeiture case.[111] In this case, police seized the automobile belonging to the defendant after having determined that there was probable cause that the car was subject to forfeiture.[112] They subsequently did an inventory search, found drugs in the vehicle, and arrested White.[113]

Justice Thomas wrote the opinion in *White*, relying on the seminal case dealing with the automobile exception, *Carroll v. United States.*[114] The opinion in *Carroll* had relied on statutes enacted soon after the Fourth Amendment was passed, which permitted warrantless searches and seizures of ships suspected of containing goods subject to duties.[115] Therefore, according to *Carroll*, warrantless searches of modes of transport were clearly envisioned by the Framers.[116] Moreover, Justice Thomas relied on the underlying premise of *Carroll*–that "recognition of the need to seize readily movable contraband before it is spirited away . . . is equally weighty when the automobile, as opposed to its contents, is the contraband the police seek to secure."[117] Finally, Thomas pointed out that the seizure took place in a public parking lot and drew an analogy to an arrest: when the person is in a public place, no warrant is required.[118]

White does not appear to be a particularly controversial decision. If the automobile itself is potential evidence, *White* indicates police can seize the entire automobile, which includes taking it back to the station, where presumably an inventory is conducted as part of storing it. Of course, this is routinely done anyway–there is no requirement that an automobile be searched at the moment it is determined that there is probable cause to believe that evidence of a crime is inside it.

While the defense may try to argue that *White* is a civil forfeiture case, government counsel should be ready to argue its even stronger applicability in a typical criminal case. In *White*,

106. *Id.* at 2014.

107. *Id.* at 2013.

108. *Id.*

109. *Id.*

110. *Id.* at 2014. Two key previous Supreme Court decisions, *United States v. Ross*, 456 U.S. 798 (1982), and *Pennsylvania v. Labron*, 518 U.S. 938 (1996), made it clear that the automobile exception does not have a separate exigency requirement.

111. 526 U.S. 559 (1999). As this opinion is not yet paginated, pinpoint cites will use the 119 S. Ct. 1555 (1999) version of the opinion.

112. *Id.* at 1557-58.

113. *Id.* at 1558.

114. *Id.* (citing Carroll v. United States, 267 U.S. 132, 149 (1925)).

115. *Id.* (citing *Carroll*, 267 U.S. at 150-51).

116. Id.

117. *Id.* at 1559.

118. *Id.*

the conduct that gave rise to the forfeiture occurred months before and was only tangentially related to the automobile's seizure.[119] In most cases, seizure of the automobile will be directly related to the case at hand and occur soon after the misconduct.

United States v. Richter: Extensive Facts, Multiple Fourth Amendment Doctrines

United States v. Richter[120] dealt with several Fourth Amendment issues, though it focused on items discovered during a search of the accused's truck. Technical Sergeant Richter was stationed at Nellis Air Force Base, Nevada, where he worked as a security policeman.[121] Another non-commissioned officer (NCO) identified Richter to an Air Force OSI agent as having stolen government property.[122] He also apparently told the OSI agent that Richter's garage was "like a warehouse."[123] Though the NCO who identified Richter did not clearly state when the property was taken, the agent believed it to have been recently. The OSI agent was also aware of three audit reports indicating a lack of accountability or control for government property in Richter's unit.[124] Furthermore, he interviewed another NCO who told him that Richter had given her a government issued medicine cabinet.[125]

Based on all this, the OSI agent decided that Richter probably had government property in his quarters (which was located at another nearby air base).[126] The NCO to whom Richter had given the cabinet was instructed to make a pretextual phone call to Richter's home, which would be observed by OSI agents while it was made.[127] During the call she told Richter that the OSI had a search warrant, had been to her house, and picked up the medical shelf. She also told him that they also had a search warrant for Richter's residence and were coming to his house.[128] A few minutes after the call, "two white individuals" were observed near a storage shed alongside the garage, one of whom seemed to be loading items in the bed of a truck.[129]

One of the individuals then got in the truck and started driving away. A second police team stopped the truck, using headlights and flashlights to illuminate the scene.[130] The investigators saw "apparent government property" in an open box in the bed of the truck.[131]

Richter, who was driving, asked why he was stopped. He was told he was under investigation for larceny. Richter then spontaneously stated that he was taking the government property back to work and that there was more at his house.[132] An agent told Richter not to make any more statements, but did not read him his Article 31 rights.[133]

After Richter consented to a search of his vehicle, he was taken to the station where he was asked to consent to search of his residence. A warrant to search his residence had already been obtained, but Richter was not told this when his consent was sought.[134] During the subsequent search of Richter's quarters, the OSI agents found government property in the house, the garage, and the storage shed.[135]

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119. *Id.* at 1557.

120. 51 M.J. 213 (1999). *Richter* was announced on the same day as another CAAF opinion by Judge Gierke, *United States v. Owens*, 51 M.J. 204 (1999). In *Owens*, another lengthy set of facts resulted in a finding that Owens's Fourth Amendment rights had not been violated.

121. *Id.* at 215. Richter's experience was in area security, not law enforcement.

122. *Id.* at 216.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.* at 217. Some of the items seen in an open box in the truck bed, included a night viewing device, camouflage netting, and winter-weight "bunny boots."

132. *Id.*

133. *Id.*

134. *Id.*

Writing for the majority, Judge Gierke found that the trial court judge had made extensive findings of fact and conclusions of law, and thus denied the motion to suppress.[136] In Judge Gierke's opinion, the question of whether Richter's consent to search his truck was truly voluntary did not need to be decided.[137] Based upon the prior information that indicated Richter had taken government-owned property for personal use and the reaction to the pretext phone call, the OSI had "reasonable suspicion" to make a *Terry* stop of the truck.[138] Once the stop was made, the agents could lawfully observe items in open view in the truck bed. Seeing these items in public view, the agents then had probable cause that Richter had stolen government property in the truck and could, under the automobile exception, search the truck without a search authorization or warrant.[139]

Judge Gierke also examined the question of the search of Richter's quarters. Richter had argued that the search was based upon coerced consent: because of the pretext phone call, he was under the impression the OSI had already obtained a warrant.[140] However, Judge Gierke stated that consent is determined looking at the "totality of the circumstances," and mere mention of an intent to obtain a warrant would not necessarily vitiate consent.[141]

Rather, Judge Gierke held that the military judge's holding was correct. The NCO who had made the pretext call was not Richter's superior or an OSI agent.[142] Instead, she was calling as a friend and that the mentioning of the warrant was to get a reaction from Richter, not to gain his consent.[143] Furthermore, there were several intervening events between the pretext call, to include finding government property in Richter's truck, before being asked for his consent.[144] Also, Richter was advised of his right to refuse consent during the interview, and the OSI agents did not mention a warrant.[145]

Richter is less important for its actual findings than it is for its full explication of the facts. None of the conclusions of law, regarding consent, *Terry* stops, or the automobile exception are controversial or groundbreaking. This case illustrates how often Fourth Amendment issues will overlap, how one exception to search and seizure doctrine can lead to another and thus justify a more extensive search. It also illustrates the importance for the military judge to establish very extensive factual findings on the record to justify his decision. Indeed, Judge Gierke devoted most of the Fourth Amendment section of the opinion to the factual background.[146]

In cases such as *Richter*, both defense and government counsels have to present as much factual evidence as possible to make their respective cases. While the government has the evidentiary burdens (and a "clear and convincing" standard in consent issues), search and seizure law has so many exceptions to its requirements that defense counsel can never rest on simply arguing that the government has failed to meet such a burden. It must be at least as proactive as the government in arguing that the facts indicate that not only has the government failed to meet its burden, but that the particular exception it may be relying on does not apply.

135. *Id.* at 218.

136. *Id.* at 218-19.

137. *Id.* at 220. Judge Gierke used a "clearly erroneous" standard of review for the military judge's findings of fact and a *de novo* standard for his conclusions of law. *Id.*

138. *Id.* (citing Terry v. Ohio, 392 U.S. 1 (1968)).

139. *Id.* (citing MCM, *supra* note 72, MIL. R. EVID. 314(f)(1)).

140. *Id.* at 221.

141. *Id.* at 220-21 (quoting Schneckloth v. Bustamonte, 412 U.S. 218, 248-49 (1973)).

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. The case also dealt with a request for immunity and alleged unlawful command influence. *Id.* at 222-23.

Consent Through Trickery: *United States v. Vassar*

In *United States v. Vassar*,[147] the CAAF dealt with the concept of consent as well as with a judge's apparent incorrect interpretation of the law. In *Vassar*, the accused was scheduled to report for duty but called in late, saying that he had been kicked in the head playing rugby.[148] A Senior Master Sergeant overheard Vassar saying that he would drive to sick call. The Master Sergeant then told Vassar that he should not drive and that he would come to his house and take him to the hospital.[149] Arriving at Vassar's house, he smelled an odor of stale marijuana while waiting for him, but said nothing. After he took Vassar to the emergency room, the Master Sergeant called the unit First Sergeant and told him he had smelled marijuana at Vassar's house.[150]

After the First Sergeant had consulted with legal counsel, he came to the hospital and indicated to Vassar that because of the circumstances of his injury, Vassar should consent to a urinalysis test.[151] The First Sergeant never mentioned the smell of stale marijuana. Vassar was neither advised of his Article 31 rights,[152] nor was he informed of his right to withdraw consent.[153] Only after Vassar actually urinated was he given a consent form with all the proper language about the right to refuse consent.[154]

At trial, after the government argued against the motion to suppress based on lack of voluntary consent, the military judge said "considering the evidence in the light most favorable to the prosecution . . . I find that the government has established, by clear and convincing evidence, that the accused's consent was voluntary."[155] Considering evidence in light most favorable to the prosecution, however, is the standard for appellate review, not for trial.[156] Yet, despite this abuse of discretion, the CAAF found beyond a reasonable doubt that the incorrect view of the law was harmless because there was no evidence that suggested that the consent was not voluntary.[157]

The majority opinion looked at the facts surrounding the consent, particularly Vassar's state of mind.[158] Not only did he immediately give oral consent, but also "[n]otwithstanding his head injury, he was aware of his surroundings and conversed naturally. The atmosphere was non-coercive and lighthearted, as reflected by the joking about the urinalysis."[159] Vassar also signed two written consent forms after he had submitted to the urinalysis.[160]

Judge Sullivan dissented, saying: "I cannot find the key legal error was harmless."[161] Nevertheless, *Vassar* is another very pro-government case, and further indicates the extreme difficulty defense will have invalidating consent. Despite a ruse, despite that Vassar suffered a head injury, despite written consent not being obtained until after the test, the court determined that consent was voluntary. A suspect need not be completely informed for his consent to be voluntary; rather he must not be coerced. What the defense needs to establish is that, in the end, the accused had no real choice to make. Therefore, in cases involving medical treatment, the argument for an accused should be that in order to get proper medical treatment for injury, the accused had to consent. Placed in those terms, the question then is one of voluntariness, not of being informed. Otherwise, as long as the government frames the issue along the

147. 52 M.J. 9 (1999).

148. *Id.* at 10.

149. *Id.*

150. *Id.*

151. *Id.* The First Sergeant then specifically phrased it as a question: "Due to your injury, would you consent to a urinalysis test?" *Id.*

152. UCMJ art. 31 (LEXIS 2000).

153. *Vassar*, 52 M.J. at 10.

154. *Id.* at 11. In fact, first consent form was not properly executed. The hospital laboratory technician would not administer the urinalysis until a second form was properly filled out. *Id.*

155. *Id.*

156. Military Rule of Evidence 314(e)(5) states that consent to search must be shown by clear and convincing evidence. MCM, *supra* note 72, MIL. R. EVID. 314(e)(5).

157. *Vassar*, 52 M.J. at 11.

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

lines of *Vassar* –indicating that, despite a ruse, the accused voluntarily consented–it will prevail in such a motion, despite the "clear and convincing" evidentiary standard.

Descriptions in Search Warrants: *United States v. Fogg*

The case *United States v. Fogg*[162] centers around the language of a search warrant. In the facts of the case, undercover law enforcement officers had been buying drugs from Fogg, who was very adept at understanding surveillance technology.[163] Indeed, Fogg actually had pictures taken of people buying drugs from him and would then check to see if they were police.[164]

After several drug buys, Fogg was also identified as being a Marine, and was tipped off that the buyers were undercover police.[165] Therefore, the detective handling the case moved quickly to get a search warrant of Fogg's off-post quarters before any evidence could be destroyed.[166] In the detective's affidavit, the detective stated that items to be searched for and seized included counter-surveillance equipment, which were things such as "RF (Radio Frequency) detectors, photos, cameras, binoculars, anything that can be used for surveillance, video."[167] This, however, was not in the warrant itself.[168] Rather, the affidavit was attached to the warrant. The warrant actually authorized seizure of "crack cocaine, packaging and repackaging equipment, papers proving occupancy, records, weapons, pagers, RF detectors, photos, cell phones, police scanners, [and] scales/paraphernalia."[169]

During the search of Fogg's bedroom in his off-post quarters, a detective picked up a video camera and noticed a tape inserted in it as well as a second tape nearby.[170] Though a video camera was not specifically mentioned in the warrant or the affidavit attached to it, the detective viewed the tape to see if he had been caught in surveillance activities.[171]

The detective believed the first tape showed marijuana being grown, though it was hard to see in the camcorder.[172] He therefore seized the tape. The detective inserted the second tape into the video camera, which showed a scene with an apparently underage female who appeared to be intoxicated.[173] Thinking that tape might be evidence of contributing to the delinquency of a minor, he also seized that tape. Later viewed, the tape showed underage girls engaging in sexual intercourse with someone who appeared to be the appellant's son.[174] The girls were identified, and as a result of their interviews, Fogg was charged and convicted of rape, indecent assault, and committing indecent acts as well as numerous drug offenses.[175]

At trial, defense counsel attempted to suppress the tapes saying the search of the tapes exceeded the warrant.[176] The judge denied the motion, stating that the warrant granted police the right to search for and seize "photos," which therefore also gave them the authority to search for, view, and seize the videos.[177]

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162. United States v. Fogg, 52 M.J. 144 (1999).

163. *Id.*

164. *Id.* at 146. He also had a RF detector that could detect wires.

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.* At trial, the detective indicated that he thought that because "counter-surveillance equipment" was listed in the warrant application and that photos were listed in the warrant itself, he had authority to look at the video in the camcorder. *Id.* at 146-47.

172. *Id.* at 147.

173. *Id.*

174. *Id.*

175. *Id.* at 145, 147.

176. *Id.*

177. *Id.*

Chief Judge Crawford, writing for the majority, also stated that the videotapes were included within the scope of the warrant.[178] To support her position, she relied on case law that stated that officers are not obligated to interpret a warrant narrowly.[179] She specifically relied upon an Eighth Circuit case, *United State v. Lowe*,[180] in which the court applied the "practical accuracy" test for warrants. In *Lowe*, because the search warrant permitted a search and seizure for "photographs" and "items of personal identification," the videotape that had been seized depicting Lowe and co-conspirators holding firearms was included reasonably in the warrant.[181] Judge Crawford also relied upon the definition of photographs in MRE 1001(2), as well as North Carolina Rule of Evidence 1001(2).[182] In both rules, the definition of "photographs" also includes videotapes.[183] Those definitions are "indicative of the plain meaning of the word," even if such language would not be necessarily controlling.[184]

Judge Gierke dissented. In his dissent, he stated that the trial court itself had stated the tapes were not within the scope of the warrant either.[185] He further distinguished the *Lowe* case cited by Chief Judge Crawford. According to Judge Gierke, *Lowe* held that the warrant authorized searches and seizures of items of "personal identification, and that the videotapes were such because they were labeled with the defendant's 'street name.'"[186] Therefore, according to Gierke, *Lowe* did not support the position that "photos" included videotapes. Rather, a warrant must specifically list the items to be seized.

The whole idea of the particularity requirement of the Fourth Amendment is to prevent general searches, a concept most famously asserted in *Marron v. United States*.[187] "The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another."[188] Yet in practice, the courts have been more or less generous in permitting the law enforcement official to seize something not specifically mentioned in a warrant, depending upon the *type* of item seized. Thus for example, contraband–property which by its nature is illegal–generally does not require specificity.[189]

Yet nevertheless, the items the police were looking for in *Fogg*–surveillance equipment–were not inherently contraband. Indeed, the seizure of literature, pictures, films, and recordings, because of First Amendment concerns, is generally thought to require a higher degree of specificity than other items.[190] Furthermore, the language in the warrant appeared to be clear, and thus did not appear to require a review of the underlying affidavit to aid in its interpretation, which may be permitted if the affiant is the investigating officer, as is the case here.[191]

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178. *Id.* at 148.

179. *Id.*

180. United States v. Lowe, 50 F.3d 604 (8th Cir. 1995).

181. *Fogg*, 52 M.J. at 148 (citing *Lowe*, 50 F.3d at 604).

182. *Id.*

183. *Id.*

184. *Id.* Judge Crawford asserted that alternative theories of admissibility applied as well. She stated that the "plain view" doctrine justified the seizure. The detective who had seized the evidence knew that Fogg was monitoring him, knew that videotapes are often used by drug dealers to record transactions, and therefore once in the house legally could seize evidence related to that monitoring. Judge Crawford also asserted that the good faith exception and the independent source doctrine applied. *Id.* at 149-52. Judges Sullivan concurred, affirming the case on the basis that the videotape evidence was seized during a lawful search and within the scope of the warrant. Judge Effron concurred with Chief Judge Crawford, but joined Judge Gierke's dissent as to the alternative theories that Judge Crawford presented. *Id.* at 152-53. In his dissent Judge Gierke disagreed the videotapes met the "plain view" doctrine, since nothing indicated the videos were evidence of a crime. He also disagreed that the good faith exception or independent source doctrine applied. *Id.*

185. *Id*. While it is unclear what theory of admissibility justified the inclusion of the videos at trial, the lead opinion states that "The judge denied the [defense's] motion by ruling that the word "photos" in the warrant gave the police authority to seize and view the videotapes. He also found the officers acted in good faith." *Id.* at 147.

186. *Id.*

187. 275 U.S. 192 (1927).

188. *Id.*

189. *See* 2 WAYNE LAFAVE, SEARCH AND SEIZURE, ch. 4.6(b), 560 (3d ed. 1996).

190. *Id.* at 577-80.

191. *See, e.g.*, United States v. Occhipinti, 998 F.2d 791 (10th Cir. 1993); State v. Dye, 250 Kan. 287 (1992).

Fogg thus seems to be lacking in precedential value, because it does not fully explore the specificity requirement in a warrant enough to justify the majority's main premise. Perhaps given the nature of search authorizations in the military (not required to be under oath or in writing, and issued by commanders as well as military judges and magistrates), the military case law on warrant specificity is lacking. Defense counsel, when confronted with a search that exceeds the face of the warrant should not allow Fogg to end the inquiry. Rather, defense should fully present all the specificity requirements and their rationales when aiming to defeat a search.

A Crime Scene Exception? *Flippo v. West Virginia*

Is there a "crime scene exception" to the Fourth Amendment? That is, does the fact that a location is an apparent crime scene allow law enforcement officials to dispense with a warrant requirement to search an area and seize discovered evidence? In another per curiam Fourth Amendment decision issued by the Supreme Court, *Flippo v. West Virginia*,[192] the Court answered no.

In 1996, Flippo, who had been vacationing with his wife at a cabin in a state park, called 911 to report that he and his wife had been attacked. Police arrived and found Flippo had been apparently injured, and inside the cabin, found his wife with fatal head wounds.[193] Police then closed off the area and searched the exterior and interior of the cabin for footprints or signs of forced entry.[194] Later a police photographer arrived, and for the next sixteen hours, police "processed the crime scene," which included taking photographs, collecting evidence, and searching through the cabin.[195] They found evidence implicating Flippo, but at no point obtained a warrant.[196]

Flippo claimed at trial that the evidence obtained from the scene should be suppressed because the police had not obtained a warrant, and that no exception to the warrant requirement existed in this case. The prosecution argued that police may conduct an immediate investigation to preserve evidence from intentional or accidental destruction, and that this was a "crime scene inventory exception."[197] The trial court agreed that this was a "homicide crime scene" exception and denied Flippo's motion.[198]

The Supreme Court unanimously reversed the West Virginia Supreme Court's upholding of this ruling, stating that "[a] warrantless search by the police is invalid unless it falls within one of the narrow and well-delineated exceptions to the warrant requirement."[199] It further indicated that the trial judge's decision directly conflicts with the Supreme Court's holding in *Mincey v. Arizona*, which rejected the "murder scene exception."[200] Furthermore, the Court determined that the trial judge did not consider other possible avenues of admissibility, such as implied consent on the part of Flippo as he apparently directed the police to the scene of the attack. As the question of consent was factual, the Court held that is was a question that was not to be resolved for the first time at its level.[201]

In *Flippo*, the Supreme Court broke no new ground, but simply reaffirmed the necessity to fit the warrantless search within the context of clearly carved-out warrant exceptions. The Supreme Court indicates in a footnote that while the prosecution had argued under theories of plain view (which is not a search doctrine at all, but a seizure doctrine, and thus would not get the police into the area on its own), exigent circumstances, and inventory, the trial judge's ruling "undermine[d] the State's interpretation."[202]

Flippo reminds us of the importance of carefully distinguishing facts to fit into exceptions. Thus, it seems implausible to claim that, after police had secured the crime scene, "exigent circumstances" justified the search of that scene–the evidence was secure. More plausible perhaps would have been the argument that the police's initial entry was an "emergency search" that justified a securing of the cabin and its environs. The police could have also argued the search was consensual, and perhaps that by Flippo himself calling 911, had forfeited a "rea-

192. Flippo v. West Virginia, 120 S. Ct. 7 (1999).

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.* at 8. The prosecution also relied upon the "plain view" exception.

198. *Id.*

199. *Id.* The West Virginia Supreme Court of Appeals had denied discretionary review of Flippo's appeal. *Id.*

200. *Id.* (citing Mincey v. Arizona, 437 U.S. 385 (1978)).

201. *Flippo*, 120 S. Ct. at 8.

202. *Id.* at 8 n2.

sonable expectation of privacy" in a cabin that was government property anyway. Finally, based upon some or all of the circumstances and justifications above, perhaps it could have argued that the evidence would have been "inevitably discovered," thus rendering the need for a warrant superfluous. What *Flippo* thus tells the prosecutor is to reject novel search exceptions, and focus on fitting the facts to the (multiple) existing exceptions. Furthermore, a prosecutor should be cautious on relying on one "sweeping" exception, but should look to the facts to indicate that one exception might lead to another (for example, an emergency search might lead to inevitable discovery).

Urinalysis Cases

Jackson Extended: United States v. Brown

In *United States v. Brown*,[203] the Army Court of Criminal Appeals (ACCA) extended the holding in *United States v. Jackson*,[204] which dealt with an inspection for drugs in the barracks, to an inspection for drugs in soldiers' urine. Indeed, the ACCA stated that "[t]he facts of this case are remarkably similar to those in *Jackson*."[205] In *Jackson*, the CAAF presented a significant interpretation of MRE 313(b);[206] in *Brown*, the ACCA applied that interpretation to urinalysis cases.

Brown was convicted of, among other things, wrongful use of cocaine, the primary evidence of which was a positive urinalysis test result.[207] Brown had been assigned to a transportation company, whose commander had been informed by his first sergeant of several soldiers suspected of using drugs in the unit.[208] The commander, however, had no other information that the soldiers were using drugs other than that they were named. Relying in part on advice from his legal advisor, the commander determined that there was insufficient probable cause to command-direct a urinalysis of the soldiers allegedly using drugs, but instead decided to conduct a unit urinalysis.[209]

After determining further that a one-hundred-percent urinalysis was not logistically feasible, he instead decided upon a thirty-percent test.[210] The commander then ran a computer generated program that produced the names of soldiers to be tested. Four of the five soldiers named as having used drugs were listed, as was Brown.[211] While the defense challenged whether the commander ran a program that produced a truly random cross-section of soldiers in his unit, this was evidently refuted by the list itself which listed "US," meaning unit sweep, indicating a random selection. Furthermore, the evidence indicated only one run of the computer program had been done.[212]

The defense counsel also argued that the unit urinalysis test was simply "a subterfuge for an otherwise illegal search."[213] The defense counsel argued that the examination followed immediately the report of an offense and was not previously scheduled. Because of this–and because the commander had selected specific individuals for testing and because Brown was subjected to a substantially different intrusion–the "subterfuge rule" of MRE 313(b) was triggered. As a result, the government had to prove by clear and convincing evidence that the primary purpose of the examination was an administrative inspection and not a search for criminal evidence.[214]

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203. 52 M.J. 565 (Army Ct. Crim. App. 1999).

204. 48 M.J. 292 (1998). In *Jackson*, the company commander had received an anonymous tip that Jackson had drugs in his barracks room. Lacking probable cause, he ordered an inspection of all the barracks rooms under his command, using Criminal Investigation Command agents and drug dogs. Marijuana was found in a speaker in Jackson's room. Judge Effron held that the commander's primary purpose for ordering the inspection was administrative not criminal, and thus did not violate MRE 313(b), the so-called "subterfuge" rule. The commander testified that his primary purpose in ordering the inspection was to ensure his unit did not have drugs. Primarily because of the commander's testimony, the government thus met its "clear and convincing" burden that the primary purpose of the inspection was administrative, and the evidence was deemed admissible. *Id.* at 292-98.

205. *Brown*, 52 M.J. at 570.

206. MCM, *supra* note 72, MIL. R. EVID. 313(b).

207. *Id.* at 566.

208. *Id.* at 566-67. The first sergeant had been approached by an NCO from another unit who told him that several soldiers in the company were using drugs.

209. *Id.* at 567.

210. *Id.*

211. *Id.*

212. *Id.* at 568. The defense also argued that there were serious deviations in the urine collection and transport process. However, the ACCA stated that his "failure to object [to the litigation packet, urine collection bottle, chain of custody document, and expert witness] was a tacit acknowledgement that the flaws in the collection process went to the weight to be accorded in the evidence, not its admissibility." *Id.* at 571.

213. *Id.* at 569.

214. *Id.*

The military judge applied the "clear and convincing" standard to MRE 313(b), but nevertheless held that the commander's primary purpose was not criminal. Rather, the commander's "primary purpose . . . was because he wanted to do a large enough sampling to validate or not validate that there were drugs being used in his company, and he additionally was very concerned about the welfare, morale, and safety of the unit caused by drugs."[215]

Using the "clearly erroneous" standard to examine the military judge's findings of fact, the ACCA concluded that they were "amply supported by the record."[216] Relying upon *Jackson*, the ACCA stated that there is "no requirement" that an inspection be preplanned or previously scheduled, as long as the primary purpose is unit readiness, as opposed to disciplinary action.[217] Relying again on *Jackson*, it further stated that "[b]ecause drug use has significant potential to damage a unit, the commander and the military judge may consider such potential for damage in determining if the primary purpose of the inspection was administrative . . . [t]he record here amply supports the conclusion that the 9 July 1996 urinalysis was a valid inspection . . . ."[218] Again, as in *Jackson*, the source of the information that supported such a finding was the commander's own testimony. On the witness stand, he testified that his primary reason in ordering the test was the "effect drug abuse could have on his unit" and testified that "you don't want someone . . . that's doing drugs operating a Super-HET [heavy equipment transporter]."[219]

Brown may appear to be a logical extension of *Jackson.* The latter case dealt with drugs in the barracks, the former deals with soldiers using drugs. Yet it should raise some concerns with how MRE 313(b) is to be interpreted. A reading of *Jackson* and *Brown* together suggests that MRE 313(b) is without much effect when it comes to deterring a commander from announcing an inspection in the wake of a report of drug possession or use in his unit. All he apparently has to do is, rather than ordering a test of the one targeted soldier, order a test of several of them, assert that his primary purpose is "unit readiness," and he overcomes even the "clear and convincing" standard. It was suggested last year, after *Jackson* came out, that perhaps defense counsel could try to distinguish *Jackson*, which dealt with drugs being possessed in the barracks (and thus possibly distributed to other soldiers) from drug use.[220] The ACCA in *Brown* appears to reject such a distinction. Indeed, when it comes to possession or use of illegal drugs, following *Brown* and *Jackson*, it appears unlikely in nearly any case that a commander's subsequent inspection will fail.

Oddly enough, however, while *Brown* might indicate a gigantic "win" for the government in urinalysis inspections, it is counterbalanced by the holding in *United States v. Campbell.*[221] Thus, what ultimately may defeat the government in using such a test at a court-martial is not a military rule of evidence premised on search and seizure doctrine, but rather the CAAF's interpretation of the "permissive inference" rule.[222] At any rate, one may wonder whether, when concerning illegal drugs, MRE 313(b) has much effect anymore at all.

The Innocent Ingestion Defense and Its Requirements: *United States v. Lewis*

In *United States v. Lewis*,[223] the CAAF reversed a urinalysis result because the military judge apparently did not allow defense to present an innocent ingestion defense at the court-martial. In the case, the accused was charged with wrongfully using cocaine.[224] The government case rested on the positive urinalysis result alone. In a pretrial conference, the military judge stated, when a potential innocent ingestion defense was brought up by defense counsel, that innocent ingestion was "an affirmative defense in which she [defense counsel] would have to put on evidence of persons and places to which the events of innocent ingestion took place."[225] Shortly afterwards, the defense counsel withdrew the innocent ingestion motion and

215. *Id.*

216. *Id.*

217. *Id.* at 570.

218. *Id.* (citing United States v. Jackson, 48 M.J. 292, 295-96 (1998)).

219. *Id.*

220. *See* Major Walter M. Hudson, *A Few New Developments in the Fourth Amendment,* ARMY LAW., Apr. 1999, at 36.

221. United States v. Campbell, 50 M.J. 154 (1999).

222. *Id. See* Major Walter M. Hudson & Major Patricia A. Ham, *United States v. Campbell*: A Major Change for Urinalysis Prosecutions? ARMY LAW., May 2000, at 39.

223. 51 M.J. 376 (1999).

224. *Id.* at 377.

225. *Id.* at 377-78.

the defense counsel indicated on the record that there would be no innocent ingestion defense raised.[226]

During the direct examination of the accused at the court-martial, the defense indicated it was going to present a diagram of the club where the accused was on a particular evening prior to the urinalysis. The trial counsel objected, stating this diagram was to be used to elicit possible innocent ingestion defense testimony.[227] The defense in response asserted that she had understood that no innocent ingestion defense could be presented unless witnesses could testify about it, but that she could still "present the circumstances of the evening where something could have happened."[228] The military judge allowed the defense to elicit testimony concerning where the accused was during the evening and what he did, but the judge indicated that further questioning would move into an innocent ingestion defense, and presumably not be allowed.[229]

The CAAF reversed and set aside the findings of guilty and the sentence.[230] Rules for Courts-Martial (R.C.M.) 701(b)(2) does require the defense to disclose notice of the defense of innocent ingestion, to include the place(s) where, and the circumstances under which the accused claims he innocently ingested, and the names and addresses of witnesses upon whom the accused intends to rely on to establish the defenses.[231] Judge Sullivan, writing for the majority, held however that the provision does not *require* corroborative witnesses or direct evidence for an affirmative defense.[232] Defense is simply required to disclose such facts if it has them. Case law clearly allows an accused to testify that someone may have spiked a drink with no corroborative witnesses.[233]

Because the military judge apparently misread R.C.M. 701, he thereby substantially prevented the defense counsel from presenting and framing the issue, to include barring the counsel from mentioning it during opening or closing.[234] Under either standard of constitutional or non-constitutional error, the CAAF held that reversal was required.[235]

Why did the CAAF hold that the judge's error warranted reversal? Although the accused was allowed to testify "as to his visits to the karaoke clubs on the nights in question, his voracious drinking of beer, and his repeated trips to the bathroom leaving his drinks unguarded and mingled with the drinks of other bar patrons" as well as argue that these circumstances "created the possibility that someone put something in his beer without his knowledge, or that he picked up someone else's drink," he was nonetheless "prejudically chilled" in presenting his case.[236] The accused could not present evidence to rebut the government's cross-examination, in which he admitted he had no enemies at the bars on the nights in question.[237] The judge also failed to give instructions on innocent ingestion that could have favored the defense.[238]

Judges Crawford and Cox dissented. The dissent was premised in part on whether or not the military judge actually did refuse to permit the defense to put an innocent ingestion defense on. The confusion is in whether the judge simply indicated that the military judge was prepared to preclude the defense due to a lack of witnesses, or whether, because of the lack of witnesses, the military judge wanted to have the ability to raise the defense litigated on the record.[239] The issue was never again litigated since the defense counsel withdrew the

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226. *Id.* at 378.

227. *Id.*

228. *Id.*

229. *Id.* The military judge stated: "Well, I'll allow you to indicate where he was that evening and what he did. But, again, if you start threading over into this innocent ingestion defense, I'm going to call a 39(a) session awfully quick." *Id.* Thus, the clear implication was that such questioning would not be allowed.

230. *Id.* at 383.

231. MCM, *supra* note 72, R.C.M. 701(b)(2).

232. *Lewis*, 51 M.J. at 380.

233. *Id.* (citing United States v. Ford, 23 M.J. 331, 333 (C.M.A. 1987); United States v. Harper, 22 M.J. 157, 162 (C.M.A. 1986)).

234. *Id.* The Navy-Marine Corps Court of Criminal Appeals and the government on appeal also conceded the judge erred applying R.C.M. 701(b)(2). *Id.*

235. *Id.* at 380-81. If the errors were constitutional in nature, then the government is required to show they were harmless beyond a reasonable doubt. If they were non-constitutional, the accused must show they substantially prejudiced material rights. *Id.* (citing Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986) (constitutional error standard); United States v. Barnes, 8 M.J. 115, 116-17 (1979) (non-constitutional error standard)).

236. *Id.* at 381.

237. *Id.* The government was also allowed to argue that the spiking of his drink was thus improbable. *Id*.

238. *Id.* at 382.

239. *Id.* at 384.

motion voluntarily, although the defense counsel apparently understood she could still "present the circumstances of the evening where something could have happened."[240]

Lewis is an example of unresolved ambiguity that works to the benefit of the accused. Indeed, reading the excerpts quoted by both the majority and dissenting opinions, it is difficult to know exactly what the limitations were regarding the innocent ingestion defense. Was the military judge actually misreading R.C.M. 701(b)(2)? Was the judge reading it correctly, but simply notifying the defense that if she wanted to assert the defense, she would have to first litigate it, and since she did not, she could not raise it? Was she allowed to bring in evidence of the defense anyway from the accused? Did the military judge read R.C.M. 701(b)(2) correctly, but did the defense counsel read it wrong?

While the dissent makes a case that the military judge did not misread R.C.M. 701(b)(2), the record has enough vague language from judge and counsel to indicate the opposite. When the defense counsel said, for example, that she could still present "circumstances of the evening where something could have happened"[241] does that mean she understands that she *was* permitted to pursue the defense? What does "where something could have happened" mean? *Lewis* should thus serve as a signal for the military judge to address matters with clarity, and to make sure counsel address such matters with the same clarity, and to resolve ambiguities clearly on the record.

Addendum: Anonymous Tips and Reasonable Suspicion: *Florida v. J.L.*

On 28 March 2000, the Supreme Court issued an opinion in the case *Florida v. J.L.*,[242] in which it held that an anonymous tip without further corroboration was insufficient to justify a *Terry* stop and frisk. In the facts of the case, an anonymous caller informed the Miami-Dade police that a young black male in a plaid shirt standing at a certain bus stop had a gun on his person.[243] No other information corroborated the tip, the caller was never identified, and no audio recording of the tip was made. Six minutes after receiving the tip, the police saw three black males, one of whom, J.L., was wearing a plaid shirt. An officer approached J.L. frisked him, and seized a gun from his pocket.[244] He was arrested and charged with carrying a concealed firearm without a license and possessing a firearm under the age of eighteen.[245]

Justice Ginsburg, writing for a unanimous Court,[246] pointed out that in certain situations, the Court had recognized an anonymous tip has a basis for a *Terry* stop. Specifically, in *Alabama v. White*,[247] the Court held that suspicion was reasonable when the police had received an anonymous tip indicating a woman had cocaine and that she would "leave an apartment building at a specified time, get into a car matching a particular description, and drive to a named motel."[248] However, Justice Ginsburg stated that *White* was considered "borderline" and thus distinguishable from the present case. The anonymous tip in *Florida v. J.L.* provided no "predictive information" and left police without a way to test the anonymous tipster's reliability or credibility.[249]

Justice Ginsburg's language is slightly puzzling, because clearly the anonymous tipster's language *was* predictive. The tipster said that a young black male in a plaid shirt would be standing at a certain bus stop and would be armed. Six minutes later, police found such a person. If, in *Alabama v. White* there was a predictability of movement on the part of the suspect, in *Florida v. J.L.* there was predictability of location and description. The basic problem was not that no predictive information was provided, but that it was insufficient.[250] For this reason, *Florida v. J.L.* provides little new information to clarify the often muddy waters of "stop and frisk" exceptions, but simply

240. *Id.*

241. *Id.*

242. Florida v. J.L., No. 98-1993, 2000 U.S. LEXIS 2345 (U.S. Mar. 28, 2000).

243. *Id.*

244. Id.

245. The trial court suppressed the gun, holding the search was unlawful. The intermediate appellate court reversed, but the Florida Supreme Court agreed with the trial court, holding the search invalid under the Fourth Amendment. *Id.*

246. Justice Kennedy filed a concurring opinion, which Chief Justice Rehnquist joined.

247. 496 U.S. 325 (1990), *cited in J.L.*, 2000 U.S. LEXIS 2345.

248. *Id.* at 328.

249. *J.L.*, 2000 U.S. LEXIS 2345.

250. One wonders if the result would be the same if the tipster had given considerable more detail to police in describing the suspect, regardless of his possible movements.

draws a line based upon a (perhaps easily) distinguishable set of facts.

United States v. Campbell: A Major Change for Urinalysis Prosecutions?[1]

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Introduction

United States v. Campbell[2] is perhaps the most significant case dealing with urinalysis prosecutions in many years and has generated a tremendous number of questions and a fair amount of controversy. The Government Appellate Division (GAD) took the unusual step of petitioning the United States Court of Appeals for the Armed Forces (CAAF) to reconsider its opinion and on 22 March 2000, the CAAF issued a per curiam opinion on reconsideration.[3] Unfortunately, the reconsideration opinion did not resolve many underlying questions, and in fact may have added to the confusion. For practitioners, the fundamental underlying question is: has *Campbell* drastically changed the requirements for drawing the permissive inference of wrongfulness in urinalysis prosecutions?

The Facts

Private First Class (PFC) Christopher Campbell was tried and convicted in May 1995 for wrongful use of lysergic acid diethylamide (LSD), in violation of Article 112a, Uniform Code of Military Justice (UCMJ).[4] Campbell's sentence included a bad-conduct discharge, seventy-five days confinement, forfeiture of $549.00 pay per month for two months, and reduction to the lowest enlisted grade.[5]

It was not the facts in the case involving use of LSD that created the specified appellate issues. Instead, the determinative issue was whether the military judge had erred in admitting the urinalysis test results and the government's expert testimony regarding the LSD testing methodology used to analyze Campbell's urine sample.[6] At the court-martial, the defense counsel moved to suppress the test results on the ground that the procedure used to confirm the presence of LSD was not considered reliable as required by Military Rule of Evidence (MRE) 702.[7] The defense contended that the procedure used to confirm the LSD presence, the gas chromotography tandem mass spectoscopy (GC/MS/MS) test, was not reliable as defined by MRE 702.[8]

The defense relied on two experts to support its claim. One, a retired state forensic toxicologist, stated that GC/MS/MS was not accepted in the scientific community as a method for testing LSD.[9] According to this expert, adequate peer review of the testing methodology had not been accomplished. Another defense expert testified that the extremely minute amount of

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1. Major Hudson would like to thank Captain Jeremy Ball for assisting him in the research and preparation of this article.

2. 50 M.J. 154 (1999) (*Campbell I*).

3. United States v. Campbell, 52 M.J. 386 (2000) (opinion on reconsideration) (*Campbell II*).

4. *Campbell I*, 50 M.J. at 155.

5. *Id*.

6. *Id*.

7. *Id*. at 156.

8. *Id*. The urine sample was initially sent to Fort Meade, Maryland for a radioimmunoassay (RIA) screening test. A sample is tested twice using the RIA method. However, that method is insufficient itself to confirm a sample as positive for drug use and is not certified as reliable under Department of Defense (DOD) guidelines. The sample was then sent to Northwest Toxicology Laboratory (NTL) for additional testing using the GC/MS/MS method. When this sample was tested, the so-called "gold standard" for urine testing was gas chromotography mass (not tandem) spectoscopy. The NTL GC/MS/MS result showed a reading of 307 picograms of LSD per milliliter of urine. A picogram is a trillionth of a gram, much smaller than the nanogram detection levels for most urinalysis testing. The DOD cutoff for LSD is 200 picograms per milliliter of urine.

9. *Id*. at 157.

LSD in one's urine—given the average intake of LSD—made the urine difficult to scientifically analyze.[10] He also pointed out that the GC/MS/MS procedure is "a rather unique system" that "combine[s] two mass spectrometers together to give us some additional data that can hopefully be used for drug identification."[11] The expert further pointed out that the only lab that conducted the testing was Northwest Toxicology Laboratory (NTL) and that as a consequence, the methodology had not been accepted in the scientific community at large. As the expert testified, "This is a very novel technique, a novel piece of equipment and a very novel methodology."[12] The expert also testified, however, that the reliability of NTL's results from GC/MS/MS testing could be verified by open control tests in other laboratories using different testing methodologies.[13] A prosecution expert was also called to the stand, noting that there were over 300 GC/MS/MS instruments in use throughout the world, though NTL was the only one using GC/MS/MS for LSD confirmation.[14]

The CAAF's Decision

Given the novel testing procedure and the incredibly minute amounts of LSD found in the urine, it appeared the case would be decided on a straightforward application of expert witness principles based on *Daubert v. Merrill Dow Pharmeutical*.[15] In fact, the Army Court of Criminal Appeals had decided the case on that basis.[16] Moreover, the original issue granted review by the CAAF also indicated the case would be decided using *Daubert* standards.[17] However, following oral argument at the CAAF in December 1997, the court specified three additional issues for review, focusing on the scientific basis for the Department of Defense (DOD) cutoff level of 200 picograms, and it based its decision to reverse on those specified issues.[18]

According to Judge Effron, the CAAF had to determine whether the prosecution had failed to provide "sufficient evidence on the record about the test that, under our case law, would permit a reasonable fact finder to conclude beyond a reasonable doubt that appellant used LSD and that the use was wrongful."[19] Judge Effron held that the prosecution had so failed.

In analyzing the issue, Judge Effron wrote that "cases which have permitted the inference of wrongfulness strictly require that the prosecution also establish the reliability of the methodology and explain the significance of the results of the test of the accused's sample."[20] While this was not controversial, Judge Effron then went on to state that the prosecution's expert testimony *must* show: (1) that the metabolite is "not naturally produced in the body" or any substance other than the drug in question, (2) that the cutoff level and reported concentration are high enough to *reasonably discount the possibility of unknowing ingestion and to indicate a reasonable likelihood that the user at some time would have "experienced the physical and psychological effects of the drug,"* and (3) that the testing methodology reliably detected the presence and reliably quantified the concentration of the drug or metabolite in the sample.[21]

10. *Id.*

11. *Id.*

12. *Id.* at 158.

13. *Id.*

14. *Id.*

15. 509 U.S. 579 (1993). *Daubert* lists four non-exclusive factors to determine whether expert scientific evidence should come in: (1) can the theory be tested or has it been tested, (2) has it been subject to peer review, evaluation, or publication, (3) what is the potential error rate of the theory, (4) and an application of general acceptance in the scientific community. *Id.* In a follow up case to *Daubert*, *KumhoTire v. Carmichael*, the Supreme Court has allowed a judge considerable leeway in applying Daubert standards to a variety of scientific and nonscientific evidence. Kumho Tire v. Carmichael, 526 U.S. 137 (1999). For a discussion of *Daubert* and *Kumho Tire* standards of admissibility in military courts, see Major Victor M. Hansen, *Rule of Evidence 702, The Supreme Court Provides a Framework for Reliability Determinations*, 162 MIL. L. REV. 1 (1999). It is interesting to note that if the CAAF had relied on a *Daubert* analysis in reversing the case, *Campbell* would probably not be very significant or problematic today. The Army does not use NTL anymore for LSD testing. Rather, all LSD testing is ultimately completed at Tripler Army Medical Center, and the methodology used is the GC/MS test, the "gold standard" test considered the most reliable for urinalysis testing. In fact, both the urinalysis laboratories at Tripler Army Medical Center and Fort Meade are developing a new testing procedure for LSD called liquid chromotography/mass spectoscopy (LC/MS) which, if DOD certified and accepted by scientific communities, may soon be used to test for LSD in urine samples. Telephone Interview with Dr. Cathy Okano, Tripler Army Medical Center Forensic Toxicology Drug Testing Laboratory (Sept. 21, 1999).

16. United States v. Campbell, No. 9400527 (Army Ct. Crim. App. Apr. 1, 1996) (unpublished).

17. United States v. Campbell, 46 M.J. 449 (1997).

18. *Campbell I*, 50 M.J. at 155. The CAAF heard additional oral argument on the specified issues in June 1998.

19. *Id.* at 160-61.

20. *Id.* at 160.

21. *Id*. (emphasis added).

Referring to these three requirements of proof as "well-established case law,"[22] the CAAF held that the prosecution in PFC Campbell's case failed to prove the levels or frequency given in testing, which in turn could indicate

> (1) that the particular GC/MS/MS test reliably detected the presence of LSD metabolites in urine; (2) that GC/MS/MS reliably quantified the concentration of those metabolites; and (3) that the DOD cutoff level of 200 pg/ml was greater than the margin of error and sufficiently high to reasonably exclude the possibility of a false positive and establish the wrongfulness of any use.[23]

Judge Effron added: "In particular, the Government introduced no evidence to show that it had taken into account what is necessary to eliminate the reasonable possibility of unknowing ingestion or a false positive."[24] As such, according to Judge Effron, the evidence left open the question of whether the cutoff level and the level of LSD in Campbell's urine "would *reasonably exclude the possibility of a false positive and would indicate a reasonable likelihood that at some point a person would have experienced the physical and psychological effects of the drug*."[25] Indeed, according to Judge Effron, this was the type of evidence previously "required to ensure that any use was wrongful."[26]

This language appeared problematic and even novel; since *United States v. Mance*,[27] military practitioners believed that introducing evidence to eliminate the possibility of unknowing ingestion or false positives was not necessary. Instead, the positive result was sufficient to allow, but not require, a factfinder to infer that the accused wrongfully used drugs.[28] Yet, this reasonable inference based on the result alone was exactly what Judge Effron said could not be drawn in this case: "[W]e conclude that there was no rational basis upon which the factfinders could draw a permissible inference of wrongfulness of use from the concentration of LSD reported in the appellant's urine sample."[29] The GC/MS/MS testing could neither reasonably exclude the possibility of a false positive, nor could it indicate a reasonable likelihood that at some point a person would experience the physical and psychological effects of the drug.[30]

A Rationale for *Campbell*

As *Campbell* turns on a permissive inference, a brief examination of this inference is necessary. A permissive inference "allows—but does not require—the trier of fact to infer the elemental fact from proof by the prosecutor of the basic one and which places no burden of any kind on the defendant."[31] Because the fact finder is free to accept or reject the inference, and no burden of proof is shifted, it affects the "beyond a reasonable doubt" standard only if, under the facts of the case, "there is no rational way the trier could make the connection permitted by the inference."[32] It is thus considered far less problematic than a mandatory presumption in a criminal case. The only requirement for the inference is a "rational link" between the proven basic fact and the elemental one.[33]

The Supreme Court has distinguished a mandatory from a permissive presumption or inference by describing a mandatory presumption as "logically divorced from [the facts of the case] and based on the presumption's accuracy in the run of cases."[34] This is why the Supreme Court has determined that an independent evaluation of facts is irrelevant when analyzing a mandatory presumption, but not a permissive one, unless "there is ample evidence in the record other than the presumption to support a conviction."[35]

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22. *Id.*

23. *Id*. at 161.

24. *Id*.

25. *Id.* (emphasis added).

26. *Id.*

27. 26 M.J. 244 (C.M.A. 1988).

28. *Id.*

29. *Campbell I*, 50 M.J. at 161.

30. *Id.*

31. Ulster County Court v. Allen, 442 U.S. 140, 157 (1979).

32. *Id*.

33. *Id*.

34. *Id*. at 159.

Therefore, the counter argument to the standard pre-*Campbell* urinalysis permissive inference is that it was precisely the *lack* of other evidence in the so-called "paper case" that made the drawing the permissive inference problematic. For if the element of wrongfulness or knowledge can *only* be adduced from the presence of the metabolite or the drug in the urine, then it may appear the permissive inference was given undue weight without something further, such as an additional requirement that an expert reasonably discount innocent ingestion and indicate physical or psychological effects.

A second rationale for the *Campbell* opinion may be the broad encompassing nature of the military's urinalysis program. Unquestionably, the military urinalysis program is the most sweeping in the United States. The Supreme Court has upheld the constitutionality of federal drug testing programs in *Skinner v. Railway Labor Executives' Association*[36] and *National Treasury Employees v. von Raab.*[37] However, neither testing program is as comprehensive as the military's, and generally do not involve criminal prosecutions. For example, the testing program for customs employees in *von Raab* shielded the employees from monitors when urinating, and positive results could not be turned over to criminal prosecutors without the employee's written consent.[38] *Campbell* thus may be a way to make urinalysis prosecutions much more difficult, and more like civilian testing programs, and thereby cause the government to use administrative methods, rather than criminal prosecutions.

A Departure from Precedent?

Whether the CAAF intended *Campbell* to make the military's urinalysis programs more closely resemble civilian programs or not, the apparent requirement of an expert who reasonably discounts the possibility of unknowing ingestion and indicates a reasonable likelihood that the user at some time would have "experienced the physical and psychological effects of the drug,"[39] has created significant confusion. There is no precedent for this requirement in prior military case law, despite Judge Effron's characterization of it as part of the "well established case law" dealing with urinalysis. Indeed, as previously mentioned, numerous prior cases include facts that appear specifically to reject such a requirement.[40]

Furthermore, *Campbell* relies on *United States v. Harper*[41] for support for its requirement of a reasonable likelihood that a person would at sometime have experienced the physical and psychological effects of the drug. *Harper* does discuss evidence presented by the prosecution that discounted the possibility of innocent ingestion as well as indicating that the user felt the effects of the drug.[42] However, this evidence apparently was presented to persuade the court to draw the permissive inference, and not as an underlying requirement:

> As indicated earlier in this opinion, the prosecution introduced sufficient evidence from which a factfinder could find beyond a reasonable doubt that appellant used marijuana. *On this basis, the prosecution could also ask the factfinder to infer that the use was wrongful . . . To persuade the court to draw this inference, however, expert testimony was again offered by the prosecution. Doctor Jain testified that the nanogram readings on the three samples ruled out the possibility of passive inhalation. Moreover, he testified that these particular results indicated that the user at one time felt the physical and psychological effects of the drug.*[43]

In other words, Dr. Jain's testimony was not required for the court to draw the inference of wrongfulness, but it was persuasive.

Furthermore, some experts today contend that Dr. Jain's expert testimony is considered scientifically dubious. Specifically, his testimony that the results indicated that the user at one time felt the physical and psychological effects of the drug, even if thought credible in the mid 1980s, at the time of *Harper,*

35. *Id*. at 160.

36. 489 U.S. 602 (1989). In *Skinner,* the Federal Railroad Administration mandated urinalysis testing for employees involved in accidents and who had violated certain safety rules. *Id.*

37. 489 U.S. 656 (1989). In *von Raab,* the United States Custom Service required Customs Service employees applying for jobs involving illegal drugs or use of firearms to provide urine samples. *Id.*

38. *Id.*

39. *Id.*

40. *See, e.g.*, United States v. Bond, 46 M.J. 86 (1997); United States v. Pabon, 42 M.J. 404 (1995).

41. 22 M.J. 157 (C.M.A. 1986).

42. *Id.* at 163.

43. *Id.* (emphasis added).

is no longer viewed as such in the toxicology field today.[44] As one currently practicing toxicologist states: "We know some toxicologists would not have supported that opinion, and for sure, now we know that it is not the case."[45] The CAAF has thus taken a scientific "standard" that was arguable at best in 1986, and not credible at all today, and apparently turned it into a virtual threshold of admissibility.

Campbell's holding on the permissive inference thus appears to be based upon dubious scientific testimony and, in any event, is a significant departure from precedent. In *United States v. Ford*,[46] for example, the Court of Military Appeals held that a finding of wrongfulness beyond a reasonable doubt could be upheld even when the defense submits evidence that undermines or contradicts the permissive inference. Yet, the court did not require any evidence to indicate that the accused felt physical or psychological effects of the drug.[47]

A subsequent case, *United States v. Mance*, also indicated that the permissive inference could be drawn even "where contrary evidence is admitted," if the prosecution could convince the fact finder to disbelieve that contrary evidence.[48] At least implicitly, *Mance* thus reiterated that a failure to discount the reasonable possibility of innocent ingestion would not prevent fact finders from drawing the permissive inference of wrongfulness solely based on the urinalysis result and expert testimony explaining the test.[49] The court in *Mance* simply stated that the inference could be drawn under "appropriate circumstances" and that the knowledge element of both possession and use of illegal drugs could be inferred by the fact finder from the presence of the controlled substance.[50]

What are those "appropriate circumstances" as described in subsequent cases? "Appropriate circumstances" do *not* appear to be those in which an expert has to discount a reasonable possibility of innocent ingestion or indicate that the user at sometime felt the effects of the drug. Indeed, the CAAF asserted the opposite in *United States v. Pabon*, when it rejected the defense's challenge to the permissive inference of knowledge.[51] In *Pabon*, the government expert testified that the accused's level of 1793 nanograms of cocaine metabolite per milliliter of urine was "consistent with unknowing ingestion."[52] In fact, the prosecution's expert testified that the level of cocaine metabolite in Pabon's urine was a "small enough dose" that it was possible to be given "*without [the user's] knowledge and with no sufficient physiological or psychological symptoms to be aware that there was some sort of pharmocologically active drug that had been administered*."[53]

Similarly, in *United States v Bond*,[54] the accused denied using cocaine and proffered an innocent ingestion defense. The government's chemist admitted "that someone who ingested a small amount of cocaine . . . dissolved in an alcoholic beverage might not know they had ingested cocaine."[55] Despite this testimony, the CAAF found the evidence legally sufficient. As the CAAF had previously held in *Harper*, urinalysis test results and expert testimony explaining the procedure and results were sufficient to permit a fact finder to find beyond a reasonable doubt that an accused used drugs and for a permissive inference of wrongfulness to be drawn.[56] "The existence of evidence raising an innocent ingestion defense . . . did not compel introduction of additional prosecution evidence rebutting it or cause the prosecution's evidence . . . to become legally insufficient."[57]

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44. Electronic Correspondence between Dr. Donald Kippenberger, Director of Forensics Operations, Research Dynamics Incorporated, and Major Walter M. Hudson (Apr. 8, 2000) (on file with author) [hereinafter Kippenberger Correspondence]. Dr. Kippenberger, a forensic toxicologist, currently inspects Department of Defense drug testing laboratories, and from 1990-1994 was consultant to the Surgeon General of the Army, helping set policy for Department of Army drug testing laboratories. Lieutenant Colonel Ronald Shippee, Commander of the Fort Meade Drug Testing Laboratory has also stated that, "Based on a "spot urine" specimen result only, no expert can testify with any degree of accuracy: (1) how the subject was exposed to the drug, (2) when the subject was exposed, and (3) the degree of impairment at the time of exposure." Electronic Correspondence between Lieutenant Colonel Ronald Shippee and Major Walter M. Hudson (Apr. 12, 2000) (on file with author).

45. Kippenberger Correspondence, *supra* note 44.

46. United States v. Ford, 23 M.J. 331, 332 (C.M.A. 1987).

47. *Id.*

48. United States v. Mance, 26 M.J. 244, 253 (C.M.A. 1988) (quoting *Ford*, 23 M.J. at 335).

49. *Id.* at 253.

50. *Id.*

51. United States v. Pabon, 42 M.J. 404, 405 (1995).

52. *Id.*

53. *Id.* (emphasis added).

54. 46 M.J. 86, 88 (1997).

55. *Id.* at 89.

56. *Id.* (citing United States v. Harper, 22 M.J. 157, 161-62 (C.M.A. 1986)).

If, as *Campbell* seems to indicate, it is now required that, to draw the permissive inference of wrongfulness, an expert must testify that the possibility of innocent ingestion can be reasonably discounted or that it is reasonably likely that the user felt the physical or psychological effects of the drug, it is virtually certain that in many cases the prosecution's proof will fail. As one expert has pointed out, "[e]xcept for cases involving very high concentrations of the drug or metabolite in urine, an expert could not state with absolute confidence that the donor felt the effects of most drugs."[58] Furthermore, in many, if not most, cases involving urinalysis tests, innocent ingestions are also possible with the current cutoff levels—the cutoff levels were established for the purpose of negating "the possibility of false positives."[59]

Therefore, defense counsel have been making motions for findings of not guilty pursuant to Rule for Courts-Martial (R.C.M.) 917 in cases where the only evidence of drug use is a positive urinalysis test.[60] In a so-called "paper case" in which the government only has the positive urinalysis result and expert opinion about it, such an inference is necessary for the knowledge element of the offense. If the fact finder cannot draw the inference, the prosecution fails on that element of proof.

Can *Campbell* Be Limited to its Facts?

The most obvious government response to *Campbell* is to restrict it to its facts—specifically, the type of LSD testing done on Campbell's urine or to LSD as opposed to other drugs. One can argue that the CAAF has "repeatedly accepted the use of GC/MS [gas chromotography/mass spectoscopy, the so-called "gold standard" for urinalysis testing] with regards to testing for and prosecuting drugs other than LSD, such as marijuana and cocaine" and, thus, rely on years of the CAAF's past case law allowing the permissive inference to be drawn in such cases.[61]

The problem with this attempt to limit *Campbell* to LSD cases or to the testing methodology used in the case is that the opinion is apparently not limited in that manner. The cases relied upon in Campbell as support for the requirement of expert testimony that reasonably discounts innocent ingestion, and that the user felt the effects of the drug, do not involve LSD.[62] The opinion more logically leads to the opposite conclusion: this testimony is required in *all* "urinalysis alone" cases. Indeed, that *Campbell* would apparently not be limited to its facts was the cause of Judge Sullivan's concern in his dissent in the case: "[T]he majority's new approach to drug prosecutions goes far beyond the rules for proving drug cases now provided by the President in the Manual for Courts-Martial, United States."[63]

Campbell Reconsidered[64]

57. *Bond*, 46 M.J. at 90 (citing United States v. Matias, 25 M.J. 356, 361 (C.M.A. 1987)).

58. Affidavit of Aaron J. Jacobs at 5, Petition for Reconsideration of United States v. Campbell, 50 M.J. 154 (1999). Dr. Jacobs states elsewhere in the affidavit:

> Each individual reacts differently to drug ingestion due to numerous factors, to include prior usage, weight, and overall health condition. For example, a heavier person may have to ingest much more of a drug to feel the same physiological affects as well as achieve the same level of drug in a urine sample as another, smaller person.

Id. at 7. The CAAF declined to admit Dr. Jacobs's affidavit and, therefore, will not consider it in its decision on whether to grant the government's petition for reconsideration.

59. *Id*.

> The cutoff concentrations were intentionally selected at concentrations that would not detect all drug users. Rather, the levels chosen would allow for the detection of a sufficient number of drug users to serve as a deterrent to those who abuse drugs in the population tested. The presence of a drug and/or drug metabolite at a concentration at or above the cutoff level in urine confirms the donor ingested the drug. The mode of ingestion of the drug is unknown (oral, insufflation [snorting], or intravenous).

Id. Additionally, Dr. Donald Kippenberger served as the consultant to the Army Surgeon General when cutoff changes to nanogram levels were made for certain drugs such as cocaine (moving cocaine confirmation from 150 ng/ml to 100 ng/ml). According to him, "We looked solely at the technical capabilities of our instrumentation and whether we knew that the population of the negatives did not overlap with the population of the positives." Kippenberger Correspondence, *supra* note 44.

60. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 917 (1998) [hereinafter MCM]. Since *Campbell*, two motions for findings of not guilty had been granted in Army courts-martial, and at least one in Navy and Air Force courts-martial. In *United States v. Green*, one of the only two Court of Criminal Appeals decisions dealing with urinalysis prosecutions since *Campbell*, the Navy-Marine Corps Court of Criminal Appeals essentially ruled contrary to *Campbell*, simply listing it as authority contrary to a long line of cases beginning with *United States v. Harper.* United States v. Green, No. 9900162 (N.M. Ct. Crim. App. Feb. 10, 2000) (unpublished).

61. Government Response to Defense Motion for Finding of Not Guilty at 9, United States v. Tanner (on file with authors).

62. United States v. Campbell, 50 M.J. 154, 160 (1999) (*Campbell I*) (citing United States v. Murphy, 23 M.J. 310, 312 (C.M.A. 1987); United States v. Harper, 22 M.J. 157, 161 (C.M.A. 1986)).

Because *Campbell* was such a controversial decision, and apparently a major departure from precedent, the GAD petitioned the CAAF to reconsider its opinion. On 22 March 2000, the CAAF issued a per curiam opinion on the reconsideration, with a dissent from Judge Sullivan.[65] However, the reconsideration opinion raised a series of questions itself.

The CAAF first disposed of Campbell's contention that the reconsideration opinion would only be advisory and that the Government's reconsideration petition should be rejected because of an alleged conflict of interest.[66] The CAAF then stated the purpose for its opinion: "In the present case, which addresses the frequently litigated subject of drug testing, clarification upon reconsideration may provide a useful means of reducing potential for unnecessary litigation in the future."[67] Unfortunately, the reconsideration opinion did not clarify the original opinion. Rather, because it is subject to several interpretations, may only have confused matters more. Practitioners at both the trial and appellate level may have to wait for further clarification from the CAAF before the dust settles on this issue.

The CAAF reiterated the three-part standard it set forth in the original opinion used to demonstrate the "relationship between the test result and the permissive inference of knowing, wrongful use . . . ."[68] This was the controversial three-part standard, with the second part that stated "that the cutoff level and reported concentration are high enough to reasonably discount the possibility of unknowing ingestion and to indicate a reasonable likelihood that the user at some time would have 'experienced the physical and psychological effects of the drug.'"[69] Interestingly, the CAAF stated that the prosecution "may [as opposed to must] demonstrate the relationship between the test result and the permissive inference of knowing, wrongful use" by using the three part standard.[70] In the original opinion, the CAAF stated that the type of evidence used to establish the test "was required in *Harper*," indicating evidence that met the standard was mandatory.[71]

The CAAF then identified the perceived deficiency in *Campbell*. According to the CAAF, the deficiency was the "absence of evidence establishing the frequency of error and margin of error" which caused the CAAF to hold that the prosecution did not reasonably exclude the possibility of an unknowing ingestion and thus the inference could not be drawn.[72] The CAAF further stated that the "three part standard" was not the only "evidence" the government could use to allow a rational basis for the inference to be drawn, as long as it met Daubert standards of reliability and relevance.[73]

Yet the above arguably does little to clarify the CAAF's earlier holding. As an indication of the confused nature of the opinion, it equates the three-part standard with "evidence" used to satisfy such a standard.[74] Additionally, it states that the three-part standard is not necessary in order to draw the rational basis, but provides no indication as to what other standard should be used.[75] Instead it states that *Daubert* evidentiary standards, as further elaborated upon by the *Kumho Tire* analysis, are factors that may be used to establish the"reliability and relevance" of scientific evidence.

63. *Id.* at 162.

64. The status of the government's petition for reconsideration generated controversy as well. In late March 2000, the Air Force Court of Criminal Appeals released *United States v. Adams*, Misc. Dkt. 99-13 (A.F. Ct. Crim. App. Mar. 20, 2000). In that brief opinion, Senior Judge Young, writing for the court, dismissed an Article 62, UCMJ appeal the government had submitted seeking to overturn a military judge's finding of not guilty pursuant to R.C.M. 917 in a urinalysis case. The military judge had relied on *Campbell* in dismissing the case, stating that the prosecution was required to prove that the accused felt the physical and psychological effects of methamphetamine. While the Air Force Court dismissed the government's appeal, it did state:

> [T]he *Campbell* decision does not represent a final, binding decision of the Court. Decisions of the CAAF are inchoate until Court issues a mandate. *See United States v. Miller*, 47 M.J. 352, 361 (1997). The CAAF has not issued a mandate in this case because it still has a motion for reconsideration . . . Therefore, *Campbell* was not binding on the military judge.

Id. Presumably, following the reconsideration, the Air Force Court of Criminal Appeals accepts *Campbell* as binding precedent.

65. United States v. Campbell, 52 M.J. 386 (2000) (opinion on reconsideration) (*Campbell II*).

66. *Id.* at 387-388.

67. *Id.* at 388.

68. *Id*.

69. *Id*.

70. *Id*.

71. United States v. Campbell, 50 M.J. 154, 161 (1999) (*Campbell I*).

72. *Campbell II*, 52 M.J. at 388.

73. *Id. See supra* note 15 for a discussion of *Daubert* and *Kumho Tire* evidentiary standards.

Does this mean that standard "scientifically accepted" testing procedures, such as the use of the gas chromotography/mass spectroscopy (GC/MS), do not require use of the three-part standard? If so, there is a logical flaw in the CAAF's reasoning, for while the GC/MS test may be an accepted testing procedure, the procedure itself indicates nothing about how or why the drug or drug metabolite got into the sample provider's urine.[76] An expert testifying about the testing methodology by itself provides no connection between the methodology and the permissive inference.

In other words, if the CAAF is stating that establishing the viability of the testing is enough for the inference, it is "mixing apples with oranges"—it is confusing a standard to establish a methodology with a standard upon which to draw an inference of knowing use. It seems then, until a methodology is established that can allow an expert to state that the testing procedure itself allows one to connect the test with knowing ingestion—if such a methodology is even possible, there is arguably no way around the three-part standard.

The counter argument to this interpretation of the opinion on reconsideration is that the CAAF's language was carefully drafted to back down from it original opinion that seemed to require the three-part test as a prerequisite of proof in urinalysis cases. This reading of the opinion has some credence because Chief Judge Crawford, one of the two dissenters in *Campbell I*, joined in the per curiam opinion. While the CAAF may have left open the question of exactly what other expert testimony or evidence would satisfy the concerns in *Campbell I*, at least the door has been left open for other methods to be successful. Subsequent case law and trial practice will have to answer any questions stemming from these methods as they arise.

As for the test established in *Campbell I* itself, the reconsideration also states that, in using the three-part standard, the prosecution does not need to "introduce scientific evidence tailored to the specific characteristics of the person whose test results are at issue."[77] Rather, it is sufficient for an expert to testify "with respect to human beings as a class" to draw the inference, and if the defense states that the inference should not be applied to a person with the accused's characteristics, that goes toward the weight of inference a factfinder may place on it, and not to its permissibility.[78]

In other words, an expert does not seem to need to refer to a person with the accused's characteristics—height, weight, and other characteristics—to reasonably discount the possibility of unknowing ingestion and to indicate a reasonable likelihood that the accused at some time would have experienced the physical and psychological effects of the drug. Rather, an expert can presumably posit that "an average person" or "a typical person" with a particular nanogram level would probably not have innocently ingestion and would probably have felt the drug's effects. At first glance, this appears to aid the government in getting past the three-part standard. Yet this may not be as helpful as it seems.

The reason is that even when positing an "average person" or a "typical person" or simply "human beings as a class," very little can be said about feeling physical and psychological effects at virtually any known level. Perhaps at nanogram concentrations considerably above the cutoff levels, an expert could testify that a person might feel such effects, but this is highly speculative and subjective.[79] Certainly, for nanogram levels at or near the cutoff levels, such expert testimony is not currently scientifically available.[80]

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74. The opinion stated:

> If the Government relies upon test results, it is not precluded *from using evidence other than the three-part standard* if such evidence can explain, with equivalent persuasiveness, the underlying scientific methodology and the significance of the test results, so as to provide a rational basis for inferring knowing, wrongful use.

Campbell II, 52 M.J. at 388-389 (emphasis added).

75. *Id.*

76. *See* discussion *supra* note 44.

77. *Campbell II*, 52 M.J. at 389.

78. *Id.*

79. For example, "when pressed" one expert stated that she could perhaps state that a first time user would feel the effect of cocaine at 100 ng/ml, though she admits this is "highly subjective." Telephone Interview with Dr. Cathy Okano, Tripler Army Medical Center Forensic Toxicology Drug Testing Laboratory (Apr. 7, 2000) [hereinafter Okano Interview]. A study published in 1987 in the *Journal of Analytical Toxicology* states that a 25 mg oral dose given to a single volunteer resulted in a peak urinary concentration of 269 ng/ml at one hour and 7,940 ng/ml at twelve hours, remaining at 300 ng/ml at forty-eight hours. According to the study, one hour after the drug ingestion, the volunteer "noted a slight dryness of the mouth, lightheadedness, and mild headache, which persisted for approximately 1.5 h." R.C. Baselt & R. Chang, *Urinary Excretion of Cocaine and Benzoylecgonine Following Oral Ingestion in a Single Subject*, 11 JOURNAL OF ANALYTICAL TOXICOLOGY 81 (1987). Another expert has stated that, short of a documented study to support such an opinion, "the expert is just guessing" and that there is little, if any, scientific evidence on which to base such an opinion on. Kippenberger Correspondence, *supra* note 44.

80. Okano Interview, *supra* note 79; Kippenberger Correspondence, *supra* note 44.

Furthermore, discounting innocent ingestion, even given an "average human being," again is not possible at nanogram levels at or near the cutoffs, and indeed would have to be tied to a particular set of facts. If the nanogram level were at a certain level, again, considerably above the cutoff, and a hypothetical was posited (which would have to be based upon the accused's explanation of his innocent ingestion), then an expert could perhaps render an opinion that would discount the possibility of innocent ingestion. However, if the nanogram level were not sufficiently high enough, the expert could not discount such a possibility.

It appears then that the CAAF's opinion on reconsideration still may require the three-part standard as a threshold for the permissive inference. An alternative reading of the opinion is that it does not require the three part standard, but it is not clear what, in the absence of that standard, is acceptable. It also appears that while an expert can testify as to "human beings as a class" and not a particular accused, only in cases involving high nanogram levels will an expert be able to testify that the cutoff level and reported concentration are high enough to reasonably discount the possibility of unknowing ingestion and to indicate a reasonable likelihood that the user at some time would have experienced the physical and psychological effects of the drug. Thus, the reconsideration may really have added little or nothing to the original opinion. This may explain Judge Sullivan's dissent, in which he states: "The majority does not meaningfully depart from this position today [that the user at some time would have experienced the physical and psychological effects of the drug], so I again dissent."[81]

The Consequences of *Campbell*

Campbell could result in significant shift in the trying of so-called "paper" urinalysis cases, at least when the reported level of drug in the urine is at or near the cutoff level. Administrative actions, such as bars to reenlistment, adverse counseling, and possibly administrative separations, rather than trial by court-martial could potentially become the alternative means of disposition for this class of drug offenses.[82] Furthermore, it seems logical that Article 15, UCMJ, punishments would also decrease. A soldier could turn down the Article 15 and demand trial by court-martial, knowing the prosecution's potential problems of proof. This, in turn, could potentially decrease the number of urinalysis tests conducted, because the test's significance as a drug deterrent will diminish. Indeed, one can postulate a "worst case scenario" for the government: if the consequences of a positive urinalysis result are purely administrative, this might create an incentive for soldiers who want to be discharged to take drugs and be subsequently administratively separated.

Conclusion

Regardless of whether *Campbell I* and the reconsideration improperly rely on scientific testimony and a misapplication of precedent, or deliberately restrict the use of urinalysis testing in courts-martial, it is having an impact in the military community. Defense counsel are wisely making motions pursuant to R.C.M. 917,[83] and trial counsel are wisely attempting to distinguish *Campbell* from other cases. Following the reconsideration, because of its rather confusing language, the debate should only intensify, with the government arguing that *Campbell* allows other methods, which can "with equivalent persuasiveness" provide a rational basis for inferring knowing and wrongful use, and the defense stating that current testing procedures in themselves can provide no rational connection. Or perhaps both sides will engage in a "battle of the experts" with the government expert testifying that, at (a presumably extremely high) nanogram level, the user likely felt the physical and psychological effects of the drug and that innocent ingestion can be discounted, and the defense expert drawing the opposite conclusion. Whatever the outcome in particular cases, one unfortunate result of *Campbell* is both uncertainty and confusion.

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81. *Campbell II*, 52 M.J. at 389 (Sullivan, J., dissenting).

82. It has been reported anecdotally to the authors that some cases have been disposed of under *Army Regulation 635-200*, Chapter 10, Discharge in lieu of trial by court-martial, as a result of *Campbell*. U.S. DEP'T OF ARMY, REG. 635-200, PERSONNEL SEPARATIONS: ENLISTED PERSONNEL, ch. 10 (17 Oct. 1990).

83. *See supra* note 60 (discussing successful R.C.M. 917 motions made by defense counsel citing *Campbell*).

The Armor: Recent Developments in Self-Incrimination Law

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Introduction

Put on the full armor of God so that you can take your stand against the devil's schemes.[1]

The original meaning of the term "chivalry" referred to the heavy cavalry of the Middle Ages, which constituted the most effective warlike force.[2] The knight, the professional soldier within the chivalry, used the lance and the sword as his principal weapons. Because his opponent used the same type of lethal weapon, the knight wore several items of body armor for protection. The armor consisted of a helmet, a shield, a breastplate, and a hauberk (a short tunic made of a mesh of interlinked metal rings).[3] Each piece of armor served a vital role in protecting the knight during battle. Without it, the knight became vulnerable to the enemy.

Like the knight's battle-armor, the law of self-incrimination contains several essential sources of protection. There is the helmet of the Sixth Amendment,[4] the shield of the Fifth Amendment,[5] the breastplate of Article 31,[6] and the hauberk of the voluntariness doctrine.[7] Each source serves a crucial role in protecting the privilege against self-incrimination.[8] When combined, these sources form the body of law referred to as the law of self-incrimination. During the 1999 term,[9] the military appellate courts decided self-incrimination issues that addressed nearly all of these important safeguards.

On the whole, the courts applied the recognized rule of law applicable to the protection. In some cases, however, the courts injected a subtle twist to a rule. Some decisions perpetuated an existing trend, and others indicated the emergence of a new development. In the end, this year produced no landmark decisions that directly redefined an aspect of self-incrimination law. This article discusses the recent cases that touch upon issues impacting most of the sources of self-incrimination protection.[10] In each area, this article briefly explains the relevant self-incrimination concepts, reviews the case or cases that touch upon the concept, and identifies any developing trends. This article will not discuss *all* the self-incrimination cases decided this term; rather, it will focus on the more significant cases. When reflecting on this term's self-incrimination cases, it becomes apparent that each source of protection provides a vital piece of the armor of self-incrimination law.

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1. *Ephesians* 6:24 (New International Version).

2. 11 THE WORLD BOOK ENCYLOPEDIA 348 (1997). The word *chivalry* comes from the Old French word *chevalerie,* meaning *horse soldiery.* The term eventually came to mean the code of behavior and ethics that knights were to follow.

3. *Id*. at 350.

4. U.S. CONST. amend. VI.

5. *Id*. amend. V.

6. UCMJ art. 31 (LEXIS 2000).

7. The voluntariness doctrine embraces the common law voluntariness, due process voluntariness, and Article 31(d). *See* Captain Frederic I. Lederer, *The Law of Confessions–The Voluntariness Doctrine*, 74 MIL. L. REV. 67 (1976) (detailing historical account of the voluntariness doctrine).

8. STEPHEN A. SALTZBURG ET AL., MILITARY RULES OF EVIDENCE MANUAL § 3, at 121 (4th ed. 1997).

9. The 1999 term began 1 October 1998 and ended 30 September 1999.

10. All the sources of protection are addressed in this article except the Sixth Amendment. The Sixth Amendment guarantees an accused the right to counsel for his defense in all criminal prosecutions. Although an individual's exercise of his Sixth Amendment right may have the ancillary effect of invoking the privilege against self-incrimination, the trigger and scope are unique. Under the Sixth Amendment, a right to counsel is triggered by initiation of the adversarial criminal justice process. In the civilian sector, the trigger point is reached upon indictment. *See* McNeil v. Wisconsin, 501 U.S. 171 (1991). In the military, the Sixth Amendment right to counsel attaches upon preferral of charges. MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 301(d)(1)(B) (1998) [hereinafter MCM]. Further, the protection is limited. It only applies to those offenses in which there are preferred charges. One of the many encounters the government may have with the accused post-preferral is an interrogation. When this occurs, the government must ensure the accused is afforded his Sixth Amendment right to counsel. This term presented no significant decisions pertaining to self-incrimination and the Sixth Amendment.

The Fifth Amendment

The most versatile piece of armor used by a knight was the shield. The shield not only provided added protection against the battle-ax and heavy battle hammer, but it also served as a stretcher in which the knight, or one of his fallen comrades, could be carried off the field when wounded.[11] Regardless of its use, the shield was vital to the knight's survival on the battlefield. Like the shield protects the knight, the Fifth Amendment provides essential protection against compelled incrimination.[12] In 1966, in *Miranda v. Arizona*,[13] the Supreme Court defined the protection when it held that prior to any custodial interrogation, the police must warn the suspect that he has a right to remain silent, to be informed that any statement made by the suspect may be used as evidence against him, and to the assistance of an attorney.[14] This Court-created warning requirement was intended to protect individuals against compelled confessions[15]—armor guaranteed by the Fifth Amendment. This year, in *United States v. Dickerson*,[16] the Fourth Circuit boldly challenged the *Miranda* decision when it determined that the admissibility of a confession in federal court should be assessed in light of a federal statute, 18 U.S.C. § 3501,[17] in lieu of the *Miranda* requirements. To appreciate *Dickerson*, one must understand the history behind the statute.

Congress enacted 18 U.S.C. § 3501 almost two years after the Supreme Court decided *Miranda*. At the time, Congress feared that the rigid mandates of *Miranda* would unfairly impede the government's ability to investigate criminal misconduct.[18] In response, Congress enacted 18 U.S.C. § 3501, a statute that adopts the voluntariness standard as the test to govern the admissibility of confessions introduced in federal courts. Under the statute, whether the police gave *Miranda* warnings is not determinative; rather, it is one factor to consider when deciding the admissibility of a confession.[19] Consequently, there could be a situation in which the police interrogate a suspect while in custody, fail to provide *Miranda* warnings, yet, based on the totality of the circumstances, obtain a voluntary confession that is admissible in court.

But why hasn't this statute consumed *Miranda*? The reason is because the Department of Justice (DOJ) believes that 18 U.S.C. § 3501 is an unconstitutional attempt by Congress to overrule *Miranda*.[20] For over thirty-three years, DOJ has refused to apply it. Despite efforts by the Supreme Court encouraging DOJ to argue the statute's validity, DOJ continues to ignore its legitimacy.[21] This year, with *Dickerson*, the Supreme Court will finally have the opportunity to either embrace or reject this statute.

In January 1997, the First Virginia Bank in Old Town, Alexandria, Virginia, was robbed.[22] A witness described the getaway car. The description matched the description of a car owned by Charles Dickerson.[23] Without providing *Miranda* warnings, Federal Bureau of Investigations agents questioned Mr. Dickerson concerning his whereabouts on the day of the robbery.[24] In response, Mr. Dickerson made several statements that implicated him in the robbery. At the district court, the trial judge suppressed the statements, finding they were made "while [Mr. Dickerson] was in police custody, in response to police interrogation, and without the necessary *Miranda* warnings."[25] Even though the court excluded the statements, it went on to find that the statements were voluntary and that the evidence found as a result of the statements was admissible.[26] The government appealed the decision to the Fourth Circuit.

The Fourth Circuit seemed anxious to address the issue of whether 18 U.S.C. § 3501 determined the admissibility of confessions in federal court vice *Miranda*.[27] First, the court determined that "the failure to deliver *Miranda* warnings is not itself a constitutional violation."[28] Then, the Fourth Circuit concluded that Congress possessed the authority to enact the statute.[29] In the end, the court of appeals found that "the admissibility of confessions in federal court is governed by 18 U.S.C.A. § 3501 (West 1985), rather than *Miranda*."[30] On 6 December 1999, the Supreme Court granted *certiorari* to decide the legality of 18 U.S.C. § 3501.[31]

If the Supreme Court affirms the *Dickerson* decision, then the federal statute will replace *Miranda* as the test to determine

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11. 11 THE WORLD BOOK ENCYLOPEDIA 348 (1997).

12. U.S. CONST. amend V. In part, the Fifth Amendment states: "nor shall [any person] be compelled in any criminal case to be a witness against himself . . . ." *Id.*

13. 348 U.S. 436 (1966). In *United States v. Tempia*, 37 C.M.R. 249 (C.M.A. 1967), the Court of Military Appeals applied *Miranda* to military interrogations.

14. *See Miranda*, 348 U.S. at 465. The Court found that in a custodial environment, police actions are inherently coercive, and therefore, police must give the suspect warnings concerning self-incrimination. The test for custody is an objective examination, from the perspective of the suspect, of whether there was a formal arrest or restraint or otherwise deprivation of freedom of action in any significant way. *Id.* at 444. *See also* Berkemer v. McCarty, 468 U.S. 420, 428 (1985); MCM, *supra* note 10, MIL. R. EVID. 305(d)(1)(A). The Supreme Court intended *Miranda* warnings to overcome the inherently coercive environment. In support of the Court's opinion that warnings are necessary, the Court referred to the military's warning requirement under Article 31(b). *Miranda*, 348 U.S. at 489. Unlike Article 31(b) warnings, the *Miranda* warnings do not require the interrogator to inform the suspect of the nature of the accusation, but *Miranda* confers a right to counsel.

15. For purposes of this article, the word "confession" includes both a confession and an admission. A confession is defined as "an acknowledgment of guilt." MCM, *supra* note 10, MIL. R. EVID. 304(c)(1). An admission is defined as "a self-incriminating statement falling short of an acknowledgment of guilt, even if it was intended by its maker to be exculpatory." *Id.* MIL. R. EVID. 304(c)(2). Military Rules of Evidence (MRE) 301-306 reflect a partial codification of the law of self-incrimination. There are no equivalent rules under the Federal Rules of Evidence.

16. 166 F.3d 677 (4th Cir. 1999), *cert. granted*, 120 S. Ct. 578 (1999).

17. 18 U.S.C.S. § 3501 (LEXIS 2000). Section 3501, titled, "Admissibility of confessions," states:

> (a) In any criminal prosecution brought by the United States or by the District of Columbia, a confession, as defined in subsection (e) hereof, shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.
>
> (b) The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession. The presence or absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession.
>
> (c) In any criminal prosecution by the United States or by the District of Columbia, a confession made or given by a person who is a defendant therein, while such person was under arrest or other detention in the custody of any law-enforcement officer or law-enforcement agency, shall not be inadmissible solely because of delay in bringing such person before a magistrate [magistrate judge] or other officer empowered to commit persons charged with offenses against the laws of the United States or of the District of Columbia if such confession is found by the trial judge to have been made voluntarily and if the weight to be given the confession is left to the jury and if such confession was made or given by such person within six hours immediately following his arrest or other detention: Provided, That the time limitation contained in this subsection shall not apply in any case in which the delay in bringing such person before such magistrate or other officer beyond such six-hour period is found by the trial judge to be reasonable considering the means of transportation and the distance to be traveled to the nearest available such magistrate or other officer.
>
> (d) Nothing contained in this section shall bar the admission in evidence of any confession made or given voluntarily by any person to any other person without interrogation by anyone, or at any time at which the person who made or gave such confession was not under arrest or other detention.
>
> (e) As used in this section, the term "confession" means any confession of guilt of any criminal offense or any self-incriminating statement made or given orally or in writing.

Id.

18. *Dickerson*, 166 F.3d at 690.

19. *See* 18 U.S.C.S. § 3501.

20. *Dickerson*, 166 F.3d at 682 n.16.

21. *Id.* at 681 (citing Davis v. United States, 512 U.S. 452 (1994)). In *Davis*, Justice Scalia, in a concurring opinion stated, "The United States' repeated refusal to invoke § 3501, combined with the courts' traditional (albeit merely prudential) refusal to consider arguments not raised, has caused the federal judiciary to confront a host of 'Miranda' issues that might be entirely irrelevant under federal law." *Davis*, 512 U.S. at 465.

22. *Dickerson*, 166 F.3d at 673. The amount stolen was $876.

23. *Id.*

24. *Id.*

25. *Id.* at 675.

26. *Id.* at 676.

27. *Id.* at 680. Paul Cassell, Professor, College of Law, University of Utah, brought the issue before the Fourth Circuit with an *amicus curiae* brief. The DOJ prohibited the United States Attorney's Office from supporting the federal statute. *Id.* at 681. *See* Terry Carter, *The Man Who Would Undo Miranda*, A.B.A. J. 44 (Mar. 2000).

28. *Dickerson*, 166 F.3d at 691.

29. *Id.* at 692.

30. *Id.* at 695. As the district court already determined that Mr. Dickerson's statements were voluntary, the Fourth Circuit did not order a further fact-finding inquiry.

31. Dickerson v. United States, 120 S. Ct. 578 (1999).

the admissibility of confessions in federal courts. Since the military courts are federal courts, 18 U.S.C. § 3501 would apply to the military.[32] Affirming *Dickerson* would have no immediate impact on the military, however. The President, through Military Rule of Evidence 305(d)(1)(A),[33] expressly made *Miranda* applicable to the military. As such, the additional protections under *Miranda* would remain a part of our system until the President says otherwise.

Miranda is not the only element of the Fifth Amendment breastplate; *Edwards v. Arizona*[34] is also an integral part of the armor. In *Edwards*, the Supreme Court created a second layer of protection for a person undergoing a custodial interrogation.[35] If a suspect invokes his right to counsel in response to *Miranda* warnings, not only must the questioning cease, but the police cannot obtain a valid waiver of that right until counsel has been made available or the suspect initiates further communication with the police.[36] This rule is known as the *Edwards* rule.[37]

What happens after the invocation will dictate how the government can satisfy the *Edwards* rule so police can reinitiate the interrogation? If the suspect remains in continuous custody after an invocation of counsel, counsel must be present before the police can reinitiate an interrogation.[38] If, however, the government releases the suspect from custody, and during the release the suspect has a "real opportunity to seek legal advice," then the police can reinitiate the interrogation.[39] *United States v. Mitchell*[40] and *United States v. Mosley*[41] are two recent cases in which the military courts scrutinize the government's actions to determine if it satisfied the *Edwards* rule.

The *Mitchell* case presents a scenario in which the accused invoked his Fifth Amendment right to counsel, then remained in custody. Revenge drove the accused to shoot his shipmate after a drunken night in Key West, Florida.[42] Soon after the shooting, the accused was arrested and detained, pending transportation to a confinement facility in Jacksonville, Florida. Concurrent with the arrest, the accused was advised of his rights under Article 31(b) and *Miranda*.[43] The accused requested counsel, and all questioning stopped.[44] The next day, while still in custody, members of the accused's command visited him. One of the visitors was Aviation Ordnanceman Chief (AOC) Grabiel, the leading Chief Petty Officer in the accused's direct chain of command.[45] While alone with the accused, AOC Grabiel asked him, "Was it worth it?"[46] The accused

32. *Cf.* Noyd v. Bond, 395 U.S. 683 (1969) (holding that the All Writs Act, 28 U.S.C. § 1651, a federal statute, applies to military courts); United States v. Dowty, 48 M.J. 102 (1998) (concluding that the Right to Financial Privacy Act, 12 U.S.C. §§ 3401-3422, a federal statute, applies to members of the armed forces). *But see* United States v. Longstreath, 45 M.J. 366 (1996) (equivocating on whether the Child Victims' and Child Witnesses' Rights Act applies to the military). Any application of 18 U.S.C. § 3501 to the military would have to be in accordance with Article 31. *See* UCMJ art. 31 (LEXIS 2000).

33. MCM, *supra* note 10, MIL. R. EVID. 305(d)(1)(A). This rule requires that the suspect be informed of his right to counsel when "[t]he interrogation is conducted by a person subject to the code . . . and the . . . suspect is in custody, or reasonably believe himself or herself to be in custody, or is otherwise deprived of his or her freedom of action in any significant way." *Id.*

34. 451 U.S. 477 (1981).

35. *See* Miranda v. Arizona, 384 U.S. 435 (1966). *Miranda* provides the first layer of protection.

36. McNeil v. Wisconsin, 501 U.S. 171, 177 (1991). *See* MCM, *supra* note 10, MIL. R. EVID. 305 (d)-(g).

37. *Edwards*, 451 U.S. at 484. It is important to note that the *Edwards* rule is not offense specific. *See* Arizona v. Roberson, 486 U.S. 675 (1988).

38. *McNeil*, 501 U.S. at 177; Minnick v. Mississippi, 498 U.S. 146 (1990).

39. *See* United States v. Young, 49 M.J. 265 (1998) (re-interrogating the accused after a two-day break in custody satisfied the *Edwards* rule); United States v. Faisca, 46 M.J. 276 (1997) (re-interrogating the accused after a six month break in custody was permissible); United States v. Vaughters, 44 M.J. 377 (1996) (re-interrogating the accused after being released from custody for nineteen days provided a meaningful opportunity to consult with counsel); United States v. Schake, 30 M.J. 314 (C.M.A. 1990) (re-interrogating the accused after a six day break in custody, provided a real opportunity to seek legal advice).

40. 51 M.J. 234 (1999).

41. 52 M.J. 679 (Army Ct. Crim. App. 2000). Although a case decided in the 2000 term, it is relevant and timely to the discussion of counsel availability rules presented in this article.

42. *Mitchell*, 51 M.J. at 235. The accused was upset that his shipmate hit him earlier in the evening while they fought in an alley.

43. *Id.*

44. *Id.*

45. *Id.* at 238.

46. *Id.* at 236. Evidence presented during the motion session indicated that AOC Gabriel knew the accused requested a lawyer. This fact, however, carries little weight in an *Edwards* violation determination because knowledge of a Fifth Amendment counsel invocation is imputed to all government agents. *See* Minnick v. Mississippi, 498 U.S. 146 (1990); Arizona v. Roberson, 486 U.S. 675 (1988).

responded, "The way I was raised, it was an eye for an eye. He left me in the alley."[47] At trial, the accused moved to suppress this statement.

The accused's position was that AOC Grabiel interrogated him after he invoked his right to counsel and while he remained in continuous custody.[48] This action on the part of a government agent violated the protections afforded him under *Edwards*. Therefore, the accused argued that his statement should be suppressed. The government's position was that the reason AOC Grabiel asked the question was to satisfy his personal curiosity, and not for a disciplinary or law enforcement purpose.[49] The military judge agreed with the government and denied the accused's motion. Applying the same rationale, the Navy-Marine Corps Court of Criminal Appeals, in an unpublished opinion, upheld the military judge's decision.[50] The Court of Appeals for the Armed Forces (CAAF) disagreed.

In reaching its decision to reverse the service court and set aside the findings and sentence, the CAAF accurately defined the issue as a Fifth Amendment counsel invocation question.[51] Accordingly, the court focused on the appropriate test—was the questioning part of a custodial interrogation. If it was, under *Edwards*, counsel would have to be present for the post-invocation questioning by AOC Grabiel?[52] The government argued that AOC Grabiel's questioning of the accused "was not [a] police interrogation as prohibited by *Miranda* and *Edwards*."[53] Clearly, AOC Grabiel was a non-police government agent. Regardless, the CAAF looked to the "totality of the circumstances to determine whether impermissive coercion . . . occurred or continued."[54] Applying this standard, the court determined that, under the facts of the case, "the 'inherently compelling pressures' of the initial interrogation continued to exist" during the meeting with AOC Grabiel.[55] As such, the military judge committed error in denying the accused's motion to suppress his statement to AOC Grabiel.[56]

In a strong dissent, Judge Crawford opined that the purpose of AOC Grabiel's questioning should control the analysis.[57] Based on her review of the case, AOC Grabiel questioned the accused to satisfy his personal curiosity, and not for a law enforcement or disciplinary purpose. The "purpose of the questioning" analysis is an Article 31(b) element.[58] Judge Crawford recognized this, but stated that "the purposes served by Article 31 and the *Edwards* prophylactic rule are the same, and their inquires should be as well."[59] To the majority's credit, it did not blend Article 31(b) concepts with the Fifth Amendment analysis. The court stayed in the Fifth Amendment lane of analysis and applied the applicable test to determine if the government violated the *Edwards* rule.

Mitchell reveals two important points. First, when addressing a self-incrimination issue, one must identify the applicable protection or protections involved, then apply the relevant law when analyzing each protection. Failing to categorize the analysis will result in confusion and misapplication of self-incrimination law. Second, *Mitchell* illustrates that our unique military environment can easily create circumstances where non-police government agents, like AOC Grabiel, can impact Fifth Amendment protections. Generally, *Mitchell* is a good reference when the accused requests an attorney as part of a custodial interrogation, remains in custody, then faces another interrogation.

United States v. Mosley[60] addresses a somewhat different scenario–a situation whereby the accused invokes his Fifth

47. *Mitchell*, 51 M.J. at 236.

48. *Id.* at 237.

49. *Id.*

50. *Id.* at 235.

51. *Id.* at 238.

52. *Id*. at 237. *See supra* notes 33 and 38 and accompanying text.

53. *Mitchell*, 51 M.J. at 238.

54. *Id.*

55. *Id.* at 240 (quoting United States v. Brabant, 29 M.J. 259, 263 (C.M.A. 1985)). In brief, the factors the court relied on in reaching its decision were the chain of command relationship between the accused and AOC Grabiel; the location of the meeting (a jail cell); and AOC Grabiel's knowledge of the misconduct. *Id.* at 239.

56. *Id.*

57. *Id.* at 246.

58. *Id.* at 244. *See infra* notes 100-137, and accompanying text for a discussion of Article 31(b).

59. *Mitchell*, 51 M.J. at 244.

60. 52 M.J. 679 (Army Ct. Crim. App. 2000).

Amendment right to counsel, is released from custody then encounters another interrogation. While investigating a series of seemingly unrelated barracks larcenies, Criminal Investigative Command (CID) investigators interrogated the accused in *Mosley.* During the questioning, the accused invoked his right to silence and his Fifth Amendment right to counsel.[61] The investigators released the accused from custody. Twenty hours later, two other CID agents, investigating another barracks larceny, questioned the accused as a suspect. This time, the accused waived his rights and made several incriminating statements.[62] At trial, the defense moved to suppress the statements, but the military judge denied the challenge.[63]

On appeal before the Army court, the accused again challenged the admissibility of his statements. The accused argued that CID violated the *Edwards* rule. Specifically, the accused opined that once he invoked his Fifth Amendment right to counsel during the initial interrogation, under *Edwards*, CID was prohibited from any further questioning until counsel was made available.[64] The twenty-hour break in custody was insufficient to satisfy this requirement.[65] Therefore, the military judge erred in denying his suppression motion. The Army court held otherwise. Looking at the totality of the circumstances, the Army court found that the twenty-hour break in custody afforded the accused a reasonable and real opportunity to consult with counsel.[66]

Besides shortening the required length of the break in custody,[67] *Mosley* gives practitioners clear guidance on how to address an *Edwards* challenge when there is a break in custody between the counsel invocation and a subsequent interrogation. First, the prosecution has the burden to prove, by a preponderance of the evidence, that there was a break in custody.[68] The prosecution must show that, based on the totality of the circumstances, the break in custody was not "contrived or pretextual," but was reasonable.[69] "In sum, it is a test of the quality of, rather than the quantity of, the break in custody time."[70] If the government meets this burden, then there is a presumption that during the break in custody, the accused had a reasonable or real opportunity to seek counsel.[71] The defense must overcome this presumption by presenting evidence that demonstrates "that even thought there was a break in custody, such break in custody was not a reasonable period to obtain counsel under the totality of the circumstances."[72] In *Mosley*, the Army court provides welcome clarity to an area of self-incrimination law that lacked specificity.[73]

An important aspect of the Fifth Amendment counsel invocation that cannot be overlooked is the manner in which the suspect attempts to invoke this right. The stage of the interrogation will determine the clarity with which the suspect must request counsel. During the initial waiver stage, the interrogator must seek clarification of an ambiguous request for counsel.[74] However, the Supreme Court announced in *Davis v. United States*[75]

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61. *Id.* at 681. Initially, CID suspected the accused in one of the larcenies, which led to the interrogation. The CID investigators interrogated the accused in a custodial setting. Therefore, before questioning him, they advised him of his rights under Article 31(b) and *Miranda. Id.*

62. *Id.* at 682.

63. *Id.* at 683. Once the military judge denied the defense motion to suppress the statements, the accused entered a "conditional guilty plea and providently pled to the offenses." *Id.*

64. *Id.* at 684.

65. *Id.*

66. *Id.* at 686.

67. *See supra* note 39 and accompanying text.

68. *Mosley*, 52 M.J. at 683.

69. *Id. See also* MCM, *supra* note 10, MIL. R. EVID. 305(g)(2)(B)(ii). This rule states that prosecution must "demonstrate by a preponderance of the evidence that– (ii) the accused or suspect has not continuously had his or her freedom restricted by confinement, or other means, during the period between the request for counsel and the subsequent waiver." *Id.*

70. *Mosley*, 52 M.J. at 685.

71. *Id.*

72. *Id.*

73. *See* Major Martin H. Sitler, *Silence is Golden: Recent Developments in Self-Incrimination Law*, ARMY LAW., May 1999, at 48.

74. MCM, *supra* note 10, MIL. R. EVID. 305(g)(1). This rule states: "The waiver must be made freely, knowingly, and intelligently. A written waiver is not required. The accused . . . must acknowledge affirmatively that he . . . understands the rights involved affirmatively decline the right to counsel and affirmatively consent to making a statement." *Id.*

75. 512 U.S. 452 (1994).

that, once the suspect initially waives his *Miranda* rights and agrees to a custodial interrogation without the assistance of counsel, only an unambiguous request for counsel will trigger the *Edwards* protection.[76] In two cases this year, *United States v. Henderson*[77] and *United States v. Ford*,[78] the CAAF applied the ambiguous request for counsel rule. Taken together, these cases illustrate the CAAF's broadening of this very narrow concept.

In *Henderson*, the German police apprehended the accused as a suspect in a stabbing.[79] While in custody, the German police advised the accused of his rights (under both German law and *Miranda*/Article 31(b)), obtained a waiver, and interrogated the accused.[80] The accused denied any involvement in the stabbing and eventually asked to continue the interview in the morning. The German police immediately stopped the questioning. Shortly thereafter, while the accused remained in custody, the CID observer, who was present during the initial interview, spoke to the accused in private.[81] He emphasized the importance of telling the truth and that the accused had "nothing to worry about."[82] The accused indicated he wanted to "tell the truth," but wanted to talk to a lawyer.[83] Eventually, the accused agreed to make a statement to the CID agents and talk to a lawyer in the morning. During the interrogation, the accused admitted to stabbing one of the victims.[84] At trial, the military judge denied the accused's motion to suppress the confession.

Citing *Davis*, the CAAF held that the accused's request to talk to a lawyer in the morning was an ambiguous request for counsel and did not invoke the protections of *Miranda* and *Edwards*.[85] Accordingly, the court found that the military judge did not err in admitting the accused's confession. In reaching its decision, the CAAF stated that it was "not convinced that *Edwards* applies in a situation involving [an] interrogation conducted by a foreign Government."[86] If so, the Fifth Amendment analysis would begin with the CID interview, and the initial waiver of rights to the German police would be of little value. If the interview with the German police was removed from the analysis, then the CAAF applied the ambiguous request for counsel rule to the initial waiver phase of the CID interrogation with the accused. When closely scrutinized, one could posit that *Henderson* supports an argument that the ambiguous request for counsel rule applies to the initial waiver stage of the interrogation. However, this position is contrary to the Supreme Court's holding in *Davis*.[87] Having a valid initial waiver is a prerequisite to the ambiguous request for counsel rule.[88] Without it, the rule does not apply.

Another interesting facet of *Henderson* is how the CAAF summarized its findings. The court stated that "[t]he record . . . shows no unequivocal assertion by [the accused] of his right to counsel *or silence*, which is required to invoke the *Miranda–Edwards* bright-line rule against further police interrogation or its functional equivalent."[89] As authority for this proposition, the CAAF cites *Davis*. As mentioned above, *Davis* is an invo-

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76. *Id.* Following an initial waiver, the accused told investigators, "Maybe I should talk to a lawyer." The Supreme Court held that this was an ambiguous request for counsel and that investigators were not required to clarify the purported request or terminate the interrogation. *Id.*

77. 52 M.J. 14 (1999).

78. 51 M.J. 445 (1999).

79. *Henderson*, 52 M.J. at 16.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* at 17.

85. *Id.* at 18.

86. *Id.*

87. Davis v. United States, 512 U.S. 452, 461 (1994). In *Davis*, the Supreme Court stated that:

> A suspect who knowingly and voluntarily waives his right to counsel after having that right explained to him has indicated his willingness to deal with the police unassisted. Although *Edwards* provides an additional protection–if a suspect subsequently requests an attorney, questioning must cease–it is one that must be affirmatively invoked by the suspect.

Id.

88. *Id.*

89. *Henderson*, 52 M.J. at 18 (emphasis added).

cation of counsel case, not an invocation of silence case.[90] Again, the CAAF seems to unintentionally expand the application of the ambiguous request for counsel rule.

In *United States v. Ford*,[91] the CAAF addressed the same issue, but with a slightly different set of facts. During a barracks inspection, members of the accused's command found an explosive device in his room.[92] Without giving warnings, an investigator questioned the accused at the barracks. When the accused "asked to have a lawyer present, or to talk to a lawyer," the investigator stopped the questioning.[93] The investigator transported the accused to the CID office and, after obtaining a waiver of rights, questioned the accused again.[94] The accused eventually gave a written confession. During the interview, however, the accused said that he did not want to talk and thought he should get a lawyer.[95] The investigator sought clarification and the accused responded that he wanted a lawyer if the investigator continued accusing him of lying.[96] After further clarification, the accused agreed to continue with the questioning.

Relying on the military judge's findings, the CAAF found that the accused did not invoke his Fifth Amendment right to counsel during the questioning at the barracks.[97] Further, the court held that the accused's comment about a lawyer during the CID office interrogation was an ambiguous request for a lawyer and did not invoke the *Miranda* or *Edwards* protections.[98] The test the court used to determine ambiguity was whether the request for counsel was "sufficiently clear that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney."[99] In *Ford*, the CAAF found the confession admissible.

In both *Henderson* and *Ford*, the CAAF relies on the ambiguous request for counsel rule to ratify the government's actions and affirm the admissibility of confessions. In doing so, at least in *Henderson*, the court arguably pushes the boundaries of the rule by hinting that it may apply to the initial waiver stage of the interrogation and to ambiguous silence invocations.

Article 31(b), Uniform Code of Military Justice (UCMJ)

The breastplate, a form-fitted steel plate that covers the chest and abdomen, protects the knight's most vital organ from attack—the heart.[100] Similarly, Article 31(b) provides the breastplate protection to guard against compelled confessions– a protection unique to the military.[101]

Since 1950, the military has enjoyed the safeguards of Article 31(b).[102] Based on the plain reading of the text, and its legislative history, Congress enacted Article 31(b) to dispel a servicemember's inherent compulsion to respond to questioning from a superior in rank or position.[103] Currently, the protections under Article 31(b) are triggered when a person who is subject to UCMJ, acting in an official capacity, and perceived as such by the suspect or accused, questions the suspect or accused for law enforcement or disciplinary purposes.[104] The

90. *Davis*, 512 U.S. at 461.

91. 51 M.J. 445 (1999).

92. *Id*. at 447.

93. *Id.*

94. *Id.* at 448.

95. *Id.*

96. *Id.* at 449.

97. *Id.* at 451. As the CAAF agreed with military judge that the accused did not invoke his right to counsel at the barracks, the court did not have to determine if the subsequent interrogation at the CID office violated *Edwards*.

98. *Id.* at 452.

99. *Id.*

100. 11 THE WORLD BOOK ENCYLOPEDIA 348 (1997).

101. *See* UCMJ art. 31(b) (LEXIS 2000). Article 31(b) states:

> No person subject to this chapter may interrogate, or request any statement from an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.

Id.

102. *See generally* Captain Frederic I. Lederer, *Rights Warnings in the Armed Services*, 72 MIL. LAW REV. 1 (1976) (providing a historical review of Article 31).

103. *See* Major Howard O. McGillian, Jr., *Article 31(b) Triggers: Re-Examining the "Officiality Doctrine,"* 150 MIL. L. REV. 1 (1995).

courts addressed two crucial concepts of the trigger this year: what is the requisite purpose of the questioning, and when is a person a suspect.

United States v. Bradley[105] is a case that focused on the purpose of the questioning. In early Article 31(b) jurisprudence, the analysis centered on the perception of the person being questioned, that is, the suspect or the accused, and whether he felt compelled to talk.[106] As the case law evolved, the focus has shifted to the perceptions of the interrogator. From the interrogator's perspective, what was the purpose of the questioning? This trend began with *United States v. Duga*[107] and *United States v. Loukas*,[108] and continues in the *Bradley* case.

The accused in *Bradley*, a cryptic linguist specialist (a specialty that requires a high-level security clearance), was suspected of raping a female member of his unit.[109] The accused's acting commanding officer (CO) learned of the allegation and the ongoing police investigation. He also knew that the police were going to question the accused about the rape.[110] Before the questioning occurred, the CO told the accused to contact him after the police finished their interrogation. The accused complied. After the accused spoke to the police, he called his CO. During the phone conversation, the CO asked the accused, "What happened?"[111] The accused responded, "I admitted to touching her without her consent."[112] The reason the CO gave for asking this question was "to inquire whether [the accused] had been arrested, charged, or accused of criminal conduct in order to determine whether [the accused's] security clearance required termination."[113]

At trial, the accused moved to suppress his statement made to the CO.[114] The military judge ruled that the question by the CO was not an interrogation, and denied the accused's motion.[115] The service court affirmed the military judge's decision.[116] The CAAF agreed, but for a different reason.

The CAAF did not determine whether the question by the CO was an interrogation; rather, the court focused on the purpose of the questioning to determine if it was for a law enforcement or disciplinary reason. First, the court acknowledged that there is a presumption that "a superior in the immediate chain of command is acting in an investigatory or disciplinary role" when questioning a subordinate about misconduct.[117] Next, the court recognized an "administrative and operational exception" that overcomes this presumption.[118] The CAAF determined

104. *See* UCMJ art. 31(b). *See also* United States v. Rogers, 47 M.J. 135 (1997) (holding that informing a suspect that he will be questioned about sexual assault includes the offense of rape). *See generally*, McGillian, *supra* note 103, at 1. Once triggered, the questioner must, as a matter of law, give the suspect or accused three warnings. These warnings are: (1) the nature of the misconduct that is the subject of the questioning, (2) the privilege to remain silent, and (3) that any statement made may be used as evidence against him.

105. 51 M.J. 437 (1999).

106. *Miranda* focuses on the environment of the questioning. If a custodial setting exists and there is going to be an interrogation, then *Miranda* warnings are required. Miranda v. Arizona, 384 U.S. 435, 436 (1966). Custody is determined from the perspective of the suspect. Would a reasonable person, similarly situated believe his freedom was significantly deprived. *See* MCM, *supra* note 10, MIL. R. EVID. 305(d)(1)(A); Stansbury v. California, 511 U.S. 318 (1994). The focus is on the perception of the reasonable suspect. Article 31(b) provides similar warnings and is triggered by a similar environment. For some reason, however, the military courts have focused not only on the perspective of the suspect, but also on the perceptions of the questioner.

107. 10 M.J. 206 (C.M.A. 1981). In *Duga*, The Court of Military Appeals determined that Article 31(b) only applies to situations in which, because of military rank, duty, or other similar relationship, there might be subtle pressure on a suspect to respond to an inquiry. As a result, the court set forth a two pronged test, the "*Duga* test," to determine whether the person asking the questions qualifies as a person who should provide Article 31(b) warnings. The *Duga* test is (1) was the questioner subject to the UCMJ acting in an official capacity in the inquiry, and (2) did the person questioned perceive the inquiry involved more than a casual conversation. If both prongs are satisfied, then the person asking the questions must provide Article 31(b) warnings.

This, however, is not the end of the Article 31(b) analysis. It is also necessary to determine if there is "questioning" of a "suspect or an accused." Questioning refers to any words or actions by the questioner that he should know are reasonably likely to elicit an incriminating response. Rhode Island v. Innis, 446 U.S. 291 (1980); United States v. Byers, 26 M.J. 132 (C.M.A. 1988). A suspect is a person who the questioner believes or reasonably should believe committed an offense. United States v. Morris, 13 M.J. 297 (C.M.A. 1982). An accused is a person against whom a charge has been preferred. BLACK'S LAW DICTIONARY 21 (6th ed. 1990).

108. 29 M.J. 385 (C.M.A. 1990). In *Loukas*, the court narrowed the *Duga* test by holding that Article 31(b) warnings are only required when the questioning is done during an official law-enforcement investigation or disciplinary inquiry. *See* United States v. Good, 32 M.J. 105 (C.M.A. 1991) (applying an objective test to the analysis of whether questioning is part of an official law enforcement investigative or disciplinary inquiry). In short, whenever there is official questioning of a suspect or an accused for law-enforcement or disciplinary purposes, Article 31(b) warnings are required.

109. *Bradley*, 51 M.J. at 439.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.* at 440.

that the question by the CO fell within the administrative and operational exception. In particular, the court found that "the purpose of [the CO's] question was to determine whether charges were filed because that action would necessitate suspension of [the accused's] high-level security clearance," and not for a criminal investigation.[119] For that reason, the CAAF concluded that Article 31(b) rights were not required.[120]

The *Bradley* decision fits nicely into the trend of the CAAF's Article 31(b) jurisprudence.[121] Based on *Bradley*, in order for Article 31(b) to apply, the *primary purpose* of the questioning must be for law-enforcement or disciplinary reasons. Trial counsel should add *Bradley* to their expanding arsenal of cases that narrow the scope and application of Article 31(b).[122] Defense counsel should attempt to limit the holding in *Bradley* to the facts of the case.

The other Article 31(b) issue addressed this year was the test for determining when a person becomes a suspect. As mentioned above, a part of the Article 31(b) trigger is the condition that the person being questioned be a suspect or an accused.[123] Defining an accused is easy. An accused is a person against whom the government prefers charges.[124] Defining a suspect, however, is not as simple. In *United States v. Muirhead*,[125] the CAAF attempted to clarify this determination.

A general court-martial convicted the accused in *Muirhead* of sexually assaulting his six-year-old stepdaughter.[126] During the investigation phase, agents conducted a permissive search of the accused's house. During the search, the accused made statements about events that happened before and after the assault of his stepdaughter.[127] At trial, over defense objection, the prosecutor used these statements to provide a motive for committing the abuse.[128] The defense argued that when the agents questioned the accused during the permissive search, he was a suspect and therefore should have been informed of his rights under Article 31(b). The military judge ruled otherwise.[129]

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115. *Id.* The legal definition for an interrogation "includes any formal or informal questioning in which an incriminating response either is sought or is a reasonable consequence of such questioning." MCM, *supra* note 10, MIL. R. EVID. 305(b)(2). The test is applied not from the perspective of the suspect, but rather from the interrogator's perspective, that is, did the police officer know or should he have known that his comments or actions were reasonably likely to invoke an incriminating response from the suspect. *See* Rhode Island v. Innis, 446 U.S. 291 (1980). In *Innis*, the Supreme Court held that an "interrogation under *Miranda* refers . . . to express questioning . . . [and] also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response . . . ." *Id.* at 301. *See also* United States v. Ruiz, 50 M.J. 518 (A.F. Ct. Crim. App. 1999) (holding that an Army-Air Force Exchange Service (AAFES) store detective's comment, "There seems to be some AAFES merchandise that hasn't been paid for," directed to a suspected shoplifter was not an interrogation).

116. *Bradley*, 51 M.J. at 441.

117. *Id.*

118. *Id.*

119. *Id.* at 441.

120. *Id.* at 442.

121. *See* United States v. Payne, 47 M.J. 37 (1997) (finding that Article 31(b) did not apply to questioning by agents from Defense Investigative Service); United States v. Moses, 45 M.J. 132 (1996) (questioning the accused while investigators were engaged in an armed standoff, was not for law enforcement or disciplinary purposes); United States v. Bell, 44 M.J. 403 (1996) (questioning a witness testifying in an Article 32(b) investigation was not for disciplinary or law-enforcement purposes; rather the questioning was for judicial purposes, and therefore, Article 31(b) warnings not required); United States v. Bowerman, 39 M.J. 219 (C.M.A. 1994) (treating physician was not required to give Article 31(b) warnings to accused when questioning him about a child's injuries, even though the doctor believed child abuse was a distinct possibility); United States v. Pittman, 36 M.J. 404 (C.M.A. 1993) (questioning motivated by personal curiosity does not trigger Article 31(b) warnings); United States v. Jones, 24 M.J. 367 (C.M.A. 1987) (questioning the accused for personal reasons does not trigger Article 31(b) warnings); United States v. Tanksley, 50 M.J. 609 (N.M. Ct. Crim. App. 1999) (holding that Naval Criminal Investigative Service agents were not acting for a law enforcement or disciplinary purpose when they questioned the accused as part of a security clearance investigation; therefore, Article 31(b) warnings were not required). *See* Major Walter M. Hudson, *The Fourth Amendment and Urinalysis: Facts (and More Facts) Make Cases*, ARMY LAW., May 2000, at 17, for a detailed discussion of the facts in *Tanksley.*

122. Aside from the result that Article 31(b) was not triggered, the common thread in *Payne*, *Bradley*, and *Tanksley* is that they all involve security clearance questioning. *See supra* note 121 and accompanying text.

123. UCMJ art 31(b) (LEXIS 2000). *See also supra* note 107 and accompanying text.

124. *See* BLACK'S LAW DICTIONARY 21 (6th ed. 1990).

125. 51 M.J. 94 (1999).

126. *Id.* at 95.

127. *Id.* at 96.

128. United States v. Muirhead, 48 M.J. 527, 536 (N.M. Ct. Crim. App. 1998). The motive proposed by the prosecutor was that the accused abused his stepdaughter to get even with his wife, whom he suspected of having an extra-marital affair. *Id.*

On appeal before the service court, the Navy-Marine Corps court addressed the issue of whether the accused was a suspect, and therefore should have been given Article 31(b) warnings. In a *de novo* review, the court held that the accused was not a suspect.[130] In reaching its decision, the court correctly defined the requisite suspicion for purposes of Article 31(b) as a suspicion that "has crystallized to such an extent that a general accusation of some recognizable crime can be framed."[131] Armed with this definition, the court found that the accused was not a suspect at the time of the questioning. In reaching this decision, the court placed great weight on the subjective beliefs of the agents.[132]

The CAAF disagreed with the service court's conclusion.[133] In doing so, the court emphasized that the determination of whether a person is a suspect is an objective test: "whether a reasonable person would consider someone to be a suspect under the totality of the circumstances."[134] The CAAF felt that the service court relied too "heavily on the fact that both . . . agents testified they did not consider [the accused] to be a suspect."[135] A review of the record by the CAAF led it to conclude that "a reasonable person under the circumstances would have considered [the accused] a suspect, requiring a rights' advisement pursuant to Article 31."[136]

The CAAF's decision in *Muirhead*, stressed that although the subjective views of the interrogator may be relevant, they carry little value when determining if a person is not a suspect.[137] To answer this question, one must look to the surrounding circumstances. It is important, therefore, for counsel not to base their positions on the beliefs of the investigators, but rather look to the surrounding facts to support their arguments.

The Voluntariness Doctrine

The hauberk provided the knight with the most comprehensive form of protection. It was a short tunic or shirt made of a mesh of linked chain.[138] It covered the knight's upper body and proved extremely effective against glancing blows from the enemy's swords and spears. By analogy, the voluntariness doctrine of self-incrimination provides a similar protection. This doctrine serves as a blanket protection that safeguard's against coerced confessions. The concept of voluntariness entails elements of the common law voluntariness doctrine, due process, and compliance with Article 31(b).[139] Regardless of whether *Miranda* or Article 31(b) is implicated, a confession must be voluntary to be valid; thus, a confession deemed coerced must be suppressed despite a validly obtained waiver in the first instance.[140] Generally, when determining whether a confession is voluntary, it is necessary to look to the totality of the circumstance to decide if the accused's will was overborne.[141] This term, in *United States v. Griffin*,[142] the CAAF reaffirmed the voluntariness test.

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129. *Muirhead*, 51 M.J. at 97.

130. *Murihead*, 48 M.J. at 537.

131. *Id.* at 536 (citing United States v. Haskins, 29 C.M.R. 181 (1960)). The court makes clear that a mere hunch of criminal activity is not enough to satisfy the definition of a suspect under Article 31(b).

132. *Id.* The factors the court considered in determining that the accused was not a suspect were the agents' beliefs that the accused was not a suspect; the accused belief that he was not a suspect; the stepdaughter's version of the abuse in which she did not implicate the accused, and the lack of other evidence incriminating the accused.

133. *Muirhead*, 51 M.J. at 98. The CAAF found that the error in admitting the confession materially prejudiced the accused. The court, therefore, reversed the service court's decision, and set aside the findings and sentence. *Id.*

134. *Id.* at 96.

135. *Id.* at 97.

136. *Id.* In reaching it's decision, the CAAF considered the facts that the emergency room physician suspected sexual abuse and told the agents of his suspicions, the mother's whereabouts was unknown, and the agents searched the accused's house at 0250 hours, which was less than two hours after the physician completed his examination of the step-daughter.

137. *Id.* at 96. In some cases, the subjective beliefs of the investigator may be appropriate to consider when the investigator, in fact, believed that the person was a suspect.

138. 11 THE WORLD BOOK ENCYLOPEDIA 350 (1997).

139. Lederer, *supra* note 7, at 68. *See* UCMJ art 31(d) (LEXIS 2000). Article 31(d) states: "No statement obtained from any person in violation of this article, or through the use of coercion, unlawful influence, or unlawful inducement may be received in evidence against him in a trail by court-martial." The Analysis to MRE 304 (c)(2) lists examples of involuntary statements as those resulting from: inflection of bodily harm; threats of bodily harm; imposition of confinement or deprivation of privileges; promises of immunity or clemency; and promises of reward or benefit. MCM, *supra* note 10, MIL. R. EVID. 304(c)(3) analysis, app. 22, at A22-10.

140. United States v. Bubonics, 45 M.J. 93 (1996) (declaring that the "Mutt and Jeff" interrogation techniques used by the interrogators improperly coerced the accused's statement).

In 1991, the Air Force Office of Special Investigations (OSI) investigated Staff Sergeant Griffin, the accused, for possible indecent acts with his two-year old daughter.[143] Due to a lack of evidence, OSI closed the investigation. Several years later, the accused requested to update his security clearance. This involved a security investigation by the Defense Investigative Service (DIS).[144] As part of the investigation, DIS questioned the accused about the prior allegation of indecent acts. During the questioning, the accused admitted "that his daughter had touched his erect penis in the bathroom on the occasion witnessed by his wife."[145]

The defense's theory at trial was that the confession made to DIS was a coerced false confession. To support this theory, the defense proffered an expert in the area of psychology to opine that the accused was a compliant person and susceptible to suggestiveness.[146] The prosecution challenged the admissibility of this testimony. The military judge excluded the defense expert's testimony.[147] The service court upheld the military judge's ruling.[148]

On appeal before the CAAF, the accused argued that the military judge abused his discretion when he excluded the expert's testimony.[149] The court agreed with the accused that the government has the burden to show, by a preponderance of the evidence, that the confession is voluntary.[150] Further, the court acknowledged that "[t]he voluntariness of a confession is determined by examining the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation."[151] If reliable, the expert's testimony would possibly be relevant regarding the characteristics of the accused. In the end, the CAAF agreed with the military judge. The false confession expert testimony was of questionable reliability and relevance in determining whether the accused's confession was involuntary.[152]

Although not a pivotal decision that alters the voluntariness analysis, the *Griffin* case illustrates a situation in which the defense challenges the admissibility of a confession despite adherence to the procedural safeguards of Article 31(b) and *Miranda.* More importantly, *Griffin* offers reassurance that the voluntariness doctrine stands at the ready to serve as a safeguard. This case also highlights the importance of developing facts from the surrounding circumstances that support your position. Defense counsel should always consider the voluntariness doctrine as a possible theory to challenge the admissibility of a confession, even when the government satisfies the procedural protections of self-incrimination law.[153]

Miscellaneous

This section examines two self-incrimination cases that address procedural considerations vital to the admissibility of confession. Although not part of the exterior armor of self-incrimination law, the procedural requisites nonetheless supply an important safeguard. The first case, *United States v. Jones*,[154] defined what is required to have standing to challenge

141. Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

142. 50 M.J. 278 (1999).

143. *Id.* at 279. The accused's wife initiated the investigation after she discovered that he was letting their two-year old daughter fondle his genitals.

144. *Id.*

145. *Id.* The questioning was done as part of a polygraph. Prior to the questioning, the accused waived his rights under Article 31(b).

146. *Id.* at 282.

147. *Id.* The military judge determined that the expert's testimony was not logically or legally relevant under the Supreme Court's analysis in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). *See* MCM, *supra* note 10, MIL. R. EVID. 401, 403.

148. *Griffin*, 50 M.J. at 278.

149. *Id.* at 284.

150. *Id.*; *see* MCM, *supra* note 10, MIL. R. EVID. 304(e).

151. *Griffin*, 50 M.J. at 284.

152. *Id.* In affirming the service court's decision, the court found that the basis of the expert's testimony was too speculative, and his testimony "shed little light on the question of whether [the accused] was coerced to confess." *Id.* at 285.

153. *See* United States v. Campos, 48 M.J. 203 (1998) (holding that the accused's confession was voluntary despite the accused being medicated). In *Campos*, Judge Sullivan, the author of the opinion, emphasizes that there are alternate theories to challenge the voluntariness of a confession. Not only should counsel consider challenging the voluntariness of the confession, but counsel should also consider a challenge to the validity of the waiver. A failure to specify the challenge may waive the issue. *Id.* at 207.

154. 52 M.J. 60 (1999).

a confession, and the second case, *United States v. Hall*,[155] examined the scope of the corroboration rule.

In *Jones*, the accused was part of a conspiracy to submit false claims to the local finance office.[156] The government made an agreement with three of the co-conspirators (the minor offenders) so they would make statements implicating the accused.[157] The government agreed to dispose of their cases with nonjudicial punishment if they would testify against the accused.[158] The co-consipirators were under the impression that the government would eventually issue them formal grants of immunity for their testimony.[159] The co-actors received nonjudicial punishment, during which they admitted to their involvement in the conspiracy. The government, however, never issued the immunity. As a result, when it came time for them to testify at the Article 32 investigation, the co-conspirators invoked their right to silence and did not testify.[160] The government informed the three co-conspirators that, if they did not testify, it would consider court-martial action against them.[161] They agreed to testify.

At trial, the accused moved to prevent the co-conspirators from testifying, arguing that the actions of the government in dealing with the three were unlawful command actions that violated their self-incrimination protections, which resulted in a violation of due process.[162] The military judge "declined to make a final ruling unless [the co-actors] were prosecuted."[163] In the end, the three testified against the accused.[164]

The court of criminal appeals affirmed the findings and sentence, and the CAAF agreed.[165] The first issue the CAAF addressed was whether the accused had standing to challenge the self-incrimination violations against the three co-conspirators.[166] Relying on the Military Rules of Evidence and case law, the court concluded that the accused did not have standing to object to the testimony of the witnesses.[167] The court found that, if any self-incrimination violations occurred, the violations were procedural in nature and did not rise to the level of coercion and unlawful influence.[168] Had the government unlawfully coerced the statements from the co-conspirators, then the accused would have standing to challenge the statements.[169]

The CAAF's opinion in *Jones* neatly defined the rules of standing as they relate to self-incrimination violations. Without question, the accused can always challenge the admissibility of a statement he makes. However, when the challenge involves a witness statement, the court distinguished between the degree of the self-incrimination violation the government committed and the likelihood for relief. If the government fails to follow the procedural requirements when interrogating the witness, that is, fails to provide Article 31(b) and *Miranda* warnings when triggered, then the accused lacks standing to challenge the statement. If, however, the witness statement is made involuntary, that is, the product of government overreaching, then the accused has standing to challenge the admissibility of the witness's statement and, depending on how egregious the overreaching is, may obtain relief. Therefore, when making self-

155. 50 M.J. 247 (1999).

156. *Jones*, 52 M.J. at 61.

157. *Id.* at 62.

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.* at 63. The defense alleged that the government violated the co-conspirators' rights under Article 31, the Fifth Amendment, and the Sixth Amendment.

163. *Id.* at 62.

164. *Id.*

165. *Id.* at 69.

166. *Id.* at 64. The court also discussed the actions by the government to determine if they arose to unlawful command action. In this discussion, the court addressed whether the government immunized the witnesses. Acknowledging that the witnesses did not have actual immunity, the court concluded that they did have informal immunity. In reaching its decision, the court identifies the various ways in which a person can be immunized. This is a good discussion that accurately summarizes the law pertaining to immunity.

167. *Id. See* MCM, *supra* note 10, MIL. R. EVID. 301(b)(1). This rule states: "The privilege of a witness to refuse to respond to a question the answer to which may tend to incriminate the witness is a personal one that the witness may exercise or waive at the discretion of the witness." *Id.*

168. *Jones*, 52 M.J. at 64.

169. *Id.*

incrimination challenges to witness statements, counsel should look to the law of voluntariness to either support or attack the issue.[170]

A procedural safeguard unique to the law of self-incrimination that pertains to confessions made by the accused is the corroboration rule.[171] Generally, the corroboration rule requires some corroboration of a confession before the confession can be considered as evidence.[172] Early in confession jurisprudence, the Supreme Court proclaimed that the "concept of justice" cannot support a conviction based solely on an out of court confession,[173] and that admissible corroborative evidence, in addition to the confession, must be presented to the trier of fact.[174] Moreover, military appellate courts have gone to great lengths to analyze the nature of corroborative evidence, ensuring that sufficient admissible evidence is considered for corroboration.[175] In *United States v. Hall*,[176] the CAAF solidified its position that admissible corroborating evidence must be introduced to the fact-finder.

During a search of Private Hall's room, the command discovered a "coffee bag containing what was later determined to be marijuana."[177] The command escorted Private Hall to the CID office where he was questioned. After waiving his Article 31(b) and *Miranda* rights, Private Hall confessed to using marijuana in March 1994.[178] During a pretrial hearing, the military judge found that the command conducted an improper search. As such, the military judge suppressed the marijuana and part

170. *See supra* notes 139, 140, and 153, and accompanying text.

171. MCM, *supra* note 10, MIL. R. EVID. 304(g) analysis, app. 22, at A22-13.

172. *Id.* MIL. R. EVID. 304(g). There are two separate aspects of MRE 304(g): (1) MRE 304(g)(2), which pertains to the military judge's determination of adequate corroboration; and (2) MRE 304(g)(1), which pertains to the introduction of corroborating evidence before the trier of fact. Specifically, MRE 304(g) states:

> (g) *Corroboration.* An admission or a confession of the accused may be considered as evidence against the accused on the question of guilt or innocence only if independent evidence, either direct or circumstantial, has been introduced that corroborates the essential facts admitted to justify sufficiently an inference of their truth. Other uncorroborated confessions or admissions of the accused that would themselves require corroboration may not be used to supply this independent evidence. If the independent evidence raises an inference of the truth of some but not all of the essential facts admitted, then the confession or admission may be considered as evidence against the accused only with respect to those essential facts stated in the confession or admission that are corroborated by the independent evidence. Corroboration is not required for a statement made by the accused before the court by which the accused is being tried, for statements made prior to or contemporaneously with the act, or for statements offered under a rule of evidence other than that pertaining to the admissibility of admissions or confessions.
>
> (1) *Quantum of evidence needed.* The independent evidence necessary to establish corroboration need not be sufficient of itself to establish beyond a reasonable doubt the truth of facts stated in the admission or confession. The independent evidence need raise only an inference of the truth of the essential facts admitted. The amount and type of evidence introduced as corroboration is a factor to be considered by the trier of fact in determining the weight, if any, to be given to the admission or confession.
>
> (2) *Procedure.* The military judge alone shall determine when adequate evidence of corroboration has been received. Corroborating evidence usually is to be introduced before the admission or confession is introduced but the military judge may admit evidence subject to later corroboration.

Id.

173. *See* Opper v. United States, 348 U.S. 84 (1954) (holding that the corroboration rule applies to admissions in addition to confessions, and that the government must "introduce substantial independent evidence which would tend to establish the trustworthiness of the statement"); *see also* Smith v. United States, 348 U.S. 147 (1954) (emphasizing the general rule that "an accused may not be convicted on his own uncorroborated confession").

174. *Smith*, 348 U.S. at 153; *Opper*, 348 U.S. at 93 (finding that all evidence in addition to the confession or admission must establish guilt beyond a reasonable doubt); *see* MCM, *supra* note 10, MIL. R. EVID. 304(g). Military Rule of Evidence 304(g) states that "[a]n admission or a confession of the accused may be considered as evidence against the accused on the question of guilt or innocence only if independent evidence, either direct or circumstantial, has been introduced that corroborates the essential facts admitted to justify sufficiently an inference of their truth." The reference to "direct and circumstantial evidence" indicates that the corroborating evidence must be admissible. *See also* MCM, *supra* note 10, R.C.M. 918(C) (identifying direct and circumstantial evidence as the type of admissible evidence the trier of fact must consider when reaching a finding). Additionally, MRE 304(g)(1) clearly states that corroborating evidence must be considered by the trier of fact "in determining the weight, if any, to be given to the admission or confession." *Id.* MIL. R. EVID. 304(g)(1). Since the corroborating evidence must be presented to the trier of fact, it must therefore be admissible evidence. Consequently, based on the plain language of MRE 304(g), one can conclude that: (1) corroborating evidence must be admissible; and (2) corroborating evidence must be presented to the trier of fact.

175. *See* United States v. Duvall, 47 M.J. 189 (1997) (finding that admissible corroborating evidence must be introduced to the fact-finder); United States v. Cotrill, 45 M.J. 485 (1997) (finding that the accused's pretrial statements were sufficiently corroborated); United States v. Faciane, 44 M.J. 399 (C.M.A. 1994) (looking to the admissible corroborating evidence to determine if sufficient corroboration exists); United States v. Rounds, 30 M.J. 76 (C.M.A. 1990) (focusing on the admissibility of the corroborating evidence and whether it adequately corroborates the confession).

176. 50 M.J. 247 (1999).

177. *Id.* at 249.

178. *Id.*

of the confession. The portion of Private Hall's confession that the military judge did not suppress pertained to the March 1994 drug use.[179] The only evidence introduced by the government on the merits was Private Hall's confession; however, the military judge, "without objection, considered the evidence on the motion as well as the evidence introduced on the merits," when deliberating on findings.[180]

On appeal, the CAAF specified the issue of whether the military judge erred in denying the defense motion to suppress Private Hall's confession based on a lack of sufficient corroboration.[181] Relying on the evidence introduced by the prosecution during the pretrial suppression hearing, the court determined that there was adequate corroborative evidence presented to justify admissibility of the confession.[182]

The CAAF's decision in *Hall* affirms the traditional protections afforded an accused under the corroboration rule. Not only does it address the adequacy of corroborative evidence, but also it supports the requirement to introduce admissible corroborative evidence to the fact-finder. What saved the *Hall* case is the unique fact that the military judge, during the deliberation on findings, considered the evidence introduced during the pretrial phase.[183] Absent this fact, the military judge would have based the accused's conviction solely on the confession, which is improper.[184] In his concurring opinion, Judge Effron makes clear that the prosecution must present admissible corroborating evidence to the trier of fact when introducing the accused's confession–even when the fact-finder is the military judge.[185]

Conclusion

This year's self-incrimination cases present few notable developments. In most cases, the courts perpetuate an existing trend, clarify a rule of law, or apply a recognized rule of law. For example, in *United States v. Bradley*,[186] the CAAF continued to focus on the primary purpose of the questioning when triggering the protections under Article 31(b). If the purpose of the questioning is not for a law enforcement or disciplinary reason, Article 31(b) is not triggered, even when the circumstances are such that a senior questions a subordinate. Similarly, in the area of corroboration, *United States v. Hall*[187] advances the trend that the prosecution must introduce admissible corroborating evidence when also presenting the accused's confession to the fact-finder. *United States v. Muirhead*[188] illustrates the CAAF's attempt to clarify a rule of law. Specifically, the court gives unequivocal guidance that the test for determining whether a person is a suspect for purposes of Article 31(b) is an objective one. Overall, the courts make a conscientious effort to apply the relevant source of self-incrimination protection to the facts presented.

The area that presents the most remarkable developments is the Fifth Amendment. In *United States v. Henderson*,[189] the CAAF, either intentionally or unintentionally, gave counsel ammunition to broaden the application of the ambiguous request for counsel rule to silence invocations and to the initial waiver stage of the interrogation. But the case that has the potential to result in the most significant change in this source of protection in thirty years is *United States v. Dickerson*.[190] If the Supreme Court agrees with the Fourth Circuit, *Dickerson* could change the way federal investigators conduct interrogations. Although the military will initially be insulated from such a decision, it will be interesting to see what, if any, long-range effects will impact military justice. Without question, this case will be one of the most significant early Supreme Court decisions of the new century.

Regardless of the ebbs and flows of the courts' analysis and application of the protections of self-incrimination law, one

179. *Id.*

180. *Id.* The military judge found the accused guilty of the drug use.

181. *Id.* at 248.

182. *Id.* at 252. During the pretrial hearing, several witnesses testified that the accused used marijuana within months of March 1994. This was enough evidence to sufficiently corroborate the confession.

183. *Id.* Absent objection, the military judge "incorporated by reference the evidence received during the hearing on the suppression motion." *Id.*

184. *See* United States v. Duvall, 47 M.J. 189 (1997) (finding that admissible corroborating evidence must be introduced to the fact-finder).

185. *Hall*, 50 M.J. at 252.

186. 51 M.J. 437 (1999).

187. 50 M.J. at 247.

188. 51 M.J. 94 (1999).

189. 52 M.J. 14 (1999).

190. 166 F.3d 667 (4th Cir. 1999), *cert. granted*, 120 S. Ct. 578 (1999).

basic principal remains true–this body of law provides the necessary protection within the criminal justice system. Like the knight going into battle, each piece of the self-incrimination armor provides crucial protection. If one of the pieces falters, the system becomes vulnerable.

Are Courts-Martial Ready for Prime Time? Televised Testimony and Other Developments in the Law of Confrontation

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Introduction

The Confrontation Clause of the Sixth Amendment[1] guarantees a criminal defendant the right to confront and cross-examine the witnesses against him. However, the right to confront witnesses is not absolute. This article discusses recent developments in the law of confrontation, focusing on two common situations where the right to confront witnesses can be abridged: the introduction of hearsay statements without producing the declarant to testify at trial; and the testimony of victims and witnesses from a remote location.

On 6 October 1999, the President signed Executive Order 13,140,[2] which included several changes to the *Manual for Courts-Martial* (*MCM*).[3] Executive Order 13,140 included new rules and procedures for taking remote testimony from child victims or witnesses. These changes borrowed heavily from the United States Code.[4] The drafters of the federal statute and military rules have attempted to codify the United States Supreme Court's holding in *Maryland v. Craig*.[5]

This article reviews the Court's holding and analysis in *Craig* and evaluates the new changes to the *MCM* using *Craig*'s analysis and holding. The result clearly shows that the new changes to the *MCM* go beyond the facts and holding in *Craig*. Practitioners must be careful when applying the new rules. Military judges should continue to approach remote testimony issues by focusing on the findings required by *Craig*. If a judge's findings satisfy the requirements of *Craig*, the findings will also satisfy the new rules. A military judge can make findings that satisfy the requirements of the new rules but violate constitutional law.

This article also reviews recent cases that expand the use of remote live testimony by video teleconference and closed circuit television. Practitioners must understand the limitations and rationale of *Craig* when expanding the use of remote live testimony beyond child victims in child sexual abuse cases.

Finally, this article reviews a recent development in the law of hearsay. The Sixth Amendment's Confrontation Clause does not categorically prohibit the introduction of out-of-court statements. However, when an out-of-court statement is admitted against the accused in a criminal trial and the declarant does not appear to testify, a confrontation issue arises. The proponent must show that the out-of-court statement is sufficiently reliable to satisfy the Confrontation Clause.[6] This article will review a recent case decided by the United States Supreme Court, *Lilly v. Virginia*,[7] which addressed the reliability of statements against penal interest.

Remote Live Testimony

Executive Order 13,140 amended Military Rule of Evidence (MRE) 611 by adding a new subsection, MRE 611(d).[8] Military Rule of Evidence 611(d) prescribes rules governing the remote live testimony of children.[9] In cases involving the abuse of a child or domestic violence, the military judge shall allow a child victim or witness to testify from an area outside the courtroom if the judge makes certain findings.[10] Remote testimony will be used if the judge finds that a child is unable to testify because of one of four reasons: fear, a substantial likelihood that the child will suffer emotional trauma from testifying, the child suffers from a mental or other infirmity, or conduct by the accused or defense counsel.[11]

The executive order created a new Rule for Courts-Martial (R.C.M.) 914A, to prescribe procedures for taking remote testimony.[12] Rule for Courts-Martial 914A provides that the mili-

1. "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U.S. CONST. amend. VI.

2. Exec. Order No. 13,140, 64 Fed. Reg. 55,115 (1999).

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

4. *See* 18 U.S.C.S. § 3509 (LEXIS 2000).

5. 497 U.S. 836 (1990).

6. *See* Ohio v. Roberts, 448 U.S. 56 (1980).

7. 527 U.S. 116 (1999).

tary judge will decide how remote testimony will be taken, but two-way closed circuit television should normally be used.[13] The rule also provides minimum procedures the judge must follow.[14]

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8. Military Rule of Evidence 611 is amended by inserting the following new subsection at the end:

> (d) Remote live testimony of a child.
>
> (1) In a case involving abuse of a child or domestic violence, the military judge shall, subject to the requirements of subsection (3) of this rule, allow a child victim or witness to testify from an area outside the courtroom as prescribed in R.C.M. 914A.
>
> (2) The term "child" means a person who is under the age of 16 at the time of his or her testimony. The term "abuse of a child" means the physical or mental injury, sexual abuse or exploitation, or negligent treatment of a child. The term "exploitation" means child pornography or child prostitution. The term "negligent treatment" means the failure to provide, for reasons other than poverty, adequate food, clothing, shelter, or medical care so as to seriously the physical health of the child. The term "domestic violence" means an offense that has as an element the use, attempted use, or threatened use of physical force against a person and is committed by a current or former spouse, parent, or guardian of the victim; by a person with whom the victim shares a child in common; by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian; or by a person similarly situated to a spouse, endanger parent, or guardian of the victim.
>
> (3) Remote live testimony will be used only where the military judge makes a finding on the record that a child is unable to testify in open court in the presence of the accused, for any of the following reasons:
>
> (A) The child is unable to testify because of fear;
>
> (B) There is substantial likelihood, established by expert testimony, that the child would suffer emotional trauma from testifying;
>
> (C) The child suffers from a mental or other infirmity; or
>
> (D) Conduct by an accused or defense counsel causes the child to be unable to continue testifying.
>
> (4) Remote live testimony of a child shall not be utilized where the accused elects to absent himself from the courtroom in accordance with R.C.M. 804(c).

Exec. Order No. 13,140, 64 Fed. Reg. 55,115, 55,118.

9. A "child" is a person who is under the age of sixteen at the time of his or her testimony. *Id.*

10. *Id.*

11. *Id.* 64 Fed. Reg. at 55,118-19.

12. The following new rule is inserted after R.C.M. 914:

> Rule 914A. Use of remote live testimony of a child
>
> (a) General procedures. A child shall be allowed to testify out of the presence of the accused after the military judge has determined that the requirements of Mil. R. Evid. 611(d)(3) have been satisfied. The procedure used to take such testimony will be determined by the military judge based upon the exigencies of the situation. However, such testimony should normally be taken via a two-way closed circuit television system. At a minimum, the following procedures shall be observed:
>
> (1) The witness shall testify from a remote location outside the courtroom;
>
> (2) Attendance at the remote location shall be limited to the child, counsel for each side (not including an accused pro se), equipment operators, and other persons, such as an attendant for the child, whose presence is deemed necessary by the military judge;
>
> (3) Sufficient monitors shall be placed in the courtroom to allow viewing and hearing of the testimony by the military judge, the accused, the members, the court reporter and the public;
>
> (4) The voice of the military judge shall be transmitted into the remote location to allow control of the proceedings; and
>
> (5) The accused shall be permitted private, contemporaneous communication with his counsel.
>
> (b) Prohibitions. The procedures described above shall not be used where the accused elects to absent himself from the courtroom pursuant to R.C.M. 804(c).

Id. 64 Fed. Reg. at 55,116.

13. *Id.*

The executive order also amended R.C.M. 804 by redesignating subsection (c) as subsection (d) and creating a new subsection (c).[15] The new subsection (c) allows the accused to voluntarily leave the courtroom during the witness's testimony to preclude the use of the remote testimony procedures.[16] If the accused makes this election, the child's testimony will be transmitted to a remote location where the accused can view it. The accused will also have private, contemporaneous communication with his defense counsel.[17]

These new rules closely resemble federal law.[18] Military Rule of Evidence 611(d) and 18 U.S.C. § 3509 codify the United States Supreme Court's decision in *Maryland v. Craig*.[19] However, MRE 611(d) and 18 U.S.C. § 3509 expand the use of remote testimony beyond the use approved in *Craig*. A brief review of *Craig* is necessary to understand the impact and dangers of MRE 611(d).

Maryland v. Craig

In *Craig*, the Supreme Court upheld the use of one-way closed circuit television to allow a child victim to testify in a criminal trial from a remote location. The accused, Sandra Ann Craig, was convicted of the sexual abuse of a six-year old girl. The child victim testified against Craig via one-way closed circuit television.[20] The Court noted:

> [O]ur precedents confirm that a defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured.[21]

The Court established three requirements before the Constitution's preference for face-to-face confrontation can be diminished.

First, the government must make an adequate showing of necessity. To satisfy the necessity requirement, the trial court must make three case-specific findings of fact. The trial court must find that the proposed procedure is necessary to protect

14. *Id.* The witness shall testify from a remote location outside the courtroom. Attendance at the remote location shall be limited to the child, counsel for each side (but not an accused proceeding *pro se*), equipment operators, and other persons deemed necessary by the judge (for example, an attendant for the child). Sufficient monitors shall be placed in the courtroom to allow the judge, the accused, the court members, the court reporter and the public to view and hear the testimony. The voice of the judge shall be transmitted to the remote location so the judge can control the proceeding. Finally, the accused shall have private, contemporaneous communication with his defense counsel.

15. Rule for Courts-Martial 804 is amended by redesignating the current subsection (c) as subsection (d) and inserting after subsection (b) the following new subsection (c):

> (c) Voluntary absence for limited purpose of child testimony.
>
> (1) Election by accused. Following a determination by the military judge that remote live testimony of a child is appropriate pursuant to Mil. R. Evid. 611(d)(3), the accused may elect to voluntarily absent himself from the courtroom in order to preclude the use of procedures described in R.C.M. 914A.
>
> (2) Procedure. The accused's absence will be conditional upon his being able to view the witness' testimony from a remote location. Normally, a two-way closed circuit television system will be used to transmit the child's testimony from the courtroom to the accused's location. A one-way closed circuit television system may be used if deemed necessary by the military judge. The accused will also be provided private, contemporaneous communication with his counsel. The procedures described herein shall be employed unless the accused has made a knowing and affirmative waiver of these procedures.
>
> (3) Effect on accused's rights generally. An election by the accused to be absent pursuant to subsection (c)(1) shall not otherwise affect the accused's right to be present at the remainder of the trial in accordance with this rule.

Id. 64 Fed. Reg. at 55,115.

16. *Id.*

17. *Id.*

18. *See* 18 U.S.C.S. § 3509 (LEXIS 2000). This section codifies the Child Victims' and Child Witnesses' Rights Act, which was enacted as part of the Omnibus Crime Control Act of 1990. *See* Lieutenant David A. Berger, *Proposed Changes to Rules For Courts-Martial 804, 914A and Military Rule of Evidence 611(d)(2): A Partial Step Towards Compliance with the Child Victims' and Child Witnesses' Rights Statute*, ARMY LAW., June 1999, at 19-20. *See also* UCMJ art. 36 (LEXIS 2000). "[T]rial . . . procedures . . . for cases . . . triable in courts-martial . . . may be prescribed by the President by regulations, which shall, so far as he considers practicable, apply the principles of law . . . generally recognized in the trial of criminal cases in the United States district courts." *Id.*

19. 497 U.S. 836 (1990).

20. *Id.* at 840-43. The named victim, as well as three other children whom Craig allegedly abused were allowed to testify via closed circuit television. *Id.* at 842-43.

21. *Id.* at 850.

the welfare of the particular child witness who seeks to testify without face-to-face confrontation. Stated another way, the trial court must find that the particular witness would suffer emotional trauma if forced to testify in the conventional manner. The trial court must also find that the emotional trauma would be caused by the presence of the accused and not by the formal courtroom setting. "Denial of face-to-face confrontation is not needed to further the state interest in protecting the child witness from trauma unless it is the presence of the defendant that causes the trauma."[22] Finally, the trial court must find that that "the emotional distress suffered by the child witness in the presence of the defendant is more than *de minimus*, i.e., more than 'mere nervousness or excitement or some reluctance to testify . . . .'"[23]

Second, the proposed procedure must be necessary to further an important state interest. The important public policy served by the Maryland statute reviewed by the Supreme Court in *Craig* was "to safeguard the physical and psychological well-being of child victims by avoiding, or at least minimizing, the emotional trauma produced by testifying."[24] The Court held

> if the State makes an adequate showing of necessity, the state interest in protecting child witnesses from the trauma of testifying in a child abuse case is sufficiently important to justify the use of a special procedure that permits a child witness in such cases to testify at trial against a defendant in the absence of face-to-face confrontation with the defendant.[25]

Finally, the proposed procedure must guarantee the reliability of the testimony. The Court said that the combined elements of the right to confrontation ensure that evidence admitted against an accused is reliable. The Court identified the elements of confrontation as physical presence in the courtroom in the presence of the defendant, the witness's oath, cross-examination, and the observation of the witness's demeanor by the trier of fact.[26] The Court stated "[t]hat the face-to-face confrontation requirement is not absolute does not, of course, mean that it may easily be dispensed with."[27] The reliability of the testimony received in the absence of face-to-face confrontation must be assured by the presence of the other elements of confrontation.

The language of MRE 611(d) and R.C.M. 914A raise several issues because they go well beyond the facts and logic of *Craig*. We will analyze the provisions of these new rules to try to identify the state interest involved, why the provision is necessary to further the state interest, and how the testimony's reliability is guaranteed.

Military Rule of Evidence 611(d)

Military Rule of Evidence 611(d)(3) provides that, "[r]emote live testimony will be used only where the military judge makes a finding on the record that a child is *unable to testify* in open court *in the presence* of the accused,"[28] for one of four reasons. The requirement that the child be unable to testify codifies *Craig*'s requirement that the distress be more than *de minimus*. Military Rule of Evidence 611's requirement that the child be unable to testify is similar to the requirement of the Maryland statute reviewed in *Craig*. In *Craig*, the statutory procedure could only be used if the emotional trauma was incapacitating.[29] In *Craig*, the Court did not decide the minimum showing of emotional trauma required for the use of special procedures because the standard specified in the Maryland statute clearly met constitutional standards.[30] Similarly, MRE 611(d)(3) requires that the child be incapacitated, or unable to testify. Military Rule of Evidence 611(d)'s required showing of the level of distress also meets constitutional standards.

Military Rule of Evidence 611(d)(3) requires that the child be unable to testify in the presence of the accused. This may be less than the required showing of necessity announced in *Craig*. In *Craig*, the Court required that the trial court find that the

22. *Id.* at 856.

23. *Id.*

24. *Id.* at 854.

25. *Id.* at 855.

26. *Id.* at 846.

27. *Id.* at 850.

28. *See* Exec. Order No. 13,140, 64 Fed. Reg. 55,115, 55,118 (1999) (emphasis added). *See also* 18 U.S.C.S. § 3509(b)(1)(B) (LEXIS 2000). "The court may order that the testimony of the child be taken by closed-circuit television . . . if the court finds that the child is unable to testify in open court in the presence of the defendant." *Id.*

29. The Maryland statute required a determination that the child witness would suffer "serious emotional distress such that the child cannot reasonably communicate." *Craig*, 497 U.S. at 856.

30. *Id.*

child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant.[31]

> Denial of face-to-face confrontation is not needed to further the state interest in protecting the child witness from trauma unless it is the presence of the defendant that caused the trauma. In other words, if the state interest were merely the interest in protecting child witnesses from courtroom trauma generally, denial of face-to-face confrontation would be unnecessary because the child could be permitted to testify in less intimidating surroundings, albeit with the defendant present.[32]

Clearly, *Craig* requires the emotional distress to be caused by the presence of the defendant. Military Rule of Evidence 611(d)(3) only requires the child to be unable to testify in the presence of the accused. The preposition is important. Under MRE 611(d)(3) and R.C.M. 914A, a child, who is so traumatized by the formal trappings of the courtroom that she could not testify, would be required to testify via closed circuit television from a remote location. This would satisfy MRE 611(d)(3), but violate *Craig*. Military Rule of Evidence 611(d)(3) must be read to require the trauma be caused by the presence of the accused to be consistent with the constitutional law. Military judges must be careful to make this finding on the record.

Military Rule of Evidence 611(d)(3)(A) provides that remote live testimony will be used when the military judge makes a finding that a child is unable to testify in open court in the presence of the accused because of fear.[33] This language is substantially the same as the United States Code.[34] *Craig* does not discuss fear. *Craig* approved of diminishing the right of confrontation to protect child victims from the emotional distress caused by testifying in the presence of the accused in a child abuse case. To comport with *Craig*, the fear must cause emotional distress and the fear must be of the accused.[35] If this provision is used in a case other than a child sexual abuse case,[36] or if a child victim testifies from a remote location based on fear (and not emotional trauma), the proponent of the witness will have to identify the state interest being promoted and explain why these procedures are necessary to further the state interest because fear (independent of emotional trauma) does not fall under the state interest found sufficiently important to justify the derogation of the right of confrontation in *Craig.*

Military Rule of Evidence 611(d)(3)(B) provides that remote live testimony will be used in those cases in which the military judge makes a finding that a child is unable to testify in open court in the presence of the accused because of a substantial likelihood, established by expert testimony,[37] that the child would suffer emotional trauma from testifying.[38] This formulation may require less than the showing of necessity required by *Craig.* In *Craig*, the Court said "[t]he trial court must also find that the child witness *would be traumatized*, not by the courtroom generally, but by the presence of the defendant."[39] The Maryland statute reviewed in *Craig* required "that the child witness *will* suffer 'serious emotional distress such that the child cannot reasonably communicate.'"[40] The Court did not speak in terms of "substantial likelihoods." If a trial judge does not carefully make his findings, it is possible to satisfy the requirements of MRE 611(d) and still violate *Craig*.

Military Rule of Evidence 611(d)(3)(C) provides that remote live testimony will be used in those cases in which the military judge makes a finding that a child is unable to testify in open court in the presence of the accused because the child suffers from a mental or other infirmity. To the extent that this provision allows alternative procedures to be used without a showing of emotional trauma to the witness, this provision is constitutionally untested. In *Craig*, the Court upheld Maryland's statu-

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31. *Id.*

32. *Id.*

33. Exec. Order No. 13,140, 64 Fed. Reg. at 55,118.

34. "The court may order that the testimony of the child be taken by closed-circuit television . . . if the court finds that the child is unable to testify in open court in the presence of the defendant, for any of the following reasons: (i) The child is unable to testify because of fear." 18 U.S.C.S. § 3509(b)(1)(B) (LEXIS 2000).

35. Cases that have used remote testimony under 18 U.S.C.S. § 3509(b)(1)(B) involved fear of the defendant that caused emotional trauma. *See* United States v. Rouse, 111 F.3d 561 (8th Cir. 1997); United States v. Carrier, 9 F.3d 867 (10th Cir. 1993); United States v. Farley, 992 F.2d 1122 (10th Cir. 1993).

36. *See supra* note 8. Military Rule of Evidence 611(d) requires the use of R.C.M. 914A's procedures in cases involving abuse of a child and domestic violence. By definition, "cases involving abuse of a child" includes physical abuse and child neglect.

37. The requirement for expert testimony is not a constitutional requirement, but experts are normally used to prove the emotional trauma. *See, e.g.*, United States v. Anderson, 51 M.J. 145 (1999).

38. Exec. Order No. 13,140, 64 Fed. Reg. at 55,118. *See* 18 U.S.C.S. § 3509(b)(1)(B)(ii).

39. Maryland v. Craig, 497 U.S. 836, 856 (1990) (emphasis added).

40. *Id.* (emphasis added).

tory procedure for receiving testimony via one-way closed circuit television based on the state's interest in protecting child witnesses from *the trauma of testifying in a child abuse case*.[41] The government may have an interest in securing testimony from children with infirmities, but this is a different interest than the one considered in *Craig. Craig* clearly required a link between the emotional trauma suffered by the child and the presence of the accused.[42] This provision may not survive constitutional review if the infirmity is not linked to the accused because the proposed procedure would not be necessary to further the important state interest.

Military Rule of Evidence 611(d)(3)(D) provides that remote live testimony will be used when the military judge makes a finding that a child is unable to testify in open court in the presence of the accused because of conduct by an accused or defense counsel. This provision appears to be based on the waiver of the Sixth Amendment right to confrontation by the accused.[43] Arguably, the requirements of *Maryland v. Craig* do not apply to this provision.

Judges and practitioners should make sure that the judge's findings satisfy the requirements of *Maryland v. Craig.* By making findings that satisfy the requirements of *Craig*, the judge will satisfy the requirements of MRE 611(d). As noted, however, it is possible to satisfy MRE 611(d), yet still violate *Craig.*

Impact On Other Substitutes For Face-To-Face Confrontation

A big difference between 18 U.S.C. § 3509 and R.C.M. 914A is the amount of discretion the trial judge has in directing the use of a two-way closed circuit television system. The United States Code provides that "the court *may* order that the testimony of the child be taken by closed-circuit television."[44] Rule for Courts-Martial 914A provides that after the military judge has determined that the requirements of MRE 611(d)(3) have been satisfied, the judge will determine the procedure to be used based on the exigencies of the situation.[45] The rule states a preference for two-way closed circuit television,[46] and the rule specifies that "[t]he witness *shall* testify from a remote location outside the courtroom."[47] The United States Code gives trial judges the option of using closed circuit television; the new Rule for Courts-Martial requires the trial judge to have the child witness testify from a remote location, with a preference for closed circuit television.[48]

Between 1990, when *Craig* was decided, and 1999, when Executive Order 13,140 was signed, military courts sanctioned the use of several methods for preventing emotional distress to child witnesses. They include the use of partitions,[49] having the witness testify with her back to the accused but facing the judge and counsel,[50] having the witness testify with her profile to the accused,[51] the whisper method,[52] and combinations of these procedures.[53] In all of these procedures, the child witness testified inside the courtroom.

Does R.C.M. 914A's mandate for testimony from outside the courtroom mean that these procedures can no longer be used? Probably not. Use of the R.C.M. 914A procedures depends on a finding that the requirements of MRE 611(d)(3) have been satisfied. One of the requirements of MRE 611(d)(3) is that the judge find on the record that the "*child is unable to testify in open court in the presence of the accused.*"[54] Military Rule of Evidence 611's requirement that the child be unable to testify is

41. *Id.* at 855.

42. *See supra* note 22 and accompanying text (explaining the requirements for a showing of necessity).

43. *Cf.* United States v. Paaluhi, 50 M.J. 782 (N.M. Ct. Crim. App. 1999) (finding the accused waived his right to confrontation where a witness's unavailability was a direct result of the actions of the accused).

44. 18 U.S.C.S. § 3509(b)(1)(B) (LEXIS 2000) (emphasis added).

45. The analysis to R.C.M. 914A, together with R.C.M. 914A(a)(1), makes it clear that the judge's discretion is limited to using two-way closed circuit television or one-way closed circuit television. *See* MCM, *supra* note 3, R.C.M. 914A analysis (1998); Exec. Order No. 13,140, 64 Fed. Reg. 55,115, 55121 (1999).

46. MCM, *supra* note 3, R.C.M. 914A(a). *See* Exec. Order No. 13,140, 64 Fed. Reg. at 55,116.

47. MCM, *supra* note 3, R.C.M. 914A(a)(1); Exec. Order No. 13,140, 64 Fed. Reg. at 55,115-16 (emphasis added).

48. Another alternative is a videotaped deposition. Under federal law, a district court judge can order a videotaped deposition instead of using remote live testimony. 18 U.S.C.S. § 3509 (b)(2). The 1999 changes to the *MCM* did not include the videotaped deposition option. *See* Exec. Order No. 13,140, 64 Fed. Reg. at 55,115. *See also* Berger, *supra* note 18, at 28 (arguing the military should adopt the videotaped deposition provisions of the Child Victims' and Child Witnesses' Rights Act).

49. United States v. Batten, 31 M.J. 205 (C.M.A. 1990).

50. United States v. Thompson, 31 M.J. 168 (C.M.A. 1990).

51. United States v. Williams, 37 M.J. 289 (C.M.A. 1993).

52. The child victim whispered her answers to her mother who repeated the answers in open court. The mother was certified as an interpreter. United States v. Romey, 32 M.J. 180 (C.M.A.).

similar to the requirement of the Maryland statute reviewed in *Maryland v. Craig.*[55] In *Craig*, the Court did not decide the minimum showing of emotional trauma required for the use of special procedures because the standard specified in the Maryland statute clearly met the constitutional standard.[56] So, a child witness could suffer some emotional distress more than *de minimus*,[57] but the distress may not be so severe as to prevent her from being able to testify. In this case, R.C.M. 914A would not apply, and the court-martial could use special procedures where the witness testifies from within the courtroom.

This result assumes that R.C.M. 914A is not the exclusive legal authority for using alternative forms of testimony. In *Marx v. Texas,*[58] the Texas Supreme Court held, although the legislature prescribed a specific alternative testimonial procedure under certain defined circumstances, the court was free to develop different procedures under other circumstances, as long as the different procedures comported with the Constitution.[59] A Texas statute provided for testimony by closed circuit television by victims of the crimes for which the defendant is on trial if the *victim* of the offense was *under* thirteen years of age.[60] In *Marx*, the victim-witness was allowed to testify by way of closed circuit television even though she was thirteen years old. Moreover, a witness, who was not a victim of the offense for which Marx was being tried, was also allowed to testify by closed circuit television.[61] The court found no statutory violation because the statute did not apply. Since the trial judge made the requisite findings of necessity, the United States Constitution was satisfied.[62] Similarly, if R.C.M. 914A is not the exclusive legal authority for using extraordinary methods of testimony, military judges could use special procedures such that the witness could testify inside the courtroom when the judge finds the witness would suffer emotional distress that is more than *de minimus* but less than disabling.

Expanding Maryland v. Craig

United States v. Shabazz[63] represents an attempt to expand the use of remote live testimony. In *Shabazz*, the trial judge allowed a key government witness, Mrs. White, to testify via video teleconference (VTC) from San Diego, California; the trial was in Okinawa, Japan. Mrs. White was an adult witness to an assault. Mrs. White reluctantly agreed to return to Japan to testify but changed her mind at the last minute.[64] Since the government had no authority to subpoena Mrs. White to return to Japan, the government requested permission to take her testimony via VTC. The military judge rejected the idea of moving the trial to California, and claimed that VTC was preferable to using former testimony[65] or a deposition.[66] Mrs. White testified via VTC.

The Navy-Marine Corps Court of Criminal Appeals set aside the finding of guilty of the charge related to Mrs. White's testimony. The court found the accused's right to confront Mrs. White was violated because the trial judge failed to ensure the

53. *See* United States v. Anderson, 51 M.J. 145 (1999) (using screens and closed circuit television). *Anderson* is a good case for practitioners to read because the opinion includes extensive portions of the record of trial where the judge made findings of fact based on the testimony of the government's expert witness, where the judge described the procedures that would be used, and where the judge instructed the members concerning the special procedures being used. These extracts may be helpful to counsel and judges when making the factual record supporting the finding of necessity, fashioning an appropriate procedure and instructing the panel members.

54. MCM, *supra* note 3, MIL. R. EVID. 611(d)(3); Exec. Order No. 13,140, 64 Fed. Reg. 55,115, 55,118 (1999) (emphasis added).

55. The Maryland statute required a determination that the child witness would suffer "serious emotional distress such that the child cannot reasonably communicate." Maryland v. Craig, 497 U.S. 836, 856 (1990).

56. *Id.*

57. To get an idea of just how minimal *de minimus* may be, see *Marx v. Texas*, 987 S.W.2d 577 (Tx.), *cert. denied*, 120 S. Ct. 574 (1999). "If the lower court's opinion in this case is in the ballpark, the 'minimum showing' required is no showing at all, and in all abused-child-witness cases this Court's exception has swallowed the constitutional rule." *Marx*, 120 S. Ct. at 574 (Scalia, J., dissenting from a denial of certiorari).

58. *Marx*, 987 S.W.2d at 577.

59. *Id.* at 583.

60. *Id.* at 579 (emphasis added).

61. *Id.*

62. *Id.* at 580-81.

63. 52 M.J. 585 (N.M. Ct. Crim. App. 1999).

64. *Id.* at 590.

65. An interesting remark considering there was no former testimony by this witness. *Id.* at 591 n.6.

66. *Id.* at 590-91.

reliability of her trial testimony.[67] During trial, and again after trial, the defense counsel objected to Mrs. White's testimony because he could hear a voice at the VTC site coaching the witness.[68] The court faulted the trial judge for not enforcing a clear protocol to control the remote site, for not immediately inquiring into the matter when the judge heard a voice at the remote site repeating questions to the witness, and for not fully developing the amount of coaching the witness received at the post-trial Article 39(a) session.[69]

The court did not address the more fundamental question of whether taking the testimony of an adult eyewitness via VTC is necessary to further an important state interest.[70] While the right to confront witnesses is a fundamental right, it is not absolute. The right to confront witnesses may be abridged to accommodate important state interests.[71] However, abrogating the confrontation right must be necessary to further the important state interest.[72] Whenever a court deviates from the common form of confrontation, the court must ensure the reliability of the testimony.[73] In *Craig*, the important state interest upon which the Court based its decision was the interest in protecting child witnesses from the trauma of testifying in child abuse cases.[74] The procedure only furthered the state's interest if the procedure was necessary in the particular case in which the procedure was proposed. If the trial court made a case-specific showing of necessity (that is, that the child would be traumatized), then the court could constitutionally use alternate procedures that eliminate the trauma but preserve the reliability of the evidence.[75]

In *Shabazz*, neither the trial court nor the appellate court identified which state interest justified abridging the accused's right to confrontation. Moreover, the court did not discuss how the use of VTC was necessary to further the state interest. The court stated, "[t]here are various interests that must be balanced against the defendant's right of confrontation, including the Government's 'strong interest in effective law enforcement,' [citing *Ohio v. Roberts*, 448 U.S. 56 (1980)] . . . the state's compelling 'interest in the physical and psychological well-being of a minor victim,' [citation omitted] and the 'societal interest in accurate factfinding.'"[76] Nonetheless, taking Mrs. White's testimony via VTC was not necessary to further any of these state interests.

The government certainly has a strong interest in effective law enforcement. But unlike *Ohio v. Roberts*,[77] in *Shabazz*, the government's witness was available to testify. The problem was the government could not force her to appear in court where the government wanted to try the case. In *Roberts*, the witness could not be located and subpoenaed.[78] In *Shabazz*, the government had other options. The trial could have been held in California or the witness could have been deposed. The trial judge rejected these options without comment.[79] Because the government had other options to procure the testimony of Mrs. White, receiving the testimony via VTC was not necessary to further this important state interest. Similarly, receiving testimony by VTC is not necessary to vindicate the societal interest in accurate fact-finding because the government had other ways to receive the testimony. The state interest in protecting minor children does not apply in this case; Mrs. White was an adult. The interest this arrangement furthered is the government interest in avoiding administrative inconvenience and delay. This interest, however, is not important enough to trump an explicit constitutional right.

Another case that expands the use the remote live testimony in criminal cases is *United States v. Gigante*.[80] Gigante was convicted of racketeering, conspiracy to commit murder, and

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67. *Id.* at 594.

68. *Id.* at 591-92.

69. *Id.* at 594.

70. "*Assuming that the use of VTC was necessary in this case,* we nonetheless find that the appellant's Sixth Amendment right to confront Mrs. White was violated when the military judge failed to ensure the reliability of her testimony . . . ." *Id.* (emphasis added).

71. Chambers v. Mississippi, 410 U.S. 284, 295 (1973).

72. Maryland v. Craig, 497 U.S. 836, 852 (1990).

73. *Id.* at 857.

74. *Id.* at 855.

75. *Id.* at 857.

76. United States v. Shabazz, 52 M.J. 585, 593 (N.M. Ct. Crim. App. 1999).

77. 448 U.S. 56 (1980).

78. *Id.* at 59-60.

79. *Shabazz*, 52 M.J. at 591 n.7.

conspiracy to commit extortion in connection with the criminal activity of La Cosa Nostra. The government called six former members of the Mafia as witnesses against Gigante. One witness's testimony was taken via two-way closed circuit television from a remote location. The witness was a participant in the Federal Witness Protection Program and, at the time of trial, was in the final stages of an inoperable, fatal cancer. Medical experts testified that it would be medically unsafe for the witness to travel to New York for testimony, but not life-threatening.[81]

The trial judge based his decision on the judge's inherent power under Federal Rules of Criminal Procedure 2 and 57(b) to conduct a criminal trial in a just manner.[82] The trial judge did not make findings that these procedures were necessary to further an important public policy. The appellate court noted the classic *Craig* formulation–the Confrontation Clause may be satisfied absent face-to-face confrontation at trial where the denial of face-to-face confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured–but held that *Craig*'s formulation was intended to constrain the use of one-way closed circuit television.[83] "Because [the trial judge] employed a two-way system that preserved the face-to face confrontation celebrated by *Coy*, it is not necessary to enforce the *Craig* standard in this case."[84] The court noted the trial judge could have ordered a deposition to preserve the witness's testimony, and that the two-way closed circuit television procedure afforded greater protection of the right to confrontation than a deposition. Therefore, the court reasoned, use of this procedure did not deny Gigante the right to confrontation.[85]

The court's assertion that the *Craig* standard is only designed to constrain the use of one-way closed circuit television is questionable.[86] To limit *Craig* to its facts, one must ignore most of the opinion. In *Craig*, the Court noted that:

> the Confrontation Clause reflects a *preference* for face-to-face confrontation at trial . . . a preference that "must give way to considerations of public policy and the necessities of the case" . . . our precedents confirm that a defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured.[87]

The critical inquiry in *Craig* was whether the use of Maryland's statutory one-way closed circuit television procedure was necessary to further an important state interest.[88] The balance of the opinion discusses whether Maryland's procedure sufficiently preserved the other elements of the confrontation right, whether the proffered state interest in protecting child victims is sufficiently important to justify the abridgment of the defendant's confrontation right, and what showing of necessity is required before abridging the defendant's right. Nothing in the opinion limits this analysis to the use of one-way closed circuit television. Nothing in the opinion indicates that this analysis does not apply to two-way closed circuit television.

The court's distinction between one-way and two-way closed circuit television is a distinction without a difference. *Craig* addresses the permissibility of eliminating the constitutional requirement for face-to-face confrontation in the presence of the accused. Although two-way closed circuit television allows the witness to see the accused on television while testifying, neither process allows for face-to-face confrontation in the presence of the accused. In *Craig*, the Court emphasized the importance of face-to-face confrontation in the presence of the accused.[89] The language and logic of the opinion make clear that any derogation of the confrontation right by any method must satisfy the standard enunciated in *Craig*.[90]

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80. 166 F.3d 75 (2d Cir. 1999), *cert. denied*, 120 S. Ct. 931 (2000).

81. *Id.* at 78-80.

82. *Id.* at 80.

83. *Id.* at 80-81.

84. *Id.* at 81.

85. *Id.* at 81-82.

86. The court's assertion in *Gigante* that the two-way closed circuit television procedure afforded greater protection of the right to confrontation than a deposition would is also questionable. In *Craig*, the court identified the elements of the right of confrontation: physical presence, oath, cross-examination, and observation of demeanor by the trier of fact. Maryland v. Craig, 497 U.S. 836, 846 (1990). In a deposition that is videotaped, the witness is cross-examined while under oath in the physical presence of the accused. The trier of fact can observe the witness's demeanor while testifying. When a two-way closed circuit television system is used, the witness testifies under oath, subject to cross-examination, and the trier of fact can observe the witness's demeanor. However, the witness does not testify in the physical presence of the accused. A videotaped deposition therefore protects the right to confrontation better than two-way closed circ uit television.

87. *Id.*

88. *Id.* at 852.

Justice Scalia dissented from the denial of certiorari in *Marx v. Texas*.

> I dissented in *Craig*, because I thought it subordinated the plain language of the Bill of Rights to the "tide of prevailing current opinion." [citations omitted] I do not think the Court should ever depart from the plain meaning of the Bill of Rights. But when it does take such a step into the dark it has an obligation, it seems to me, to clarify as soon as possible the extent of its permitted departure.[91]

In *Marx*, *Gigante*, and *Shabazz*, trial courts tested the limits of *Craig* and the Sixth Amendment's Confrontation Clause. Ultimately, the United States Supreme Court will have to decide how far trial courts can go to accommodate witnesses who cannot or will not testify in the conventional manner. Until then, practitioners and judges should be very careful when derogating the accused's confrontation right. Practitioners and judges must understand the limits and rationale of *Craig*. Before allowing remote testimony by an adult witness, or in a case not involving child sexual abuse, the proponent of the remote testimony must be able to identify the state interest involved, how the use of remote testimony furthers the state interest, and how the remote testimony will otherwise assure the reliability of the testimony.

Confrontation and Hearsay

In *Lilly v. Virginia*,[92] the United States Supreme Court considered whether the exception to the hearsay rule for statements against penal interest is a firmly-rooted hearsay exception. *Lilly* is a complicated opinion. All nine justices agreed that the admission of out-of-court statements by Mark Lilly, the defendant's brother, violated Benjamin Lilly's right to confront witnesses, but they could not agree on a rationale. To determine the impact of *Lilly*, one must understand the differences between the three approaches the Court took.

In December 1995 three men–Benjamin Lilly, his brother Mark, and Mark's roommate–broke into a home and stole liquor, guns and a safe. The next day, they robbed a small country store and shot at geese with their stolen weapons. When their vehicle broke down, they abducted a man and stole his car. They drove the man to a deserted area and killed him. The trio committed two additional robberies before being apprehended.[93]

While being interrogated by police, Mark Lilly made several incriminating statements. He admitted that he stole liquor during the initial burglary and a twelve-pack of beer in a later robbery. Mark admitted he was present during the robberies and the murder. Mark said that his brother, Benjamin, instigated the carjacking and was the one who shot the victim.[94]

When Benjamin Lilly went to trial, the state called Mark as a witness. When Mark invoked his privilege against self-incrimination, the state offered the statements Mark made to the police as statements against penal interest. The court admitted the statements over defense objection.[95] The jury convicted Benjamin Lilly and recommended the death penalty, which the court imposed.[96]

The Supreme Court of Virginia found that the statements fell within the statement against penal interest exception to the Virginia hearsay rule. Moreover, the Supreme Court of Virginia found that this exception to the hearsay rule is a firmly-rooted exception to the Virginia hearsay rule.[97] The United States Supreme Court reviewed the case to determine whether Mark Lilly's statements fall within a firmly-rooted hearsay exception for purposes of satisfying the Sixth Amendment Confrontation

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89. *id.* "We have recognized, for example, that face-to-face confrontation enhances the accuracy of factfinding by reducing the risk that a witness will wrongfully implicate an innocent person." *Id.* at 846. The Court cited *Coy v. Iowa*: "It is always more difficult to tell a lie about a person 'to his face' than 'behind his back.' . . . That face-to-face presence may, unfortunately, upset the truthful rape victim or abused child; but by the same token it may confound and undo the false accuser, or reveal the child coached by a malevolent adult." Coy v. Iowa, 487 U.S. 1012, 1019-20 (1988). "There is something deep in human nature that regards face-to-face confrontation between accused and accuser as 'essential to a fair trial in a criminal prosecution.'" *Id.* at 1017. *See Craig*, 497 U.S. at 846-47.

90. *See supra* notes 49-53 for cases where courts have applied the *Craig* analysis to cases not involving one-way closed circuit television.

91. Marx v. Texas, 120 S. Ct. 574 (1999) (Scalia, J., dissenting from a denial of certiorari).

92. 527 U.S. 116 (1999).

93. *Id.* at 125.

94. *Id.*

95. *Id.* The defense objected on two grounds. First, the statements were not against Mark's penal interest because they shifted the blame to Benjamin Lilly and Mark's roommate. Second, admission of the statements violated the Confrontation Clause of the Sixth Amendment, which has been incorporated against the states through the Fourteenth Amendment.

96. *Id.*

97. *Id.*

Clause.[98] A plurality of the Court held that these statements did not fall within a firmly-rooted hearsay exception and the admission of the statements violated Benjamin Lilly's constitutional right to confrontation.[99]

The Confrontation Clause does not prohibit the introduction of all hearsay statements. However, when a prosecutor offers an out-of-court statement and the declarant does not testify, the Confrontation Clause is implicated. The Supreme Court has created and refined a methodology for analyzing the constitutionality of hearsay statements.[100]

> [T]he veracity of hearsay statements is sufficiently dependable to allow the untested admission of such statements against an accused when (1) "the evidence falls within a firmly-rooted hearsay exception" or (2) it contains "particularized guarantees of trustworthiness" such that adversarial testing would be expected to add little, if anything, to the statements' reliability.[101]

Justice Stevens, writing for a four-justice plurality, found that statements against penal interest offered by a prosecutor to establish the guilt of an alleged accomplice of the declarant did not fall within a firmly-rooted hearsay exception. Moreover, the plurality doubted that statements given under conditions that implicate the core concerns of the old *ex parte* affidavit practice could ever be reliable enough to satisfy the Confrontation Clause without adversarial testing.[102] Mark Lilly's statements implicated the core concerns of the *ex parte* affidavit practice because the statements were given to the police during a custodial interrogation, and the defendant did not get an opportunity to cross examine the declarant at trial.

What is a firmly-rooted hearsay exception?

Justice Stevens described what makes a hearsay exception a firmly-rooted hearsay exception.

> We now describe a hearsay exception as "firmly-rooted" if, in light of "longstanding judicial and legislative experience," [citation omitted] it "rest[s][on] such [a] solid foundatio[n] that admission of virtually any evidence within [it] comports with the substance of the constitutional protection." [citations omitted] This standard is designed to allow the introduction of statements falling within a category of hearsay whose conditions have proven over time 'to remove all temptation to falsehood, and to enforce as strict an adherence to the truth as would the obligation of an oath' and cross-examination at trial. . . . Established practice, in short, must confirm that statements falling within a category of hearsay inherently "carr[y] special guarantees of credibility" essentially equivalent to, or greater than, those produced by the Constitution's preference for cross-examined trial testimony.[103]

Justice Stevens pointed out that the "against penal interest" exception to the hearsay rule is not premised on the declarant's inability to reflect before making the statement.[104] He noted that the exception is of "quite recent vintage."[105] As a result of the shallowness of the legislative and judicial experience with this exception, and a long line of cases that declare accomplices' confessions that incriminate others "presumptively

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98. *Id.* at 127.

99. *Id.* at 136.

100. White v. Illinois, 502 U.S. 346 (1992); Idaho v. Wright, 497 U.S. 805 (1990); Bourjaily v. United States, 483 U.S. 171 (1987); United States v. Inadi, 475 U.S. 387 (1986); Ohio v. Roberts, 448 U.S. 56 (1980).

101. *Lilly*, 527 U.S. at 127. This article will refer to the second prong of this test as the residual trustworthiness test.

102. "The primary object of the [Confrontation Clause] was to prevent depositions or *ex parte* affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross examination of the witness . . . ." Mattox v. United States, 156 U.S. 237, 242 (1895). The *ex parte* affidavit practice was an abuse common in England in the 16th and 17th Century.

> In 16th–century England, magistrates interrogated the prisoner, accomplices, and others prior to trial. These interrogations were intended only for the information of the court. The prisoner had no right to be, and probably never was, present. . . . At the trial itself, "proof was usually given by reading depositions, confessions of accomplices, letters, and the like; and this occasioned frequent demands by the prisoner to have his 'accusers,' i.e., the witnesses against him, brought before him face to face" . . . .The infamous trial of Sir Walter Raleigh on charges of treason in 1603 in which the Crown's primary evidence against him was the confession of an alleged co-conspirator (the confession was repudiated before trial and probably had been obtained by torture) is a well-known example of this feature of English criminal procedure.

White, 502 U.S. at 361 (Thomas, J., concurring in part and concurring in the judgment) (citations omitted). Under the *ex parte* affidavit practice, prosecutors proved their cases by presenting out-of-court statements without giving the accused the opportunity to cross-examine the declarant(s). *See Lilly*, 527 U.S. at 127.

103. *Lilly*, 527 U.S. at 127-28.

104. *Id.*

unreliable,"[106] the Court held that accomplices' confessions that inculpate others are not within a firmly-rooted hearsay exception.[107] The Court also noted that this category of statements included statements that function similarly to those used in the ancient *ex parte* affidavit system.[108]

The Residual Trustworthiness Test

Justice Stevens evaluated Mark Lilly's statements under the second prong of the *Roberts* test, even though the Virginia Supreme Court did not perform this part of the analysis.[109] Hearsay that does not fall with a firmly-rooted hearsay exception can be reliable enough to satisfy the Confrontation Clause "[w]hen a court can be confident . . . that 'the declarant's truthfulness is so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility . . . .'"[110] Because Mark was in custody, made his statements under police supervision, responded to leading questions, had a motive to exculpate himself, and was under the influence of alcohol, the Court concluded the statements were not so reliable that adversarial testing would add nothing to their reliability.[111] Since Mark Lilly's statements failed both prongs of the test, the Supreme Court reversed the decision of the Virginia Supreme Court.[112]

Justice Scalia and Justice Thomas concurred in the judgment separately, but share a similar view of the Confrontation Clause. According to these two justices, the Confrontation Clause extends only to witnesses who testify at trial and to "extrajudicial statements only insofar as they are contained in formalized testimonial material, such as affidavits, depositions, prior testimony, or confessions."[113] Justice Scalia characterized the admission of Mark Lilly's statements as a "paradigmatic Confrontation Clause violation"[114] because Mark Lilly made the out-of-court statements to the police during a custodial interrogation and the prosecutor did not make Mark available for cross-examination. Such statements resemble the abusive practice of trial by *ex parte* affidavit.

Chief Justice Rehnquist, joined by two other justices, agreed the statements at issue violated the Confrontation Clause. However, Chief Justice Rehnquist wrote that it was unnecessary for the Court to decide the issue of whether statements against penal interest fall within a firmly-rooted hearsay exception. The Chief Justice argued that the statements at issue were not against the declarant's penal interest.[115] Therefore, the Court did not have to decide if the Confrontation Clause allows the admission of a "genuinely self-inculpatory statement that also inculpates a codefendant . . . ."[116] The Chief Justice would leave open the possibility that statements against penal interest to fellow prisoners[117] and confessions to family members are reliable enough to satisfy the Confrontation Clause.[118]

Although the Court's Confrontation Clause jurisprudence is not much clearer after *Lilly* than before *Lilly*, the case contains

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105. *Id.* at 131.

106. *Id.*

107. *Id.* at 133.

108. *Id.* at 131. *See supra* note 102 and accompanying text (describing the *ex parte* affidavit system).

109. *Id.* at 133.

> Neither [the Virginia Supreme Court] nor the trial court analyzed the confession under the second prong of the *Roberts* inquiry, and the discussion of reliability cited by the Court . . . pertained only to whether the confession should be admitted under state hearsay rules, not under the Confrontation Clause. Following our normal course, I see no reason for this Court to reach an issue upon which the lower courts did not pass.

Id. at 141 (Rehnquist, C.J., concurring in the judgment).

110. *Id.* at 134.

111. *Id.* at 136.

112. *Id.*

113. *Id.* at 138 (Scalia, J., concurring in part and concurring in the judgment).

> [The *Ohio v. Roberts* analysis] implies that the Confrontation Clause bars only unreliable hearsay. Although the historical concern with trial by affidavit and anonymous accusers does reflect concern with the reliability of the evidence against a defendant, the Clause makes no distinction based on the reliability of the evidence presented. Nor does it seem likely that the drafters of the Sixth Amendment intended to permit a defendant to be tried on the basis of *ex parte* affidavits found to be reliable. . . . Reliability is more properly a due process concern. There is no reason to strain the text of the Confrontation Clause to provide criminal defendants with a protection that due process already provides them.

White v. Illinois, 502 U.S. 346, 363-64 (1992) (Thomas, J., concurring in part and concurring in the judgment).

114. *Lilly*, 527 U.S. at 138.

several helpful tips for practitioners. Trial and defense counsel must understand the narrowness of the category of statements *Lilly* affects. Statements against penal interest are a subset of statements against interest.[119] Statements against the declarant's pecuniary or proprietary interests are not affected by *Lilly.* The plurality in *Lilly* subdivided statements against penal interest into three categories: (1) voluntary admissions against the declarant; (2) exculpatory evidence offered by the defense to show the declarant committed the crime; and (3) statements offered by the prosecution to prove the guilt of an alleged accomplice of the declarant.[120] The statements in *Lilly* fall into this third category. Statements that fall into the first two categories are not affected by *Lilly.*[121] As a result, the only statements affected by *Lilly* are statements made by a declarant that incriminate a co-actor when the prosecution offers the statement at the co-actor's trial.

In reality, however, even a subset of the statements which fall into the third category may be unaffected by *Lilly.* Although the plurality concluded that statements against penal interest do not fall within a firmly-rooted hearsay exception, the plurality left open the possibility that some statements in the third category could pass the residual trustworthiness test.[122] The plurality noted that statements in the third category are presumptively unreliable and that it is highly unlikely that the presumption can ever be rebutted when the "government is involved in the statements' production . . . and [the statements] have not been subjected to adversarial testing."[123] Therefore, statements in the third category that are made independent of governmental influence may be reliable enough to rebut the presumption of unreliability. The Chief Justice specifically reserved judgment on this issue when the statement against penal interest was made to a fellow prisoner or to a family member. The approach of Justices Scalia and Thomas also permits admission of statements in the third category when the government was not involved in the making of the statement; Justices Scalia and Thomas would not apply the Confrontation Clause to extrajudical statements not contained in formalized testimonial material. Trial counsel should continue to offer statements against penal interest in those cases in which the statements were made to someone who is not a government official.

Trial and defense counsel must also understand the precedential value of *Lilly.* The plurality concluded statements against penal interest do not fall within a firmly-rooted hearsay exception in Part IV. Parts III, IV, and V of Justice Stevens' opinion are not the opinion of the Court. Nevertheless, it is unlikely that the Court will find that statements against penal interest fall within a firmly-rooted hearsay exception in the future.[124] Statements that fall within a firmly-rooted hearsay exception are statements which are made under "conditions [which] have proven over time 'to remove all temptation to falsehood, and to enforce as strict an adherence to the truth as

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> When asked about his participation in the string of crimes, Mark admitted that he stole liquor during the initial burglary and that he stole a 12-pack of beer during the robbery of the liquor store. . . . He claimed, however, that while he had primarily been drinking, petitioner [Benjamin Lilly] and Barker [Mark Lilly's roommate] had 'got some guns or something' during the initial burglary. . . . Mark said that Barker had pulled a gun in one of the robberies. He further insisted that petitioner had instigated the carjacking and that he (Mark) 'didn't have nothing to do with the shooting' of DeFilippis. . . . In a brief portion of one of his statements, Mark stated that [Benjamin Lilly] was the one who shot DeFilippis.

Id. at 124-25.

116. *Id.* at 140.

117. *See* Dutton v. Evans, 400 U.S. 74 (1970).

118. *Lilly*, 527 U.S. at 141.

119. *See* MCM, *supra* note 3, MIL. R. EVID. 804(b)(3).

120. *Lilly*, 527 U.S. at 128.

121. Statements in the first category are generally admissible under MRE 801(d)(2)(A). Since the accused is the declarant, there is no confrontation issue. Joint trials could raise special problems. *See* Bruton v. United States, 391 U.S. 123 (1968). Statements in the second category do not raise a confrontation issue because the statements are offered by the defense. *See* Chambers v. Mississippi, 410 U.S. 284 (1973) (illustrating the admission of statements in the second category).

122.

> This, of course, does not mean, as the CHIEF JUSTICE and Justice Thomas erroneously suggest . . . that the Confrontation Clause imposes a "blanket ban on the government's use of [nontestifying] accomplice statements that incriminate a defendant." Rather, it simply means that the Government must satisfy the second prong of the *Ohio v. Roberts* [citation omitted] test in order to introduce such statements.

Lilly, 527 U.S. 133 n.5.

123. *Id.* at 135.

124. *See* United States v. Gomez, 191 F.3d 1214, 1222 (10th Cir. 1999) (holding statements against penal interest do not fall within a firmly-rooted hearsay exception).

would the obligation of an oath' and cross-examination at a trial."[125] For example, excited utterances and statements made for the purpose of receiving medical treatment were found to fall within firmly-rooted hearsay exceptions.[126] The condition that removes all temptation to falsehood from the declarant of an excited utterance is the stress caused by the excitement of a startling event. The condition that guarantees the reliability of statements made for the purpose of medical treatment is the expectation of receiving medical treatment. Statements against penal interest are not "based on the maxim that [the] statements are made without a motive to reflect on the legal consequences of one's statement . . . ."[127] Moreover, they are not made in situations that remove the temptation to lie because it is against the declarant's interests to be untruthful.[128]

Trial counsel must be prepared to satisfy the residual trustworthiness test when offering statements against penal interest. Trial counsel must understand that the particularized guarantees of trustworthiness must come from the circumstances surrounding the making of the statement.[129] Corroborating evidence that verifies the truth of the contents of the statement is irrelevant.[130] The standard for admission under the residual trustworthiness test is high. To satisfy the residual trustworthiness test, the statements must be as reliable as statements that fall within a firmly-rooted hearsay exception.[131] Trial counsel must be prepared to show that the conditions surrounding the making of the statements removed all temptation to lie.

In a recent case, *United States v. Gomez*,[132] the 10th Circuit Court of Appeals applied the *Lilly* decision and reversed the defendant's conviction because the government violated her right to confrontation. Gomez was charged with conspiracy and possession with intent to distribute over fifty kilograms of marijuana. To prove its case, the government called a co-conspirator, who testified pursuant to a plea agreement, and the government presented two written confessions inculpating the defendant from two other co-conspirators. Citing *Lilly v. Virginia*, the court held these two written statements against interest did not fall into a firmly-rooted hearsay exception.[133] The court also held these statements did not have sufficient indicia of reliability to satisfy the residual trustworthiness test.[134]

This case is helpful to practitioners because the court discussed ten factors used in analyzing the statements' reliability when conducting the residual trustworthiness test. The factors the court discussed were: the amount of detail in the statement, whether the statement was coerced, whether the declarant was in a position to have personal knowledge of the events, whether the statement was given soon after the events, whether there was a reason for the declarant to retaliate against the defendant, whether there was an offer of leniency, the declarant's demeanor, whether the second declarant saw the written statement of the first declarant, the declarant's character for truthfulness, and whether the statement was strongly against the declarant's interest.[135] Trial counsel can use these factors to demonstrate the reliability of proffered hearsay from the circumstances surrounding the making of the statement.

Finally, counsel must evaluate *United States v. Jacobs*[136] in light of *Lilly* and *Gomez.* In *Jacobs*, the Court of Appeals for

125. *Lilly*, 527 U.S. at 128.

126. White v. Illinois, 502 U.S. 346 (1992).

127. *Lilly*, 527 U.S. at 128.

128. *Id.*

129. The relevant circumstances "include only those that surround the making of the statement and that render the declarant particularly worthy of belief." Idaho v. Wright, 497 U.S. 805, 819 (1990).

130. *Lilly*, 527 U.S. at 135.

131. "Because evidence possessing 'particularized guarantees of trustworthiness' must be at least as reliable as evidence admitted under a firmly rooted hearsay exception . . . we think that evidence admitted under the former requirement must similarly be so trustworthy that adversarial testing would add little to its reliability." *Wright*, 497 U.S. at 821.

132. 191 F.3d 1214 (10th Cir. 1999).

133. *Id.* at 1222.

134. *Id.* at 1223.

135. *Id.* at 1222-23.

136. 44 M.J. 301 (1996). The CAAF held that statements against penal interest fall within a firmly-rooted hearsay exception. However, the CAAF remanded the case to The Judge Advocate General of the Air Force to determine which parts of the declarant's statement were truly self-inculpatory in view of *Williamson v. United States*, 512 U.S. 594 (1994). In *Williamson*, the Supreme Court held the hearsay exception for statements against interest "does not allow admission of non-self-inculpatory statements, even if they are made within a broader narrative that is generally self-inculpatory." On remand, the Air Force Court of Criminal Appeals found that parts of the declarant's statement were not self-inculpatory and were erroneously admitted. However, the Air Force court found the error harmless. The CAAF affirmed the decision of the Air Force court. United States v. Jacobs, 48 M.J. 208 (1998).

the Armed Forces (CAAF) held that declarations against penal interest fall within a firmly-rooted hearsay exception.[137] The CAAF's holding in *Jacobs* is vulnerable in light of *Lilly.* First, the statements at issue in *Jacobs* were made by an accomplice to police in a custodial interview. The statements fall within the third sub-category of statements against penal interest described by *Lilly.* Second, the CAAF's opinion in *Jacobs* contains no analysis. The court held statements against penal interest fall within a firmly-rooted hearsay exception based on the weight of authority.[138] The court did not evaluate the legislative and judicial experience with this category of hearsay to determine if the conditions surrounding the making of the statements "have proven over time 'to remove all temptation to falsehood, and to enforce as strict an adherence to the truth as would the obligation of an oath' and cross-examination at trial."[139] The CAAF based its decision on the fact that six circuit courts of appeals treated declarations against penal interest as a firmly-rooted hearsay exception and only two circuits did not.[140] One of the circuits that considered declarations against penal interest as a firmly-rooted hearsay exception was the 10th Circuit. The 10th Circuit no longer views statements against penal interest as firmly-rooted hearsay in view of *Lilly.*[141] To the extent a plurality opinion can overrule a prior case, *Lilly* probably overrules *Jacobs.* As *Gomez* demonstrates, the rationale for the court's holding in *Jacobs* is no longer valid.

Conclusion

The 1999 changes to the *MCM* create new ways to protect child victims and child witnesses from the trauma of testifying in court. Unfortunately, the recent changes to the *MCM* also create new dangers for violating the confrontation rights of a criminal defendant. The law is clear in the area of child sexual abuse cases. A military judge need only do what military judges have been doing for ten years: make sure the court's findings satisfy the requirements of *Maryland v. Craig*. In other contexts, the law is just beginning to evolve. A military judge who allows remote live testimony of a witness in a case not involving child sexual abuse must be sure to identify the important state interest served by the remote testimony. The judge must also make findings that the remote testimony is necessary to further the important state interest and assure the reliability of the remote testimony.

Trial counsel and defense counsel must recognize the Confrontation Clause issue that arises when the government offers hearsay against an accused soldier and the declarant does not testify at trial. Statements against penal interest are difficult because the setting in which they are made may make the difference when the defense challenges their admission. Trial counsel must be careful offering statements against penal interest in those cases in which the declarant made the statement to the police. Nevertheless, trial counsel should not over react to *Lilly v. Virginia.* Trial counsel should continue to offer statements against penal interest that are not made to government officials. In all cases, trial counsel must be prepared to demonstrate the reliability of out-of-court statements against penal interest from the circumstances surrounding the making of the statements. Defense counsel must be prepared to oppose these statements. Cross-examination "is beyond any doubt the greatest legal engine ever invented for the discovery of truth."[142] The defense should not lightly surrender the right of confrontation.

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137. *Jacobs*, 44. M.J. at 306.

138. *Id.*

139. Lilly v. Virginia, 527 U.S. 116, 128 (1999).

140. *Jacobs*, 44 M.J. at 306.

141. *Compare* United States v. Gomez, 191 F.3d 1214 (10th Cir. 1999) (holding statements against penal interest do not fall within a firmly-rooted hearsay exception) *with* Jennings v. Maynard, 946 F.2d 1502 (10th Cir. 1991) (holding statements against penal interest do fall within a firmly-rooted hearsay exception).

142. LARRY S. POZNER & ROGER J. DODD, CROSS-EXAMINATION: SCIENCE AND TECHNIQUES 2 (1993) (quoting 5 WIGMORE, EVIDENCE § 1367 (Chadborn Rev. 1794)).

New Developments in Sentencing: A Year of Fine Tuning

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The past year in sentencing has seen a lot of activity. The President signed an executive order changing the definition of aggravation evidence.[1] Congress changed the maximum authorized period of confinement that can be adjudged by a special court-martial.[2] The Court of Appeals for the Armed Forces (CAAF) decided over a dozen cases addressing sentencing issues. Despite all this activity however, the sentencing landscape has not dramatically changed. Some of the prominent terrain features have been given greater definition, Congress' action has set in motion changes yet to come, but this past year was one of fine-tuning and not overhauling. This article addresses the statutory changes and rule changes along with case law developments in sentencing over the last year, beginning with the statutory and rule changes.

Statutory and Rule Amendments

There were two major events this past year that affect the statutes and rules in the area of military sentencing. First, Congress amended Article 19 of the Uniform Code of Military Justice (UCMJ).[3] Second, the President signed Executive Order 13,140, which changed the definition of aggravation evidence under Rule for Courts-Martial (R.C.M.) 1001(b)(4).

On 5 October 1999, Congress amended Article 19 of the UCMJ by changing the maximum authorized period of confinement and forfeitures that a special court-martial could adjudge. Congress increased that period from a maximum of six months to one year.[4] Congress also stated that any non-bad conduct discharge special courts-martial where the authorized confinement or forfeitures could exceed six months would require a verbatim record of trial and a qualified and detailed defense counsel and military judge.[5] The change to Article 19 will affect only those cases where the charges are referred on or after 1 April 2000.

At first glance it would seem that the special courts-martial just got a new set of teeth, a set twice as large as the old ones. This, however, is not the case. Congress has authorized the President to increase the maximum punishment permissible at a special courts-martial but the President has not yet acted.[6] Under Article 19, Congress sets the maximum punishments permissible at a special court-martial, but the President may further limit the punishments.[7] Under R.C.M. 201(f)(2)(B), the President has limited the maximum period of confinement and forfeitures to six months. Until the President chooses to change R.C.M. 201(f)(2)(B), the tooth size of the special court-martial will remain the same.

The next major event affecting sentencing was the President signing Executive Order 13,140. Executive Order 13,140 amended the *Manual for Courts-Martial* (*MCM*), changing the definition of aggravation evidence under R.C.M. 1001(b)(4).[8] This new definition affects only those cases where charges were referred on or after 1 November 1999.[9] There have been two sentences added to the present definition of aggravation evidence.

The first comes directly from the discussion section of R.C.M. 1001(b)(4) and appears immediately after the first sentence of R.C.M. 1001(b)(4):

> Evidence in aggravation includes, but is not limited to, evidence of financial, social, psychological, and medical impact on or cost to

1. Exec. Order No. 13,140, 64 C.F.R. 55,115 (1999).

2. 10 U.S.C.S. § 819 (LEXIS 2000).

3. *Id.*

4. *Id.*

5. *Id.*

6. Information Paper, LTC Denise Lind, Office of The Judge Advocate General, subject: 1999 Amendments to UCMJ Article 19 (10 Nov. 1999) (on file with author).

7. 10 U.S.C.S. § 819.

8. Exec. Order No. 13,140, 64 C.F.R. 55,115 (1999).

9. *Id.* 64 C.F.R. at 55,120.

> any person or entity who was the victim of an offense committed by the accused and evidence of significant adverse impact on the mission, discipline, or efficiency of the command directly and immediately resulting from the accused's offense.[10]

The new analysis section to the *MCM* provides no explanation for the change, stating only that "R.C.M. 1001(b)(4) was amended by elevating to the Rule language that heretofore appeared in the Discussion to the Rule."[11] Although the new analysis to R.C.M. 1001(b)(4) does not explain why this change was made, the Preamble to the *MCM* may. According to the Discussion of Section 4 to the Preamble, the various discussions that accompany the R.C.M. and punitive articles are considered supplementary materials and thus "[d]o not create rights or responsibilities that are binding on any person, party, or entity . . . . Failure to comply with matter set forth in supplementary materials does not, of itself, constitute error."[12]

Before this change, the Discussion to R.C.M. 1001(b)(4) had no binding effect on judges. By elevating the Discussion to R.C.M. 1001(b)(4) to the Rule itself, the language of the former Discussion is now binding on the judge and all parties to the court-martial.

The next question to be answered is what is the practical impact? It is unlikely that many judges were ignoring the Discussion to R.C.M. 1001(b)(4). The Discussion merely elaborated, in a common sense manner, on the basic definition of aggravation evidence contained in R.C.M. 1001(b)(4): "any aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty."[13] If there were judges who made it a habit of ignoring the Discussion to R.C.M. 1001(b)(4), their days of doing that are over, at least for those crimes that were referred to trial on or after 1 November 1999.

The second new sentence in R.C.M. 1001(b)(4) is the following:

> In addition, evidence in aggravation may include evidence that the accused intentionally selected any victim or any property as the object of the offense because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person.[14]

This language expressly recognizes that when an accused commits a crime out of hate for a particular gender, race, or national origin, that motivation will be admissible as aggravation evidence. The new analysis section to the *MCM* provides a good explanation of why this sentence has been added to R.C.M. 1001(b)(4):

> The additional "hate crime" language was derived in part from section 3A1.1 of the Federal Sentencing Guidelines, in which hate crime motivation results in an upward adjustment in the level of offense for which the defendant is sentenced.[15]

Thus this additional sentence was added to try and keep pace with changes in federal sentencing.

Does this change anything? The answer is yes, but not as much as one would expect. The reason this amendment probably will not have a significant impact is that evidence of the motive of an accused to commit a crime was already admissible under R.C.M. 1001(b)(4). The pre-Executive Order 13,140 definition of aggravation allowed the trial counsel to introduce "any aggravating circumstance directly relating to or resulting from the offenses of which the accused has been found guilty."[16] A reasonable interpretation of R.C.M. 1001(b)(4) is that the motive of an accused to commit a crime directly relates to the crime. Apart from a common sense analysis of R.C.M. 1001(b)(4), there is a case on point.

United States v. Zimmerman[17] deals with the admissibility of an accused's motive, under R.C.M. 1001(b)(4), to commit a crime. In *Zimmerman*, the accused pled guilty to conspiracy and larceny of military property. The stolen military property included ammunition, flares, tear gas, artillery simulators, M-16 magazines, and various weapons. The accused admitted in a stipulation of fact that he and his co-conspirators "were motivated by an extremist philosophy and held white supremacist views."[18] One of the issues in the case was whether the military

10. *Id.* at 55,116.

11. *Id.* 64 C.F.R. at 55,121 (detailing changes to the Analysis accompanying the *Manual for Courts-Martial*).

12. MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. I, 1 (1998) [hereinafter MCM].

13. *Id.* R.C.M. 1001(b)(4).

14. Exec. Order No. 13,140, 64 C.F.R. at 55,116.

15. MCM, *supra* note 12, R.C.M. 1001(b)(4).

16. *Id.*

17. 43 M.J. 782 (Army Ct. Crim. App. 1996).

judge properly instructed the panel that the accused's motive to commit the crime was aggravation evidence. The court stated "Evidence that appellant was motivated by white supremacist views when he wrongfully disposed of stolen military munitions to what he believed was a white supremacist group constitutes aggravating circumstances that directly related to the offense."[19]

After considering *Zimmerman* and a common sense reading of the 1998 version of aggravation evidence, it seems that the new "hate crime" language in R.C.M. 1001(b)(4) is not going to have much impact. The new language is, however, of value. It demonstrates to the American public that the military condemns hate crimes just as much as the civilian world does. It also may benefit government counsel where, but for this new language, a judge would be tempted to keep out evidence of hate crime motivation under Military Rule of Evidence (MRE) 403.[20]

Although the new language under R.C.M. 1001(b)(4) has not dramatically changed the types of evidence the government will be introducing, it has provided a more specific definition of the types of evidence admissible under that rule. Similarly, just because Congress' change to Article 19 has no independent impact does not make it without significance. Congress' change to the statute is a shot across the bow, alerting military practitioners of a major change in the offing, provided the President chooses to act.

Court of Appeals for the Armed Forces Opinions

The CAAF was content to clarify some long standing rules of law, rather than creating new ones. The developments in case law will be presented in the order that they normally appear at trial: the government's case, the defense's case, argument, sentence credit, and sentence comparison.

Government's Case

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

The CAAF decided two cases in the area of evidence admissible under R.C.M. 1001(b)(2). Those cases were *United States v. Clemente*,[21] and *United States v. Gammons*.[22] *Clemente* deals with the admissibility of letters of reprimand, while *Gammons* deals with the admissibility of records of non-judicial punishment (NJP). Of the two cases, *Clemente* is the more significant, with a broader impact on the overall interpretation of R.C.M. 1001(b)(2).

The issue in *Clemente* was whether the judge abused his discretion by admitting two letters of reprimand into evidence over defense objection. The accused pled guilty to six specifications of attempted larceny, thirteen specifications of larceny, and one specification of larceny of the mail.[23] During the pre-sentencing phase the government introduced two letters of reprimand, both predating the trial by at least a year. The letters were apparently introduced in rebuttal to the defense adducing good character evidence.[24] One of the letters was for leaving three minor children unattended and the other was for a simple assault on his spouse.[25] The defense counsel objected to the evidence under MRE 403, but the judge ruled the probative value of the evidence was not substantially out weighed by its prejudicial impact.[26]

The CAAF applied a standard of review of "clear abuse of discretion"[27] and found the judge did not violate the standard. The court quickly reviewed the rules governing the admissibility of evidence under R.C.M. 1001, and more particularly R.C.M. 1001(b)(2). The CAAF reminded practitioners that the intended purpose of R.C.M. 1001 is "to permit presentation of much the same information to the court-martial as would be contained in a presentencing report [in the federal system], but [R.C.M. 1001] does so within the protections of an adversarial proceeding, to which rules of evidence apply."[28] The court went

18. *Id.* at 784.

19. *Id.* at 786.

20. MCM, *supra* note 12, MIL. R. EVID. 403.

21. 50 M.J. 36 (1999).

22. 51 M.J. 169 (1999).

23. *Clemente*, 50 M.J. at 36.

24. *Id.* at 37.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

on to also remind readers that to introduce a piece of evidence during sentencing, the evidence must fit within one of the types of permissible evidence the government is allowed to introduce, as detailed in R.C.M. 1001(b), and be relevant and reliable. After discussing this methodology, the court applied it to the letters of reprimand.

The CAAF noted that the defense did not allege that the letters of reprimand were improperly maintained in the accused's personnel file, or that the records were inaccurate or incomplete. The sole allegation by defense was that the reprimands were inadmissible under MRE 403. The court held that letters of reprimand directly rebutted the good character evidence presented by defense and any prejudicial impact from the letters was outweighed by their probative value.

An important part of the *Clemente* decision is the court's distinction between *Clemente* and a previous case with similar facts, *United States. v. Zakaria.*[29] In *Zakaria*, the accused was convicted of larceny. The government offered a letter of reprimand under R.C.M. 1001(b)(2) and the judge admitted it.[30] The reprimand was for indecent acts with children under sixteen. In *Zakaria*, the court held that the probative value of the letter of reprimand was substantially outweighed by its prejudicial effect. Besides apparent reliability problems with the letter of reprimand, the court stated that "it is difficult to imagine more damaging sentencing evidence to a soon-to-be sentenced thief than also branding him as a sexual deviant or molester of teenage girls."[31]

The *Clemente* court made several distinctions between its holding and that of the *Zakaria* court. First, the nature of the misconduct in the letters of reprimand was different. The misconduct in *Zakaria* was "explosive evidence of sexual perversion,"[32] while the evidence in *Clemente* was less severe. Second, in *Zakaria*, the defense contested the misconduct alleged in the letter of reprimand, while in *Clemente* the defense did not. By challenging the reliability of the information in the letter of reprimand, the defense in *Zakaria* successfully reduced the evidence's probative value.[33] Finally, the court looked at the punishments received by the accused in each case. In *Zakaria*, the accused was facing a maximum period of confinement of five years and he received four.[34] In *Clemente* the accused was facing a maximum period of confinement of ninety-five and a half years and received one year.[35] Although the court does not say it, the court appears to have concluded that the accused in *Clemente* must not have been prejudiced by his letters of reprimand because his sentence does not reflect prejudice.

Clemente is important for a variety of reasons. The case reminds practitioners of the origin of R.C.M. 1001 and provides a methodology for analyzing the admissibility of evidence under R.C.M. 1001(b)(2). It also provides greater definition to where the boundary lies for evidence under R.C.M. 1001(b)(2); *Zakaria* is out of bounds while *Clemente* is in bounds.

The next case dealing with evidence under R.C.M. 1001(b)(2) is *United States v. Gammons.*[36] In *Gammons*, the accused was convicted of using marijuana and of using and distributing LSD. During the judge alone sentencing, the government offered into evidence an Article 15 which was administered for the same underlying misconduct as one of the charged offenses.[37] The judge called the defense counsel's attention to the Article 15 and asked if he objected. The defense counsel did not object. The judge then asked if the defense planned to address the Article 15 in its case.[38] The defense counsel said he did. During the government's argument, trial counsel called the judge's attention to the fact that the accused had committed additional misconduct right after receiving an Article 15. The defense did not object and referred to the punishment that the accused had already received through his Article 15.[39] On appeal, the Coast Guard Court of Criminal Appeals affirmed the findings but ordered a rehearing on sentencing.[40]

29. 38 M.J. 280 (1993).

30. *Id.* at 285.

31. *Id.* at 283.

32. *Clemente*, 50 M.J. at 37.

33. *Zakaria*, 38 M.J. at 283.

34. *Id.* at 284.

35. *Clemente*, 50 M.J. at 37.

36. 51 M.J. 169 (1999).

37. *Id.* at 172.

38. *Id.* at 180.

39. *Id.*

40. *Id.* at 172.

The Coast Guard court also ordered that the Article 15 be expunged.[41]

After reading the facts of *Gammons*, practitioners may be left wondering how the Coast Guard court could have arrived at its holding. The accused's Article 15 was for wrongful use of marijuana. The *MCM* clearly states: "non-judicial punishment for an offense other than a minor offense . . . is not a bar to trial by court-martial for the same offense."[42] It also states: "Ordinarily, a minor offense is an offense which the maximum sentence imposable would not include a dishonorable discharge or confinement for more than one year."[43] Wrongful use of marijuana carries a maximum punishment of two years confinement and a dishonorable discharge.[44] Thus, the prosecution was not barred. The reason the Coast Guard court ordered a rehearing is not clear in the CAAF opinion, but it is clear after reading the full Coast Guard court opinion.[45]

The Coast Guard court decided *Gammons* in reaction to a Supreme Court decision, *Hudson v. United States*.[46] The Coast Guard court interpreted *Hudson* as undermining the basis of earlier military cases such as *United States v. Pierce*,[47] and *United States v. Fretwell*.[48] *Pierce* and *Fretwell* both concluded that trying a soldier at a court-martial for the same offense for which he received an Article 15, did not violate the Fifth Amendment's double jeopardy clause.[49] When the Coast Guard court interpreted *Hudson*, they concluded, "While there are valid arguments on both sides of this issue, it appears to us that the latest Supreme Court decisions support the conclusion that nonjudicial punishment falls squarely under the terms of the Fifth Amendment."[50]

The CAAF made two valuable announcements in *Gammons*. First it stated in clear terms that nonjudicial punishment does not fall under the terms of the Fifth Amendment's double jeopardy clause, thus overruling the Coast Guard court's ruling.[51] Second, the CAAF refined its description of the possible uses of a past Article 15 when the misconduct is the same as a present court-martial charge.

The CAAF recognized that the Coast Guard court was asking them to "overrule the line of cases from *Fretwell* to *Pierce* . . . and hold that Congress acted unconstitutionally in Article 15(f)."[52] The court concluded that *Hudson* did not provide an adequate foundation for the conclusion that proceedings under Article 15 were criminal proceedings within the meaning of the Fifth Amendment.[53]

Next, the CAAF discussed how the government's conduct in *Gammons* could be reconciled with *United States v. Pierce*. In *Gammons*, the trial counsel mentioned the accused's previous Article 15 during sentencing argument, "noting that [the] appellee committed further misconduct shortly after being punished under Article 15."[54] This act by trial counsel seems to run afoul of the broad language in *Pierce* that "the nonjudicial punishment may not be used for any purpose at trial."[55] The *Gammons* court qualified this broad pronouncement by saying, "The designation of the accused as the gatekeeper under Article 15(f) does not require us . . . to preclude the prosecution from making a fair comment on matters reasonably raised or implied by the defense references to the NJP."[56] The court also made it clear that just because the accused is the gatekeeper of nonjudicial punishment does not mean they can actively mislead the panel.

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41. *Id.* at 181.

42. MCM, *supra* note 12, pt. V, 1e.

43. *Id.*

44. *Id.* pt. IV, 57.

45. United States v. Gammons, 48 M.J. 762 (C.G. Ct. Crim. App. 1998).

46. 522 U.S. 93 (1997).

47. 27 M.J. 367 (C.M.A. 1989).

48. 29 C.M.R. 193 (1960).

49. *Pierce*, 27 M.J. at 368; *Fretwell*, 29 C.M.R. at 195.

50. *Gammons*, 48 M.J. at 764.

51. United States v. Gammons, 51 M.J. 169, 184 (1999).

52. *Id.* at 176.

53. *Id.*

54. *Id.* at 180.

55. United States v. Pierce, 27 M.J. 367, 369 (C.M.A. 1989).

> For example, if a service member punished under Article 15 for violating a general order subsequently violates a second order, and both matters are referred to trial by court-martial, the accused should not be permitted to assert with impunity that at the time he violated the second order, he had no prior disciplinary infractions.[57]

Although *Gammons* deals with a fairly rare event, the sentencing at a court-martial of an accused for an offense that they have already been punished for at Article 15, it is valuable. First, it removes any doubt about whether a previous Article 15 will bar a court-martial prosecution for the same offense, provided the offense is not "minor." Second, it qualifies and narrows the very broad language from *Pierce*.

Rehabilitative Potential Evidence

There were several cases decided this past year by the CAAF dealing with rehabilitative potential evidence under R.C.M. 1001(b)(5). This article discusses two such cases.

The first case is *United States v. Williams*.[58] In *Williams*, the accused was convicted consistent with his pleas of wrongful use of marijuana and breaking restriction.[59] During the government's sentencing case the accused's company commander testified. After the trial counsel laid the proper foundation for the company commander's opinion regarding the rehabilitative potential of the accused, the following exchange occurred:

> Q. Again Captain Brauer, based on your experience as a commander and supervisory experience, you stated that you do have an opinion as to whether the accused is capable of rehabilitation. And what is your answer to that?
> A. No.
> Q. Tell me why.
> A. We have tried. We have spent numerous hours counseling him. We have tried verbal counseling, letters of counseling, letters of reprimand, Article 15's, and they won't work. Base restriction didn't work. I just wanted to administratively discharge him. He wasn't able to conform to military life. He wasn't able to live up to the standard. And I just wanted to administratively discharge him. He could not stay out of trouble long enough so that we could finish up the disciplinary actions and discharge him.[60]

The defense did not object to the above testimony at trial. On appeal, however, the appellant claimed that the company commander's testimony violated the prohibition against witnesses recommending a punitive discharge established in *United States v. Ohrt*.[61] The appellant argued that the phrase: "I just wanted to administratively discharge him" was a euphemism for recommending a punitive discharge.[62] The court agreed with the defense contention that the company commander's phrase was a euphemism, but they went on to note that "not all violations of *Ohrt* and R.C.M. 1001(b)(5)(D) require sentence relief."[63] Because the defense counsel failed to object at trial, the appellate defense counsel would have to establish that plain error had occurred.[64] In order to establish plain error, the defense would have to demonstrate that the error in question materially prejudiced a substantial right. The court held that the error in this case did not, therefore no relief was warranted.[65] The reason Captain Brauer's comments did not materially prejudice the accused was because "the objectionable aspects of her testimony were implied and immersed within other adverse testimony from that commander which was admissible."[66]

Williams is noteworthy because it reinforces the validity of the euphemism rule and it provides yet another phrase to the list of euphemisms for a punitive discharge. Reinforcing the

56. *Gammons*, 51 M.J. at 180.

57. *Id.*

58. 50 M.J. 397 (1999).

59. *Id.* at 398.

60. *Id.* at 399.

61. 28 M.J. 301 (C.M.A. 1989).

62. *Williams*, 50 M.J. at 399.

63. *Id.* at 400.

64. *Id.*

65. *Id.*

66. *Id.*

euphemism rule was necessary for Army practitioners after *United States v. Yerich*.[67] In *Yerich*, the Army court discussed the application of the euphemism rule. It concluded that the euphemism rule was "difficult, if not impossible, to apply. To a large degree it is like beauty; it exists in the eye of the beholder, and . . . is dependent on the circumstantial context in which it occurred."[68] *Williams* reminds practitioners that euphemisms are not merely in the eye of the beholder, the euphemism rule can be applied by looking at the facts of the particular case and applying the law.

The next case in the area of rehabilitative potential evidence is *United States v. Armon*.[69] *Armon* can be a confusing case because it stands at the crossroads of two rules: R.C.M. 1001(b)(4) and R.C.M. 1001(b)(5). *Armon* highlights the importance of keeping in mind under what rule a particular piece of evidence is being offered.

In *Armon* the accused was convicted pursuant to his pleas of making false official statements and the unauthorized wearing of military accouterments.[70] The accused wore the Special Forces tab, a Special Forces combat patch, the Combat Infantryman's Badge, and the Combat Parachutist's Badge, without authorization.[71] The government called three witnesses in aggravation to testify about the impact of the accused's crime on them. Although the testimony offered by the government witnesses was offered under R.C.M. 1001(b)(4), it reads more like evidence offered under R.C.M. 1001(b)(5). For example, one of the witnesses called was Colonel Newman. Colonel Newman had commanded a ranger company during the invasion of Grenada and had earned the Combat Parachutist's Badge. During his testimony, Colonel Newman talked about his combat experience and the bond between combat veterans. Next he talked about the accused's crimes:

> Q: Sir is this the first soldier you've run into that's made this claim [to have done a combat jump in Grenada]?
> A: No.
> Q: So you've had an opportunity to form an opinion about the character of soldiers who lie about service in Grenada?
> A: Yes.
> Q: And what is that opinion?
> A: Poor.
> Q: Sir, when the accused came into your office that day and lied to you about combat in Grenada, did you form an opinion about his character?
> A: I know it was something less than outstanding . . . .
> Q: And finally sir, as a two time combat veteran, based upon what you've seen of the accused, if you were jumping into combat tomorrow, would you want him around?
> A: Nope.[72]

The argument on appeal was that the colonel's testimony violated R.C.M. 1001(b)(5)(C) and R.C.M. 1001(b)(5)(D). According to the CAAF, the colonel's comment that he had a poor opinion of the accused's character ran afoul of R.C.M. 1001(b)(5)(C) because it was based principally on the nature of the offense.[73] The court also found the colonel's comment that he would not want the accused around on a combat jump could have been an indirect way of saying he did not want the accused in his brigade, and so was in violation of R.C.M. 1001(b)(5)(D).[74] Although the CAAF agreed with defense appellate counsel that Colonel Newman's comments violated R.C.M. 1001(b)(5), it was quick to point out that Colonel Newman's testimony was offered under R.C.M. 1001(b)(4). According to the court, Colonel Newman's testimony was permissible under R.C.M. 1001(b)(4).

The defense appellate counsel objected to all three witnesses under R.C.M. 1001(b)(5) when each of the witnesses' testimony was offered under R.C.M. 1001(b)(4). The court stated that had the evidence of some of the witnesses been offered under R.C.M. 1001(b)(5) it would have been impermissible. If the evidence had been offered under R.C.M. 1001(b)(5) the appellee might have been entitled to some relief. Nonetheless, the court kept returning to the point that the evidence was offered under R.C.M. 1001(b)(4). This bears out the principle learning points from *Armon*, just because a piece of evidence would be impermissible under one subparagraph of R.C.M. 1001(b) does not mean that it cannot be admitted under a different subparagraph.

67. 47 M.J. 615 (Army Ct. Crim. App. 1997).

68. *Id.* at 619.

69. 51 M.J. 83 (1999).

70. *Id.* at 84.

71. *Id.*

72. *Id.* at 85.

73. *Id.* at 86.

74. *Id.* at 87.

Argument

In the area of sentencing arguments, there has been one major development. This past year the CAAF decided *United States v. Stargell*.[75] *Stargell* put a new and significant spin on the ability of counsel to discuss the effects of a punitive discharge on retirement benefits during sentencing argument.

Stargell deals with whether a trial counsel is allowed to argue during sentencing that the accused "will receive honorable retirement unless you give him a BCD [Bad-Conduct Discharge]."[76] The answer to this question is yes, under the right circumstances.

The accused in *Stargell* was a noncommissioned officer with nineteen and one-half years in service. He pled guilty to wrongful use and possession of marijuana.[77] The accused raised the issue of retirement benefits in his unsworn statement.[78] The government did not offer any evidence on retirement benefits or the likelihood of the accused being able to retire if not given a punitive discharge. During the government's sentencing argument, the trial counsel stated that the accused "will get an honorable retirement unless you give him a BCD."[79] The defense counsel did not object to the trial counsel's argument. During the defense's sentencing argument, the defense counsel stated that the accused was "not coasting into retirement."[80] The government counsel was granted rebuttal and again argued that if the panel did not separate the accused he would receive an honorable retirement.[81] During the government's rebuttal argument, the defense counsel objected that the trial counsel was improperly characterizing the panel's task. The defense argued that "[t]he punishment before the members is a bad-conduct discharge. There are other administrative possibilities."[82] The military judge overruled the defense objection but instructed the panel that their vote was not "to retain or separate the member but whether or not to give the accused a punitive discharge as a form of punishment."[83] Defense counsel did not object to the military judge's instruction nor did he ask for any additional instructions.[84]

The issues certified by the CAAF were whether the judge erred by not correcting the trial counsel's assertion that absent a punitive discharge the accused would get an honorable retirement, and whether the judge erred by overruling the defense's objection to trial counsel's argument. The court resolved both these issues in favor of the government, concluding that the trial counsel's argument was proper.

In concluding that the trial counsel's argument was proper, the court made two critical conclusions. First, that adequate evidence was present at trial to support the government argument that the accused would receive an honorable retirement if not given a punitive discharge. Second, that such an argument falls within the bounds of fair argument.[85]

The CAAF discussed how they arrived at both conclusions, but the focus of their discussion was on the first conclusion. The court linked together a series of well-established rules regarding argument to explain why the government should be allowed to argue that the accused would get an honorable retirement if not given a bad conduct discharge, despite the fact that the government did not present any evidence to support such an argument. The CAAF began by stating that "counsel [may] refer to evidence of record and such inferences as may be drawn therefrom."[86] Next, the court points out that "counsel may ask members to draw on ordinary human experience and matters concerning common knowledge in the military community . . . including knowledge about routine personnel actions."[87] The one piece of evidence presented by the government that according to the court, through inferential expansion, supported the

75. 49 M.J. 92 (1998).

76. *Id.* at 93.

77. *Id.* at 92.

78. *Id.* at 93.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* at 94.

86. *Id.*

87. *Id.*

trial counsel's argument in this case was the fact that the accused was at nineteen and one-half years service. The court explained that panel members who met the Article 25 selection criteria "could know as a matter of common knowledge . . . that a military member is eligible to retire at twenty years and that retirement is usually under honorable conditions."[88] The court concluded their discussion of this issue by ruling that it was a fair inference that if the accused did not get a punitive discharge he would receive an honorable retirement.[89]

Judge Sullivan and Judge Effron dissented from the majority opinion. Both judges wrote opinions attacking the majority's conclusion that the government's argument was a fair comment on the evidence. Judge Sullivan focused on the validity of the trial counsel's statement. According to Judge Sullivan, the trial counsel's comment was a distortion of the truth and misled the panel.[90] Judge Sullivan pointed out that if the accused did not receive a punitive discharge, he could still face an administrative discharge board. A separation board could administratively separate the accused before retirement or the Secretary of the Air Force could refuse to grant the accused an honorable retirement.[91]

Judge Effron's dissent took a different tack on the issue. Judge Effron argued that the trial counsel's comment regarding retirement was not proper because it went beyond the realm of fair inference and became "an unqualified assertion of legal consequences that would flow from the failure to impose a punitive discharge."[92]

Both dissents attacked the majority's conclusion that the trial counsel's argument was a fair inference drawn from the evidence and the common knowledge of the panel. Judge Sullivan attacked the accuracy of the trial counsel's argument and Judge Effron took issue with the form and force of the argument.[93] Although not specifically discussed, a third possible flaw is inferred by the dissents. The third flaw deals with the issue of what is within the common knowledge of the panel. Are the administrative consequences of the accused's court-martial conviction really within the common knowledge of the panel members? Certainly it is within the common knowledge of panel members that soldiers who serve twenty years of service and are eligible to retire, will likely receive an honorable discharge. This fact is common knowledge because it is witnessed regularly by servicemembers. Arguably it is not within the common knowledge of panel members that soldiers who are at nineteen and one-half years of service and are convicted of drug charges but not given a punitive discharge will receive an honorable retirement. These circumstances are rare. It is unlikely that many military attorneys, let alone the average panel member, could answer whether Sergeant Stargell could receive less than an honorable retirement after his court-martial, without first researching the question.

The holding in *Stargell* is significant. It allows trial counsel, under the right circumstances, to argue the possible consequences of not giving a punitive discharge to an accused who is near retirement eligibility. In *Stargell*, the CAAF seems to have said, that if the defense is permitted to argue about the benefits an accused will lose if given a punitive discharge, then the government can argue the benefits that the accused will receive if not given a punitive discharge.

Sentence Credit

This past year, the CAAF decided *United States v. Rock*.[94] *Rock* provides an excellent summation of how the various types of sentence credit are to be applied. In *Rock*, the accused pled guilty to AWOL, and drug possession, and distribution.[95] Prior to pleading guilty, the accused raised several motions, including a motion for pretrial punishment credit under Article 13. The judge awarded pretrial punishment credit of eight months based on a combination of the following facts: the accused was not allowed to train in his military occupation specialty; the accused was placed in a squad which did nothing but details all the time; and conditions were placed upon the accused's liberty.[96] The military judge sentenced the accused to sixty-one months of confinement, and then reduced the confinement by the amount of pretrial punishment credit he had already awarded, thus reducing the accused's confinement time to fifty-three months.[97] The accused had a pretrial agreement in which the convening authority had agreed to disapprove any confinement in excess of thirty-six months.[98] Because the

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* at 95.

92. *Id.* at 97.

93. *Id.* at 94-99

94. 52 M.J. 154 (1999).

95. *Id.* at 155.

96. *Id.*

accused's approved term of confinement was thirty-six months, the military judge's award of pretrial punishment credit had no actual effect on the accused's term of confinement.

On appeal, the accused alleged that the military judge improperly assessed the pretrial punishment credit. The accused argued that the pretrial punishment credit should have been subtracted from the sentence which the convening authority approved and not from the adjudged sentence. According to the accused, his term of confinement should have been twenty-eight months not thirty-six.

The CAAF affirmed the Army court's conclusion that the military judge properly assessed the sentence credit in this case. The CAAF briefly discussed all the different types of pretrial confinement and punishment credit that exist, including *Allen* credit, R.C.M. 305(k) credit, *Mason* credit, *Pierce* credit, and *Suzuki* credit.[99] After discussing the different types of credits, the court pointed out that none of the cases that established those credits addressed "the point from which the sentence is to be reduced by the credit."[100] The CAAF, however, concluded that the answer to this question was simple–"credit against confinement awarded by a military judge always applies against the sentence adjudged-unless the pretrial agreement itself dictates otherwise."[101] This statement, standing alone, is misleading. Without further modification readers are left with the impression that confinement credit for actual pretrial confinement could, under the right circumstances, have no effect on the approved term of confinement.[102] The court later clarified their intent by reminding practitioners that, according to Department of Defense Instruction 1325.4, actual pretrial confinement or its equivalent is always credited against the approved sentence. Thus, "*Allen* credit" and "*Mason* credit" will always be credited against the approved sentence. That leaves "*Pierce* credit" (under certain circumstances), Article 13 credit, and "*Suzuki* credit" to be credited against the adjudged sentence.

Sentence Comparison

The CAAF decided two cases this past year in the area of sentence comparison. Those cases were *United States v. Lacy*[103] and *United States v. Fee*.[104] Both cases reinforce the high standard for gaining relief due to sentence disparity. Both cases also discuss the high standard for gaining relief from the service court,[105] and the high standard for gaining relief from the CAAF when the accused claims the service court erred.[106]

The accused in *Lacy* pled guilty to having intercourse with an underage girl in the presence of others. The accused and two other Marines were tried for the above offense. All three Marines were tried by separate general courts-martial, all pled guilty, and all were sentenced by the same military judge.[107] The accused was sentenced to eighteen months of confinement; his co-actors were sentenced to eight months and fifteen months.[108] Appellate defense counsel contended that the Navy-

97. *Id.* at 156.

98. *Id.* at 155.

99. *Id.* at 156. The CAAF discusses all the different types of pretrial confinement and punishment credits that exist in the military beginning with *United States v. Allen* (17 M.J. 126 (C.M.A. 1984)). In *Allen* the Court of Military Appeals concluded that Department of Defense Instruction 1325.4 required that when an accused was subject to legal pretrial confinement he should receive day for day credit for that pretrial confinement against the confinement he ultimately serve. Next the CAAF discusses credit for illegal pretrial confinement as authorized under *Manual For Courts-Martial* R.C.M. 305(k) and R.C.M. 1107(f)(4)(F). The court goes on to discuss credit for pretrial restriction which is tantamount to confinement or "*Mason* credit" (United States v. Mason, 19 M.J. 274 (C.M.A. 1985)). Next the CAAF discusses "*Pierce* credit" for punishments previously received at non-judicial punishment (United States v. Pierce, 27 M.J. 367 (C.M.A. 1989)). The court concludes its review of the different types of pretrial confinement or punishment credit by discussing "*Suzuki* credit" through which the judge can award greater than day for day confinement credit where the government has engaged in illegal pretrial punishment (United States v. Suzuki, 14 M.J. 491 (C.M.A. 1983)).

100. *Rock*, 52 M.J. at 156.

101. *Id.*

102. If the CAAF's announcement was taken without modification, actual pretrial confinement served could result in no reduction to the approved term of confinement. Consider the accused in *Rock*, assume that his punishment credit was for legal pretrial confinement (*Allen* credit) instead of illegal pretrial punishment. Rock's adjudged sentence was sixty-one months, after subtracting the confinement credit his adjudged term of confinement would be fifty-three months. The judge would then read the quantum portion of the pretrial agreement and approve only so much of the punishment as calls for thirty-six months of confinement. Under this interpretation the accused would get no substantive benefit from the judge accounting for actual pretrial confinement.

103. 50 M.J. 286 (1999).

104. 50 M.J. 290 (1999).

105. According to *Lacy* and *Fee*, to gain relief from a service court on the basis of sentence disparity the accused must establish three facts: one, that the accused case is closely related to some other case; two, that the sentence of the accused and that other case are highly disparate; and three, there is no justification for the disparity.

106. The CAAF will over turn the service court's decision if the accused establishes that the service court has abused its discretion or there has been a miscarriage of justice.

107. *Lacy*, at 287.

Marine Corps Court of Criminal Appeal erred by not revising the confinement that the accused had to serve, given the co-accused's sentences.

The standard of review that the CAAF had to apply was whether the lower court had abused its discretion or there had been a miscarriage of justice in the case. In answering this question, the court limited its review of the Navy court's decision to three questions:

> three questions of law: (1) whether the cases are "closely related". . . ; (2) whether the cases resulted in "highly disparate" sentences; and (3) if the requested relief is not granted in a closely related case involving highly disparate sentences, whether there is a rational basis for the differences between or among the cases.[109]

The CAAF found that the accused's case was "closely related" to the cases of the co-accused, because they committed the same crime, with the same victim, and at essentially the same time. The court did not find, however, that the resulting sentences were highly disparate. The CAAF pointed out that in determining whether sentences are highly disparate, the starting point of the analysis might not be what sentences were given but what could have been given: "The test in such a case is not limited to a narrow comparison of the relative numerical values of the sentences at issue, but also may include consideration of the disparity in relation to the potential maximum punishment."[110] In the accused's case, he and his co-accused could have received twenty-seven years of confinement based on their guilty pleas alone. Given the relatively short term of confinement that the accused and his co-accused received, the court concluded that the accused had not demonstrated that the sentences were highly disparate.[111] The court never ruled on the third question in this case because the accused had failed to establish the sentences were highly disparate.

The second case this term where the CAAF addressed sentence comparison was *United States v. Fee*.[112] In *Fee* the accused and her husband were both convicted of possession and use of marijuana, and possession, use, and distribution of LSD.[113] The accused was also convicted of distribution of marijuana. The periods of time over which the accused committed her crimes were greater than those of her husband. Additionally, the accused pled guilty and cooperated in the contested case against her husband. The accused's sentence, as approved, was three years of unsuspended confinement, three years of suspended confinement, and a dishonorable discharge.[114] Her husband received fifteen months confinement and a bad conduct discharge. On appeal, the accused argued that the service court erred by not reducing her sentence.

The CAAF reviewed the service court's decision to determine if there had been an abuse of discretion or miscarriage of justice. In determining these issues, the court again had to answer three questions: (1) was the accused's case and that of her husband closely related; (2) were the sentences highly disparate; and (3) if the cases were closely related and the sentences highly disparate, was there a justification for the disparate sentences.[115] The service court concluded that the cases were closely related. The CAAF accepted that conclusion and moved on to the question of whether the sentences were highly disparate. The service court concluded that the sentences were not highly disparate, but if they were, there were factors to justify the disparity. The service court concluded that the disparity in the accused's sentence and that of her husband was justified because they were convicted of different offenses and the accused had committed some of the same offenses as her husband over a longer period of time. The CAAF never decided whether the sentences were highly disparate. Instead, they concluded that, because the service court provided reasons that justified a disparity in the sentences of the accused and her husband, there had been no abuse of discretion or miscarriage of justice.

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108. *Id.*

109. *Id.* at 288.

110. *Id.* at 289.

111. *Id.*

112. 50 M.J. 290 (1999).

113. *Id.* at 291.

114. *Id.*

115. *Id.*

Conclusion

The impact of this year's new developments in sentencing are subtle, yet significant. The immediate impact of Congress' statutory changes may be imperceptible, but the potential future impact could be great. If the President chooses to change R.C.M. 201, the changes to Article 19 could have a significant impact on the way criminal cases are processed in the military. The regulatory changes and new cases provide greater detail on well-established sentencing rules. Several cases, such as *Clemente*, *Gammons*, *Williams*, and *Rock*, do an excellent job of explaining the history and present state of the law on particular issues in sentencing. This was a year of fine-tuning, there were no major changes but some well-established rules received greater refinement and definition.

New Developments in Posttrial: Once More Unto The Breach, Dear Friends, Once More![1]

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Introduction

This past year the Court of Appeals for the Armed Forces (CAAF) once again took on the issue of posttrial errors. Like the English forces in Henry V, trying to take the town of Harfleur, the CAAF makes another valiant assault upon the fortress of posttrial error. Over the past three years posttrial errors have taken up more and more of the CAAF's time.[2] The CAAF has made numerous attempts to stem the tide of error, all to no avail. In *United States v. Cook*,[3] the CAAF supported the Air Force Court of Criminal Appeals decision to correct a posttrial error by fashioning their own relief, rather than returning the case to the convening authority. In *United States v. Chatman*,[4] the court reversed its long standing rule of presumptive prejudice when new matter is interjected into the addendum, and required appellate defense counsel to demonstrate prejudice. In *United States v. Wheelus*,[5] the CAAF expanded the *Chatman* decision to any posttrial errors, requiring appellate defense counsel who allege error to demonstrate prejudice. In each of the above decisions, the CAAF's frustration with posttrial errors was evidenced by how the court chastised the staff judge advocates (SJAs) involved and the court's bemoaning the continuing problems with posttrial processing.

The posttrial cases this past year have elevated the CAAF's frustration to new heights. This frustration is manifested in the majority opinion written by Judge Cox in *United States v. Johnston*,[6] "All this court can do to ensure that the law is being followed and that military members are not being prejudiced is to send these cases back for someone *to get them right*."[7] The emphasis in the above quote is part of the published opinion. Judge Cox also wrote that it was the court's hope that the judge advocate generals of the services are taking note of this "sloppy staff work and inattention to detail . . . [and] holding those responsible accountable for their actions or lack thereof."[8] Such strong language demonstrates the CAAFs resolve to do whatever is necessary to end the posttrial errors.

Besides expressing frustration in its opinions, the CAAF has alluded to a new solution to the problem of posttrial errors. The CAAF has also decided a variety of cases effecting a wide range of posttrial issues. This article begins by discussing what appears to be a new solution to the problem of errors in the posttrial review process. Next the article discusses cases affecting SJA posttrial recommendations (PTR), posttrial modifications of pretrial agreements, posttrial ineffective assistance of counsel, and errors in the action.

A New Solution to an Old Problem

The CAAF has battled posttrial error for years to no avail. What appears to be most frustrating to the court is the nature of the errors being committed. The errors are often gross and obvious; they are "reflective of defective staff work"[9] and a lack of attention to detail. This year the CAAF addressed the problem of sloppy posttrial processing in three cases and appears to propose a new solution to this old problem. In *United States v. Lee*,[10] *United States v. Finster*,[11] and *United States v. Johnston*,[12] the CAAF focuses on posttrial error which is reflective of

1. WILLIAM SHAKESPEARE, HENRY V, act 3, sc. 1.

2. United States v. Wheelus, 49 M.J. 283, 286 (1998); United States v. Johnson-Saunders, 48 M.J. 74, 76 (1998); United States v. Cook, 46 M.J. 37, 40 (1997).

3. 46 M.J. at 37.

4. 46 M.J. 321 (1997).

5. 49 M.J. at 283.

6. 51 M.J. 227 (1999).

7. *Id.* at 230.

8. *Id.*

9. United States v. Lee, 50 M.J. 296, 298 (1999).

10. *Id*. at 296.

incomplete or defective staff work. Although each case deals with distinct issues,[13] all three contained the same statement that when records of trial come to the appellate courts with "defective staff work . . . they simply are not ready for review."[14] Judge Cox, writing for the majority in *Lee* states:

> Quite frankly, records that come to the Courts of Criminal Appeals with defective staff work are simply not ready for review. When such errors are brought to our attention or to the attention of the Courts of Criminal Appeals, the record should be promptly returned to the convening authority for the preparation of a new SJA recommendation and action.[15]

All three cases state or imply that when records come to the appellate court with defective staff work the courts do not have to examine them for prejudice. The appellate courts can summarily return the records, directing convening authorities and SJAs to fix the problems. It is important to examine each of these three cases to understand just what the CAAF considers to be defective staff work, and how far the court has gone in creating this new remedy.

The first case in which the CAAF discusses a posttrial defect so substantial that it renders the record not ready of review was *United States v. Lee.*[16] In *Lee*, the accused pled guilty to multiple specifications of carnal knowledge, consensual sodomy, and indecent acts–all committed against a twelve-year old. The accused was sentenced to a dishonorable discharge, eighteen years confinement, total forfeitures, and reduction to the pay grade of E-1.[17] After announcing the sentence, the military judge recommended the convening authority grant clemency by deferring part of the adjudged and automatic forfeitures. The judge recommended the convening authority set up an allotment so that the accused could pay his child support obligations for six months.[18] The SJA failed to mention the recommendation in his PTR or addendum and the defense made no mention of it in its submissions.[19]

The CAAF quickly concluded that there was error. The SJA is required, in accordance with Rule for Courts-Martial (R.C.M.) 1106(d)(3)(B), to advise the convening authority of recommendations for clemency from the sentencing authority.[20] The court also found that the error was prejudicial and the appellant had demonstrated what he should have been done to correct the error.[21] The court could have ended its decision there, but it did not. The court goes on to write:

> This must be said. Errors in posttrial processing reflect defective staff work. Such errors are fundamentally different from the errors resulting from the intense, dynamic atmosphere of a trial. We do not accept the notion that commanders are well served by staff work that is incomplete or inaccurate. . . . Quite frankly, records that come to the Courts of Criminal Appeals with defective staff work are simply not ready for review.[22]

The court applied the *Wheelus* standard,[23] but went on to write that the record was not ready for review in the first place.

When *Lee* was first published the court's comments about posttrial error and defective staff work appeared to be just more venting on the part of the CAAF. This impression was perpetuated by the fact that the defective staff work language appears

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11. 51 M.J. 185 (1999).

12. 51 M.J. at 227.

13. *Lee* and *Finster* dealt with errors in the SJA's post trial recommendation (PTR), while *Johnston* dealt with the failure to detail a defense counsel for posttrial matters and failure to serve the SJA PTR.

14. *Johnston*, 51 M.J. at 229; *Finster*, 51 M.J. at 189; *Lee*, 50 M.J. at 298.

15. *Lee*, 50 M.J. at 298.

16. *Id.*

17. *Id.* at 297.

18. *Id.*

19. *Id.*

20. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1106(d)(3)(B) (1998) [hereinafter MCM].

21. *Id.* at 298.

22. *Id.*

23. United States v. Wheelus, 49 M.J. 283 (1998).

in the section of the majority's opinion which was written in rebuttal to the dissent. Now that the court has repeatedly referred to the defective staff work language in *Lee*, it appears it was more than just venting and a rebuttal to the dissent.

The next case to discuss this new approach to posttrial error was *United States v. Finster*.[24] In *Finster*, the accused pled guilty to a variety of property based crimes, and was sentenced to a bad conduct discharge, confinement and forfeitures for three months, and reduction to the pay grade of E-1. Prior to taking action the convening authority failed to obtain the recommendation of his staff judge advocate or legal officer, as required by R.C.M. 1106(a) and R.C.M. 1107(b)(3)(A)(ii). Instead the convening authority received his posttrial recommendation from a Machinist Mate Chief Petty Officer.

The government conceded that an unqualified individual prepared the recommendation. The government argued, however, that the accused had waived the error by not objecting to the posttrial recommendation. The Navy-Marine Corps Court of Criminal Appeals reviewed the case and concluded there was plain error. The government appealed the ruling, and argued that the Navy-Marine Court of Criminal Appeals had erred by finding plain error where no prejudice had been demonstrated. The CAAF did not agree.

In addressing the issue of prejudicial impact, the CAAF concluded, "the prejudicial impact of the error was manifest"[25] because the error "seriously affect[ed] the fairness, integrity and public reputation of the proceedings."[26] Just as in *Lee*, the court could have concluded its discussion after finding that the *Wheelus* criteria had been met, but the court went further. Judge Effron writing for the majority added: "The decision of the Court of Criminal Appeals is consistent with the position we articulated in *United States v. Lee* . . . where we noted: 'Errors in posttrial reflect defective staff work. . . . Records that come to the Courts of Criminal Appeals with defective staff work are simply not ready for review."[27]

In *Finster*, what had previously looked like dicta in *Lee* now takes on more of the appearance of a rule of law. The court in *Finster* seemed to be stating that the Navy-Marine Corps Court of Criminal Appeals could have relied on the *Lee* decision alone, and returned the record due to "defective staff work" without doing a *Wheelus* analysis. Of course this is not conclusive because the court did a *Wheelus* analysis first, and then discussed its holding in *Lee*.

The third case this year to discuss the ramifications of defective staff work in the posttrial process is *United States v. Johnston*.[28] *Johnston* is fitting to end the discussion of posttrial errors which are reflective of defective staff work because it is replete with posttrial processing errors. The accused in *Johnston* pled guilty to unauthorized absence, and wrongful introduction and distribution of marijuana.[29] The accused was sentenced to three months confinement, forfeiture of $550.00 per month for three months, and a bad conduct discharge. The first posttrial recommendation and action in this case were undated, the action sought to suspend the confinement in excess of sixty days but failed to state the period for which the suspension was supposed to run.[30] In February 1995, the appellate court ordered that a new PTR and action be completed. The new PTR and action were not prepared until August 1997. The new PTR was served on the accused's former military defense counsel. The accused's defense counsel had left active duty in the interim between 1995 and 1997, and was in civilian practice when the second PTR was served on him. The former defense counsel for the accused made no effort to contact the accused, and the accused was not served with a copy of the new PTR until after action had been taken. After finding out about the new action in his case, the appellant told his appellate defense counsel that he could have sent clemency matters.

The Navy-Marine Corps Court of Criminal Appeals reviewed the case and affirmed the findings and sentence. The court ruled that the accused and his former military defense counsel still had an attorney-client relationship at the time the second PTR was served on the defense counsel.[31] The court went on to conclude that the accused was represented by presumptively adequate counsel throughout the posttrial process.

The CAAF disagreed with the lower court, and ruled that the accused was not represented by counsel at a "critical point in the criminal proceeding against him, as is required by R.C.M. 1106(f)(2)."[32] The court found that the convening authority's failure to detail a substitute counsel had prejudiced the accused by depriving him of his best opportunity for sentence relief,

24. 51 M.J. 185 (1999).

25. *Id.* at 188.

26. *Id.*

27. *Id.* at 189.

28. 51 M.J. 227 (1999).

29. *Id.*

30. *Id.* at 228.

31. *Id.*

"[t]hus the appellant suffered harm prejudicial to a substantial right."[33]

After concluding that a new PTR and action were required in accordance with *Wheelus*, the court went on to restate its position from *Lee*: "when records of trial come to the Courts of Criminal Appeals with defective staff work, as was the case here, they simply are not ready for review."[34] The court also explicitly states that "When such an error [failure to serve detailed or substitute counsel with the SJA recommendation] is brought to the attention of the Courts of Criminal Appeals, that court should promptly return the record of trial"[35] Next, the court makes it clear that they envision records of trial being returned before a full appellate review is done. The court advises that the appellate courts to "return the record of trial to the convening authority before appellate counsel and the appellate courts expend any further effort on reviewing other aspects of the case that may be affected by a proper recommendation and action by the convening authority."[36]

The *Johnston* decision takes a decidedly more forceful tone than *Lee* or *Finster* regarding how the services' appellate courts should address defective staff work posttrial error. The CAAF expressly tells the Navy-Marine Corps Court of Criminal Appeals that they should have sent this record of trial back for a new action and PTR when the error was brought to its attention. Of course the force of the CAAF's directive to the Navy-Marine Corps Court of Criminal Appeals was undercut by the use of two independent reasons for setting aside the lower court's holding. Because the CAAF found material prejudicial to a substantial right of the accused, in addition to its conclusion that the record was not ready for review due to defective staff work, it is still unclear whether defective staff work alone is enough to turn a record of trial back.

With each new decision where the CAAF addressed defective staff work, which may render a record of trial not ready for review, the court has grown bolder. When the court first introduced this idea in *Lee*, it appeared to be little more than the court expressing its frustration and responding to a dissent. Next in *Finster*, the court affirmed the Navy-Marine Corps Court of Criminal Appeals' decision to return a record of trial based on material prejudice, but the CAAF also stated that the lower court's opinion was "consistent with the position we articulated in *United States v. Lee*."[37] The *Finster* decision made it clear that the court was not merely expressing frustration in *Lee*, but it was still not clear where the court was going. After *Johnston* it is clearer. The court appears to be setting up another method by which appellate courts can dispose of posttrial error. In those cases where there is posttrial error which is reflective of defective staff work, the CAAF and the services' appellate courts can return the record for correction without a finding of prejudice and without conducting a full appellate review. This appears to be where the CAAF is going but they are not there yet. The court has yet to rely on defective staff work in the posttrial process as the sole basis for returning a record of trial. The CAAF is announcing this new method much like how a swimmer enters a cold ocean–gradually. With *Lee*, *Finster*, and *Johnston* behind it, the CAAF appears to be waist deep in the water. The question, however, still remains–will they take the plunge?

From the Systemic to the Specific

The *Lee*, *Finster*, and *Johnston* decisions were directed at correcting posttrial errors systemically. The CAAF also decided several cases this year addressing specific posttrial issues. The remainder of this article discusses those cases, and is divided into four parts. The first part discusses errors in the posttrial recommendation. The second part deals with the rarely discussed issue of post-conviction modification of a pretrial agreement. The third part addresses posttrial ineffective assistance of counsel. The fourth part discusses errors in the action.

Posttrial Recommendation: Authors in Search of Anonymity.

It has been said, "the worst thing you can do to an author is to be silent as to his work . . . [authors] would rather be attacked than unnoticed."[38] One exception to this rule is the SJA recommendation. Nothing would make the author of the SJA PTR happier than to go completely unnoticed by appellate courts. Unfortunately, SJA PTRs often do get noticed, and attacked. The errors in the PTR which draw attack range from failure to include clemency recommendations, to misidentifying the charges the accused was found guilty of, to improper authorship. This past year the CAAF took up five cases dealing with

32. *Id.* at 229.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. United States v. Finster, 51 M.J. 185, 188 (1999).

38. JOHN BARTLETT, FAMILIAR QUOTATIONS 432b (14th ed. 1968).

error in the SJA recommendation. Two of the cases dealt with authorship of the SJA PTR: *United States v. Finster*, and *United States v. Hensley*. Two cases, *United States v. Magnan* and *United States v. Lee*, dealt with the failure to mention a clemency recommendation from the sentencing authority and the effect of waiver. The last case, *United States v. Johnston*, dealt with posttrial representation of counsel and failure to serve the PTR on the accused and detailed counsel. Three of the five cases have already been discussed, *Lee*, *Finster*, and *Johnston*. As discussed above, the CAAF announced two, independent bases for its holdings in *Lee*, *Finster* and *Johnston*. The first section of this article explained the new, more unconventional bases. This section examines the traditional analysis that the court applied.

Authorship

Who should author the posttrial recommendation is usually a simple question to answer. The staff judge advocate should author the recommendation.[39] The times when this question becomes difficult to answer is when ships are at sea, units are deployed, or SJAs are disqualified. This year the court decided two cases dealing with who can author the SJA PTR. In both cases the author was not the SJA. In one case an enlisted legal clerk was the author and in another case a non-lawyer legal officer was the author. In the first case the court ruled a new SJA PTR and action was required, in the second the court ruled it was not.

The first case is *United States v. Finster*. The facts of *Finster* have already been summarized. There are two facts in this case which are particularly important: (1) the SJA PTR was prepared by a Machinist Mate Chief Petty Officer, and (2) the accused submitted clemency matters. On appeal, the government conceded that there was error but claimed it was waived and did not rise to the level of plain error. The court did not discuss whether the accused had waived the error but went directly to the issue of whether there was plain error. The CAAF found that there was.

The court concluded that there was plain error because the individual writing the SJA PTR clearly did not meet the requirements of Article 60 of the Uniform Code of Military Justice (UCMJ). Article 60 requires the individual writing the posttrial recommendation be the legal officer or staff judge advocate of the convening authority.[40] Next, the court examined whether the error materially prejudiced a substantial right of the accused. The CAAF found that the error did, stating "the convening authority's reliance on a recommendation from an unqualified person materially prejudiced the right of the accused to have his submission considered by a qualified SJA or legal officer prior to the convening authority's action."[41] The court also agreed with the appellate court that the "error seriously affects the fairness, integrity, and public reputation of the proceedings."[42]

The most significant aspect of the CAAF's plain error analysis in *Finster* is how it handled the issue of prejudice. The court concluded that "the prejudicial impact of the error was manifest."[43] In effect the court stated that, under the facts of this case, the error was per se prejudicial.

The second case dealing with the authorship of the posttrial recommendation is *United States v. Hensley*.[44] The *Hensley* opinion modifies *Finster* by clarifying what the accused has a right to when it comes to the posttrial recommendation. *Hensley* provides practitioners with a better idea of the outer limits of *Finster*.

The accused in *Hensley* pled guilty to larceny and attempted larceny, and was sentenced to a bad conduct discharge, reduction to the pay grade of E-1, and confinement and forfeitures for three months.[45] The issue on appeal was whether it was plain error for an individual who was neither the SJA nor the legal officer for the convening authority to prepare the posttrial recommendation. It is important to the discussion of this case to note that the Navy, Marine Corps, and Coast Guard are authorized under Article 60(d) of the UCMJ to use non-lawyer legal officers for the posttrial recommendation. Article 1(12) describes a legal officer as "any commissioned officer of the Navy, Marine Corps, or Coast Guard designated to perform legal duties."[46] In *Hensley* the lieutenant who prepared the posttrial recommendation was not a lawyer and not the legal officer for the accused's convening authority. He was, however, a legal officer for the Command Services Department Head, Trial Service Office West, in San Diego, California. The defense counsel did not object to the substituted author of the

39. MCM, *supra* note 20, R.C.M. 1106.

40. UCMJ art. 60 (LEXIS 2000).

41. United States v. Finster, 51 M.J. 185, 188 (1999).

42. *Id.*

43. *Id.*

44. 52 M.J. 391 (2000).

45. *Id.*

46. UCMJ art. 1(12) (LEXIS 2000); MCM, *supra* note 20, A 2-1.

posttrial recommendation. The record of trial does not reflect why the ship's legal officer did not prepare the posttrial recommendation, nor does it indicate whether the convening authority was included in the decision.

The central issue in *Hensley* was whether the substitution of a qualified officer to author the posttrial recommendation without having the convening authority appoint the substitution created plain error? The court concluded it did not.

The analysis in this case began with the government conceding that there was error. The error in this case was that the convening authority failed to get a posttrial recommendation from his SJA or legal officer, and failed to request designation of another SJA or legal officer for the preparation of the posttrial recommendation. The court found the error was obvious because the lieutenant who prepared the posttrial recommendation clearly was not the convening authority's legal officer. Next the court looked to whether this error materially prejudiced a substantial right. The court recognized that, according to Article 60(d) and *Finster*, the accused has a "right to a recommendation prepared by a qualified officer."[47] The court goes on to write, "Article 60(d) does not, however, give an accused a right to a recommendation from a specific individual."[48] This conclusion is supported by R.C.M. 1106(c)(1), which gives the convening authority the option to request assignment of a different SJA or legal officer.[49] Because the lieutenant who prepared the SJA PTR was a qualified legal officer, albeit not an attorney and not the legal officer for the convening authority, the court held that the accused's material rights had not been prejudiced.[50]

There are two spirited dissents in this case, one written by Judge Sullivan and another from Judge Effron. Both dissents point out how remarkably similar the present case is to *Finster*, and both questioned how the majority arrived at a different conclusion. Judge Effron's dissent was especially vigorous, focusing on the importance of the convening authority getting the recommendation of his principle legal advisor.

Finster and *Hensley* fit well with one another. *Finster* identifies the right of the accused to have his matter considered by a qualified officer; *Hensle*y makes it clear what the CAAF considers to be a qualified officer.

Clemency Recommendation

According to R.C.M. 1106(d), the posttrial recommendation must include six types of information. One of those six types of information is any recommendation for clemency from the sentencing authority, made at the time the sentence is announced.[51] Last year the court decided two cases which addressed the issue of what relief is appropriate when the PTR does not contain the clemency recommendation of the sentencing authority. The two cases were *United States v. Lee* and *United States v. Magnan*.[52]

The facts of *United States v. Lee* have already been summarized. The critical facts in this case were that the military judge provided a clemency recommendation to the convening authority regarding the accused's forfeitures and the SJA failed to mention it in the posttrial recommendation.[53] Also important to understanding *Lee* is how the appellate court disposed of the case. It concluded that the judge's clemency recommendation went directly and solely to the issue of automatic forfeitures under Article 58b.[54] Since the accused's crimes all predated Article 58b the automatic forfeitures did not apply to the accused's case. Thus, the failure to mention the judge's recommendation, although error, did not substantially prejudice the appellant.

The CAAF disagreed. It felt the lower court took too narrow a view of what the judge was trying to accomplish in her recommendation. According to the CAAF, the judge "was seeking to ensure continued financial support for the appellant's minor child."[55] The fact that the judge incorrectly thought that automatic forfeitures would apply was irrelevant to the purpose of the recommendation.[56]

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47. *Hensley*, 52 M.J. at 391.

48. *Id.*

49. MCM, *supra* note 20, R.C.M. 1106(c)(1).

50. *Hensley*, 52 M.J. at 391.

51. MCM, *supra* note 20, R.C.M. 1106(d)(B).

52. 52 M.J. 56 (1999).

53. United States v. Lee, 50 M.J. 296, 297 (1999).

54. *Id.*

55. *Id.*

56. *Id.*

The majority in *Lee* reached its holding of prejudicial error quickly and then directed its attention to the dissent. In fact, the majority wrote nearly as much in response to the dissent as it did in reaching its conclusion of prejudicial error. The dissent from Judge Crawford can be summed this way: there was no prejudicial error in this case because there was no way, even with the clemency recommendation, that the convening authority would grant clemency. The accused pled guilty to carnal knowledge, consensual sodomy, and indecent acts with a twelve-year-old child. He was sentenced to eighteen years confinement, total forfeiture, reduction to the pay grade of E-1, and a dishonorable discharge; the confinement was reduced to fifteen years pursuant to a pretrial agreement. The reason the judge recommended clemency was so the accused could provide support to a dependent child. Since waiver was not an option, the convening authority could not direct where the disapproved or deferred forfeitures would go. The convening authority would have to give the money to the accused and hope that he paid it to his dependent child. According to Judge Crawford "no convening authority would have changed the forfeitures."[57]

The majority rejected the dissent's blanket assertion that "no convening authority" would grant the relief sought in this case. They also attacked the dissent for its failure to use the established *Wheelus* analysis for dealing with claims of posttrial error. Although the majority finds Judge Crawford's "pragmatic approach"[58] appealing, they state that it is "fundamentally flawed."[59]

Given the court's analysis in *Lee* and those preceding cases dealing with the failure to inform the convening authority of a clemency recommendation, it's hard to imagine a fact scenario where reversible error would not exist. Luckily practitioners do not have to imagine now that *United States v. Magnan* has been decided.

The accused in *Magnan* pled guilty to a single specification of unauthorized absence that was terminated by apprehension.[60] The accused had gone absent without leave to care for the woman who had raised him. During his guilty plea the accused stated that his enlistment was a mistake, that he was needed at home.[61] The accused asked for a bad-conduct discharge. The judge sentenced the accused to a bad-conduct discharge (BCD) and to confinement for the exact amount of pretrial confinement the accused had already served. After announcing the sentence the judge stated "I'm going to make a recommendation to the convening authority at this point that he suspend your BCD so you would be separated administratively instead of getting out with a bad conduct discharge."[62] After the trial was over the accused told his defense counsel not to submit any matters on his behalf; the accused did not want anything to delay his leaving the Marine Corps. The SJA PTR made no mention of the judge's recommendation and, even worse, the PTR stated "Clemency recommendation by the court or military judge: None."[63] The Navy-Marine Corps Court of Criminal Appeals affirmed the findings and sentence, as did the CAAF.

The *Magnan* opinion is a bit puzzling. The majority does not do a full *Wheelus* analysis which, given the facts, would seem to be called for in this case. Instead, there is unusual focus on whether the SJA's error was intentional. For example, the majority states: "[t]he misstatement by the SJA . . . was error. But there is no evidence in the record that this was a knowingly intentional misstatement designed to prejudice appellant."[64] According to *Wheelus*, the issue should not have been whether the act was intentional, but whether the error materially prejudiced a substantial right of the accused. The court does not discuss the case in the familiar terms of material prejudice and substantial rights.

The majority ultimately concludes that the accused intentionally relinquished or abandoned a known right.[65] This conclusion was based on an uncontroverted affidavit from the accused's defense counsel. In the affidavit the defense counsel stated that he informed the accused of his posttrial rights and that he had an excellent chance for clemency based on the judge's recommendation.[66] According to the affidavit, the accused told his defense counsel not to request clemency or to

57. *Id.* at 298.

58. *Id.*

59. *Id.*

60. United States v. Magnan, 52 M.J. 56 (1999).

61. *Id.* at 57.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.* at 58.

66. *Id.*

seek any suspension of the adjudged punitive discharge, the accused did not want anything to delay his discharge from the Marine Corps.[67] The question that remains after reading the majority opinion is what right did the accused relinquish? As is pointed out in the dissent, there was no evidence that the accused knew the SJA had misstated the clemency recommendation. Absent evidence of a knowing, intelligent, and voluntary waiver, the SJA's misstatement should still be evaluated to determine if it was plain error. Under a plain error analysis it is hard to see how the SJA's misstatement was not plain error. The mistake was obvious, in that the SJA affirmatively stated there was no clemency recommendation when there was. It certainly prejudiced the accused because the convening authority may have granted clemency as suggested by the military judge. It is difficult to reconcile *Lee* and *Magnan* without a clearer statement by the court of what rights the accused relinquished.

Posttrial Assistance of Counsel

The one case decided last year regarding posttrial assistance of counsel was *United States v. Johnston*.[68] As discussed earlier, the posttrial processing in *Johnston* was a disaster. As a result of errors in the original posttrial recommendation the record of trial was returned to the convening authority for a new action and SJA PTR. It took the command over two years to produce a new PTR.[69] In the time between the accused's court-martial and the production of the second PTR the accused was placed on appellate leave status and the accused's defense counsel left active duty. After the second PTR was produced the command served it on the accused's original defense counsel. The original defense counsel did nothing with the PTR and the command took action approving the findings and sentence.[70] No matters were submitted by defense counsel or the accused until after action was taken by the convening authority. There was no evidence in the record that the accused was served with the second PTR prior to the second action.[71]

The appellate court ruled that the accused was fully represented throughout the proceedings against him and affirmed the findings and sentence. The CAAF reversed the lower court's decision. It ruled that the accused was not represented as required by R.C.M. 1106(f)(2), and the lack of representation cost the accused his "best opportunity for sentence relief."[72] The court concluded it was the convening authority's responsibility to detail a substitute counsel for the accused and by not doing that the "appellant suffered harm prejudicial to his substantial rights."[73]

The Posttrial Modification of the Pretrial Agreement: Let's Make Another Deal

The CAAF decided two cases this past year dealing with posttrial modification of a pretrial agreement. Those cases were *United States v. Dawson*[74]and *United States v. Pilkington.*[75] In both cases the court ruled that the posttrial modification was permissible despite the absence of judicial scrutiny.

In *Dawson* the accused pled guilty before a military judge to six specifications of uttering worthless checks and one specification of breaking restriction. There was a pretrial agreement in the case where the convening authority agreed to convert the first thirty days of the accused's confinement to forty-five days of restriction, and any confinement in excess of thirty days would be suspended.[76] The military judge sentenced the accused to 100 days of confinement and to a bad conduct discharge.[77]

The accused was placed on restriction immediately after trial and, while on restriction missed muster. The accused's chain of command told her that they were going to take steps to vacate the suspended sentence because she missed muster. At this point the accused absented herself from the unit, and the chain of command placed her on desertion status.[78] While the accused was absent from her unit, a vacation hearing was conducted which vacated the suspended punishment of the

67. *Id.*

68. 51 M.J. 227 (1999).

69. *Id.* at 228.

70. *Id.*

71. *Id.*

72. *Id.* at 229.

73. *Id.*

74. 51 M.J. 411 (1999).

75. 51 M.J. 415 (1999).

76. *Dawson*, 51 M.J. at 412.

77. *Id.*

accused.[79] Neither the accused nor her defense counsel were present at the vacation hearing. Eventually, the accused was caught and placed in pretrial confinement. The commander who ordered the accused into pretrial confinement failed to conduct a pretrial confinement hearing as required by R.C.M. 305.[80] While the accused was in pretrial confinement the command preferred a single specification of desertion against her.

At some point, the SJA advised the convening authority that the command had made a variety of errors in the posttrial handling of the accused's case. Those errors included forcing the accused to begin serving her restriction before the convening authority had taken action, conducting a vacation hearing with the accused and counsel absent, and failing to give the accused a pretrial confinement hearing.[81] In the accused R.C.M. 1105 matters, submitted regarding the first court-martial, the accused's defense counsel requested that the convening authority dismiss the new charge and credit the period of pretrial confinement presently being served against the suspended portion of the sentence.

Subsequent to the R.C.M. 1105 submission, the accused entered into an agreement where she agreed to waive her right to appear at the vacation hearing against her and that the convening authority would no longer be bound by the pretrial agreement from the first court-martial.[82] In exchange, the convening authority agreed to dismiss the new charge and credit the pretrial confinement against the approved sentence. Due to the numerous errors in the posttrial restriction and confinement of the accused, the SJA recommended that the convening authority only approve the accused's bad conduct discharge and disapprove all adjudged confinement. The convening authority followed the SJA's recommendation.[83]

After reviewing the facts of *Dawson* practitioners are left wondering what the accused was hoping the appellate court would do for her. The accused ended up with an approved sentence that was much better than her pretrial agreement. Under the pretrial agreement the convening authority could have approved the punitive discharge, forty-five days of restriction and suspended an additional seventy days of confinement. In the end the convening authority approved the discharge and nothing more.

The issue the CAAF had to decide was whether the convening authority and accused could enter into the above agreement without approval from a military judge.[84] The court concluded they could. In answering this question, the court focused on what was being negotiated. The CAAF pointed out that both the vacation hearing and the decision whether to proceed to court-martial on a new charge were "within the cognizance of the command and not subject to review by the military judge who presided at trial."[85] The CAAF also stated that this is not a case of "posttrial renegotiation of a judicially approved pretrial agreement; nor does it otherwise threaten to undermine the purposes of the judicial inquiry under *United States v. Care.*"[86] The court pointed out that there was no evidence of government overreaching or that the accused did not understand the agreement. The CAAF ruled that if a posttrial agreement is collateral to the court-martial and deals with decisions that are within the prerogative of the command to make, no judicial review is necessary.[87]

The second case on posttrial modification of a pretrial agreement is *United States v. Pilkington*.[88] *Pilkingto*n is more of a pure modification case than *Dawson*. In *Dawson* the issue of posttrial modification was easily avoided because the appellant committed additional misconduct. The agreement issue in *Dawson* was not a posttrial modification of the pretrial agreement; instead, it was a second agreement. There was no additional misconduct in *Pilkington*. In *Pilkington* the accused simply sought and received a modification of his pretrial agreement.

The accused pled guilty at a special court-martial to conspiracy, maltreatment of subordinates, false official statement, and assault. The accused had a pretrial agreement that any punitive discharge would be suspended for twelve months following the

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id* at 413.

85. *Id.*

86. *Id.*

87. *Id* at 414.

88. 51 M.J. 415 (1999).

date of trial.[89] The accused was sentenced to 150 days confinement, a bad conduct discharge, forfeitures, and reduction to the pay grade of E-1. After the trial was over the accused sought to modify the agreement. The accused, against the advice of counsel, sought to trade his suspended bad conduct discharge for a sentence cap of ninety days.[90] The convening authority agreed, and in accordance with the new agreement, the accused only served ninety days of confinement, but the sentence to a bad conduct discharge was approved.[91] The issue the court had to decide was whether the convening authority and accused could enter into such an agreement. The court concluded they could.

The majority analyzed this case as they would any case involving negotiations between the convening authority and accused. The court examined "whether the accused has been stripped of substantial rights, has been coerced into making a posttrial agreement, or has somehow been deprived of his due process rights."[92] The majority answered all these questions in the negative. Two facts were critical to the majority's opinion that the negotiations in this case were done at arms length and did not deprive the accused of his substantive rights. The first fact was that the accused approached the convening authority; the second was that the accused sought out the convening authority against the advice of counsel.[93] The majority seemed to concede that the unsuspended bad-conduct discharge was an increase in punishment, but that was the accused's decision to make, so long as it was informed.[94]

Judge Effron joined Judge Sullivan in dissent. The dissent criticized the majority's decision because it allowed the alteration of a pretrial agreement without the same judicial scrutiny that was necessary for the parties to undergo in order to enter into the agreement in the first place.[95] The dissent was concerned that the judicial inquiry done prior to the acceptance of a guilty plea would be turned into "an empty ritual"[96] by allowing posttrial modification of pretrial agreements without judicial scrutiny.

The message to be taken from *Dawson* and *Pilkington* is that posttrial modification of pretrial agreements is permissible. Counsel should be aware that the court will scrutinize the negotiations to insure the accused has not been stripped of substantial rights, coerced into making the posttrial agreement, or been deprived of his due process rights.[97] Also the court has yet to decide a case where the government approached the accused about modification of a pretrial agreement.

Ineffective Assistance of Counsel: A High Bar to Clear

The CAAF decided two cases last year that addressed posttrial ineffective assistance of counsel. Both cases found the accused was not prejudiced, reinforcing the high standard for establishing prejudice in ineffective assistance of counsel cases even in posttrial matters. The two cases were *United States v. Brownfield*[98] and *United States v. Lee*.[99]

In *Brownfield*, the accused was convicted of false official statement and carnal knowledge. The accused was sentenced to three months confinement, forfeitures, reduction to the pay grade of E-1, and a bad-conduct discharge.[100] Both before trial and after, there was evidence of a personality conflict between the accused and his defense counsel. After the trial, the accused told his defense counsel he did not want him to submit clemency matters on his behalf.[101] Sometime later, the defense counsel received a copy of the accused's intended R.C.M. 1105 submission. The court outlines the three acceptable options available to the defense counsel at this point. The defense counsel's options were:

89. *Id.*

90. *Id.* at 416.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* at 417.

96. *Id.*

97. *Id.* at 416.

98. 52 M.J. 40 (1999).

99. 52 M.J. 51 (1999).

100. *Brownfield*, 52 M.J. at 41.

101. *Id.* at 45.

> First, he could have worked with this document to rewrite a suggested clemency petition for appellant's review, and with appellant's approval, eventually submitted this document. Second, after speaking with appellant, defense counsel could have forwarded appellant's document to the convening authority with a cover letter. Or finally, defense counsel could have secured a signature from appellant that released defense counsel from representation and forwarded a copy of the SJA's recommendation to appellant for his use in drafting the petition, or having another attorney assist him with this.[102]

The defense counsel chose none of these options. Instead the defense counsel sent the accused's submission back to the accused with a memo. The memo informed the accused that the submissions were improperly styled and that clemency was going to be denied regardless of the submission. Defense counsel based his opinion of the chances of the accused receiving clemency on a conversation with the SJA.[103]

The CAAF concluded that the defense counsel in this case allowed his personality conflict with the accused to cause him to "not fully discharge his obligation."[104] The defense counsel who is faced with a personality conflict can either resolve the conflict and continue to zealously represent his client or seek relief from the obligation of representation.[105] In this case the court concluded that the defense counsel did neither, but a finding of ineffective assistance of counsel does not necessitate relief. Besides the ineffectiveness, prejudice must be shown. Specifically, to establish prejudice the appellant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[106]

The appeals court and the CAAF found no prejudice. The appeals court mentioned three findings in its opinion that the CAAF used in determining that the accused suffered no prejudice. First, the Navy-Marine Corps court found that the SJA recommendation accurately summarized the offenses committed by the accused and the occasional good duty performance of the accused.[107] Second, the court found that the defense counsel got an accurate opinion from the SJA that clemency was not going to be granted based on the offense, the accused's plea, and the accused's poor to mediocre military career which included two Article 15s. Finally, the Navy-Marine Corps court found that given what the accused wanted to submit, he was better off having nothing submitted.[108] Although, the CAAF seemed unimpressed with the first two reasons for the Navy-Marine Corps Court of Criminal Appeal's conclusion that no prejudice occurred, the final rationale made sense to the CAAF.

The second case this year dealing with ineffective assistance of counsel is *United States v. Lee*.[109] In *Lee* the court took a different approach to the *Strickland*[110] test than it did in *Brownfield*. In *Lee*, the court considered whether the alleged ineffective assistance of counsel was prejudicial before determining whether the counsel's behavior was in fact ineffective. The accused in *Lee* pled guilty to attempted distribution of cocaine, distribution of cocaine, conspiracy to commit larceny, larceny, and dereliction of duty.[111] He was sentenced to ten months confinement, reduction to the pay grade of E-1, and a dishonorable discharge. The accused had a pretrial agreement that required the convening authority to disapprove any confinement in excess of sixteen months, so the agreement had no effect on the approved sentence.[112] In clemency matters submitted by the accused, his father, his wife, and his sister, the convening authority was asked to disapprove the accused's punitive discharge and allow the accused to be administratively discharged. The defense counsel in his R.C.M. 1106 submission requested that the convening authority disapprove the dishonorable discharge in lieu of a bad-conduct discharge. The convening authority did not grant any clemency. On appeal the

102. *Id.* at 45.

103. *Id.*

104. *Id.*

105. *Id.*

106. United States v. Wiley, 47 M.J. 158, 159 (1997).

107. *Id.*

108. *Id.*

109. United States v. Lee, 52 M.J. 51 (1999).

110. Strickland v. Washington, 466 U.S. 668 (1984).

111. *Lee*, 52 M.J. at 51.

112. *Id.*

accused claimed his defense counsel undercut his clemency submission by acknowledging the accused deserved a bad-conduct discharge.

The CAAF skipped the first prong of the *Strickland* test and went directly to the issue of prejudice. The court discussed the high standard required to demonstrate prejudice: "appellant must show a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceeding would have been different."[113] The court went on to explain that the lower standard for demonstrating prejudice in matters affecting posttrial clemency from *United States v. Wheelus* should be laid over *Strickland*.[114] Thus, the appellant should only have to make a colorable showing that it was possible, that the counsel's unprofessional errors would have resulted in a different result in the proceeding. Even with this lower standard the court found no prejudice. The court concluded that absent the alleged error on the part of defense counsel the accused would have faired no better. The court believed the convening authority would not have granted the accused's request for an administrative discharge because he would not even take the lesser step of commuting the dishonorable discharge to a bad-conduct discharge.[115] Thus the defense counsel's clemency request would have had no impact on the results of the clemency proceedings.

Brownfield and *Lee* illustrate that even with the standard for establishing ineffective assistance of counsel being lowered when committed in connection with posttrial clemency matters, it is still a high standard. *Brownfield* also provides a good methodology for defense counsel to apply when facing a personality conflict in the posttrial with an accused.

Convening Authority Action

This past year one case was decided dealing with the validity of a convening authority's action. That case was *United States v. Schrode*.[116] *Schrode* addressed the unusual circumstance where a convening authority stated in his action that he had considered the matters submitted by defense counsel and the accused when none had been submitted.

The accused pled guilty at a special court-martial to possession of marijuana, absence without leave and violation of a lawful general order. He was sentenced to ninety days confinement, forfeitures, reduction to the pay grade of E-1, and a bad-conduct discharge.[117] The accused's defense counsel received the authenticated record of trial on 3 November 1995 and the SJA PTR on 20 November. The SJA PTR was dated 16 November and so was the convening authority's action approving the sentence.[118] The appellant never submitted clemency matters or a response to the posttrial recommendation, and according to an affidavit from the accused's defense counsel "there were no R.C.M. 1106 matters."[119]

The CAAF found that there was error in the process, but could not find prejudice. The failure to establish prejudice stemmed from the fact that the accused never submitted any clemency matters and, according to defense counsel, there were none to be submitted. The court pointed out that "The objective of posttrial procedure is to ensure that the convening authority has all relevant information related to the accused and the charges prior to when he takes his action."[120] The posttrial procedure requires that the convening authority receive a posttrial recommendation from his SJA and affords an accused the opportunity to submit matters relating to the findings and sentence[121] and to respond to the posttrial recommendation.[122] Although the accused had the opportunity to submit the above matters, it is not mandatory. Since the accused never submitted matters, the convening authority had all the relevant information at the time he took action.

The message from *Schrode* is clear: even if the convening authority has taken action still submit clemency matters. It seems unlikely, given the low standard for establishing prejudice in the posttrial,[123] that the court would have found no prejudice had defense submitted some kind of request for clemncy.

113. *Id.* at 53.

114. *Id.*

115. *Id.*

116. 50 M.J. 459 (1999).

117. *Id.*

118. *Id.*

119. *Id.* at 460.

120. *Id.*

121. MCM, *supra* note 20, R.C.M. 1105.

122. *Id.* R.C.M. 1106(f)(4).

123. United States v. Wheelus, 49 M.J. 283 (1998).

Conclusion

This article began by likening the Court of Appeals for the Armed Forces to the English troops in Shakespeare's Henry V, trying to take the town of Harfleur. Those who have read the play will recall that even after Henry rallyied his troops and sent them back into the breach, the town did not fall. It was not until later in the play, when Henry promises the mayor of Harfleur that if he does not yield the city when his men did take the city they would show no mercy to the town's people. Henry says "defy us to our worst."[124]

In reading the cases this past year involving posttrial error, it is difficult to not be struck by the frustration and hostility the CAAF has for errors in this area of military practice. It seems that for years they have tried to devise a method of reducing posttrial error without success. As the language of the court's decisions in this area becomes more severe, the message seems to be the same as Henry's: "defy us to our worst."[125]

124. WILLIAM SHAKESPEARE, HENRY V, act 3, sc. 3.

125. *Id.*

New Developments in Military Capital Litigation: Four Cases Highlight the Fundamentals

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> [W]e will ensure that fundamental notions of due process, full and fair hearings, competent counsel, and above all, a "reliable result," are part of the equation. In the final analysis, we have heretofore examined, and shall continue to examine, the record of trial in capital cases to satisfy ourselves that the military member has received a fair trial.[1]

Introduction

The final months of the twentieth century witnessed a flurry of judicial activity in an area of military jurisprudence that has seen periods of seeming inactivity and sparse comment. In the eleven months between October 1998 and September 1999, the Court of Appeals for the Armed Forces (CAAF) issued opinions in four capital cases.[2] In two of the decisions the CAAF reversed the death sentences,[3] and in a third the CAAF affirmed the lower court's sentence reassessment awarding appellant life imprisonment.[4] In the fourth case, the CAAF affirmed the soldier's death sentence,[5] effectively joining his case with that of Inmate Dwight Loving who currently awaits presidential approval of his death sentence.[6] The decisions and opinions highlight the multifaceted and complicated issues inherent in military capital litigation. They also provide guidance, procedurally and substantively, with respect to the necessary steps required for a capital court-martial. The goal is that the ultimate result, one of such terminal consequence to the appellant, reaches the over-arching standard of "result reliability." This article discusses select issues from these recent decisions, highlights the CAAF's guidance with respect to these issues, and describes a recent change to Rule for Courts-Martial (R.C.M.) 1004.[7]

Background

In 1996 the United States Supreme Court addressed a soldier's appellate attack of the President's promulgation of the necessary aggravating factors for military capital sentences.[8] In *United States v. Loving*, the Court rejected the claim that the President, as Commander-in-Chief, lacked the requisite authority to promulgate by executive order the mechanism under R.C.M. 1004 that may yield a death sentence.[9] By its action, the Supreme Court affirmed the military's capital litigation process and, in rejecting Loving's claims, moved the case an additional

1. United States v. Murphy, 50 M.J. 4, 15 (1998). With this statement, then Chief Judge Cox reiterated an earlier reference to the Supreme Court's over-arching concern in capital cases: "One continuous theme is found throughout the death-penalty cases handed down by the Supreme Court over the last 30 years. That theme is reliability of result." *Id.* at 14.

2. These four cases involve the following personnel: Inmate Jose F.S. Simoy, Inmate James T. Murphy, Inmate Ronald A. Gray, and Inmate Ronnie A. Curtis. A fifth case, involving Inmate Dwight J. Loving, is largely beyond the scope of the purpose of this article. In *Loving v. Hart*, 47 M.J. 438 (1998), the CAAF denied a writ of mandamus filed by Inmate Loving after the Supreme Court had affirmed his capital conviction and sentence. *See* Loving v. United States, 517 U.S. 748 (1996). Several months after its denial of this writ, the CAAF subsequently denied Inmate Loving's petition for reconsideration. Loving v. Hart, 49 M.J. 387 (1998) (Effron, J., dissenting).

3. United States v. Simoy, 50 M.J. 1 (1998); *Murphy*, 50 M.J. at 4.

4. United States v. Curtis, 52 M.J. 166 (1999).

5. United States v. Gray, 51 M.J. 1 (1999).

6. *Loving*, 47 M.J. at 438. In accordance with Article 71, Uniform Code of Military Justice (UCMJ), Presidential review and action is required before a service member may be executed pursuant to a capital sentence. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1203, 1204, 1207 (1998) [hereinafter MCM]. That the CAAF has affirmed Inmate Gray's capital conviction and sentence does not mean that procedurally his case is on par with Loving's. From a procedural perspective, Gray's case is behind Loving's and it appears that Gray has other appellate options that are no longer available to Loving (such as Supreme Court review).

7. MCM, *supra* note 6, R.C.M. 1004.

8. Loving v. United States, 517 U.S. 748 (1996). The facts of the case are briefly as follows: on 11 December 1988, Private Loving robbed two convenience stores in Killeen, Texas. His efforts produced less than $100. Thus, the next evening, he decided to rob taxi drivers. Pursuant to this plan, Private Loving robbed and shot to death a soldier moonlighting as a cab driver. Approximately fifteen minutes later, he robbed and killed another cab driver. Still later in the evening, Private Loving robbed and attempted to kill a third cab driver who resisted and fled. Upon his ultimate apprehension, Private Loving confessed to his crimes. At general court-martial, the panel convicted Loving of the two murders, the attempted murder and the five robberies. United States v. Loving, 41 M.J. 213, 229-231 (1994).

step closer to finality. In April 1998, the CAAF rejected Loving's writ of mandamus[10] and the Supreme Court subsequently denied yet another petition for certiorari filed by Loving.[11] For purposes of processing pursuant to the Uniform Code of Military Justice (UCMJ), the case is governed by Article 71.[12]

It remains to be seen what action the President will approve upon the required review of Loving's case. Pursuant to Article 71, the President acts as the final review, appeal and clemency authority for a soldier sentenced to death.[13] Upon presidential approval, a court-martial death sentence is ready for execution as the inmate's direct appellate options have largely been exhausted.[14] The only remaining option lies within federal habeas corpus proceedings.[15] While such proceedings are certainly a possibility after presidential approval of a capital sentence, the likelihood of successful habeas petitions at this stage is remote, especially given the apparent standard of review applied by the reviewing court.[16] Simply put, absent habeas relief, the matter of Inmate Loving's life and death lies in the hands of the Commander in Chief.[17]

Inmate Loving is not alone within the ranks of military personnel awaiting review and action with respect to their capital convictions and sentences. Currently, there are six military prisoners confined under a sentence of death at the United States Disciplinary Barracks, Fort Leavenworth, Kansas.[18] Each prisoner's case is procedurally postured at various stages in the appellate review process. The *Loving* decision alerts these appellants specifically and the military law practitioner generally that, at a minimum, the R.C.M. 1004 process passes

9. *Loving*, 517 U.S. at 769. Loving's attack first alleged that the Congress lacked the power to give the President this ability because the Constitution vests only in Congress the authority to "make Rules for the Government and Regulation of the land and naval forces." *Id.* at 758 (citing U.S. CONST. art. I, § 8, cl. 14). The Court rejected this and other arguments and found the delegation to the President to be lawful and his promulgation of R.C.M. 1004 within the four corners of that delegation: "There is nothing in the constitutional scheme or our traditions to prohibit Congress from delegating the prudent and proper implementation of the capital murder statute to the President acting as Commander in Chief." *Id.* at 769.

10. Loving v. Hart, 49 M.J. 387 (1998).

11. Loving v. Hart, 525 U.S. 1040 (1998).

12. UCMJ art. 71 (LEXIS 2000). Article 71 (a) provides that no death sentence may be executed until it has been approved by the President. Subpart (c)(1) further provides that a death sentence "may not be executed until there is a final judgment as to the legality of the proceedings." Judgment finality occurs when review has been completed by the respective Court of Criminal Appeals, the CAAF, and "review is otherwise completed in accordance with the judgment of the Supreme Court." *Id.* art. 71 (c)(1)(C)(iii). In accordance with R.C.M. 1204(c)(2) and (4) after judgment finality occurs, the service Judge Advocate General shall transmit the case "to the Secretary concerned for the action of the President." Notwithstanding that rule's mandatory inclusion of the Service Secretary, R.C.M. 1205 appears to allow direct transmittal, after action by the Supreme Court, to the President. The President may, per R.C.M. 1207, approve execution of the death sentence or, per Article 71(a), commute the death sentence. *Id.*

13. *Id.* The last service member to be executed by the United States military was Army Private First Class (PFC) John A. Bennett who had raped and attempted to murder a young girl while stationed overseas. Pursuant to Article 71, President Eisenhower approved Bennett's death sentence on 2 July 1957 but the execution did not occur until 13 April 1961, after President Kennedy had denied Bennett's telegram plea for clemency. *See generally* Captain Dwight H. Sullivan, *The Last Line of Defense: Federal Habeas Review of Military Death Penalty Cases*, 144 MIL. L. REV. 1 (1994) (discussing the process that accompanied the Bennett execution).

14. The *Bennett* case, post presidential approval, provides an interesting study in the efforts that may be undertaken to prevent execution of a military death sentence. After President Eisenhower's decision, PFC Bennett tried twice to obtain habeas relief from the United States District Court for the District of Kansas, appealed those decisions unsuccessfully to the United States Court of Appeals for the Tenth Circuit, and also failed to obtain from the CAAF a successful petition for a writ of error coram nobis. *See* Sullivan, *supra* note 13, at 3 (citing Bennett v. Cox, 287 F.2d 883 (10th Cir. 1961); Bennett v. Davis, 267 F.2d 15 (10th Cir. 1959)).

15. "[A] petition for a writ of habeas corpus remains a viable means to challenge a military death sentence." *Id.* at 11. "[F]ederal courts normally will not entertain habeas petitions by military prisoners unless all available remedies have been exhausted." *Id.* at n.13 (citing Schlesinger v. Councilman, 420 U.S. 738, 758 (1975)). Sullivan notes further that the statutory authority for the military habeas process, 28 U.S.C. § 2241, has been "expressly noted" by the Supreme Court as providing "'federal civil courts' with habeas corpus jurisdiction over military death penalty cases." Sullivan, *supra* note 13, at 7 & n.20 (citing Burns v. Wilson, 346 U.S. 137, 139, & n.1 (1953)).

16. The Tenth Circuit courts, because they serve the area within which the United States Disciplinary Barracks is located (the district of Kansas), are the courts whose case law "will govern habeas corpus review of military capital cases." *Id.* at 17. However, at least as of a decade ago, the Tenth Circuit Court of Appeals noted that its "precedent concerning the scope of review in military habeas cases is in a 'confusing state.'" *Id.* at n.70 (citing Dodson v. Zelez, 917 F.2d 1250, 1252 (10th Cir. 1990)). The current standard the court employs is the "full and fair consideration" standard posed by the plurality opinion of the Supreme Court in *Burns v. Wilson*, 346 U.S. at 144. "[I]t is the limited function of the civil courts to determine whether the military have given fair consideration to each of [the petitioner's] claims." Sullivan, *supra* note 13, at 14. However, according to Sullivan, the court so narrowly restricts this test that only a "rare case, indeed . . . would qualify for review." *Id.* at 22. The Tenth Circuit courts continue to follow this approach. The review is limited to the following four questions:

> whether the claimed error is of substantial constitutional dimension; (2) whether a legal, rather than a factual, issue is involved; (3) whether military considerations may warrant different treatment of constitutional claims such that federal civil court intervention would be inappropriate; and (4) whether the military courts have given adequate consideration to the claimed error and applied proper legal standards.

Seaver v. Commandant, United States Disciplinary Barracks, 998 F. Supp. 1215 (D. Kan. 1998) (citing *Dodson*, 917 F.2d at 1252-53). Perhaps Inmate Loving's case will clarify the courts' approach if, in fact, he seeks habeas review in the Tenth Circuit. However, regardless of the standard employed, absent a successful habeas petition, upon presidential approval no appellate process will exist to halt execution of sentence.

legal muster. What remains then from an analysis of recent appellate decisions are those substantive and case specific issues that provide lessons learned for future cases. The following section reveals the CAAF's recent disposition of such issues. Taken together, the cases present a military capital litigation primer—a basic subject matter approach not unlike that used in a freshman college course. From the military judge's role regarding instructions to the performance of defense counsel to the appellate review process and to the authority of the appellate courts, each case highlights the requisite fundamentals.

United States v. Simoy and Capital Courts-Martial Trial Procedure 101: "The Four Gates"

In 1992, a general court-martial convicted and sentenced to death Senior Airman Simoy for the offenses of conspiracy to commit robbery, robbery, felony murder, attempted murder, and desertion terminated by apprehension.[19] Simoy, a security policeman at Anderson Air Force Base, Guam, planned an ambush of a commissary worker as that person made a night deposit of the business day's receipts.[20] Simoy recruited his brother and friends to assist him and chose the Christmas holiday period to effect the conspiracy as that time had the potential to produce the most lucrative results.[21] On 29 December 1991, Simoy and his gang robbed a commissary worker of approximately $34,000 and attacked two Air Force noncommissioned officers, killing one.[22]

At trial, Simoy's defense counsel argued that information concerning the civilian murder trial of Simoy's brother should have been provided to the panel.[23] The military judge overruled this argument and found that such information would result in a "misleading and confusing" subset or "mini-trial" of Simoy's court-martial that went "far beyond its probative weight."[24] In his sentencing case, the civilian defense counsel submitted two documents, one of which was Simoy's three and one-half page apology, and called no live witnesses.[25] Finally, in his sentencing instructions, and without objection by either side, the military judge reversed the procedure with respect to the order panels address and vote on proposed sentences.[26] The Air Force Court of Criminal Appeals examined these issues as

17. Since the *Bennett* case, only one additional capital court-martial case has proceeded through the Article 71 phase. In *United States v. Henderson*, 11 C.M.A. 556 (1960), President Kennedy, acting on advice of the Secretary of the Navy and contrary to the advice of the Judge Advocate General of the Navy, commuted a death sentence to confinement for life for a service member whose case presented "a reasonable possibility that his mentality is impaired." Sullivan, *supra* note 13, at n.10 (citing a 5 December 1960 memorandum to the Secretary of Defense from the Secretary of the Navy contained in the *Henderson* record of trial. Sullivan further notes that the Secretary of Defense and the Attorney General concurred in this recommendation. These two officials are not expressly included in the current Article 71, R.C.M. 1204, 1205 and 1207 review and action process). The passage of nearly forty years since the *Henderson* case, coupled with the changes to the *Manual for Courts-Martial* in 1984, arguably create, with respect to Article 71 procedures and the *Loving* case, an issue of first impression. While the *Manual for Courts-Martial* provides a template for presidential review and action in a military death sentence case, that template does not necessarily foreclose input and action by other agencies. For example, could a military death sentence, approved by the President, make its way to the U.S. Department of Justice Pardons Office for input and recommendation? One observer has so questioned and notes further that such office could begin an investigation to be conducted by the Federal Bureau of Investigations the results of which could accompany a recommendation to the President to use his power to pardon the service member. *See* David E. Rovella, *Closing Ranks on Executions, Military nears first death penalty since JFK; Policy assailed*, THE NAT' L.J. 3 (Apr. 5, 1999). Finally, as was the case in *Henderson*, the President could solicit the input and recommendations of not only the Secretary of Defense and the Attorney General, but also that of the Department of Defense General Counsel and the Army General Counsel. The concomitant additional review and analysis of the subject death sentence would add even more credibility to the ultimate conclusion that the court-martial had produced a "reliable result."

18. Electronic Interview with Lieutenant Colonel Alan L. Dunavan, Command Judge Advocate, Headquarters, U.S. Army Disciplinary Barracks, Fort Leavenworth, Kansas (Apr. 4, 2000). Three of the prisoners are soldiers: Inmates Loving, Gray, and Kreutzer; and three are Marines: Inmates Walker, Parker, and Quintanilla. Inmate Murphy, whose case and death sentence the CAAF remanded to the Army court for further review, also remains housed on death row. Gray and Murphy were court-martialed in 1987 for their offenses. Inmate Loving was tried in 1989. Walker and Parker were court-martialed in 1992, Kreutzer was court-martialed in 1995, and Quintanilla was court-martialed in 1996.

19. United States v. Simoy, 46 M.J. 592, 601 (A.F. Ct. Crim. App. 1996).

20. *Id.* at 599.

21. *Id.*

22. *Id.* at 600. Simoy's brother Dennis killed one of the men by beating his head with a lead pipe and another gang member stabbed and viciously slashed the other victim with a knife. Although not the actual murderer (or the man who knifed the second victim), Simoy was a link between planning and execution of the assaults. As the ambush began, one of the conspirators asked "Jose, what if the guy dies?" Simoy responded, "If the guy dies, he dies." *Id.* Later, when the second victim happened upon the scene, another conspirator asked, "Jose, there's a guy in a car. Do we have to kill him?" Simoy responded twice, "Yeah, kill him." *Id.* In addition to the cash, the gang obtained approximately $40,000 in food stamps and checks. *Id.* at 601.

23. Dennis Simoy, at the time of his brother's court-martial, faced a sentencing hearing, as he had already pleaded guilty to robbery and murder. He was tried in the United States District Court for the Territory of Guam wherein the maximum sentence he faced was a mandatory life sentence. *Id.* at 608.

24. *Id.* at 609.

25. *Id.* at 603. The other document merely explained Simoy's efforts to secure a pretrial agreement. In argument, counsel informed the members of Simoy's wife and three children as well as of other family members.

well as the issue of sentence appropriateness and affirmed the findings and sentence.[27]

The CAAF agreed with the Air Force court on all the findings issues but disagreed as to the issue concerning the military judge's failure "to instruct the members to vote first on the lightest proposed sentence."[28] The CAAF found this failure to be plain error, affirmed the findings, set aside the sentence and returned the case to The Judge Advocate General of the Air Force with the authority to conduct a sentence rehearing.[29] In the opinion of the CAAF, Judge Crawford notes: "[I]n order for the death penalty to be imposed in the military, four gates must be passed . . . ."[30] Those gates are as follows:

> (1) The panel members must find unanimously that the accused is guilty of a death eligible offense.[31]
> (2) The panel members must find unanimously beyond a reasonable doubt that at least one qualifying aggravating factor exists.[32]
> (3) The panel members must unanimously concur that any aggravating factors substantially outweigh any mitigating factors.[33]
> (4) The panel members must unanimously vote for the death penalty as the sentence for the accused.[34]

Judge Crawford reiterates that unanimity of decision is required at every gate in the process and that the military judge's instructions must "make these four gates clear" to the members.[35] Finally, and perhaps most important of all, the military judge must impart to the members that even if they successfully clear gates one through three, they are not allowed to vote on the death penalty first if any member has proposed a lesser sentence.[36]

The CAAF's guidance in *Simoy* underscores a specific fundamental requirement of the military judge regarding sentencing instructions and procedure as provided in R.C.M. 1006: the members must be informed that they must vote on the proposed sentences beginning with the least severe and moving to the next least severe until the required number of members has agreed.[37] It is the duty of the military judge in a capital case to ensure that the members are informed and understand that they may propose lesser sentences and, if so propose, must vote on such sentences before reaching a vote for death.[38] The members must know this specifically as to sentencing and must appreciate generally that in a capital case, "because of requirements for unanimous votes, any one member at any stage of the proceeding could have prevented the death penalty from being imposed."[39] From such procedural perfection may come a result that is reliable in a military capital case.[40]

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26. *Id.* at 614. The actual instruction was as follows: "If the aggravating circumstance has been found unanimously by proof beyond reasonable doubt, and if one or more members proposed consideration of the death sentence, begin your voting by considering the death sentence proposal, which have the lightest additional punishment if any." United States v. Simoy, 50 M.J. 1, 2 (1998).

27. *Simoy,* 46 M.J. at 599. The court concentrated on the issues of ineffective assistance of counsel (pretrial and during the merits and sentencing phases of trial), the sentencing instructional errors, and sentence appropriateness. The court opined that the remaining forty-five issues asserted on appeal had largely been "laid to rest" by the Supreme Court in the *Loving* decision. *Id.* at 601.

28. *Simoy,* 50 M.J. at 2.

29. *Id.* at 3. According to the Air Force's Appellate Defense Division, on rehearing Simoy received a life sentence that has subsequently been approved by the convening authority. Telephonic Interview with Major Thomas R. Uiselt, U.S. Air Force Appellate Defense Division (Apr. 10, 2000).

30. *Simoy,* 50 M.J. at 2. This is not the first CAAF death penalty opinion to refer to the requisite stages in the process as "the four gates." In *Loving v. Hart*, 47 M.J. 438 (1998), decided eight months before the *Simoy* decision, Judge Gierke notes that the "military capital sentencing procedure set out in R.C.M. 1004 and 1006 establishes four 'gates' to narrow the class of death-eligible offenders." *Id.* at 442. He further notes that the first two gates involve unanimous votes as to conviction for a death eligible offense and the existence of at least one aggravating factor and then describes the third gate as the "weighing" gate. He concludes that an accused becomes "death eligible" only after the case has moved through the three gates and then he refers to the final gate as "the sentencing decision itself." *Id.*

31. MCM, *supra* note 6, R.C.M. 1004(a)(2).

32. *Id.* R.C.M. 1004(b)(7).

33. *Id.* R.C.M. 1004(b)(4)(C).

34. *Id.* R.C.M. 1006(d)(4)(A).

35. *Simoy,* 50 M.J. at 2.

36. *Id.*

37. MCM, *supra* note 6, R.C.M. 1006(d)(3)(A).

United States v. Murphy and Effective Assistance of Counsel 101: Nobody's Perfect but . . .

In *United States v. Murphy*,[41] the CAAF faced ninety-one issues but focused its opinion on jurisdiction, several claims of ineffective assistance of counsel, and claims of newly discovered evidence with respect to appellant's mental responsibility.[42] In a 3-2 decision, the CAAF resolves the jurisdictional issue against Murphy but determines that it is "satisfied that appellant did not get a full and fair sentencing hearing."[43] As a result, the court sets aside the Army court's decision and returns the record of trial to the Army Judge Advocate General for remand to the lower court for further review.[44]

At court-martial, Murphy's defense counsel faced a daunting task given the facts presented by the government. For a period of time, Murphy had been married to Petra Murphy, a German national, and had fathered a son with her.[45] Petra Murphy also had another son, Tim, from an earlier marriage.[46] German police discovered the bodies of these three people on 23 August 1987, in Petra Murphy's off-post apartment.[47] Upon his apprehension at Redstone Arsenal, Alabama, and several days later after his return to Germany, Murphy confessed to killing his family.[48]

The Ineffective Assistance Claims: Pretrial, During, and Posttrial

Prior to trial in December 1987, Murphy spent several months confined in the Mannheim Confinement Facility, Germany.[49] While there, he confessed to two inmates, one of whom, Private Michael French, later testified against Murphy at his court-martial.[50] French, upon hearing Murphy's confession, reported what he heard to his detailed military defense

38. But what about the situation where panel members request clarification of voting instructions? How far a judge must go to clarify jury questions regarding instructions was reached by the U.S. Supreme Court in a recent decision. In *Weeks v. Angelone*, 120 S. Ct. 727 (2000), the justices decided, 5-4, that a trial judge's refusal to do more than to refer the jury to pattern instructions he had given before deliberations was permissible and constitutionally sound. The question addressed whether the jury had to decide on death as a sentence after it had found at least one aggravating factor. The judge did not expand or improve on the pattern instruction regarding the relationship between aggravating factors and mitigating circumstances and instead directed the jurors to the pattern instruction he had already given them. In their dissent, Justices Stevens, Ginsburg, Breyer, and Souter maintain that the pattern instruction itself was ambiguous and that the judge needed to do more than merely repeat that instruction ("a simple, direct answer to the jury's question would have avoided the error") *Id.* at 738 n.5. Military judges, mindful of their responsibilities with respect to shepherding the panel through the four gates at capital courts-martial, are well-advised by *Simoy* and *Weeks* that the better course is to provide clarity and meaningful response to instructional questions.

39. *Simoy*, 50 M.J. at 3.

40. In their concurring opinions, Judges Sullivan, Gierke, and Effron write to convey their view that the military judge erred in excluding information regarding the maximum possible sentence that Simoy's brother faced in federal civilian court (that is, mandatory life sentence). Judge Sullivan notes that "to hold the triggerman's fate [Simoy's brother] is irrelevant in appellant's case, a nontriggerman participant in the same murder, ignores applicable federal practice without reason." *Id.* at 3 (citing UCMJ art. 36). Judge Gierke agrees with this notion: "Congress considers the sentence of a co-actor relevant in federal capital cases." *Id.*

41. United States v. Murphy, 50 M.J. 4 (1998).

42. *Id.* at 6.

43. *Id.* at 15. On appeal, Murphy attacked the jurisdictional aspect of his case in three ways: first, he alleged ineffective assistance of counsel because his detailed military defense counsel were prohibited from representing him in jurisdiction negotiations with the German authorities. Second, he alleged the German authorities were mistaken as to the issue of whether the victims were his dependents and thus American authorities illegally acquired jurisdiction of the case. Finally, he alleged he was prejudiced by the process and offered correspondence between German and American authorities establishing that the Germans would not have released jurisdiction "if they had not been mistaken about the true facts." *Id.* at 6, 7. The court resolves the issues primarily on the basis of the existence of in personam jurisdiction that flowed from Murphy's status as a soldier and adds the performance of his counsel on this matter to the pot from which the court brews up its opinion as to counsels' competence. *Id.* at 8 (referring to United States v. Solorio, 483 U.S. 435 (1987); Loving v. Hart, 47 M.J. 438 (1998)).

44. *Id.* The options for the Army court from this remand order include: (1) review the "newly discovered evidence" to determine if different findings might reasonable result; (2) if the record is inadequate, order a rehearing, pursuant to *United States v. DuBay*, 37 C.M.R. 411 (1967), to consider the factual issues raised on appeal as to findings; (3) if no different findings verdict would reasonably result, affirm Murphy's sentence only as to life imprisonment; or (4) order a rehearing as to the death sentence. *Id.* at 16.

45. *Id.* at 6.

46. *Id.* at 30.

47. *Id.* at 6.

48. *Id.* In her dissent, Judge Crawford comments "I find it telling that the majority gives short shrift to a discussion of the evidence in this case." *Id.* at 29 (Crawford, J., dissenting). To buttress her contention that Murphy was not prejudiced by his counsels' performance, Judge Crawford recounts the facts of this case in greater detail than does the majority. *Id.* at 29-30 (Crawford, J., dissenting). Petra and appellant had been estranged for some time prior to the murders and were involved in a contentious dispute over financial support. *Id.* at 29 (Crawford, J., dissenting). During this time, Murphy allegedly remarked to other soldiers "if he had to pay alimony he was going to kill her." *Id.* (Crawford, J., dissenting). In a series of ever-increasingly incriminating statements, Murphy ultimately recounted that on the day of the murders, he went to his ex-wife's apartment, repeatedly struck Petra with a hammer, and placed her and the two children into a bathtub where they died by drowning. *Id.* at 30 (Crawford, J., dissenting).

counsel, Captain (CPT) Schneller.[51] Captain Schneller later negotiated a pretrial agreement for his client, Private French, and then successfully moved to withdraw from further representing French at his court-martial.[52] At the same time he assisted Private French, CPT Schneller was also serving as Murphy's Assistant Defense Counsel (ADC).[53] At Murphy's court-martial, Private French testified as a government witness, providing additional evidence regarding Murphy's motive behind the killing of his biological son.[54] Neither Murphy's lead defense counsel, CPT Vitaris, nor the ADC, CPT Schneller, cross-examined French on this damning evidence.[55]

Prior to trial, the defense team, faced with multiple confessions and a determination by a sanity board that Murphy presented no mental issues to estop prosecution, concentrated on undermining the validity of the confessions and also prepared for a sentencing case.[56] The merits strategy failed and the sentencing efforts (also an ultimate failure), comprised merely telephonic and written correspondence with Murphy's family and friends in the United States.[57]

Over five years after the court-martial, appellate defense counsel, using funds approved by The Army's Judge Advocate General, procured a "post-trial social history."[58] This investigation uncovered "new matters" regarding Murphy's background and also included medical opinions that Murphy indeed suffered from organic brain damage that may have resulted from fetal alcohol syndrome.[59]

Assessing these facts under the Supreme Court's two-pronged test for ineffective assistance of counsel claims,[60] Judge Cox, writing for the majority, finds that the record of trial as well as the numerous posttrial affidavits submitted by a series of appellate counsel yields only one conclusion: Murphy did not receive effective assistance of counsel with regard to his sentencing case.[61] To support that conclusion, Judge Cox cites four reasons: first, the defense counsel "were neither educated nor experienced in defending capital cases, and they either were not provided the resources or expertise to enable them to overcome these deficiencies, or they did not request same."[62] Second, the unexplained conflict of interest that arose from CPT Schneller's simultaneous representation of a soldier who faced a capital court-martial and a witness who later testified against him, leaves "the question whether this conflict of interest had any impact on the sentencing proceedings . . . unresolved."[63] Third, the defense counsels' cursory investigation of Murphy's "traumatic family and social history"[64] affords the court the belief that, combined with a lack of training and experience,

49. *Id.* at 6.

50. *Id.* at 10.

51. *Id.*

52. *Id.* The military judge who granted the motion to withdraw also presided over French's ultimate court-martial as well as over Murphy's.

53. *Id.*

54. *Id.* at 11.

55. *Id.* at 10.

56. *Id.* at 12.

57. *Id.* at 12, 13. The CAAF notes further with disbelief that the defense team, because of communications problems with military phone lines, had to seek the permission of the lead prosecutor in order to make commercial calls back to the States. *Id.* at 9 n.1.

58. *Id.* at 13.

59. *Id.* at 14.

60. *Id.* at 8. The test is as follows:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland v. Washington, 466 U.S. 668, 687 (1984).

61. *Murphy*, 50 M.J. at 5.

62. *Id.* at 9.

63. *Id.* at 11. Judge Cox observes that the Army court decided this issue exclusively on the basis of examining the affidavits submitted by Murphy and the defense counsel and finding the defense counsels' submissions to be more credible. Per Judge Cox, this "questionable practice of resolving pure disputes of material fact" is contrary to the CAAF precedent. *Id.* at 11 (citing United States v. Ginn, 47 M.J. 236 (1997)).

such efforts were "questionable tactical judgments, leading us to the ultimate conclusion that there are no tactical decisions to second-guess."[65] Finally, regarding the posttrial "newly discovered" psychiatric evidence,[66] the court determines that it cannot assess the impact such evidence may have had in sentencing as it "has not been tested in the crucible of an adversarial proceeding."[67]

Judge Cox observes that the CAAF's scrutiny of the defense counsels' performance is assisted by not only the posttrial absence of "the fog of battle, but it is also clarified by the guiding lights of aggressive appellate counsel."[68] He insists that the court is "not looking for perfection, but rather we are seeking to ensure that military accused are represented by 'reasonably competent' counsel, and that the results obtained at trial are reliable."[69] Armed with the facts and issues springing from nearly a decade of appellate spadework, Judge Cox concludes "there are too many questions" unanswered to ascertain that Murphy received "a full and fair sentencing hearing."[70]

Murphy reveals obvious case-specific issues regarding the performance, generally, of defense counsel but it also provides a valuable look at the expectations demanded, specifically, of capital courts-martial advocates. If, indeed, perfection in performance is not the "watchphrase," something not too far from it must certainly be found in order to arrive at "result reliability." Given the potential terminal consequence of a capital court-martial, defense counsel are well-advised by *Murphy* to seek out training, assistance, expertise, resources, and any other help possible in order to glean all that may be had from thorough, and perhaps exhaustive, research and investigation of the case and its facts and issues.

The decision also conveys the notion that defense counsel are not alone in this process. Indeed, the military judge must be sensitive to problem areas that he knows or reasonably should know of and government counsel are equally put to task to ensure a clean record. The conflict of interest issue in *Murphy* is a prime example of failures of all parties to clarify and perhaps resolve, on the record, an issue of tremendous potential impact on the efficacy of the ultimate result. Had the military judge—the same one who had tried Murphy and the witness, French—asked counsel and Murphy whether they had discussed the matter then this issue might not have survived the trial.[71] The case, its issues and the lessons learned from it make *Murphy* a "must-read" before defense counsel launch into a capital case performance.

United States v. Gray and Appellate Review Fundamentals 101: Lengthy Process + Lengthy Consideration = Reliable Result

In *United States v. Gray,*[72] the CAAF, in another 3-2 split among the judges, affirms the findings and death sentence for a soldier whose general court-martial convicted him of two premeditated murders, one attempted premeditated murder, three rapes, two robberies, two forcible acts of sodomy, burglary, and larceny.[73] Writing for the majority, Judge Sullivan notes that the opinion is, by necessity, a long one "because we feel it is necessary to explain our resolution of the numerous issues involved in this case."[74] Those issues, numbering 101, include systemic challenges, case-specific issues, and issues personally assigned by the appellant.[75] The CAAF resolves all of them against the appellant.[76] Judges Effron and Cox dissented, believing that the military judge committed clear error with

64. *Id.* at 10 (citing to Issue XVI of appellant's brief at Appendix, p.18).

65. *Id.* at 13.

66. *Id.* at 15.

67. *Id.*

68. *Id.* at 8.

69. *Id.* (citing Strickland v. Washington, 466 U.S. 668 (1984);United States v. Polk, 32 M.J. 150 (C.M.A. 1991)).

70. *Id.* at 15. In their dissents, Judges Sullivan and Crawford take issue with what they perceive to be an absence of legal authority to support the majority's conclusions. Judge Sullivan laments the majority's reversal of a death sentence obtained eleven years prior and sees "no legal basis upon which the majority can reverse this case because the defense attorneys might have been better trained." *Id.* at 27 (Sullivan, J., dissenting). While he does not comment on the conflict of interest issue, Judge Sullivan focuses on the latent developed mental issues and believes that the majority's decision "generally allows mental responsibility to be an open question, practically forever." *Id.* at 28 (Sullivan, J., dissenting). Finally, he concludes by disagreeing with the majority's "'too many questions' standard of appellant [sic] review." *Id.* at 29 (Sullivan, J., dissenting). While Judge Sullivan concedes that "death penalty cases must be closely scrutinized" he also observes such cases "should not be allowed to continue forever." *Id.* at 28 (Sullivan, J., dissenting). Judge Crawford finds no prejudice to Murphy flowing from the conflict of interest issue and determines that defense counsels' failure to investigate further Murphy's childhood background and mental health was "reasonable, based upon the information provided to them by appellant and his witnesses." *Id.* at 34 (Crawford, J., dissenting). In Judge Crawford's view, case law does not support the majority's conclusion that defense counsel, by their inexperience, were ineffective and she concludes that "the strong evidence of appellant's sanity, [makes it] unlikely that the post-trial psychiatric report would have convinced the members to acquit him, even if it had been presented to them." *Id.* at 35 (Crawford, J., dissenting).

71. According to the CAAF, the conflict of interest issue "could have been resolved at trial by the simple exercise of CPT Schneller reminding the military judge of the prior representation, and by the judge conducting a suitable inquiry of counsel and appellant on the record." *Id.* at 11.

72. 51 M.J. 1 (1999).

respect to the trial counsel's peremptory challenge of a minority panel member.[77]

Gray's court-martial occurred over a period of several months from December 1987 to April 1988.[78] The convening authority approved the findings and death sentence on 29 July 1988 and forwarded the record of trial to the Army's Defense Appellate Division the following week.[79] Appellate defense counsel filed their first pleadings over one year later and in February 1990 the Army Court of Criminal Appeals (then the Army Court of Military Review) ordered that Gray submit to a sanity board.[80] The following June, the board found no mental responsibility or competency issues in existence then or when Gray committed his offenses, and in July the government appellate counsel filed their answer.[81]

From late December 1990 to October 1991, Gray's appellate counsel sought several times appellate court orders directing the government to provide $15,000 for several experts to conduct psychological, legal, and social history investigations.[82] The Army court denied the motion in March 1991 and denied a reconsideration request the following August.[83] Undaunted by the failure to convince the Army appellate judges, counsel filed a petition requesting the CAAF order the government to provide $10,000 and to issue an emergency stay of the proceedings before the lower court.[84] The CAAF denied both requests in October 1991, and in December 1991, the Army court, pursuant to another request by Gray, ordered military authorities to conduct a battery of psychological tests.[85] The resultant report, notwithstanding its ultimate conclusion that Gray was currently sane and was so when he committed his offenses, prompted defense counsel to petition for a new trial based on "newly discovered evidence of lack of mental responsibility."[86]

In February 1992, defense counsel filed supplemental errors, the Army court heard oral argument in April, and the following December the court denied the petition for new trial and affirmed the case.[87] That month, Gray's counsel filed yet another motion for funding as well as a petition for reconsideration of the court's case decision. The Army court denied both the following month, denied an *en banc* request in March of 1993, allowed the supplemental filing of additional errors, and again affirmed the case in June of 1993.[88] Although ordered by

73. *Id.* at 9. Gray was also convicted by a North Carolina state court for the additional murders and rapes of two other victims as well as for a number of other related offenses. He pleaded guilty to those offenses and received three consecutive and five concurrent life sentences. United States v. Gray, 37 M.J. 730, 733 & n.1 (A.C.M.R. 1992).

74. *Gray*, 51 M.J. at 11. As was the case in *United States v. Murphy*, 50 M.J. 4 (1998) (wherein Judges Sullivan and Crawford dissented), Judge Gierke provides the third vote for the majority, this time joining Judges Sullivan and Crawford to affirm the findings and death sentence.

75. *Id.* Gray's appellate counsel briefed seventy issues for the CAAF's consideration. These included several issues centering on the information that was available to the panel regarding Gray's mental health; newly discovered evidence alleging that Gray suffers from organic brain damage; the denial of competent psychiatric assistance before and during trial; ineffective assistance of counsel for failure to investigate more thoroughly Gray's family, social, and medical histories; and a multitude of systemic issues regarding the military's capital court-martial process. Gray personally asserted thirty-one additional issues for the court's consideration.

76. *Id.* at 64.

77. *Id.* at 65. Judges Effron and Cox dissent because the military judge did not require the trial counsel to articulate a race neutral reason for his decision to peremptorily challenge a Major Quander, who, like Gray, is an African-American. *Id.* (citing Batson v. Kentucky, 476 U.S. 79 (1986)). The majority resolves this issue against Gray, finding that (a) *Batson* did not yet apply at courts-martial when this case was tried, (b) the trial counsel in fact offered a race-neutral explanation for his challenge, and (c) the judge, while not expressly ruling, "clearly stated his satisfaction with trial counsel's disavowal of any racist intent in making the challenge." *Id.* at 35.

78. *Id.* at 9.

79. *Id.* The Defense Appellate Division received the record of trial on 8 August 1988. *Id.*

80. *Id.* at 9.

81. *Id.*

82. *Id.* Counsel specifically sought "an expert psychiatrist, a death-penalty-qualified attorney, and an investigator." *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* (citing United States v. Gray, 37 M.J. 730 (A.C.M.R. 1992)).

88. *Id.* at 10.

the CAAF to file final briefs by summer's end, Gray's counsel did not do so until June of 1994.[89] During that period of time the CAAF denied another funding request and granted the lead appellate counsel's motion to withdraw.[90] The CAAF heard oral argument in March 1995, allowed the supplemental filing of additional issues after the U.S. Supreme Court issued its opinion in *Loving*, and heard oral argument again in December 1996.[91]

By virtue of the foregoing lengthy appellate process in this case, several issues came to light posttrial and their investigation, discussion and resolution enhances the reliability of the CAAF's ultimate conclusions. Many of the latent developing issues are independent of each other but several of them are threaded to a tapestry of ineffective assistance of counsel that appellate counsel weave throughout their contentions. The CAAF addresses all the issues, but as to the ineffective assistance theme the CAAF specifically disagrees with Gray's contentions and finds that counsel rendered a performance that is neither defective nor inadequate.[92]

The CAAF first addresses a supplemental issue, filed after the Supreme Court's *Loving* decision, wherein counsel allege that the reach of *Solorio* (insofar as that case does not require a service-connection in order to obtain jurisdiction over a service member) extends only to non-capital cases.[93] The CAAF agrees that *Solorio* provides "an important question" regarding whether a service-connection must be established in a military capital case but ultimately determines that such question "need not be decided" in this case.[94] For the CAAF, the facts provide a "sufficient service connection" such that the issue of jurisdiction, even if it were to necessitate a *Solorio* analysis, is resolved against Gray.[95]

The ineffective assistance claims spring from the posttrial discovery of Gray's mental problems as well as from the posttrial development of the sentencing case. In four phases Gray attacks his counsels' performance. First, he alleges that his lawyers failed adequately to investigate his "family, social, and medical histories and [his] intoxication at the time of the offenses."[96] Second, he attacks his counsels' failure to challenge the competence of the psychiatrists who evaluated his mental health pretrial.[97] Third and fourth, he alleges that his attorneys rendered inadequate performances on the merits and in sentencing.[98] The CAAF found that he failed in all attacks.

Recall that the posttrial development of Gray's various "histories" evolves with the passage of time and that the results produced come from the zealous and energetic efforts of appellate counsel. In fact, the results, called by counsel a "wealth of evidence in mitigation,"[99] reveal a more complete picture of Gray's mental health and enhance an analysis of his mental responsibility at the time he committed his offenses. While the CAAF does not "welcome descent into the 'psycho-legal' quagmire of battling psychiatrists and psychiatric opinions,"[100] it surely welcomes the additional clarity that enables it to resolve the issue. Moreover, the newly discovered evidence enhances its review of the case in general as well as the specific allegations of ineffective assistance at the various phases of the case.

The investigative and research efforts achieved by counsel and the courts during *Gray*'s appellate history (a history that encompasses the passage of nine years from Gray's commission of the offenses until final arguments before the CAAF), renders a conclusive analysis of a multitude of issues. Those efforts and that investigation also produce a valid appellate determination that Gray's death sentence can only be described as a "reliable result."[101] It is common knowledge not only that

89. *Id.*

90. *Id.*

91. *Id.* During this period of time, the CAAF granted the withdrawal motion of yet another lead appellate defense counsel.

92. *Id.* at 18.

93. *Id.* at 11 (citing Solorio v. United States, 483 U.S. 435 (1987)).

94. *Id.*

95. *Id.*

96. *Id.* at 18.

97. *Id.* at 19.

98. *Id.* Although not expressly alleged by counsel on appeal, one can surmise that the ineffective assistance argument extends also to the failure to procure the necessary funds for investigation and expertise and also to the failure to argue *Batson* when the military judge failed to comply with its dictates. As is the case with the other ineffective assistance issues, both of these issues developed post-trial.

99. *Id.* at 15.

100. *Id.* at 17.

101. United States v. Murphy, 50 M.J. 4, 15 (1998).

a rush to judgment often produces flawed results but that the passage of time can produce an end product of greater reliability. *Gray* and its history suitably supports that latter contention, as is evidenced by several of the issues resolved by the CAAF in its decision. *Gray* also reveals a not unusual review process of which counsel must be mindful and be prepared to utilize. Certainly, the military appellate process cannot allow for a death sentence case to work the system *ad infinitum* but practitioners, at the trial and appellate levels, cannot escape the conclusion that the deliberate, thought-out, thoroughly investigated case produces the result that best answers all needs concerned. If that process must take an extra amount of time than does the usual case, then so be it. The alternative, that is, a less-than-reliable result produced by a speedy process, cannot be seen to serve the interests of military justice.

United States v. Curtis and Sentence Reassessment 101: Whose Task Should it Be—the TJAG's or the Service Court's?

In *United States v. Curtis*,[102] the CAAF addresses two issues certified to it by the Judge Advocate General of the Navy in a case where the Navy court had, on remand, affirmed a sentence of life imprisonment.[103] Those issues concerned whether the Navy court was authorized to reassess a death sentence and whether the court had abused its discretion by doing so in this case without instead ordering a sentence rehearing.[104] In a per curiam decision, the court determines that service courts have the requisite authority to reassess death sentences and that the Navy court did not abuse its discretion in so doing without ordering a rehearing.[105] In her dissent, Judge Crawford maintains that while service courts may have the requisite authority to reassess a death sentence, in this case the CAAF, by its remand order, "usurped the role of the Judge Advocate General"[106] and effectively limited the treatment of this case so as to produce a "tainted outcome."[107]

Curtis is the end result of yet another lengthy appellate review that is comprised of multiple opinions and actions by the respective appellate courts. In 1987, a general court-martial convicted then Lance Corporal Curtis of murdering his officer-in-charge and the officer's wife.[108] After multiple reviews and thorough analysis of the numerous issues cited by appellate counsel, the CAAF affirmed the findings and sentence.[109] On reconsideration, however, the CAAF reversed the death sentence on the basis of ineffective assistance of counsel during the sentencing phase of trial.[110] The Navy-Marine court, on remand, affirmed a life sentence, stating that its decision was the result of "a careful review of the entire record and in light of the foregoing [appellate history]."[111]

The CAAF begins its review of the certified issues by noting that the government, in challenging the earlier determination of ineffective assistance of counsel, did not also challenge the remand mandate, and neither government appellate counsel nor the Navy's Judge Advocate General challenged the decision to direct this mandate to the lower court instead of to the Navy Judge Advocate General.[112] Finally, the CAAF also notes that the government did not avail itself of Supreme Court review either of the ineffective assistance of counsel conclusion or of the remand order.[113]

Regarding the first certified issue, the CAAF observes that the UCMJ expressly authorizes the CAAF to "direct" the respective Judge Advocate Generals to return a record of trial to the intermediate service courts "for further review in accordance with the decision of the Court."[114] Coupled with the

102. United States v. Curtis, 52 M.J. 166 (1999).

103. The remand order came from the CAAF's earlier decision wherein the court had reversed the death sentence based upon its determination that Curtis had received ineffective assistance of counsel during the sentencing phase of his court-martial. United States v. Curtis, 46 M.J. 129 (1997). In the decretal paragraph of the decision, the court reversed the lower court's decision as to the sentence and stated: "The record of trial is returned to the Judge Advocate General of the Navy *for remand* to the United States Navy-Marine Corps Court of Criminal Appeals. That court may affirm a sentence of life imprisonment and accessory penalties, or order a rehearing on sentence." *Id.* at 130 (emphasis added).

104. *Curtis*, 52 M.J. at 167.

105. *Id.* at 168, 169.

106. *Id.* at 171.

107. *Id.* at 170.

108. United States v. Curtis, 28 M.J. 1074 (N.M.C.M.R. 1989).

109. United States v. Curtis, 44 M.J. 106 (1996).

110. United States v. Curtis, 46 M.J. 129 (1997).

111. *Curtis*, 52 M.J. at 167 (citing United States v. Curtis, WL 918810, at *2 (N.M.C.C.A. 1998) (unpublished opinion)).

112. *Id.*

113. *Id.*

CAAF decisional law as well as an earlier opinion from the U.S. Supreme Court (wherein the justices held that a service court could reduce a life sentence to a term of years),[115] the statutory authority provides the CAAF with a basis for its holding that service courts may reassess sentences in capital cases.[116] Judge Crawford's dissent concedes that this authority in fact lies within the purview of the service courts.[117]

The CAAF then addresses the issue regarding abuse of discretion and observes that the government has actually demanded an explanation for the decision by the lower court. Even though such an explanation is not generally required of appellate courts, the government maintains that a capital case requires an explanation in order therefore to "ensure public confidence and to ensure that the court has not applied an incorrect legal standard."[118] The CAAF disagrees and, in applying the prevailing view, found that because the Navy-Marine Corps court "was able to discern that the sentence would have been at least life imprisonment," then it was free to reassess the sentence itself instead of ordering a sentence rehearing.[119]

Judge Crawford concedes as well that the lower court did not abuse its discretion but posits that the remand order effectively removed the Navy Judge Advocate General from the reassessment process and turned him instead into nothing more than an errand clerk tasked with a delivery order. In her opinion, the CAAF remand "bypassed the normal comprehensive process" and "assured there would only be a limited review of the sentencing considerations."[120] For Judge Crawford, the normal process (and the one better suited to facilitate public confidence[121]) involves The Judge Advocate General's freedom to direct the case either to a court of criminal appeals or to a convening authority.[122] With this flexibility, the Judge Advocate General has additional resources as well as procedures, evidence and other material all of which is not available to the court. Taken as a whole, the process produces a more comprehensive review that cannot be duplicated solely by directing the matter in the first instance to the court. Judge Crawford concluded that the remand order in *Curtis* deprived the Navy's Judge Advocate General of discretion, flexibility and a more thorough review such that, in the final analysis, the result—while legally permissible—"is most unwise and should be avoided in the future."[123]

As it is consistent with the over-arching concern for result reliability, it appears that Judge Crawford's opinion is more persuasive than the majority's in *Curtis*. In the Crawford approach, when the CAAF determines that a death sentence is a flawed result, it should use its remand power to compel a sentence reassessment that is founded on a thorough re-look at the available evidence, information, and any other relevant material. Short of a sentence rehearing, the only mechanism to obtain that thorough investigation and analysis comes from a convening authority's independent efforts. The intermediate appellate court is constrained by its limitation to a review of the record of trial and cannot duplicate the efforts either of a convening authority or of advocates arrayed in a sentencing rehearing.[124] Surely the interests of military justice and the interests of all parties in ascertaining that "fundamental notions of due process"[125] have been met would be better served by a more comprehensive review. While an intermediate appellate court is authorized to reassess a sentence, the reliability of that conclusion is suspect without the benefit of something more than the record of trial.[126]

114. *Id.* at 168 (citing UCMJ art. 67(e)).

115. *Id.* (citing Jackson v. Taylor, 353 U.S. 569 (1957)).

116. *Id.*

117. *Id.* at 170.

118. *Id.* at 169.

119. *Id.* This rationale comes from the CAAF's decision in *United States v. Taylor*, 47 M.J. 322, 324 (1997), wherein the court held: "When prejudicial error occurs at trial, the Court of Criminal Appeals may reassess the sentence instead of ordering a sentencing rehearing if the court is convinced that appellant's sentence 'would have been at least of a certain magnitude . . . .'" (quoting United States v. Sales, 22 M.J. 305, 307 (C.M.A. 1986)).

120. *Curtis*, 52 M.J. at 170.

121. *Id.*

122. *Id.*

123. *Id.* at 172. Judge Crawford also observes that the court should review its remand order in *Murphy* in order "to allow a full review process to take place." *Id.* at n.1.

124. *See generally* UCMJ art. 66(c) (LEXIS 2000).

125. United States v. Murphy, 50 M.J. 4, 15 (1998).

126. Judge Crawford suggests that a "wide variety of factors" may be examined. These include "newly discovered evidence, post-trial developments such as clarification of the evidentiary and procedural rules, new scientific procedures, availability of witnesses, victim-impact considerations, and the philosophy or purpose behind sentencing." *Curtis*, 52 M.J. at 170.

New Development in Capital Offenses: Additional Aggravating Factor for R.C.M. 1004

Pursuant to Executive Order 13,140, R.C.M. 1004 was recently amended to include an additional aggravating factor the proof of which may authorize a death sentence. This factor, added to the list of aggravating factors found at R.C.M. 1004(c), authorizes a death sentence to be adjudged where the members find beyond a reasonable doubt that the victim of the murder was less than fifteen years of age.[127] Per the executive order, this additional aggravating factor is applicable only to offenses that are committed after 1 November 1999.[128]

Conclusion

The preceding discussion of four capital cases and their recent disposition reveals a review of the basics by the CAAF. *Simoy* highlights the military judge's role, *Murphy* shows deficient performance by defense counsel, *Gray* demonstrates that a lengthy appellate review process serves to enhance appellate conclusions as to factual and legal sufficiency, and *Curtis* discusses the relative strengths and weaknesses of sentence reassessment in the absence of a sentence rehearing. Each case, in turn, provides the capital court-martial advocate the ground rules in several areas. Regarding *Loving*, the ground rules may not be so certain and it remains to be seen whether those rules evolve into something more than a "by-the-book" process.

The cases also convey the prevalent themes that consistently appear in capital litigation. Not only is the issue of the judge's role a viable one but the issue of counsel performance, on the merits and in sentencing, remains persistent. Finally, the lasting impression from an analysis of these cases is the idea that no court-martial death sentence will be executed without having undergone multiple plenary review. The exhaustive and comprehensive process in the military's capital litigation scheme is, unlike that seen too often in the civilian sector,[129] a process that strives ever to reach "result reliability." Anything less than that goal would be antithetical to the due process and fairness guarantees that flow from the UCMJ.

127. Exec. Order No. 13,140, 64 Fed. Reg. 55,115, 55,116 (1999) (citing R.C.M. 1004(c)(7)(K)).

128. *Id.* 64 Fed. Reg. at 55,120.

129. *See generally* William Claiborne, *Illinois Governor, Citing Errors, Will Block Executions*, WASH. POST, Jan. 31, 2000, at A1 (reporting that Illinois Governor George Ryan imposed a moratorium on the imposition of the death penalty in Illinois because of a perceived need to ascertain "that the system is working and that only the clearly guilty are being executed").

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
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.

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

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).
12-14 June	3d Staff Judge Advocate Team Leadership Seminar (5F-F52-S).
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).
18-22 September	47th Legal Assistance Course (5F-F23).
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).
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).
27 November- 1 December	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).
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).
17-19 January	7th RC General Officers Legal Orientation Course (5F-F3).
21 January- 2 February	2001 JAOAC (Phase II) (5F-F55).
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).
26 February- 2 March	59th Fiscal Law Course (5F-F12).
26 February- 9 March	35th Operational Law Seminar (5F-F47).

March 2001

5-9 March	60th Fiscal Law Course (5F-F12).
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).
30 April- 11 May	146th Contract Attorneys Course (5F-F10).

April 2001

2-6 April	25th Admin Law for Military Installations Course (5F-F24).
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).

Note: This workshop has been cancelled.

30 April- 18 May	44th Military Judge Course (5F-F33).

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

12 May ICLE	Administrative Law Cobb Galleria Centre 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:

Charles H. Whitebread, *Recent Criminal Decisions of the United States Supreme Court: The 1998-1999 Term*, 36 J. AM. JUDGES ASS'N 16 (Winter 2000).