New Developments in Sentencing: A Year of Fine Tuning

Major Timothy C. MacDonnell
Professor, Criminal Law Department
The Judge Advocate General's School, United States Army
Charlottesville, Virginia

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.

---

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.

---

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.