

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 CAAF's 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

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 post-trial 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 pre-trial 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 Efron. 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 Efron'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; *Hensley* 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

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 *Pilkington* 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 post-trial 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 fared 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 post-trial 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 post-trial 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 post-trial 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 post-trial 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 post-trial procedure requires that the convening authority receive a post-trial recommendation from his SJA and affords an accused the opportunity to submit matters relating to the findings and sentence¹²¹ and to respond to the post-trial 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 post-trial,¹²³ that the court would have found no prejudice had defense submitted some kind of request for clemency.

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 rallied 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.*