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Military Justice Symposium—Volume II

Articles

Recent Developments in Unlawful Command Influence

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The good news is that there were only a handful of appellate opinions dealing with unlawful command influence this past year. The bad news is that unlawful command influence is still alive. This year's developments showcase the enduring nature of this most contentious issue. Unlawful command influence has been with us since well before enactment of the Uniform Code of Military Justice (UCMJ), over fifty years ago. It continues today, just as contentious as it was half a century ago when Congress sought to eliminate it from the military justice system with the UCMJ.

Unlawful command influence will not go away as long as commanders are responsible for the military justice system and execute those responsibilities. Commanders exert influence in all that they do, including maintaining good order and discipline in their commands. The challenge for judge advocates is to assist commanders in taking those actions that both maintain discipline and protect the integrity of the military justice system. In other words, judge advocates must be able to assist commanders in exerting lawful command influence. The challenges for military justice practitioners are to be able to distinguish between lawful and unlawful command influence, and to be prepared to address and remedy those instances where a commander or other leader crosses the line.

Over the years, the Court of Appeals for the Armed Forces (CAAF) has added definition and clarity to the prohibition on unlawful command influence found in Article 37 of the UCMJ.[1] It is generally accepted that unlawful command influence can, and does, take many forms. The clearest examples are those instances where a commander directs or implies that a case be disposed of in a certain manner,[2] selects court-members to achieve a particular result,[3] exerts pressure on court members,[4] or attempts to influence witnesses.[5] Unlawful command influence can also take other forms, such as a convening authority who exhibits an inflexible attitude toward disposition or punishment,[6] imposes pretrial punishment with a view toward ensuring that an accused receives severe punishment,[7] or seeks

1. Article 37 states:

> (a) No authority convening a general, special, or summary court-martial, nor any other commanding officer, may censure, reprimand, or admonish the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercises of its or his functions in the conduct of the proceedings. No person subject to this chapter may attempt to coerce, or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts. The foregoing provisions of the subsection shall not apply with respect to (1) general instructional or informational courses in military justice if such courses are designed solely for the purpose of instructing members of a command in the substantive and procedural aspects of courts-martial, or (2) to statements and instructions given in open court by the military judge, president of a special court-martial, or counsel.
>
> (b) In the preparation of an effectiveness, fitness, or efficiency report or any other report or document used in whole or in part for the purpose of determining whether a member of the armed forces is qualified to be advanced, in grade, or in determining the assignment or transfer of a member of the armed forces or in determining whether a member of the armed forces should be retained on active duty, no person subject to this chapter may, in preparing any such report (1) consider or evaluate the performance of duty of any such member of a court-martial, or (2) give a less favorable rating or evaluation of any member of the armed forces because of the zeal with which such member, as counsel, represented any accused before a court-martial.

UCMJ art. 37 (2000).

2. *See* United States v. Rivers, 49 M.J. 434 (1998) ("There is no place in the Army for illegal drugs or for those who use them."); United States v. Gerlich, 45 M.J. 309 (1996) (brigade commander improperly ordered subordinate commander to set aside Article 15, UCMJ proceedings, and directed reinvestigation); United States v. Martinez, 42 M.J. 327 (1995) (commander suggested a "starting point" for NCOs involved in alcohol-related offenses).

3. *See* United States v. Hilow, 32 M.J. 439 (C.M.A. 1991) (stating that the division deputy adjutant general developed a list of nominees who where supporters of "harsh discipline"); United States v. McClain, 22 M.J. 124 (C.M.A. 1986) (improper exclusion of junior enlisted soldiers from the pool of potential panel members); United States v. Redman, 33 M.J. 679 (A.C.M.R. 1991) (stating that the panel was replaced because of "results that fell outside the broad range of being rational").

4. *See* United States v. Youngblood, 47 M.J. 338 (1997) (stating that it was improper for convening authority and the staff judge advocate to offer opinions in presence of sitting panel members that certain commanders had "underreacted " to misconduct).

5. *See* United States v. Gleason, 43 M.J. 69 (1995) (stating that the battalion commander expressed opinion that he believed accused was guilty and that TDS was the "enemy"); United States v. Stombaugh, 40 M.J. 208 (C.M.A. 1994) (stating that officer pressured by other officers to not testify on behalf of the accused).

to put pressure on the military judge.[8] Military justice practitioners must be able to recognize the various forms that unlawful command influence can take. More important, though, is understanding the framework for analyzing the facts. In cases such as *United States v. Thomas*,[9] *United States v. Ayala*,[10] and *United States v. Stombaugh*,[11] the CAAF provided a methodology for analyzing allegations of unlawful command influence. In the most recent significant unlawful command influence decision, *United States v. Biagase*,[12] the CAAF further refined the methodology for dealing with this issue. The CAAF traced the development of the burden of proof once an accused raises the issue. The CAAF also clarified that the burden of proof for all determinations associated with the litigation of unlawful command influence allegations is proof beyond a reasonable doubt.[13]

There were no decisions of *Biagase* significance this past year. The opinions of the service courts and the CAAF do underscore, however, that it is difficult to define a template for unlawful command influence. The courts also continued to emphasize the importance of litigation and resolution at the trial level, and the importance of remedial measures. In one instance, however, the opinion of the court warns that we may become overly cautious on this issue.

Pretrial Publicity—United States v. Ayers

Pretrial publicity can pose a variety of problems for trial counsel and defense counsel, not the least of which is the potential for unlawful command influence. Comments made by the command can reflect predisposition, and possibly affect court members and potential witnesses. Of course, establishing that remarks to the press, arguably, violate UCMJ art. 37 is not enough. There must be some showing that the unlawful act was the proximate cause of some unfairness in the case at trial.[14] It was this lack of nexus between the remarks to the press and unfairness at trial that the CAAF relied on in denying relief in *United States v. Ayers.*[15]

Staff Sergeant Ayers was tried and convicted by general court-martial at Fort Lee, Virginia, for attempted adultery, attempted violation of a lawful general regulation, adultery, and indecent assault. He was sentenced to a dishonorable discharge, confinement for four years, total forfeitures, and reduction to the lowest enlisted grade.[16] All of the offenses grew out of his conduct as an instructor. The two victims were female soldiers undergoing Initial Entry Training.[17] Charges were preferred against Sergeant Ayers in December 1996. At trial, defense counsel moved to dismiss the charges because of the appearance of unlawful command influence. The basis for the motion was the contemporaneous press coverage, and official comments regarding the cadre-trainee sex scandal at Aberdeen Proving Ground.[18]

The defense counsel first expressed concern about pretrial publicity at the Article 32 investigation. He focused on the command climate at Fort Lee because of the press coverage of the sex scandal at Aberdeen Proving Ground that broke about the same time as the command was processing charges against Sergeant Ayers. In the recommendation, the Article 32 investigating officer noted that "he had felt no pressure from any individual or agency associated with the Army, Fort Lee, the local chain of command or the media."[19]

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6. *See* United States v. Fernandez, 24 M.J. 77 (C.M.A. 1987) (stating that the presence of inelastic attitude suggests that a convening authority will not adhere to legal standards in post-trial review process); United States v. Howard, 48 C.M.R. 939 (C.M.A. 1974) (stating that the commander who is predisposed to disapprove clemency in drug cases denies an accused the right to a careful and individualized review of his sentence).

7. *See* United States v. Cruz, 25 M.J. 326 (C.M.A. 1987).

8. *See* United States v. Ledbetter, 2 M.J. 37 (C.M.A. 1976); *see also* United States v. Mabe, 33 M.J. 200 (C.M.A. 1991).

9. 22 M.J. 388 (C.M.A. 1986).

10. 43 M.J. 296 (1995).

11. 40 M.J. 208 (C.M.A. 1994).

12. 50 M.J. 143 (1999).

13. *Id.* at 150-51.

14. United States v. Stombaugh, 40 M.J. 208 (1994); *Biagase*, 50 M.J. at 143.

15. 54 M.J. 85 (2000).

16. *Id.* at 87.

17. *Id.*

18. *Id.*

19. *Id.* at 92.

The defense counsel raised the issue again at trial, which began in March 1997, requesting that the court dismiss the charges because of unlawful command influence associated with pretrial publicity. Defense counsel also moved for appropriate relief and change of venue. In support of the motion, defense counsel introduced newspaper clippings, transcripts of news conferences, and television program transcripts, in which senior military leaders commented on the allegations of drill instructor sexual misconduct at Aberdeen Proving Ground. Specifically, the defense counsel focused on the impact that these senior leader comments had on court members in Sergeant Ayers' trial. The trial judge denied the defense motions.[20]

It is noteworthy that the defense counsel did not voir dire the court members specifically on the issue, nor was there any other reference by trial counsel to the comments by senior leaders at trial.[21] However, the issue was raised again on appeal, the argument being that the enormous pretrial publicity, to include clear commentary by the Army's military and civilian leaders on sexual harassment type cases, created the appearance of unlawful command influence.

The CAAF identified four categories of evidence related to the issue: condemnation,[22] investigation,[23] training,[24] and disciplinary action.[25] The issue at the CAAF was whether public statements about the misconduct at Aberdeen Proving Ground and sexual misconduct cases in general constituted actual or apparent unlawful command influence with respect to Sergeant Ayers' court-martial. When unlawful command influence is raised at trial, defense counsel and the accused must satisfy two requirements. They must: (1) allege sufficient facts which, if true, constitute unlawful command influence; and (2) establish a logical connection between the unlawful command influence and the potential for unfairness in the court-martial in question.[26] The CAAF concluded that Sergeant Ayers and his defense counsel failed on both counts.

The analysis employed by the court in *Ayers* is quite interesting, and clearly illustrates how the two requirements in the initial burden on the accused are interrelated. On the surface, the burden appears to be a two-step process. Theoretically, a military judge or appellate judge could find that the facts alleged by an accused do not constitute unlawful command influence and end the inquiry. Arguably, there would be no reason to address whether there was a logical connection between the conduct and the court-martial. The court in *Ayers*, however, found that the accused failed to show that the remarks by senior military leaders constituted actual or apparent unlawful command influence.[27] Though not stated in the opinion, one can assume that the court unanimously concluded that the remarks made by senior military leaders did not fit the definition of unlawful command influence. However, the court did not stop there. The court also addressed the issue of whether there was a logical connection between those remarks and the potential for unfairness in Sergeant Ayers' court-martial, and found none.[28] Specifically, the court found that the views expressed by the senior leaders were never "interjected" into Sergeant Ayers' trial. The court also found that they were not directed at his

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20. *Id*. at 93.

21. *Id.*

22. The comments attributed to the Secretary of the Army included: "[S]exual harassment is particularly repugnant when it involves the abuse of authority." *Id.* The Army Chief of Staff stated that "everyone is deeply troubled by the allegations of rape which occurred" and later referred to the conduct as "unacceptable." *Id*. The Chief of Staff was "particularly troubled by the abuse of power" and resented the allegations because they "tarnished the Army's reputation." *Id.* The Training and Doctrine Command Commander stated that "America deserves better than this. Our soldiers deserve better than this and our Army is better than this." *Id.* The Aberdeen Proving Grounds Commander stated, "What we want out in front of the formation is a leader, not a lecher." *Id.*

23. The Chairman of the Joint Chiefs of Staff stated on a November 1996 news program that the services must "bring every complaint to the surface, investigate it properly and set what's wrong right." *Id.* at 94. He stated that the Services must "ensure that we find exactly how widespread it is and bring to justice all those who should be brought to justice." *Id*. A separate news program reported that the Secretary of Defense "ordered the entire military, not just the Army, to weed out sex offenders." *Id.* The Secretary of the Army directed the Army Inspector General to "assess the responsibility and accountability of the chain of command." *Id.* The Secretary of the Army also created a Senior Review Panel to "examine how Army leaders throughout the chain of command view and exercise their responsibility to address sexual harassment, together with recommendations for improvement." *Id.*

24. A November 1996 news program reported that the Army Chief of Staff sent out a personal letter to all general officers on active duty underscoring the Army's position on sexual harassment and that the Army had followed the letter on "training packages" including a video sent to "targeted commanders of the Army around the world." *Id.*

25. The Secretary of the Army stated: "If violations have occurred, we will hold the perpetrators accountable. We will eradicate them. This is about noncommissioned officers who violated the law in the first instance. . . . When we punish, the word goes out." *Id.* The Chairman of the Joint Chiefs of Staff echoed "the outrage and commitment to seeing justice done that have been expressed by other senior defense officials." *Id*. The Army Chief of Staff stated: "The service's leadership would move swiftly to ensure that those responsible are brought to justice." *Id.* Finally, a Fort Lee spokesman stated that "disciplinary action in appellant's case could range from a reprimand to a general court-martial, but that the lower end of the range is probably not going to be considered." *Id.*

26. United States v. Biagase, 50 M.J. 143, 150 (1999).

27. *Ayers*, 54 M.J. at 95.

28. *Id*.

trial; there was no suggestion that Sergeant Ayers was guilty, nor any evidence presented that his court-martial was "unfair" because of the publicity associated with the Aberdeen cases.[29]

While one could question whether this second step was even necessary in this case,[30] the result would have been the same. The opinion also recognizes that senior leaders will, and should, comment on military justice challenges that are facing the Department, and can do so without violating Article 37.

Comments by the Convening Authority—
United States v. Baldwin

Despite the CAAF's decision in *Ayers*, commanders speaking publicly about how certain types of cases should be handled, and what are appropriate punishments for certain offenses and categories of offenders, is fraught with danger. These types of remarks are particularly troubling when they refer to cases currently pending court-martial. Depending on the content of the remarks and the message received by the audience, an allegation of unlawful command influence will certainly follow, as occurred in *United States v. Baldwin.*[31]

Captain Baldwin was tried and convicted by general court-martial of larceny, conduct unbecoming an officer, mail tampering, and obstruction of justice. She was sentenced to a dismissal, confinement for one year, and total forfeitures.[32] Nine months after her conviction, Captain Baldwin filed an affidavit[33] with the Army Court of Criminal Appeals. She alleged that during the period of her court-martial, the general co/urt-martial convening authority held two Officer Professional Development (OPD) sessions where the topic was officer misconduct. She alleged that the convening authority expressed his sense that the court-martial sentences for officers were too lenient and that the minimum sentence should be one year of confinement. She further alleged that the second session included the general theme that officers should not be allowed to resign, but should be court-martialed.[34]

On appeal, Captain Baldwin asserted that these actions by the convening authority constituted unlawful command influence, and that her sentence and the rejection of her resignation packet were a direct result of these comments.[35] The CAAF was not convinced by the government's argument that Captain Baldwin had not met her threshold burden of production. Quite to the contrary, the court was more concerned about the possibility that a command meeting was used to purposefully influence court members, even though the only evidence of such a meeting was Captain Baldwin's affidavit.[36] Unlike in *Ayers*, there appeared to be a connection in this case between the commander's comments and Captain Baldwin's court-martial, both in terms of timing and in terms of content. Further, the court noted that there was no evidence from the government to the contrary. The court chose not to grant Captain Baldwin relief based on her affidavit, but felt it sufficient to warrant a *DuBay* hearing on the unlawful command influence issue.[37]

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29. *Id*.

30. The court limited its decision to the facts of this case and left open the question of whether these remarks may have injected unlawful command influence into the courts-martial at Aberdeen. *Id*.

31. 54 M.J. 308 (2000).

32. *Id*.

33. The text of Captain Baldwin's affidavit stated, in part:

> At that particular [Officer Professional Development (OPD)], one of the topics discussed was an incident that happened with three of the officers in 31st [Air Defense Artillery Brigade] that were being court-martialed. The address included comments that the court-martial sentences were too lenient and that the minimum sentence should be at least one year and that Officers should be punished harsher than enlisted soldiers because Officers should always set the example and be above reproach. The day after this OPD one of the officers from the 31st was to be sentenced . . . . On the day of my conviction and sentence, the final part of the trial was delayed for another OPD that was mandatory for all Officers on post. This OPD dealt with the situation Lt. Kelly Flynn was embroiled in [sic]. The theme about this OPD was that she [1LT Kelly Flynn] should not have been allowed to resign, but should have been court-martialed . . . . I submitted a Resignation for the Good of Service [sic] . . . and it was held and never sent up as the regulation states . . . . That afternoon after the officers on my panel went to the OPD, I was convicted and sentenced to 1 year at Fort Leavenworth. It should be noted that four of the officers on my panel were in the same rating chain . . . .

Id. at 309.

34. *Id*.

35. *Id*.

36. *Id*. at 310.

37. *Id*. at 312.

Collateral Investigations—United States v. Johnson

Collateral administrative actions often accompany the processing of court-martial charges, and commanders must make various recommendations and decisions in these contemporaneous actions. For example, a commander may conclude, based on an *Army Regulation 15-6*[38] or *JAGMAN*[39] investigation into officer misconduct, that relief from command is the appropriate action to take. This decision necessarily requires that the commander approve the findings and recommendations of the investigating officer, and decide the merits of the allegations based on the evidence collected in the investigation. Add the usual consultation up and down the chain of command that usually accompanies such actions and you have the recipe for disaster if the same officer misconduct results in the preferral of court-martial charges. It is imperative that the command maintain a firewall between such contemporaneous actions to avoid the potential for unlawful command influence. A recent example of how contemporaneous administrative and court-martial actions can result in unlawful command influence allegations is *United States v. Johnson.*[40]

Lieutenant Johnson, a Navy dentist, was charged with and ultimately convicted of two specifications of oral sodomy on his fifteen-year-old son.[41] When the allegations first arose, the command was faced with three interrelated, but quite different issues: First, whether Lieutenant Johnson should be allowed to continue to practice dentistry on minors; second, whether he should be processed administratively for homosexual conduct; and third, whether court-martial charges should be preferred.[42] As could be expected, there was consultation up and down the chain of command on the first two issues. For example, the command conducted a local peer review on whether Lieutenant Johnson should be allowed to continue to practice dentistry, a matter which was reviewed all the way up to the Naval Bureau of Medicine (NBM).[43] On the second issue, the local command decided not to process Lieutenant Johnson administratively for homosexual misconduct, a decision that was also reviewed all the way up to the Navy Personnel Bureau (NPB). Complicating matters, an internal NPB memorandum, written by legal counsel, was leaked to the press. The memorandum specifically mentioned Lieutenant Johnson's case, and advocated mandatory processing for separation for homosexual conduct with children.[44]

Lieutenant Johnson asserted that the consultation and discussion that accompanied these administrative actions had an adverse impact on his court-martial. Specifically, he asserted that they prompted his immediate commander to withdraw his recommendation for suspension of any dismissal adjudged in his case, a course of action that the convening authority was giving consideration.[45] Unfortunately for Lieutenant Johnson, there was a change of convening authorities before final action was taken on his court-martial and the evidence adduced at the DuBay hearing revealed that the new convening authority never considered suspending the dismissal.[46] Lieutenant Johnson also alleged that there were attempts from higher level commanders, communicated through staff judge advocates, to influence the new convening authority's decision on suspension of the dismissal.

When CAAF first reviewed this case, there was marked disagreement on whether the evidence presented by Lieutenant Johnson even raised the issue of unlawful command influence.[47] After the Dubay hearing, the court unanimously agreed that unlawful command influence did not affect the decision in this case.[48] The court acknowledged that there were discussions up and down the chain of command regarding administrative processing of Lieutenant Johnson's case. Notwithstanding, the court concluded that there was no evidence

38. U.S. Dep't of Army, Reg. 15-6, Procedures for Investigating Officers and Boards of Officers (30 Sept. 1996).

39. U.S. Dep't of the Navy, Jag Instr. 5800.7c, Manual of The Judge Advocate General (3 Oct. 90).

40. 54 M.J. 32 (2000).

41. *Id*. at 34. Lieutenant Johnson pleaded guilty and was sentenced to a dismissal and three years confinement. United States v. Johnson, 46 M.J. 253 (1997).

42. *Johnson*, 54 M.J. at 34-35.

43. *Id.* at 34. The NBM overruled the local decision, barring Lieutenant Johnson from practicing pending disposition of the court-martial charges.

44. *Id.*

45. *Id.* at 34. After Lieutenant Johnson was convicted, his immediate commander also wrote the Chief of Naval Personnel, requesting that Lieutenant Johnson not be separated from the service because "his retention . . . would be in the best interest of his family and in the best interest of the Navy." *Johnson*, 46 M.J. at 254.

46. *Id*.

47. *Johnson*, 46 M.J. at 254-56. Then Chief Judge Cox, Judge Effron, and Judge Sullivan believed that Lieutenant Johnson's then unrebutted affidavit was sufficient to warrant a fact-finding hearing. Chief Judge Crawford and Judge Gierke concluded that the affidavit was insufficient to raise the issue because there was no evidence that Lieutenant Johnson's immediate commander had withdrawn his recommendation.

48. Judge Sullivan still viewed leaking of the memorandum as problematic because of its content, but concluded that the memorandum did not prejudice Lieutenant Johnson. *Ayers*, 54 M.J. at 36.

that anyone on the personnel-administrative side of these actions contacted anyone on the military justice side.[49] In essence, there was no unlawful command influence.

Lawful or Unlawful Command Influence— United States v. Francis

The Army Court of Criminal Appeals (ACCA) probably made the strongest statements in an unlawful command influence case this year. In *United States v. Francis*,[50] the ACCA strongly challenged the military judge's conclusion that unlawful command influence was proven, and the military judge's imposition of remedial measures in the case.

At his court-martial for absence without leave and wrongful use of marijuana and LSD, Private First Class Francis alleged that his squad leader and platoon leader told fellow soldiers not to associate with him. He also alleged that his squad leader and platoon leader directed that he be separated from the rest of the soldiers.[51] His theory was that these actions constituted unlawful command influence on potential witnesses in his case. In support of these allegations, three enlisted soldiers testified. These soldiers testified that they were never told not to testify for the accused, nor were they threatened in any way.[52] In response, the government called the squad leader and platoon leader, who testified that the gist of their comments to other soldiers was that they should not hang out with the wrong crowd, because they would get into trouble as well.[53] The gist of the platoon leader's testimony was that he told the noncommissioned officers in the platoon not to put Private Francis in positions of responsibility. He also told them to make sure that Private Francis did not hurt himself, and ensure that he did not get into more trouble.[54]

The defense theory was that the comments by the squad leader and platoon sergeant inhibited soldiers from coming forward to testify on behalf of Private Francis. He had no evidence, however, to support his theory and conceded as much.[55] Based on the testimony of the witnesses, the military judge found that, despite the comments by the leaders, there was no evidence that witnesses were pressured not to testify, nor had any witnesses been discouraged from testifying. Further, the military judge found that Private Francis had not been hindered in any way in obtaining evidence for trial.[56] The military judge did find, however, that the actions by the squad leader and platoon leader "could be reasonably understood by the listener as an attempt to influence or interfere with potential witnesses, and thus constitute . . . unlawful—command influence," thus satisfying the first prong of *Stombaugh.*[57] The military judge was not satisfied, however, that the accused had satisfied the second and third prongs of the Stombaugh analysis.[58] In other words, the accused had not shown how the proceedings would be unfair, nor how he might be hampered in obtaining favorable evidence. This finding notwithstanding, the military judge concluded that some remedial measures were appropriate and directed six different remedial measures of the type employed in *United States v. Rivers*[59] and *United States v. Biagase.*[60] All of these remedial measures were designed to offset what the military judge described as perceived taint and to prevent future interference with witnesses.[61]

On appeal, the accused asserted that the military judge erred by not shifting the burden of proof to the government after the initial showing of unlawful command influence. The Army court concluded that the military judge did not commit error by not shifting the burden, but also found, contrary to the military judge's ruling at trial, that the accused did not meet his initial burden of production. In essence, the Army court found that the actions of the squad leader and platoon leader did not constitute unlawful command influence. Therefore, the findings and remedial measures employed by the military judge resulted in a windfall to the accused.[62] Specifically, the court found that the military judge's application of the *Stombaugh* analysis was

49. *Id*. at 35.

50. 54 M.J. 636 (Army Ct. Crim. App. 2000).

51. *Id*. at 638.

52. *Id*.

53. *Id*.

54. *Id.*

55. *Id.*

56. *Id*. at 639.

57. *Id.*

58. *Id*

59. 49 M.J. 434 (1998).

60. 50 M.J. 143 (1999).

flawed.[63] In essence, the court concluded that the *Stombaugh* analysis applies only to review at the appellate level, and has no application in deciding unlawful command influence motions at the trial level.[64] Rather, the appropriate test is that announced in *United States v. Biagase*.[65]

The Army court's opinion in *United States v. Francis* is noteworthy for several reasons. The court's discussion of the various burdens and standards in unlawful command influence cases, as prescribed by CAAF in *United States v. Stombaugh* and *United States v. Biagase*, is right on the mark. Particularly useful is the discussion of the distinction between the methodology employed at trial as compared to the standard applied at the appellate level. It is also noteworthy for the tenor of the attack on the findings and conclusions of the military judge. The military judge heard the testimony, viewed the demeanor of the witnesses, and entered findings that he thought were warranted by the evidence. He also imposed measures that he thought were warranted under the circumstances. Over the past few years, the CAAF and service courts, in dealing with allegations of unlawful command influence, have praised military judges who have acted as "the last sentinel" against unlawful command influence.[66] In addition to being strongly worded, the ACCA opinion in *Francis* is certainly at odds with that trend. The subtle message, however, is that not all command influence is unlawful command influence, and trial practitioners must be able to make that distinction.

The Dangers of Electronic Mail— United States v. Stoneman

There are many advantages to communicating by electronic mail (e-mail). It is fast, not limited by the duty day, and lessens the need for telephone conversations. It does have disadvantages, however. Many of the normal inhibitions that are associated with face-to-face conversations—the time to reflect, and the ability to explain and elaborate—are not available with electronic mail. Nor is the ability to recall once the "send" button is activated. These disadvantages are magnified if the subject of the e-mail just happens to be military justice or the state of discipline in a command. Judge advocates typically strongly advise against conducting military justice business through e-mail. *United States v. Stoneman*[67] is a shining example of why this advice is right on the mark.

Not too long before his court-martial, Specialist Stoneman's brigade commander "declared war on all leaders not leading by example."[68] In essence, the brigade commander was expressing his outrage at certain types of misconduct, particularly when committed by officers and noncommissioned officers, including driving under the influence, rape, drug use, larceny of government equipment, and loss of government equipment. The first medium he chose to get his message across was electronic mail.[69] He later restated his concerns in person at brigade leader training. At some point after the leader training, the command recognized the potential problems with the brigade commander's comments. Approximately two weeks later, at

61. *Francis*, 54 M.J. at 640. In directing, in general, the following remedial measures, the military judge:

> (1) required the company commander to issue a retraction which included references to the platoon leader and squad leader's statements, a reminder to soldiers of their duty to testify if called, and that all members of the platoon make themselves available for interview; (2) prohibited the government from presenting evidence in aggravation; (3) required the government to produce all witnesses requested by the defense; (4) allowed the accused to testify regarding what he thought other witness would say; (5) prohibited cross-examination of the accused during sentencing; and (6) barred the platoon leader and squad leader from the courtroom during the trial.

Id.

62. *Id*. at 640-41.

63. *Id*. at 639-40.

64. *Id*.

65. *Id*.

66. *See* United States v. Rivers, 49 M.J. 434 (1998); *see also* United States v. Biagase, 50 M.J. 143 (1999).

67. 54 M.J. 664 (Army Ct. Crim. App. 2000).

68. *Id*. at 666. The first e-mail message read, in part:

> If leaders don't lead by example, and practice self-discipline, then the very soul of our Army is at risk. No more [platoon sergeants] getting DUIs, no more NCOs [noncommissioned officers] raping female soldiers, no more E7s coming up "hot" for coke, no more stolen equipment, no more "lost" equipment, no more approved personnel actions for leaders with less than 260 APFT [Army physical fitness test scores], no more leader APFT failures at DA [Department of the Army] schools,—all of this is BULLSHIT, and I'm going to CRUSH leaders who fail to lead by example, both on and off duty.

Id.

69. *Id*. The full text of both e-mail messages is reproduced in *Stoneman*. *Id.* at 674-79.

the urging of his staff judge advocate, he issued a second e-mail to clarify the first. In the second e-mail, the brigade commander emphasized that he did not intend to influence the decision-making process of subordinate commanders, witnesses, or court members. He also stated that he expected each of these groups to discharge their duties without interference from anyone.[70]

Notwithstanding the second e-mail message, in Specialist Stoneman's court-martial for rape and sodomy, his defense counsel moved to stay the proceedings until all members from the affected brigade were removed from the panel. The defense argument was that, because of having read the initial e-mail and attending the leader briefing, the members were impliedly biased. In support of the motion, they offered the testimony of a noncommissioned officer who stated that his interpretation of the message was that any soldier who got in trouble was "to be crushed."[71] Since the motion was only directed at panel members, the military judge ruled that it was premature and that the issue could be explored more fully in voir dire, which it was, both as a group and individually. Five of the members had seen the e-mail or attended the training. They testified, inter alia, that: they thought the email "suggested an 'appearance of a lack of law and order and discipline among certain elements of the brigade;'" "focused on discipline problems in the brigade . . . and encouraged leaders to 'pick up the standards;'" and "'may have had something to do with accountability [or] integrity.'" They believed "that the intent was to describe potential problem areas and to encourage leaders to prevent their soldiers from getting into trouble," and that the "message was primarily focused on problems the brigade was having with drunk driving."[72]

A sixth member attended the leader training only, and stated that he thought the focus of the briefing was "DUIs, drug abuse, spouse abuse, and sexual harassment of subordinates."[73] All six members testified that they would be fair and impartial and that they would not be swayed by either the email or leader training. They also testified that there was no direction or guidance on how to dispose of misconduct.[74]

The military judge denied the implied bias challenge against members of the brigade based on Rule for Courts-Martial 912(f)[75] and *United States v. Youngblood.*[76] The military judge also relied on the members' statements during voir dire that they would not be swayed by anything said by the brigade commander.[77]

Quick work by the staff judge advocate saved the day in *Stoneman.* The facts in this case, however, underscore the dangers of public comment by commanders on indiscipline and specific misconduct, as well as the dangers associated with addressing misconduct through e-mail. Certainly, the speed of e-mail can serve a commander well. In keeping a superior aware of the status of a serious incident, or the progress on an investigation, it is a wonderful tool, as long as the communication is going up the chain of command, and not down.

Convening Authority Testimony at Trial— United States v. Littlewood

An interesting issue is raised whenever a commander from the chain of command testifies at a court-martial. Is such testimony, per se, unlawful command influence? That was the question facing the CAAF in *United States v. Littlewood.*[78]

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70. *Id*. The full text of the second e-mail message is reproduced as appendix II to the Army Court opinion. It is an excellent example of the types of remedial measures applauded by CAAF in cases such as *United States v. Rivers*, 49 M.J. 434 (1999), and *United States v. Biagase*, 50 M.J. 143 (1999).

71. *Stoneman*, 54 M.J. at 674-79.

72. *Id*. at 667-68.

73. *Id*. at 668.

74. *Id.*

75. Rule for Court-Martial 912(f)(1)(N) provides:

> (1) *Grounds.* A member shall be excused for cause whenever it appears that the member:
>
> . . . .
>
> (N) Should not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality.

MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 912(f)(1)(N) (2000).

76. 47 M.J. 338 (1997).

77. *Stoneman*, 54 M.J. at 668.

78. 53 M.J. 349 (2000).

Staff Sergeant Littlewood was tried and convicted of several UCMJ Article 134 sexual assault offenses. Over defense counsel's objection, the military judge allowed Staff Sergeant Littlewood's squadron commander to offer his opinion as to whether Staff Sergeant Littlewood's conduct was prejudicial to good order and discipline and service discrediting.[79] The majority of the court analyzed this as an evidentiary issue, and ruled that the military judge abused his discretion in receiving the testimony as opinion testimony under Military Rule of Evidence 701. The court concluded, however, that any error was harmless.[80] Three judges thought the issue significant enough to warrant further comment. Judge Gierke, joined by Chief Judge Crawford, opined that the government simply failed to lay an adequate foundation for the testimony. The opinion goes on to disagree with the majority's suggestion that such testimony could foster the appearance of unlawful command influence.[81] The court did qualify this portion of its opinion by noting that this case was tried before military judge alone, thereby eliminating any possibility of unlawful command influence.[82] While that may be true, Judge Gierke does not address whether there should be different considerations in a case tried before members. Senior Judge Cox, concurring in the result, but disagreeing with Judge Gierke's analysis of this issue, correctly identified the potential for unlawful command influence in this type of testimony. It is because of the "razor-thin line between expertise and command influence," that Judge Cox advises against using a commanding officer to express opinions on whether conduct is service discrediting and prejudicial to good order and discipline.[83]

"Non-Commander" UCI— United States v. Pinson

As the courts have noted in the past, improper or ill-advised conduct by a commander, or a representative of the commander, is not automatically unlawful. Faced with an allegation of improper conduct by the staff judge advocate, the Air Force court reached that same conclusion in *United States v. Pinson.*[84]

Senior Airman Pinson was tried and convicted of disobeying lawful orders, subornation of perjury, communicating threats, adultery, and assault. He was sentenced to a bad-conduct discharge, confinement for three years, and reduction to E1.[85] One of several issues he raised on appeal was the staff judge advocate's role in the completion of the Article 32 investigation. He asserted that the staff judge advocate, by giving the investigating officer a letter requesting that she address specific issues, deprived him of a fair and impartial trial. Although Airman Pinson couched the allegation in terms of prosecutorial misconduct, the Air Force court viewed the issue as unlawful command influence and made short work of it.[86] As the representative of a commander who could direct that an investigating officer reopen an investigation, the court concluded that there was nothing improper in the staff judge advocate doing just that.[87]

Contact between the staff judge advocate and court members was the issue in *United States v. Miller.*[88] In Master Sergeant Miller's general court-martial for numerous offenses, there was some concern for security in the courtroom. The military judge directed the use of a variety of security measures, including a metal detector, closing entrances to the courtroom, and posting an Air Force Office of Special Investigation agent in the courtroom.[89] Master Sergeant Miller asserted that contact between the staff judge advocate and the president of the court-martial panel regarding the reasons for the security measures amounted to unlawful command influence.[90] There was no question that a conversation between the staff judge advocate and the president of the panel occurred, but there was significant disagreement about the content of the conversation. Notwithstanding, the Air Force court concluded that a conversation

79. *Id*. at 352.

80. *Id*. at 353. The majority concluded that the testimony was conclusory, not supported by the facts, and couched in legal terminology. As such, it was not helpful to the factfinder, but the error was deemed harmless in this case.

81. *Id*. at 355.

82. *Id*.

83. *Id*. at 354 (Cox, J., concurring).

84. 54 M.J. 692 (A.F. Ct. Crim. App. 2001).

85. *Id*. at 694.

86. *Id*. at 698.

87. *Id*.

88. 53 M.J. 504 (A.F. Ct. Crim. App. 2000).

89. *Id*. at 507.

90. *Id.*

between the staff judge advocate and a court member regarding the details of a court-martial in progress was improper and logically connected to the court-martial, and thus satisfied Master Sergeant Miller's initial burden.[91] The only remaining question was whether this contact resulted in some harm to Master Sergeant Miller, or some unfairness in the trial. The court concluded that the proceedings were fair.[92] The key to the decision was the fact-finding hearing, which revealed that the staff judge advocate informed the panel member that the security measures were for the protection of Master Sergeant Miller. The hearing also revealed that the panel president never briefed the other members, nor were any members aware of alleged threats against the prosecutor, the military judge, or themselves until after the trial was over. Even more important, all of the members stated that the information that they were exposed to had no impact on them.[93] Under these circumstances, the court found that the staff judge advocate's conduct had no impact on the fairness of the trial.

Conclusion

What lessons can be learned from the most recent decisions from the appellate courts on unlawful command influence? The most obvious lesson is that it remains a contentious issue, requiring the vigilance of all military justice practitioners to keep it in check. These cases also underscore the dangers associated with commander comments on discipline and misconduct, whether through OPDs or through electronic mail. The most important lesson, however, may be the challenge from the Army Court in *Francis* to recognize that there is still a line between lawful and unlawful command influence.

91. *Id.*

92. *Id.* at 508.

93. *Id.*

Professional Responsibility: Peering Over the Shoulder of Trial Attorneys

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Introduction

The Court of Appeals for the Armed Forces (CAAF) and the various service courts have addressed several substantive issues affecting the professional responsibilities of both trial practitioners and military judges over the last year. This has been a year of gentle oversight, with occasional definitive reminders of how things should be done. On more than one occasion the courts have peered over the shoulders of counsel as they made arguments and other tactical decisions inside, and outside, the courtroom. This article begins by briefly describing how the Judge Advocates General of the armed services drafted and adopted their current professional responsibility rules. Next it analyzes recent cases through the lens of the particular applicable rule of professional responsibility. The goal of this article is to identify problem areas so that supervisors of trial attorneys, as well as trial attorneys themselves, can familiarize themselves with potential professional responsibility problems and fix them before they happen, or better yet, avoid them altogether.

History of the Rules of Professional Responsibility

The American Bar Association (ABA) promulgated its first canons of professional ethics in 1908.[1] The next seventy-five years saw significant changes in the developing rules of professional responsibility.[2] The structure and purpose of those rules was inextricably entwined with the development of the ABA.[3] The ABA finally approved the current rules of professional responsibility in 1983.[4]

After the ABA approved the current rules of professional responsibility the Judge Advocates General of the various branches of the military took steps to create one standard for their subordinate attorneys. The Army was the first service to adopt the ABA Model Rules of Professional Conduct,[5] promulgating *Department of the Army Pamphlet 27-26* on 31 December 1987.[6] The Navy adopted a modified version of the Model Rules in November 1987, but did not include the comments that accompanied the 1983 ABA Model Rules.[7] The current Army Rules[8] apply to all attorneys certified by The Judge Advocate General, lawyers employed by the Army, and civilians practicing in courts-martial.[9] Practicing attorneys within the military must view the recent case developments in professional responsibility in conjunction with the current rules of professional responsibility if they are to truly understand the current state of the law, to identify potential issues and to protect and to train their own subordinate counsel.

Recent Developments in Professional Responsibility Case Law

Many of the recent developments in the area of professional responsibility are driven by the intrinsic nature of military practice. The CAAF and service courts addressed a variety of issues over the last year. They further delineated the parameters of the attorney-client relationship in a military setting, to include both courts-martial and legal assistance. They also addressed candor towards military tribunals, the conduct of the military judge, and the ever-present ineffective assistance of counsel issue.

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1. ABA Canons of Professional Ethics (1908).

2. For an interesting article detailing the development of the current rules of professional responsibility, see Major Bernard P. Ingold, *An Overview and Analysis of the New Rules of Professional Conduct for Army Lawyers*, 124 Mil. L. Rev. 1 (1989).

3. For an in depth analysis of the early history of the American Bar Association, see John A. Matzko, The Early Years of the American Bar Association, 1878-1928 (1984) (unpublished Ph.D. dissertation, University of Virginia) (on file with the University of Virginia Law School).

4. Model Rules of Prof'l Conduct (1983). *See* Ingold, *supra* note 2, at 4 & n.20 (citations omitted); *see also* Roger N. Walter, *An Overview of the Model Rules of Professional Conduct*, 24 Washburn L.J. 455 (1985).

5. Ingold, *supra* note 2, at 1 n.1.

6. U.S. Dep't of Army, Pam. 27-26, Legal Services: Rules of Professional Conduct for Lawyers (31 Dec. 1987).

7. Ingold, *supra* note 2, at 1 n.1.

8. U.S. Dep't of Army, Reg. 27-26, Legal Services: Rules of Professional Conduct for Lawyers (1 May 1992) [hereinafter AR 27-26].

9. *Id.* paras. 1, 7.a, and Glossary.

Attorney-Client Relationships

United States v. Spriggs[10] addressed the circumstances that might sever the attorney-client relationship between a U.S. Army Trial Defense Service (TDS) counsel and his client. Captain (CPT) James Maus served as a qualified TDS attorney in 1995.[11] The Army detailed CPT Maus to represent SSG Spriggs at a special court-martial that same year.[12] The court acquitted SSG Spriggs, and he remained on active duty.[13] On 9 April 1996, CPT Maus entered terminal leave status and began a civilian career as an attorney in El Paso, Texas.[14] SSG Spriggs later faced additional charges at a general court-martial, to include specifications alleging that SSG Spriggs committed perjury during his 1995 court-martial.[15]

SSG Spriggs discussed the charges at issue in his 1996 court-martial with CPT Maus on 21 and 23 May 1996. At that time CPT Maus was working for his civilian law firm, but was still in a terminal leave status.[16] CPT Maus told SSG Spriggs that he would represent him if he could. Military law enforcement officials apprehended SSG Spriggs on 23 May. SSG Spriggs requested that they contact his attorney, Mr. Maus. CID attempted to do so and left a message with Mr. Maus's secretary.[17]

On 24 May 1996 the Senior Defense Counsel (SDC) at Fort Bliss detailed CPT Novak to serve as SSG Spriggs's TDS counsel for a pre-trial confinement hearing. He also notified CPT Novak that he would be detailed to represent SSG Spriggs beyond the pre-trial confinement hearing if CPT Maus was not deemed available. CPT Novak met with SSG Spriggs on that same day, and discussed the pre-trial confinement hearing and the issue of who would represent SSG Spriggs. SSG Spriggs told CPT Novak he wanted CPT Maus. CPT Novak told SSG Spriggs that although CPT Maus was now a civilian, SSG Spriggs might be able to make a request for individual military counsel (IMC)[18] since CPT Maus was still a member of the individual ready reserve (IRR).[19]

In a Uniform Code of Military Justice, Article 39(a)[20] session, SSG Spriggs accepted CPT Novak as his detailed counsel, and made an IMC request for CPT Maus.[21] Since CPT Maus was now in the individual ready reserve (IRR), the convening authority for the court-martial forwarded SSG Spriggs's request to the reserve commander at the Army Reserve Personnel Center. That commander contacted Mr. Maus who indicated he could not take time away from his new job at a private law firm to try this case. Accordingly, the reserve commander denied SSG Spriggs's IMC request.[22] He was subsequently convicted at trial.

The Army Court of Criminal Appeals (ACCA) held that SSG Spriggs did not demonstrate that he established a qualifying attorney-client relationship with CPT Maus. They also noted that even if he had demonstrated the existence of such a relationship, the separation of CPT Maus from active duty constituted good cause for termination of any such relationship in the circumstances of this case. The ACCA further held that

10. 52 M.J. 235 (2000).

11. Members of The Judge Advocate General's Corps are qualified and certified to serve as defense counsel if they meet the requirements of Article 27(b), Uniform Code of Military Justice, which requires that all trial and defense counsel detailed for a general court-martial must:

> be a judge advocate who is a graduate of an accredited law school or is a member of the bar of a Federal court or of the highest court of a State; or must be a member of the bar of a Federal court or of the highest court of a State; and . . . must be certified as competent to perform such duties by the Judge Advocate General of the armed force of which he is a member.

UCMJ art. 27(b)(1) (2000).

12. The secretary of each service within the Department of Defense (DOD) prescribes regulations that provide for the manner in which counsel are detailed for each general and special courts-martial. They also prescribe the regulations authorizing certain members of the DOD to detail counsel for general and special courts-martial. *See id.* art. 27(a)(1).

13. *Spriggs*, 52 M.J. at 241.

14. *Id*. As the court explained:

> On April 9, 1996, CPT Maus began a period of terminal leave (now officially designated "transition leave"), a program which allows soldiers with accumulated leave to transition into civilian life before their formal date of separation . . . . By taking terminal leave, CPT Maus was able to relinquish his full-time military duties and begin a new career in the private sector.

Id. (citing U.S. DEP'T OF ARMY, REG. 600-8-10, PERSONNEL ABSENCES: LEAVES AND PASSES, para. 4-21 (1 July 1994).

15. *Id.* at 243.

16. *Id*. at 241.

17. *Id.* at 242.

18. *See* U.S. DEP'T OF ARMY, REG. 27-10, LEGAL SERVICES: MILITARY JUSTICE, para. 5-7 (20 Aug. 1999) (detailing the procedures for filing and granting a request for an individual military counsel).

CPT Maus was not available to serve as SSG Spriggs's IMC, and affirmed his conviction.[23]

The CAAF affirmed, holding that Spriggs had not met the threshold burden of proving whether he had an ongoing attorney-client relationship with the TDS counsel from his first court-martial.[24] Since Spriggs did not prove an ongoing attorney-client relationship, the TDS counsel's release from active duty constituted good cause for severing the relationship. The CAAF left open the question of whether release from active duty would terminate the attorney-client relationship under all circumstances.[25]

Defense counsel nearing release from active duty should fully and clearly explain to their clients the potential impact of that change in status. Senior Defense Counsel should consider this issue when making detailing decisions. In any event, detailed counsel can rely upon the reasoning in *Spriggs* when explaining to their clients the potential viability of an IMC request, and the process that must be followed before a commander of an attorney in the IRR can grant an IMC request for that person.

Candor Towards the Tribunal

In *United States v. Golston*,[26] the CAAF addressed the duties and responsibilities owed by a former legal assistance attorney when, while serving as a trial counsel, he realizes that one of the witnesses for the defense is his former legal assistance client. These duties concern protecting privileged communications from the former attorney-client relationship and candor towards the tribunal. The CAAF determined that there was no issue regarding privileged communications, and instead addressed the requirement of candor towards the tribunal.

Specialist Golston was charged with indecent acts with two minor children. During arraignment the trial counsel stated that no member of the prosecution had acted in any way which might tend to disqualify them in this court martial.[27] After

19. *Spriggs*, 52 M.J. at 242. Article 38, UCMJ, states, in part, that an accused:

> has the right to be represented in his defense before a general or special court-martial or at an investigation under section 832 of this title (article 32) as provided in this subsection.
>
> (2) The accused may be represented by civilian counsel if provided by him.
>
> (3) The accused may be represented—
>
> (A) by military counsel detailed under section 827 of this title (article 27); or
>
> (B) by military counsel of his own selection if that counsel is reasonably available (as determined under paragraph (7)).

UCMJ art. 38(b)(2000).

20. Article 39(a) states:

> At any time after the service of charges which have been referred for trial to a court-martial composed of a military judge and members, the military judge may, subject to section 835 of this title (article 35), call the court into session without the presence of the members for the purpose of—
>
> (1) hearing and determining motions raising defenses or objections which are capable of determination without trial of the issues raised by a plea of not guilty;
>
> (2) hearing and ruling upon any matter which may be ruled upon by the military judge under this chapter, whether or not the matter is appropriate for later consideration or decision by the members of the court;
>
> (3) if permitted by regulations of the Secretary concerned, holding the arraignment and receiving the pleas of the accused; and
>
> (4) performing any other procedural function which may be performed by the military judge under this chapter or under rules.

UCMJ art. 39(a).

21. *Spriggs*, 52 M.J. at 242.

22. *Id*. at 243.

23. *Id*. at 246.

24. *Id*. at 245.

25. *Id*. at 246.

26. 53 M.J. 61 (2000).

arraignment, the trial counsel realized that the wife of the accused, a potential defense witness, was a former legal assistance client.[28] He knew that his former representation of Mrs. Golston might raise an appearance of impropriety on his part if she testified at trial.[29] The trial counsel tried to avoid this issue by turning over the cross-examination of Mrs. Golston to his assistant trial counsel. He told his assistant trial counsel why he could not cross-examine her and did not help the assistant trial counsel in preparing for her cross-examination. Unfortunately, he did not inform the military judge about his former attorney-client relationship with the accused's wife.[30]

Mrs. Golston testified on behalf of her husband at trial, stating that one of the alleged victims had a crush on him.[31] During cross-examination, the assistant trial counsel brought up a prior incident where Mrs. Golston had been accused of theft. The trial counsel, as a legal assistance attorney, had represented Mrs. Golston concerning that same incident. After the case recessed for the day, Mrs. Golston realized her former relationship with the trial counsel and told her husband's trial defense counsel that the trial counsel had represented her with regard to the theft incident. Trial defense counsel made a motion for a mistrial the next day, and requested in the alternative that Mrs. Golston's cross-examination be stricken. The military judge questioned trial counsel and assistant trial counsel.[32] He determined that the information about Mrs. Golston was not gleaned from any confidential discussions with her. The military judge denied the motion based upon his questioning of the trial counsel and assistant trial counsel.

The CAAF held that the trial counsel failed in his duty to avoid the appearance of impropriety concerning his attorney-client relationship with Mrs. Golston.[33] The court specifically noted the failure of the trial counsel to affirmatively raise this issue to the court and opposing counsel.[34] The court found, however, that the accused was not prejudiced by trial counsel's failure to disclose the possible conflict of interest.

Practicing attorneys should note that while the case was not overturned, the court clearly held that the conduct of the trial counsel was inappropriate. Military attorneys performing multiple duties in small offices should ensure that they have an adequate tracking system to identify who they have represented. Judge advocates who first work in a jurisdiction as a legal assistance attorney should take particular care to ensure that they are not placed in a similar situation. Finally, trial counsel must be aware of their continuing duty of candor towards the tribunal.[35] That duty concerning potential reasons for disqualification does not end at arraignment, but exists throughout the trial, and the burden is on the trial counsel to make certain that duty is met.

Prosecutorial Conduct

In *United States v. Diffoot,*[36] the CAAF considered how far trial counsel may go in making arguments calculated to inflame the passions or prejudices of the jury.[37] At issue was whether trial counsel could, during closing arguments, make comments and observations about the accused's ethnicity in order to argue

27. *Id*. at 66. *See* MANUAL FOR COURT'S-MARTIAL, UNITED STATES, R.C.M. 901(d) (2000) (requiring the trial counsel to announce the legal qualifications and status of the members of the prosecution and any actions by the trial counsel that might tend to disqualify them in that particular court martial).

28. *Golston*, 53 M.J. at 66.

29. *Id*.

30. *Id*.

31. *Id*. at 62.

32. *Id*. at 66. On direct examination by the military judge the assistant trial counsel responded clearly on this precise question:

> MJ: Well, Captain Wilson, where did you get the information upon which you cross-examined Mrs. Golston?
>
> ATC: Sir, I have the Military Police Report that includes two statements by Mrs. Golston, and that was provided to me by Captain Hellmich; and I based my cross-examination on those two statements as well as the case file for the case that we're not hearing.

Id.

33. *Id*.

34. *Id*.

35. *See generally* AR 27-26, *supra* note 6, R. 3.3. This provision states:

> A lawyer shall not knowingly make a misstatement of fact or law to a tribunal, offer evidence the lawyer reasonably believes is false, or, in an ex parte proceeding, failed to inform the tribunal of all material facts known to the lawyer which are necessary to enable the tribunal to make an informed decision, whether or not the facts are adverse.

Id.

36. 54 M.J. 149 (2000).

for a conviction based upon guilt by association. The defense argued that such comments constituted plain error and violated the accused's Article 59(a) rights.[38] It is interesting to note that this case involved an empty chair because the accused had been arraigned and then fled the jurisdiction of the court prior to trial. The CAAF does not comment on what impact the absence of the accused might have had on their decision, but in her dissent Chief Judge Crawford noted that the accused returned himself to military custody after trial, admitting to his guilt.[39]

At trial, the trial counsel made several different statements during closing argument that argued for conviction of the accused based on his association with known criminals.[40] He identified other bad Marines as the "evil Juarez, Soriano and Maria Cervantes."[41] He mocked the argument of defense counsel, sarcastically claiming that the relationship of the accused with these criminals was wholly unrelated to the current case.[42] He then identified the accused, claiming that such a thing as guilt by association is allowed, and that the panel should rely upon the fact that these "bad, evil Marines" were the "amigos" of the accused and he should be convicted because of his association with them.[43] The defense counsel did not object, and the military judge failed to correct the trial counsel *sua sponte*.[44]

The Navy-Marine Court of Criminal Appeals (NMCCA), in an unpublished opinion, held that the arguments of trial counsel in *Diffoot*, while improper, did not rise to the level of plain error necessary to warrant a new trial.[45] The CAAF disagreed, reversing the lower court and remanding the case for a new trial. They determined that the comments by trial counsel, viewed together and in the context of the entire record of trial, did materially prejudice appellant's substantial rights.[46]

The CAAF specifically noted that the military justice system does not allow for conviction based on an accused's race or associations.[47] They went on to quote Judge Wiss in *United States v. Witham*,[48] where he wrote, "Racial discrimination is anathema to the military justice system. It ought not - and it will not - be tolerated in any form." Trial counsel and chiefs of justice would do well to note the tenor of the CAAF's decision in this case. Although the accused absented himself from trial, and returned afterwards to admit his guilt, the CAAF condemned this type of argument and went out of their way to reiterate that ethnicity and the associations of an accused have no place within the court room.

In *United States v. Baer*,[49] the court considered an instance where trial counsel utilized the "golden rule" argument, diverting the jury from its duty to decide the case on the evidence.[50] The accused and three co-conspirators agreed to lure the victim, Lance Corporal (LCpl) Juan Guerrero, into one of their homes to rob him. They invited him to the home of LCpl Michael Pereira on the pretext of repaying an overdue loan. Lance Corporal Guerrero drove to LCpl Pereira's home, expecting to pick up his money and then return to his barracks. Almost immediately after entering the home, all three co-conspirators attacked him at the same time, including the accused. They beat him with their fists and a baseball bat, kicked him and then zapped him with a "stun-gun." He lost consciousness. They bound his mouth, hands, arms, and legs with heavy duct tape, wrapped his body in a canvas car cover, and put him into the back of a Chevy Blazer. The accused then stole stereo equipment and other items from LCpl Guerrero's car. They took him to a remote part of Oahu Island and summarily executed him with one shot to the head.[51]

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37. *See* MODEL RULES OF PROF'L CONDUCT R. 3-5, 3.8c (1983) [hereinafter MODEL RULES].

38. Article 59(a) provides: "A finding or sentence of court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused." UCMJ art. 59(a) (2000).

39. *Diffoot*, 54 M.J. at 155 (Crawford, J., dissenting).

40. *Id*. at 150.

41. *Id*.

42. *Id*.

43. *Id*. at 150-51.

44. *Id*.

45. *Id*. at 149.

46. *Id*. at 151.

47. *Id*. at 152. *See* United States v. Green, 37 M.J. 380, 385 (C.M.A. 1993) (race); United States v. Sitton, 39 M.J. 307, 310 (C.M.A. 1994) (associations).

48. 47 M.J. 297, 303 (1997)

49. 53 M.J. 235 (2000).

50. *See* MODEL RULES, *supra* note 37, R. 3-5.8(d) (prohibiting arguments which inject issues broader than guilt or innocence of accused under controlling law, or makes predictions of the consequences of the court members' findings).

During closing argument the trial counsel argued as follows:

> Imagine him entering the house, and what happens next? A savage beating at the hands of people he knows, fellow Marines, to which the accused was a willing participant. He's grabbed, he's choked, he's beaten, he's kicked, he's hit with a bat, small baseball bat. Imagine being Lance Corporal Guerrero sitting there as these people are beating him . . . . Imagine. Just imagine the pain and the agony. Imagine the helplessness and the terror, I mean the sheer terror of being taped and bound, you can't move. You're being taped and bound almost like a mummy. Imagine as you sit there as they start binding.[52]

The CAAF held that golden rule arguments asking the members to put themselves in the victim's place are improper and impermissible in the military justice system. However, they did recognize the validity of an argument asking the members to imagine the victim's fear, pain, terror, and anguish.[53] When improper argument is made, it must be viewed in context to determine whether it substantially affected the right of the accused to a fair and impartial trial.[54] The CAAF found no such impact here and affirmed the conviction.

Trial counsel faced with the potential for emotional and potentially inflammatory arguments should take care to keep their arguments within the bounds outlined by *Baer.* Counsel should remember that the facts in these types of cases are usually sufficient, in and of themselves, to generate an appropriate verdict. The strategy for advocates is to draw out those facts during argument in a manner that does not allow the defense to raise the golden rule argument on appeal.

In *United States v. Kulathungam,*[55] the trial counsel and court reporter altered the record of trial without the consent of the military judge and without informing defense counsel. The accused plead guilty to larceny and other related offenses. The judge accepted his pleas, but forgot to enter findings on the record.[56] The defense counsel noticed this error, but for tactical reasons remained silent. The court reporter first brought it to the attention of the trial counsel during transcription of the record of trial. The court reporter and trial counsel agreed to insert findings into the record of trial without informing the judge or opposing counsel and then did so.[57] When the military judge discovered the actions of the trial counsel and court reporter, he ordered a post-trial 39(a) session and entered findings into the record consistent with his earlier actions.

The accused raised the issue of unfair prejudice on appeal.[58] The CAAF found that the trial counsel committed misconduct by altering the record of trial in this manner. However, based on the accused's provident guilty plea, the CAAF determined that the accused was not prejudiced by the trial counsel's misconduct. Current trial counsel should read this case and commit to memory the actions of the trial counsel when faced with this type of issue, ensuring that they never attempt this type of activity. Ultimately counsel, as officers of the court, are responsible for their actions. The fraudulent nature of the trial counsel's misconduct strikes at the very heart of his duties as an officer of the court. Counsel's duty of candor towards the tribunal and special duties as a prosecutor do not end when sentence is announced.[59]

Military Judge Impartiality[60]

In *United States v. Burton,*[61] the CAAF addressed whether or not tough questioning by the military judge vitiates the military judge's impartiality. Marine Staff Sergeant Burton elected to make a sworn statement during his sentencing hearing for wrongful use of cocaine. He begged the military judge to not award a punitive discharge, citing his ten years of exemplary service.[62] The trial counsel cross-examined him on this issue, bringing out the fact that SSG Burton currently served as a career planner and had previously worked as a corrections non-

51. *Id*. at 235-36.

52. *Id*. at 237.

53. *Id*. at 238.

54. *Id*.

55. No. 99-0967, 2001 CAAF LEXIS 289 (Mar. 16, 2001).

56. *Id*. at *3.

57. *Id*. at *4.

58. *Id*. at *1.

59. *See* AR 27-26, *supra* note 6, R. 3.8.

60. ABA CODE OF JUDICIAL CONDUCT Canon 3 (1972) (A judge shall perform the duties of judicial office impartially and diligently).

61. 52 M.J. 223 (2000).

commissioned officer (NCO) in the Camp Lejeune brig.[63] The military judge questioned the accused about his work as a corrections officer in the brig. He challenged Burton to explain why he should be given any leniency when privates and lance corporals are punitively discharged for cocaine use.[64] The military judge kept questioning Burton, asking him what kind of message it would send if he did not award Burton a discharge in light of the fact that young Marines are discharged for the same offense. He then sentenced Burton to a punitive discharge.

The accused argued on appeal that the military judge crossed the line during his questioning, abandoning his impartiality. The CAAF noted that a military judge has wide latitude to ask questions.[65] The CAAF noted that although a "biased or inflexible judge is disqualified, a tough judge is not."[66] They pointed out that the accused never complained about the impartiality of the military judge at trial. They also noted that it was not improper for the military judge to ask the accused to reconcile the impact of his escaping a punitive discharge when such a verdict might well create a double standard, one for NCOs and another for junior enlisted personnel.[67] The CAAF then held that a reasonable person would not doubt the impartiality of the military judge.[68]

Defense counsel should take note of this case and ensure that they make the appropriate objection on the record concerning any possible bias of the military judge when this type of questioning occurs. Failure to do so will most likely result in a waiver on appeal. In the next case discussed, defense counsel did object, but with a very different result.

In *United States v. Sowders*,[69] the military judge divested himself of his impartiality when his questioning forced speculation on the part of the accused. The court-martial convicted the accused, contrary to his pleas, of larceny from the Recruit Exchange.[70] The facts of this particular case included two other alleged members of a conspiracy to steal money from the exchange. Both individuals testified against the accused, who then took the stand to proclaim his innocence. The trial counsel effectively cross-examined the accused on the issues surrounding the case, and then the military judge asked a series of questions designed to attack the credibility of the accused's story, forcing the accused to often answer the military judge with relatively unsatisfactory answers, such as "I don't know."[71]

In determining that the military judge had abandoned his impartiality, the service court focused on the fact that the credibility of the accused's story had previously been attacked in detail by the trial counsel and the fact that defense counsel objected to the military judge's questions. They looked to the possibility of cumulative error based upon the length and degree of questioning by the military judge.[72] The service court concluded that the military judge abandoned his impartial role.[73] The court set aside both the findings and the sentence.

Ineffective Assistance of Counsel

In *United States v. Grigoruk*,[74] the defense counsel failed to use a child psychologist, or any other expert, to challenge complainant's credibility in a prosecution for sex offenses. The CAAF held that this failure raised a sufficient claim of ineffective assistance of counsel to require additional inquiry.[75] Grigoruk was charged with sexual molestation of his stepdaughter. He wanted the convening authority to allow the defense to employ Dr. Underwager, a child psychologist, as an expert witness for the defense. The defense requested the expert, and the

62. *Id*. at 224.

63. *Id*. at 225.

64. *Id*.

65. *Id*. at 226.

66. *Id*.

67. *Id*.

68. *Id*. at 227.

69. 53 M.J. 542 (N-M. Ct. Crim. App. 2000).

70. *Id*. at 543.

71. *Id*. at 544-45.

72. *Id*. at 551.

73. *Id*. at 552.

74. 52 M.J. 312 (2000).

75. *Id*. at 315.

military judge ordered the government to produce Dr. Underwager or a suitable substitute. The government did so, and defense counsel consulted with Dr. Underwager in preparation for trial and had Dr. Underwager available as a potential witness at trial. The defense never called Dr. Underwager or any other doctor.[76]

The CAAF opined that the case was a classic credibility contest with the accused denying anything happened and a complete lack of physical evidence supporting sexual abuse.[77] After conviction, Grigoruk asked his defense counsel why Dr. Underwager was not called to rebut the allegations of the stepdaughter. Defense counsel explained that he did not call Dr. Underwager because trial counsel had evidence that would make the doctor look like a hired gun.[78]

The CAAF held that the appellant had met the threshold requirement of demonstrating possible ineffective assistance of counsel for failing to call Dr. Underwager as a defense expert.[79] Accordingly, CAAF remanded the case to ACCA to obtain additional evidence, including an affidavit from trial defense counsel explaining his failure to call a defense expert.[80]

Defense counsel should take note of the CAAF decision in this case and take the appropriate steps to accurately document these types of trial decisions. Such documentation might include memorandums for record explaining the issue to the client and documenting both the client's understanding of the risks involved in calling the witness, as well as the client's agreement on trial decisions. While the CAAF normally defers to the defense counsel on tactical decisions, it is clear that in close cases, where credibility of witnesses is a key issue, the CAAF will consider the reasonableness of counsel's decisions. In addition to reconsidering defense decisions concerning calling witnesses, the CAAF also considered the reasonableness of defense counsel's decision to send a client to military medical personnel for evaluation and treatment.

In *United States v. Paaluhi*,[81] another case involving experts and defense counsel, a trial defense counsel erroneously interpreted the possible psychotherapist-patient privilege in the military. The command placed Gunnery Sergeant Keith R. Paaluhi in pretrial confinement after his daughter told child protective services that her father had sex with her. The local TDS office detailed a defense counsel to represent him at that time.[82] During preparation for trial the defense counsel contacted Lieutenant (Lt) Suzanne Hill, a Navy Medical Service Corps officer and clinical psychologist. Lieutenant Hill was assigned to the local military medical clinic. The defense counsel stated that he anticipated a guilty plea and sentencing case when he contacted Lt Hill. He did not ask the convening authority to assign Lt Hill to assist the defense team.[83] He convinced Lt Hill to meet with the accused. He then advised his client to cooperate with Lt Hill.[84]

Lieutenant Hill faxed a document to the confinement facility titled "Initial Personal History Questionnaire." The accused received that document while in the brig on 31 May 1996. The questionnaire included a "Statement of Understanding Regarding Limits of Confidentiality within Military Mental Health Departments." That statement indicated that disclosures related to "suspected child abuse" must be turned over to "medical, legal or other authorities." Lieutenant Hill ensured that the accused read and signed that statement before she started her interviews.[85] During their meetings, the accused told Lt Hill that he had been having sex with the victim for the last five years. He did not give her any details. The military judge denied the defense's pretrial motion to suppress all of the

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76. *Id*. at 314.

77. *Id*.

78. *Id*.

79. *Id*. at 315. The court cited to the standard for determining effectiveness of counsel established in *United States v. Strickland*, 466 U.S. 668 (1984), stating that:

> In *United States v. Polk*, 32 M.J. 150, 153 (1991), our Court adopted this three-pronged test to determine if the presumption of competence has been overcome: (1) Are appellant's allegations true; if so, "is there a reasonable explanation for counsel's actions"? (2) If the allegations are true, did defense counsel's level of advocacy fall "measurably below the performance . . . [ordinarily expected] of fallible lawyers"? and (3) If defense counsel was ineffective, is there "a reasonable probability that, absent the errors," there would have been a different result[?]

Id.

80. *Id*.

81. 54 M.J. 181 (2000).

82. *Id*. at 183.

83. *Id*. at 182-83.

84. *Id*.

85. *Id*.

accused's statements to Lt Hill. Lieutenant Hill testified at appellant's court-martial that appellant told her that he had been having sex with the victim for the last five years.[86]

The accused was convicted, contrary to his pleas, of rape, sodomy with a child under the age of sixteen years, and two specifications of indecent acts with a child under the age of sixteen years.[87] On appeal he raised two issues, one concerning the existence of the patient-psychotherapist privilege within the military, and the second alleging ineffective assistance of counsel. The court held that the privilege did not exist.[88] They then focused on the ineffective assistance of counsel claim.[89]

The court began by determining that the actions of defense counsel could not fall under the rubric of "tactical decisions."[90] They focused specifically on counsel's erroneous decision to rely upon a possible patient-psychotherapist privilege, noting that the U.S. Supreme Court had not yet rendered its opinion in *Jaffe v. Redmond*[91] at the time that defense counsel decided to send his client to the military therapist. Additionally, they considered the fact that the defense counsel advised his client to discuss matters with Navy medical personnel without being aware of the local Naval Medical Department's limited confidentiality policy.[92] Finally, they considered the fact that defense counsel failed to request that Navy medical personnel be assigned as members of the defense team. While the CAAF recognized that the intent of the defense counsel was to prepare a good sentencing case, they held that did not obviate his requirement to zealously and competently represent his client. They discussed the lack of evidence that would have been available to the government if they had not been able to enter the confession of the accused given to the Navy therapist upon the advice of counsel.[93]

The CAAF reversed the lower court's decision and set-aside appellant's conviction and sentence because defense counsel rendered ineffective assistance by improperly evaluating military privilege law. The confession secured by the Navy psychologist came about as a direct result of the defense counsel's advice. It was this confession that secured Paaluhi's conviction for the government. Without this confession, there might have been reasonable doubt as to his guilt.[94] The CAAF held that this possibility negated the lower court's ruling of harmless error and remanded the case back to the convening authority.[95]

Paaluhi highlights the need for defense counsel to fully understand the unique nature of military practice, to ensure that they follow the rules concerning privilege. It highlights a defense counsel's responsibility to independently research possible pitfalls carefully before proceeding. A review of the relevant case law on privilege, as well as an understanding of local medical department regulations, would have kept the counsel in *Paaluhi* from directing his client to give information to a therapist that was clearly not protected.

Conclusion

The cases concerning professional responsibility over the last year highlight both the CAAF's reluctance to second-guess the tactical decisions made by counsel and their willingness to do so when justice demands it. Defense counsel should consider these cases when making tactical trial decisions, particularly where the use of experts is involved. They should heed the lessons of *Paaluhi* and *Grigoruk*, taking care not only to think before they act, but also to act with a reasoned, informed purpose. Trial counsel should take to heart the issues in *Baer* and *Diffoot*, ensuring that as they strive for justice that they do not lose sight of integrity. The court will continue to peer over the shoulder of counsel and into the courtroom. Counsel should make sure that they approve of what they will see.

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86. *Id*.

87. *Id*. at 182.

88. *Id*. *See* United States v. Rodriguez, 52 M.J. 444 (2000).

89. *Paaluhi*, 54 M.J. at 183.

90. *Id*. at 184.

91. 518 U.S. 1 (1996).

92. *Paaluhi*, 54 M.J. at 183.

93. *Id*. at 185.

94. *Id*.

95. *Id*.

New Developments in Search and Seizure: A Little Bit of Everything

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Introduction

The law must be stable, but it must not stand still.

—Roscoe Pound[1]

2000 was a light year for new developments in search and seizure. Combined, the Supreme Court and the Court of Appeals for the Armed Forces (CAAF) decided only a handful of Fourth Amendment cases that had any noteworthy significance in the criminal law field.[2] In addition, there was very little added or changed in published opinions by the service courts. Regardless, the body of search and seizure law has continued to grow and change. It is not standing still. The wide diversity of Fourth Amendment issues addressed over the last year by a variety of courts is evidence of a dynamic and evolving area of the law.

Computers

New Department of Justice Manual

The Department of Justice recently promulgated a new manual on computers and criminal investigations.[3] This new manual replaces the *1994 Federal Guidelines for Searching and Seizing Computers* along with its 1997 and 1999 supplements. For military practitioners, the manual is a superb resource because only a handful of military cases have touched on this growing area of law. It is the most comprehensive overview of computer-related search and seizure issues that is readily available to government practitioners. The major improvement with the new manual is that it covers federal statutes on wiretapping and electronic surveillance,[4] and the Electronic Communications Privacy Act (Title II).[5] Although the two cases discussed below deal with computer search and seizure issues, this area of the law is still very new in the military. The manual provides a useful tool for practitioners to fill the many gaps in this area of search and seizure in military law.

United States v. Tanksley

In *United States v. Tanksley*,[6] appellant, a Navy doctor and an O-6, was convicted of a variety of offenses related to the molestation of his natural daughters. He was sentenced to thirty-eight months confinement and a dismissal.[7] On appeal to the Navy-Marine Corps Court of Criminal Appeals (NMCCA) and the CAAF, he claimed that a document he left open on his computer screen was seized in violation of the Fourth Amendment[8] and Military Rules of Evidence (MRE) 314 and 316.[9]

When the misconduct first came to light, Captain Tanksley was relieved of his duties and then temporarily assigned to another base where he was allowed to use an office with a computer.[10] Captain Tanksley had been working on his computer in his office when he was called away.[11] He left his computer on, but closed the office door without locking it.[12] He also left the document he was working on, entitled "Regarding the Charges

1. INTRODUCTION TO THE PHILOSOPHY OF LAW (1922), *reprinted in* JOHN BARTLETT, FAMILIAR QUOTATIONS 610 (1992).

2. This does not include *United States v. Campbell*, 50 M.J. 154 (1999), *supplemented on reconsideration*, 52 M.J. 386 (2000). *Campbell* will not be discussed in this article. The CAAF heard oral argument in two cases applying *Campbell* on 3 October 2000, but has not decided either case as of the date of this article.

3. COMPUTER CRIME AND INTELLECTUAL PROPERTY SECTION (CCIPS), UNITED STATES DEP'T OF JUSTICE, SEARCHING AND SEIZING COMPUTERS AND OBTAINING ELECTRONIC EVIDENCE IN CRIMINAL INVESTIGATIONS (2001), *available at* http://www.usdoj.gov/criminal/cybercrime/searchmanual.htm.

4. 18 U.S.C. §§ 2510-2511 (2000).

5. *Id.* §§ 2701-2711.

6. 54 M.J. 169 (2000).

7. *Id.* at 170.

8. U.S. CONST. amend. IV.

9. MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 314, 316 (2000) [hereinafter MCM]. In short, together both rules state that government property may be searched without a warrant or probable cause unless the property was provided for personal use.

Now Pending Against Me," still open on the computer screen.[13] He was apprehended when he arrived at the location he was summoned to, and placed into pretrial confinement.[14] Later, the duty officer (a judge advocate) went to the office to secure some of Captain Tanksley's belongings.[15] The duty officer printed the document and retrieved the floppy disk that was in the computer.[16]

At trial and on appeal, Captain Tanksley claimed that he had a reasonable expectation of privacy in his office and computer.[17] However, the CAAF agreed with the military judge and the NMCCA that Captain Tanksley's Fourth Amendment rights were not violated by seizure of the disk.[18] The CAAF found that he "had, at best, a *reduced* expectation of privacy" in his office and computer.[19] In addition, he "forfeited any expectation of privacy he might have enjoyed by leaving the document in plain view on a computer screen in an unsecured room."[20]

Although the CAAF's holding seems clear at first glance, there are at least two related problems with the decision for practitioners. First, the court does not provide any meaningful reasoning for its holding. Just two lines of text in the opinion address the search and seizure issue. Although there is no requirement for the court to provide more reasoning than it did, a little more analysis would be helpful to practitioners. In contrast, the service court did provide some meaningful analysis on the same issue.[21]

Second, the CAAF does not explain what it means by a "reduced" expectation of privacy. Again, in contrast, the NMCCA held that, as a general rule, service members do not have a reasonable expectation of privacy in government property.[22] The lower court also discussed the nature of the government property used by appellant. The office and computer were both made available to him for performance of his official duties.[23] Further, the NMCCA held that one does not acquire an expectation of privacy in government property merely because the property may be secured.[24] On the other hand, by not explaining the meaning of "reduced," the CAAF suggests that they might have found a reasonable expectation of privacy in this case had the facts been different (for example, if appellant had locked the door to the office).[25] Without more reasoning though, it is unclear what the CAAF meant by a "reduced" expectation.[26]

United States v. Allen

While *Tanksley* dealt with privacy interests in a government computer, *United States v. Allen*[27] concerned internet privacy in

10. *Tanksley*, 54 M.J. at 171.

11. *Id*.

12. *Id*.

13. *Id*. at 171-72.

14. *Id*. at 171.

15. *Id*.

16. *Id*. at 172.

17. *Id*. For the first time on appeal, he also claimed that the document on his computer was seized in violation of his Sixth Amendment right to counsel. *Id*. Since he prepared it for his attorney, he claimed that the content of the document contained privileged communications. *Id.* Both the NMCCA and the CAAF rejected this claim because the document was exculpatory and did not provide any information to the government that was not already known to them. *Id.*

18. *Id*. at 169.

19. *Id*. at 172 (emphasis added).

20. *Id*.

21. *See* United States v. Tanksley, 50 M.J. 609, 620-21 (N-M. Ct. Crim. App. 1999) (providing several paragraphs of discussion regarding seizure of the computer disk). Specifically, the lower court discussed why Captain Tanksley did not have an expectation of privacy in government property and why the disk seized was admissible because it was in plain view. *Id.*

22. *Id*. at 620 (citations omitted).

23. *Id*. As opposed to preparing his defense.

24. *Id*. Here, appellant closed the office door but did not lock it.

25. Another problem with the CAAF opinion is the court's summary of facts. The court said only that the duty officer went to "appellant's office to secure his personal belongings." *Tanksley*, 54 M.J. at 171. On the other hand, the lower court said that the duty officer and two Naval Criminal Investigative Service (NCIS) agents conducted a "search" of the office. *Tanksley*, 50 M.J. at 620. From a search and seizure standpoint, this difference is significant.

stored transactional records (along with several other related search and seizure issues). The Internet privacy question in *Allen*, however, is different from the privacy issues addressed in *United States v. Maxwell*,[28] where the court found a limited expectation of privacy in *e-mail transmissions* stored by Internet service or access providers.

The accused in *Allen* was convicted of various offenses including transporting and receiving child pornography in interstate commerce.[29] He was sentenced to confinement for seven years, total forfeitures, and a dismissal.[30] The CAAF granted review to consider whether the military judge committed prejudicial error by denying the defense motion to suppress evidence obtained by the government from "Super Zippo," the accused's Internet service provider (ISP).[31]

The accused became a suspect when a government network technician observed that files passing through the network to a government computer contained pornographic images.[32] The technician examined one of the image files which appeared to contain child pornography.[33] The subsequent investigation by the Air Force Office of Special Investigations (OSI) revealed that the images were being sent to a computer used by the accused and several others.[34] When questioned, the accused admitted that he used the computer during periods when the images were being received and that his ISP was "Super Zippo."[35] Eventually, OSI agents obtained a warrant to search the accused's home, located off of the installation.[36]

Before the warrant was issued, an OSI agent contacted the ISP and asked whether a warrant or a subpoena was required.[37] The manager of "Super Zippo" contacted corporate counsel who concluded that all they needed was a request from a "lawyer."[38] The agent asked for information relating to the accused's account and "any records of access to the online service that would indicate different areas that [appellant] traveled to."[39] The agent was provided with multiple listings of sites accessed by the accused through "Super Zippo" but not information containing "communications."[40]

The defense claimed that the information provided by "Super Zippo" should be excluded because it was acquired in violation of the Electronic Communications Privacy Act (ECPA)[41] and because Allen had a reasonable expectation of privacy in the information under the Fourth Amendment.[42] The CAAF ultimately found that, under the circumstances of this case, the seizure of information from "Super Zippo" did not amount to a constitutional violation that would warrant applica-

26. See Major Walter M. Hudson, *The Fourth Amendment and Urinalysis: Facts (and More Facts) Make Cases*, ARMY LAW., May 2000, at 17, for a good discussion of the NMCCA decision and the implications of the lower court's opinion for practitioners. One important practical aspect of the CAAF decision is that the court did not treat the government computer differently from any other type of government property. In addition, practitioners should note that the CAAF relied on *United States v. Muniz*, 23 M.J. 201 (C.M.A. 1987) for its holding. *Muniz* is an excellent case for practitioners to consider when confronted with questions related to expectations of privacy in government property.

27. 53 M.J. 402 (2000).

28. 45 M.J. 406 (1996).

29. *Allen*, 53 M.J. at 403.

30. *Id*. at 404.

31. *Id*. The defense also attempted to suppress evidence obtained from the accused's private residence pursuant to a warrant issued by a civilian judge in El Paso County, Colorado. In short, the defense claimed that the warrant was granted in violation of federal and Air Force regulations, that probable cause for the warrant was lacking, and that affidavits submitted for the warrant were false. *Id*. at 406-08.

32. *Id*. at 404.

33. *Id*.

34. *Id*.

35. *Id*.

36. *Id*.

37. *Id*.

38. *Id*.

39. *Id*. at 405.

40. *Id*.

41. 18 U.S.C. § 2703(c) (2000).

42. *Allen*, 53 M.J. at 408.

tion of the exclusionary rule.[43] However, the court's ultimate holding is not as important as how the court reached its decision. The framework the court used for analysis is significant because it provides practitioners with a very good means to analyze information obtained from a computer or internet network system.

First, the CAAF looked at what type of information was obtained from the ISP and what section of the ECPA was implicated by the government's seizure.[44] The government sought and obtained information in the form of "a log identifying the date, time, user, and detailed internet address of sites accessed by appellant over several months."[45] The court found that this information was covered under 18 U.S.C. § 2703(c) of the ECPA (Title II) which addresses government access to a "record or other information pertaining to a subscriber or customer of such service (not including the contents of communications . . . .)."[46] The court concluded from the language of the ECPA that release of transactional information did not require a warrant.[47] Even if a warrant was necessary, the CAAF also found that failure to secure a warrant would not entitle appellant to any relief in the form of exclusion of the information.[48] The court commented that "[i]f Congress had intended to have the exclusionary rule apply, it would have added a provision similar to the one found under Title III of the statute, concerning intercepted wire, oral, or electronic communications."[49]

Second, the court looked at whether appellant had a reasonable expectation of privacy in the information obtained that would implicate the Fourth Amendment. Since military appellate courts have only considered a handful of cases dealing with computer and internet privacy, the CAAF looked to the federal court system. In *United States v. Kennedy*[50] and *United States v. Hambrick*,[51] separate federal district courts found no expectation of privacy in information supplied by subscribers to their internet access providers (IAP). The information included the subscriber's name, address, credit card information, and other data identifying the subscriber.[52] The CAAF categorized this information on the low end of the types of information that might receive Fourth Amendment protection. Somewhat higher on the scale was the information obtained by government agents in *United States v. Maxwell*.[53] In *Maxwell*, the CAAF "found a limited expectation of privacy in e-mail messages sent or received through an IAP."[54] This information included "communications" in the text of e-mail transmissions.[55] The information in *Allen* was somewhere between the subscriber information obtained in *Kennedy* and *Hambrick* and the e-mail communications in *Maxwell*.[56]

Another important aspect of *Allen* is that the court did not address whether appellant had any privacy interest in using the government computer. Although this is probably because appellant never raised the issue, the absence of any discussion still adds support to the general conclusion that he, like other servicemembers, did not have an expectation of privacy while using a government computer.[57]

43. *Id*. at 410. The court never decided what type of privacy interest was involved and concluded that the transactional information obtained would have inevitably been discovered had a warrant been issued. *Id*. at 409.

44. *Id*.

45. *Id*.

46. *Id*. (citing 18 U.S.C. § 2703(c)(1)(A)).

47. *Id*. The court also found that this information could be "released upon a court order issued on the 'reasonable grounds to believe' standard under 18 U.S.C. § 2703(d)." *Id*. Unfortunately, it seems the court misread 18 U.S.C. § 2703(c)(1)(A). This section of the ECPA allows for release of transactional information to "any person *other than* a governmental entity." (emphasis added). The ISP did give the information to a government entity in this case so a warrant, court order, or consent from the subscriber was required. *Id.* § 2703(c)(1)(B)(i)-(iii). Regardless, the importance of this portion of the decision lies in how the court analyzed the privacy interest at issue.

48. *Id*.

49. *Id*. (referring to 18 U.S.C. §§ 2516, 2518(10)). In short, each code section provides for suppression of intercepted communications under certain circumstances. There is no such provision under Title II of the ECPA.

50. 81 F. Supp. 2d 1103 (D. Kan. 2000).

51. 55 F. Supp. 2d 504 (W.D. Va. 1999).

52. *Kennedy*, 81 F. Supp. 2d at 1107; *Hambrick*, 55 F. Supp. 2d at 508.

53. 45 M.J. 406 (1996).

54. United States v. Allen, 53 M.J. 402, 409 (2000).

55. *Id*.

56. *Id*. The CAAF did not go any further in discussing what type of privacy interest was at issue in the case because "a warrant would have inevitably been obtained for these very same records." *Id*.

Reasonable Expectation of Privacy: "Please Don't Squeeze the Charmin"[58]

Is a bus traveler's overhead luggage an "effect" protected under the Fourth Amendment? In *Bond v. United States*,[59] the Supreme Court said yes. The Court held that a Border Patrol Agent's squeezing of soft luggage on a Greyhound bus was an unreasonable search, rejecting the government's contention that the squeeze was just a visual inspection.[60]

Petitioner Bond was traveling from California to Little Rock, Arkansas.[61] The bus stopped at a mandatory border checkpoint in Texas and a Border Patrol Agent boarded the bus to check the immigration status of passengers.[62] After verifying that all passengers were lawfully in the United States, the agent squeezed passengers' bags stored in overhead compartments as he exited the bus.[63] The agent squeezed petitioner's green canvas bag located over his seat and felt a hard, brick-like object.[64] Bond admitted the bag was his and consented to a search of the bag when he was asked by the agent for permission to inspect its contents.[65] Inside the bag, the agent discovered a brick of methamphetamine wrapped in duct tape.[66]

At trial, petitioner's motion to suppress the methamphetamine was denied, he was convicted of conspiracy to possess and possession with the intent to distribute, and he was sentenced to fifty-seven months confinement.[67] The Court of Appeals for the Fifth Circuit affirmed the denial of the suppression motion, finding that the agent's manipulation of the bag was not a search under the Fourth Amendment.[68] However, in a seven to two opinion, the Supreme Court reversed the Court of Appeals.

The focus of the case was whether or not Bond gave up any privacy interest in his bag by placing it in the open overhead storage. First, the Court concluded that Bond's bag was clearly an "effect" protected by the Fourth Amendment.[69] Accordingly, he had a privacy interest in his bag.[70] Next, the Court considered whether Bond relinquished his privacy interest by leaving it in the overhead compartment where others could physically manipulate his bag.[71] The government relied on *Florida v. Riley*,[72] and *California v. Ciraolo*,[73] both of which dealt with aerial observation by police of suspects' homes and surrounding curtilage. The government's position was that Bond left his bag out for public observation and, like the defendants in *Riley* and *Ciraolo*, he gave up his privacy interest.[74] However, the Court distinguished those cases from *Bond*, stating that "they involved only visual, as opposed to tactile, observation. Physically invasive inspection is simply more intrusive than purely visual inspection."[75]

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57. *But cf*. United States v. Tanksley, 54 M.J. 169, 172 (2000) (finding a reduced expectation of privacy in a government office and computer).

58. Charmin Toilet Tissue Television Commercial, *reprinted* in JAMES B. SIMPSON, JAMES B. SIMPSON'S CONTEMPORARY QUOTATIONS (1988), LEXIS, Reference Library, Collected Quotations File.

59. 529 U.S. 334 (2000).

60. *Id*. at 338-39.

61. *Id*. at 335.

62. *Id*.

63. *Id*.

64. *Id*. at 336.

65. *Id*. The government did not claim the evidence seized was admissible based on petitioner's consent. *Id*. at 336 n.1.

66. *Id*.

67. *Id*.

68. *Id*.

69. *Id*.

70. *Id*. at 337.

71. *Id*.

72. 488 U.S. 445 (1989).

73. 476 U.S. 207 (1986).

74. *Bond*, 529 U.S. 337.

Finally, the Court looked at the nature of the intrusion by the agent. This intrusion was not as invasive as a body "frisk," like in *Terry v. Ohio*,[76] but the agent "did conduct a probing tactile examination of petitioner's carry-on luggage."[77] Although bus passengers should all foresee that their carry-on bags will be exposed to touching and handling by others on the bus, petitioner's belief was that the agent's manipulation went far beyond just incidental touching.[78] The Court agreed, finding that Bond had a subjective expectation of privacy in his bag since it was opaque. Further, this expectation was objectively reasonable in that a bus passenger "does not expect that other passengers or bus employees will, as a matter of course, feel [their] bag in an exploratory manner."[79] This is precisely what occurred in this case and the Court concluded that "the agent's physical manipulation of petitioner's bag violated the Fourth Amendment."[80]

The impact of *Bond* is significant in that the Court provides a new bright-line rule in an important area of search and seizure law. Justice Breyer and Justice Scalia, dissenting, believe that the decision might "deter law enforcement officers searching for drugs near borders from using even the most non-intrusive touch to help investigate publicly exposed bags."[81] Whether the case will do so remains to be seen. However, practitioners in the military need to be aware of the case because it potentially could affect the conduct of government investigators or police on an installation. Although there is a long recognized "gate inspection" exception[82] to the probable cause and warrant requirement, *Bond* appears to put some restrictions on the exception, at least in terms of searches conducted without any individualized suspicion.[83] Legal advisers and trial counsel need to be aware of *Bond* as it relates to current installation policies for conducting administrative inspections or searches generally.

Surprisingly absent from the majority's opinion in *Bond* is any discussion of important government interests at border checkpoints.[84] Although the checkpoint in *Bond* was not at a border crossing, it was just miles from Mexico. Aside from the potential problems posed by the flow of illegal immigrants near the border, the real concern is drug trafficking across the border. Installation commanders have similar concerns. More importantly, they have the obligation to maintain security on the installation.[85] In order to ensure commanders will continue to fulfill this obligation, a fresh look at inspection procedures should occur at all major installations. At the very least, personnel conducting administrative searches need to be apprised of *Bond* and its implications as to what they can search and how far they can go during a search in the absence of individualized suspicion.

Roadblocks

The Supreme Court decided another case dealing with government authority to conduct searches or seizures without individualized suspicion in *Indianapolis v. Edmond*.[86] The Court had established in earlier cases that "brief, suspicionless seizures at highway checkpoints for the purposes of combating drunk driving and intercepting illegal immigrants were constitutional."[87] In *Edmond*, the Court considered the constitutionality of roadblocks "whose primary purpose is the discovery and interdiction of illegal narcotics."[88]

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75. *Id*.

76. 392 U.S. 1 (1968).

77. *Bond*, 529 U.S. at 337.

78. *Id*. at 338.

79. *Id*. at 338-39.

80. *Id*.

81. *Id*. at 342-43 (Scalia, J., and Breyer J., dissenting).

82. *See* United States v. Alleyne, 13 M.J. 331, 334-35 (C.M.A. 1982) (discussing the importance of gate inspections in the military for installation commanders to maintain readiness and effectiveness) (citing United States v. Stanley, 545 F.2d 661 (9th Cir. 1976)). In addition, the Supreme Court has recognized the need on military installations for greater authority to restrict or control activity. Brown v. Glines, 444 U.S. 348, 356 (1980).

83. Generally, individualized suspicion means that police have some amount of suspicion based on specific and articulable facts observed by the police that would lead them to believe that criminal activity was afoot. *See* United States v. Martinez-Fuerte, 428 U.S. 543, 556 (1976).

84. In *City of Indianapolis v. Edmond*, 121 S. Ct. 447, 454 (2000), discussed in the next section, the Court considers the balance between individual privacy and roadblocks conducted without individualized suspicion for important government interests like policing of borders and ensuring roadway safety. The Court later explained why they did not discuss or inquire into the purpose for the "stop" in *Bond*, stating that "where the government articulates and pursues a legitimate interest for a suspicionless stop, courts should not look behind that interest to determine whether the government's 'primary purpose' is valid." *Id*. at 456 (citations omitted).

85. U.S. Dep't of Army, Reg. 190-16, Military Police: Physical Security, para. 2-2 (31 May 1991).

86. 12 S. Ct. 447 (2000).

Over the course of several months in 1998, the City of Indianapolis established a vehicle checkpoint program and conducted six roadblocks which resulted in a total of 104 arrests.[89] How the officers conducted the roadblocks was not in dispute. Vehicles were stopped by an officer, drivers were informed that the "stop" was a drug checkpoint, and drivers were asked for their vehicle registration and license.[90] During this process, the officer looked for signs of impairment and examined the inside of the vehicles while standing outside.[91] In addition, the police walked narcotics-detection dogs around each stopped vehicle.[92] Vehicles were stopped for an average of two to three minutes.[93]

Respondents were part of a group of individuals stopped at one of the roadblocks. They filed suit to stop the program claiming that the roadblocks violated the Fourth Amendment.[94] The district court denied the motion for a preliminary injunction and the Seventh Circuit Court of Appeals reversed.[95] Ultimately, the Supreme Court agreed with the Circuit Court and affirmed, holding that the roadblocks violated the Fourth Amendment because their "primary purpose [was] indistinguishable from the general interest in crime control."[96]

Why is *Edmond* important for military practitioners? The real significance of the case lies in what the Court did not say and what they briefly mentioned in a footnote.[97] The Court does provide an excellent synopsis of prior decisions where the purpose of the respective roadblocks was held to be proper. However, the Court did not discuss whether or not they would find that a roadblock with a proper primary purpose was still proper if a collateral or secondary purpose was, for example, drug interdiction. What this means for military practitioners is that commanders with authority to order roadblocks need to be advised that "drug interdiction" is not a proper primary purpose. Further, they need to be aware that any general crime prevention or interdiction purpose is likewise not proper.[98]

On the other hand, a "sobriety" checkpoint or roadblock will still be proper if, during the course of the "stop," police walk narcotics-detection dogs around the vehicle. In other words, *Edmond* does not prohibit the government from expanding the scope of a roadblock, within reason.[99] Actually, the Court seems to offer this avenue as a means of avoiding the problems presented by a program like the one used by the City of Indianapolis.[100]

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87. *Id*. at 450 (citing Michigan Dep't. of State Police v. Sitz, 496 U.S. 444 (1990); United States v. Martinez-Fuerte, 428 U.S. 543 (1976)).

88. *Id.*

89. *Id*. The arrests represented a significantly high "hit rate" of about nine percent. *Id.*

90. *Id*.

91. *Id*.

92. *Id*. at 451.

93. *Id*. Obviously, some vehicles were stopped for considerably longer.

94. *Id*.

95. *Id*.

96. *Id*. at 458.

97. The court stated:

> [W]e need not decide whether the State may establish a checkpoint program with the primary purpose of checking licenses or driver sobriety and a secondary purpose of interdicting narcotics [or] whether police may expand the scope of a license or sobriety checkpoint seizure in order to detect the presence of drugs in a stopped car.

Id. at 457 n.2.

98. But the Court does state that a roadblock with a crime control purpose can still be proper in some exigent circumstances. The examples provided by the Court are roadblocks set up:

> to thwart an imminent terrorist attack or to catch a dangerous criminal who is likely to flee by way of a particular route [and the] exigencies created by these scenarios are far removed from the circumstances under which authorities might simply stop cars as a matter of course to see if there just happens to be a felon leaving the jurisdiction.

Id. at 455.

99. *Id*. at 457 n.2 (cautioning that the "search must be 'reasonably related in scope to the circumstance which justified the interference in the first place'") (citations omitted).

Probable Cause and Warrants

Illinois v. McArthur

In a more recent Supreme Court decision this year, *Illinois v. McArthur*,[101] the Court held that police acted reasonably when they kept a suspect from entering his home for two hours while waiting for a warrant to be issued. Police officers were "keeping the peace" while McArthur's wife retrieved her personal belongings in her trailer home.[102] McArthur was in the trailer when she arrived but the officers remained outside.[103] When she came out of the trailer, she informed the officers that her husband had marijuana hidden under a sofa.[104] McArthur denied the officers' request to enter the trailer to conduct a search.[105] While one officer and McArthur's wife went to get a search warrant, the other officer kept McArthur outside.[106] He was only allowed to enter the trailer where he could be observed by the officer standing outside.[107] When the warrant was obtained and executed, the officers found a small amount of marijuana and a marijuana pipe under the sofa.[108] McArthur moved to suppress the marijuana and the pipe as "fruit" of an illegal seizure based on the officers' refusal to let him enter his trailer.[109] His motion was granted, the Appellate Court of Illinois affirmed, and the Illinois Supreme Court denied the State's petition.[110]

Reversing the Illinois courts, the majority focused on the reasonableness of the officers' conduct and the fact that they had probable cause to believe that illegal drugs were present in the trailer.[111] In terms of the necessity for the "seizure," the officers had legitimate concerns that McArthur might destroy or hide the drugs had he been allowed to enter the trailer unobserved, and they were reasonable in their efforts to avoid entering the trailer without a warrant or consent.[112] In addition, the officers only imposed the restraint just long enough to seek the warrant.[113] Their diligence in getting the warrant, the exigency that they faced, and their concern for McArthur's privacy interest in his home led the majority to conclude the officers' actions were reasonable under the circumstances. Hence, no violation of the Fourth Amendment occurred.

The majority's opinion provides practitioners with an excellent framework for analysis. From a practical standpoint, however, Justice Souter's concurring opinion provides the best advice regarding warrants. In short, when it is a house, or if in doubt whether or not to get a warrant, get one. In his own words, "the legitimacy of the decision to impound the dwelling follows from the law's strong preference for warrants, which underlies the rule that a search with a warrant has a stronger claim to justification on later judicial review than a search without one."[114] He adds that "[t]he law can hardly raise incentives to obtain a warrant without giving the police a fair chance to take their probable cause to a magistrate and get one."[115]

Although the Illinois courts believed otherwise, the Supreme Court's nearly unanimous decision, eight to one, is a very good example for police to follow.[116] While protections against unreasonable police conduct are necessary, police officers also need to have the ability to do their jobs to protect soci-

100. *Id*. The Court did not expressly say that expanding the scope of a checkpoint program to include drug interdiction would be proper. However, by merely mentioning the possibility that a checkpoint program could be expanded in such a way, it seems the Court is offering a way for officials to succeed where the City of Indianapolis failed.

101. 121 S. Ct. 946 (2001).

102. *Id*. at 948.

103. *Id*.

104. *Id*. at 949.

105. *Id*.

106. *Id*.

107. *Id*.

108. *Id*.

109. *Id*.

110. *Id*.

111. *Id*. at 950. Justice Souter joined the majority but wrote a separate concurring opinion. Justice Stevens wrote a dissenting opinion. *Id*. at 954-55.

112. *Id*. at 950.

113. *Id*. at 951.

114. *Id*. at 953-54 (Souter, J., concurring).

115. *Id*. at 954.

ety without unnecessary and unwarranted restrictions. *McArthur* is a good example of how police officers can do their jobs while also protecting the privacy interests of citizens, particularly in their own homes.

United States v. Henley

In *United States v. Henley*,[117] the CAAF considered whether a warrant granted by a Texas magistrate to search appellant's home was supported by probable cause. The charges against appellant arose from his sexual abuse of his two children which occurred for many years.[118] He was convicted of various offenses stemming from the sexual abuse and was sentenced to six years confinement and a dismissal.[119]

At trial and on appeal, appellant challenged the warrant that was used to search his home. The magistrate was provided sworn statements from appellant's children, a statement from an investigative psychologist, and a summary of a treatise on pedophilia.[120] Appellant's children described how he would show them pornographic materials to arouse them before the sexual abuse.[121] The children also claimed that they saw the materials in appellant's possession since the period they were abused.[122] However, there was no evidence presented to the magistrate that the materials were seen in the five years preceding issuance of the warrant nor any evidence that the materials had been in appellant's present home.[123] Appellant's challenge of the warrant was based on the fact that the magistrate did not have this critical information.[124]

The Air Force Court of Criminal Appeals (AFCCA) and the CAAF both agreed with the military judge that the absence of information regarding the date the pornographic materials were last seen did not invalidate the warrant.[125] The magistrate had "substantial evidence" to support his finding of probable cause to issue the warrant.[126] Even assuming probable cause was absent, the CAAF found that "the evidence could be admitted under the 'good faith' exception to the warrant requirement."[127] From the record, the agents thought they were executing a valid warrant, they remained within the scope of the warrant, and the materials seized were described in the warrant.[128]

Judge Effron, concurring in part and in the result, disagreed with the majority's opinion that the warrant was supported by probable cause.[129] His disagreement was based on the fact that there was no evidence that the pornographic materials were used or even seen in the last five years and no indication that the material would be found at appellant's home.[130] He also believed that the statement from the psychologist, or any other information provided to the magistrate, did not save the warrant.[131]

So what does *Henley* mean for military practitioners? Not much, other than to reinforce the importance of providing timely information to the authority issuing a warrant or authorization to conduct a search. "Timeliness of the information

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116. Justice Stevens, dissenting, believes the majority got the "balance" of interests all wrong. *Id*. at 954 (Stevens, J., dissenting). He characterizes the possession of small amounts of marijuana as not a particularly important public policy concern. *Id.* On balance, this minimal concern is more than outweighed by the very important need to protect the sanctity of the home, according to the Illinois courts and Justice Stevens. *Id*. at 955 n.3.

117. 53 M.J. 488 (2000).

118. *Id*. at 490.

119. *Id*. at 489.

120. *Id*. at 491; *see also* United States v. Henley, 48 M.J. 864, 867 (A.F. Ct. Crim. App. 1998).

121. *Henley*, 53 M.J. at 491.

122. *Id*.

123. *Id*.

124. Appellant also attempted to suppress incriminating statements he made to investigators following execution of the warrant and the seizure of pornographic materials in his home. *Id*. at 490-91.

125. *Id*. at 491.

126. *Id*.

127. *Id*. (citing United States v. Leon, 468 U.S. 897 (1984); United States v. Lopez, 35 M.J. 35 (C.M.A. 1992)).

128. *Id*.

129. *Id*. at 493 (Effron, J., concurring). Judge Effron did agree with the court's reliance on the good faith exception. Accordingly, he concurred with the result of the case.

130. *Id*.

relied on is a vital part of the probable cause decision matrix."[132] Personnel seeking a warrant or authorization must not rely on the fact that the good faith exception is available as a safety net should there be a problem with probable cause. Obviously, it is much easier to be a Monday morning quarterback, but some important points can be drawn from the AFCCA's decision. The lower court provides practitioners with a good checklist to follow when making a probable cause determination. The factors that should be considered are: "the location to be searched; the type of crime being investigated; the nature of the article or articles to be seized; how long the criminal activity has been continuing; and, the relationship, if any, of all these items to each other."[133]

United States v. Khamsouk

In *United States v. Khamsouk*,[134] the NMCCA broke new ground in the area of arrest warrants, at least in military jurisprudence. Khamsouk was declared a deserter from the Navy and his commanding officer issued a DD Form 553 for his apprehension.[135] Special agents from the Naval Criminal Investigative Service (NCIS) were in possession of the form and information that appellant was staying at a particular residence off base.[136] The agents went to the residence and waited outside to apprehend Khamsouk when he left.[137] When two individuals walked out, the agents stopped them but found out Khamsouk was not one of them.[138] However, one of the individuals, Hospitalman Second Class (HM2) Guest, lived at the home. The agents told HM2 Guest that they had a warrant for Khamsouk's arrest and HM2 Guest said he would try to get Khamsouk to leave the residence.[139] The agents went to the residence with HM2 Guest and HM2 Guest went inside while the agents remained outside.[140] There were different versions as to what happened next but apparently one of the agents went inside the residence and eventually apprehended Khamsouk.[141] His knapsack and duffel bag were searched with his consent and various items were found that led to his conviction of larceny, forgery, fraudulent enlistment, and unauthorized use of another's credit card.[142] He was sentenced to five years confinement, a bad conduct discharge, a fine and forfeitures, and to be reduced to E1.[143]

Khamsouk moved at trial to suppress the evidence obtained following his allegedly illegal apprehension. His interpretation of Rule for Courts-Martial (RCM) 302(e)(2)[144] was that the requirement in the rule for an arrest warrant issued by competent *civilian* authority did not encompass DD Form 553.[145] The form was not issued by a civilian authority and, since the agent entered the residence, Khamsouk claimed the apprehension was improper. The NMCCA disagreed, holding that "when an

131. *Id*. Judge Effron commented that "[t]he statement provided by the investigative psychologist . . . does not 'bridge the gap' between the sighting [five years earlier] and the search to save the stale information." His concern is that previous cases where similar information provided by a psychologist were used to support probable cause involved gaps of less than two years and "represent the outer boundaries of the use of profile evidence to 'bridge the gap' and they do not warrant a finding of probable cause in the present case." *Id*.

132. United States v. Henley, 48 M.J. 864, 869 (A.F. Ct. Crim. App. 1998) (citing United States v. Lopez, 35 M.J. 35, 38 (C.M.A. 1992)).

133. *Id*. (citing *Lopez*, 35 M.J. at 38-39) (other citations omitted).

134. 54 M.J. 742 (N-M. Ct. Crim. App. 2001).

135. *Id*. at 743. U.S. Dep't of Defense, DD Form 553, Deserter/Absentee Wanted by the Armed Forces (Sept. 1989) The back of the form states:

> Any civil officer having authority to apprehend offenders under the laws of the United States, or of a State, territory, commonwealth, possession, or the District of Columbia may summarily apprehend deserters from the Armed Forces of the United States and deliver them into custody of military officials. Receipt of this form and a corresponding entry in the FBI's NCIC Wanted Person File, or oral notification from military officials or Federal law enforcement officials that the person has been declared a deserter and that his/her return to military control is desired, is authority for apprehension.

Id.

136. *Khamsouk*, 54 M.J. at 744.

137. *Id*.

138. *Id*.

139. *Id*.

140. *Id*.

141. *Id*. Hospitalman Second Class Guest's recollection of what occurred differed from that of the agent who made the apprehension. However, both stated that appellant was apprehended inside the house and HM2 Guest did not give the agent permission to enter the residence.

142. *Id*. at 743-44.

143. *Id*. at 743.

individual is being apprehended for desertion, a properly executed DD Form 553 stands in the place of an arrest warrant [issued by competent civilian authority]."[146]

The court noted that it routinely reviewed cases where service members had been apprehended in another person's home for desertion with DD Form 553 and convicted for either desertion or unauthorized absence.[147] What this decision means for the field is that there is now precedent for practitioners to advise that DD Form 553 may be used to apprehend deserters in a residence of another person.[148] In other words, officials apprehending a deserter do not have to obtain a separate civilian arrest warrant when a DD Form 553 has been issued. However, if and until the CAAF reviews and affirms this decision, it is only persuasive authority for the other services.

Wiretaps and Compliance with Regulations

In *United States v. Guzman*,[149] the CAAF considered whether the exclusionary rule should be applied to evidence obtained pursuant to a wiretap authorization issued without proper authority under Department of Defense (DOD) regulations. Appellant was under investigation by NCIS for making false military identification cards.[150] Naval Criminal Investigative Service agents applied for and received permission to conduct a consensual intercept of conversations between appellant and another party.[151] The other party consented to the interception and taping of the conversations.[152] Permission for the wiretap was granted by the Deputy General Counsel of the Navy.[153] *Department of Defense Directive 5200.24*[154] limited the listed authorities from delegating their power to approve wiretaps.[155] The service instruction that implemented the directive authorized the General Counsel of the Navy to approve or deny wiretap requests.[156] A later memorandum from the Secretary of the Navy delegated authority to approve wiretaps to the Deputy General Counsel.[157]

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144. MCM, *supra* note 9, R.C.M. 302(e)(2). The rule states:

> No person may enter a private dwelling for the purpose of making an apprehension . . . unless:
> . . . .
> (ii) If the person to be apprehended is not a resident of the private dwelling, the apprehension is authorized by an arrest warrant and the entry is authorized by a search warrant, each issued by competent civilian authority. A person who is not a resident of the private dwelling entered may not challenge the legality of an apprehension of that person on the basis of failure to secure a warrant or authorization to enter that dwelling, or on the basis of the sufficiency of such a warrant or authorization.

Id.

145. *Khamsouk*, 54 M.J. at 743 (emphasis added).

146. *Id*. at 747. The court also noted that the form is regularly called a "military warrant." *Id*. at 747 n.2.

147. *Id*. The court also acknowledged that "simply because this is common practice does not mean that the practice is legally correct." *Id*. At least until now (for Navy and Marine Corps cases).

148. The agents in this case believed that they could not enter HM2 Guest's residence to apprehend appellant without a civilian arrest warrant and a search warrant. *Id*. at 744.

149. 52 M.J. 318 (2000).

150. *Id*. at 319.

151. *Id*.

152. *Id*.

153. *Id*.

154. Interception of Wire and Oral Communications for Law Enforcement Purposes (Apr. 3, 1978).

155. *Id*. The directive specifically limited the delegation below the level of Assistant Secretary or Assistant to the Secretary of the Military Department.

156. *Guzman*, 52 M.J. at 320.

157. *Id*. Appellant claimed that the delegation to the Deputy General Counsel was not authorized by *DOD Directive 5200.24*. *Id*.

The government used evidence obtained from the wiretaps to convict appellant of charges related to his making of false military identification cards.[158] Appellant moved to suppress the evidence under MRE 317.[159] Appellant claimed that "the Secretary of the Navy was not authorized under *DoD Directive 5200.24* to delegate wiretap approval authority to the Deputy General Counsel."[160]

The CAAF held that, despite the apparent lack of authority for granting the wiretap in this case, appellant could not rely on the exclusionary rule to suppress the evidence.[161] The other party consented to the wiretap so appellant did not have a Fourth Amendment right to suppress evidence obtained from the wiretap.[162] In addition, there is no statutory authority prohibiting the interception of consensual conversations. Even if the wiretap was obtained without proper authority, this does not create a right to exclude the evidence based on the Fourth Amendment or any other statutory authority.[163]

Although a minor point, the practical implication of this case is that practitioners need to ensure that applicable regulations and statutes are reviewed before attempting to obtain search warrants or authorizations, particularly for wiretaps. Although the exclusionary rule was not applied in this case, the same result might not occur in cases where a statute or regulation specifically mentions that the remedy for violations is exclusion of evidence. At the very least, failure to follow applicable rules will lead to unnecessary litigation. Much worse, it may result in the trampling of individual privacy rights.

Urinalysis Testing

Ferguson v. City of Charleston

In the Supreme Court's most recent case this year, *Ferguson v. City of Charleston*,[164] some very important individual privacy concerns were addressed. The case has potentially far reaching implications for any drug testing program, including such programs and related procedures in the military. Unfortunately, only time will reveal what this opinion means for practitioners.

In response to a growing number of patients in prenatal care using cocaine, personnel at Charleston's public hospital, operated by the Medical University of South Carolina (MUSC), began a drug testing program in early 1989.[165] Initially, the program involved only screening of pregnant patients suspected of using cocaine and referrals of those that tested positive to drug counseling and treatment.[166] Later, when these efforts did not curb drug use by patients, the MUSC personnel contacted the Charleston Solicitor to offer their support in prosecuting mothers whose children tested positive when born.[167] A task force was formed by the Solicitor which included the MUSC personnel and police.[168] The task force established a policy for dealing with the drug abuse problem of patients under the MUSC care.[169] Included in the policy was the threat of involvement by law enforcement officials when a patient continued to use illegal drugs while on the program.[170] There were two different protocols for patients who tested positive before or after labor, but each included notification of police.[171]

158. *Id*. at 318-19.

159. MCM, *supra* note 9, MIL. R. EVID. 317.

160. *Guzman*, 52 M.J. at 320.

161. *Id*. at 321. The CAAF was presented with a similar issue in *United States v. Allen*, 53 M.J. 402 (2000). Citing to *Guzman* in *Allen*, the CAAF stated that "this Court refused to apply the exclusionary rule to a violation of a [DoD] or service directive where the record did not demonstrate that the limitations were 'directly tied to the protection of individual rights.'" *Allen*, 53 M.J. at 406.

162. *Guzman*, 52 M.J. at 321.

163. *Id*. The court also noted that *DOD Directive 5200.24* was canceled and replaced by U.S. DEP'T OF DEFENSE, DIR. 5505.9, INTERCEPTION OF WIRE, ELECTRONIC, AND ORAL COMMUNICATIONS FOR LAW ENFORCEMENT (20 Apr. 1995), which deleted restrictions on the Secretary of the Navy as to delegation authority for the interception of consensual wiretaps. The court added that "[a]lthough subsequent legislative or regulatory history should be viewed with caution for purposes of interpretation, the fact that the [DoD] eliminated the regulatory provision at issue confirms the marginal importance of the provision in terms of whether a violation should require vindication through an exclusionary rule." *Guzman*, 52 M.J. at 321.

164. 121 S. Ct. 1281 (2001).

165. *Id*. at 1284.

166. *Id*. at 1285. The program's written policy identified nine criteria to be used by hospital personnel to determine if a patient should be tested. *See id*. at 1285 n.4. The Court noted that respondents also argued that the searches were not suspicionless. The Court disagreed with respondents noting that none of the criteria "[were] more apt to be caused by cocaine use than by some other factor, such as malnutrition, illness, or indigency." *Id*. at 1288 n.10.

167. *Id*. at 1284.

168. *Id*. at 1285.

169. *Id*.

170. *Id*. The policy also included procedures for maintaining a chain of custody for urine samples that were taken.

Petitioners were women who tested positive under the MUSC program and were later arrested.[172] They filed a suit against the city of Charleston challenging the validity of the MUSC program. They claimed that the policy requiring urinalysis testing for criminal investigatory purposes, without a warrant or consent, was unreasonable.[173] At trial, the jury was instructed to find for petitioners unless they believed that petitioners consented to the testing.[174] Petitioners appealed after the jury found for respondents but the Court of Appeals for the Fourth Circuit did not consider the question of consent.[175] The Fourth Circuit found that the searches were reasonable based on "special needs."[176] The Supreme Court disagreed, holding that "[a] state hospital's performance of a diagnostic test to obtain evidence of a patient's criminal conduct for law enforcement purposes is an unreasonable search if the patient has not consented to the procedure."[177] Accordingly, the Supreme Court reversed and remanded the case for further proceedings to consider the issue of consent.[178]

Writing for the majority, Justice Stevens distinguished this case from the line of "special needs" cases decided previously by the Court involving urinalysis testing.[179] In all of these other cases, the "special need" was "one divorced from the State's general law enforcement interest. Here, the policy's central and indispensable feature from its inception was the use of law enforcement to coerce patients into substance abuse treatment."[180] In contrast, the "special need" in previous cases "involved disqualification from eligibility for particular benefits, not the unauthorized dissemination of test results [for law enforcement purposes]."[181] In distinguishing these previous cases, the majority did not accept respondents' assertion that the program's ultimate purpose was to protect the health of mothers and their children.[182] The Court found that the "immediate objective of the searches was to generate evidence for law enforcement purposes in order to reach that goal."[183]

So what does *Ferguson* mean for practitioners? First, the case is one of several decided by the Court this year drawing the boundary for certain types of official conduct implicating privacy interests under the Fourth Amendment. Particularly in the medical community, *Ferguson* establishes that drug treatment programs may not have overriding law enforcement purposes or involvement. This does not mean that medical personnel are prohibited from involving police when evidence of a crime is found during medical treatment. Actually, the opposite has been and continues to be the law. Medical personnel are required to notify police under certain circumstances as recognized by the Court.[184] The clear message from the Court is that police participation in programs at medical treatment facilities involving drug abuse testing should not be so pervasive that the ultimate purpose of the program becomes law enforcement instead of rehabilitation. In short, legal advisors for medical treatment facilities with drug rehabilitation programs should at least review their current program policies to ensure that the rehabilitation purpose remains the primary focus.

Second, *Ferguson* has much more subtle implications. What if there is police involvement in a particular case or type of cases that does not rise to the level present in *Ferguson*? One recent example of this possible scenario occurred in *United States v. Stevenson*.[185]

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171. *Id.* One protocol was later modified but still retained the notification and possible involvement of police.

172. *Id.* at 1282.

173. *Id.*

174. *Id.*

175. *Id.* at 1282-83.

176. *Id.* at 1283.

177. *Id.*

178. *Id.* at 1287.

179. Justice Stevens also distinguishes this case from other search and seizure cases where the Court applied a balancing test to determine the reasonableness of government roadblocks. *Id.* at 1291 n.21. However, the focus of the Court's analysis in this case was on "special needs" in the context of urinalysis testing.

180. *Id.* at 1283.

181. *Id.*

182. *Id.* The majority concludes that, because of the law enforcement purpose of the program and the "extensive involvement of law enforcement officials at every stage of the policy, this case simply does not fit within the closely guarded category of 'special needs.'" *Id.*

183. *Id.*

184. The Court commented that "[t]here are some circumstances in which state hospital employees, like other citizens, may have a duty to provide law enforcement officials with evidence of criminal conduct acquired in the course of routine treatment." *Id.* at 1288 n.13.

In *Stevenson*, NCIS agents suspected the accused committed a rape while he was on active duty.[186] Stevenson became a suspect after he was assigned to the temporary disability retired list (TDRL) and was receiving treatment at the Veterans Administration (VA) hospital in Memphis, Tennessee.[187] The agents asked the VA hospital to provide them with a blood sample for DNA analysis when Stevenson came for treatment.[188] Hospital personnel complied but did not inform Stevenson that the blood they extracted would also be provided to NCIS.[189] He was informed only that the blood sample was for medical purposes.[190] At trial, Stevenson moved to suppress the results of the DNA testing derived from the blood sample and the military judge granted the motion.[191] The NMCCA affirmed the ruling but the CAAF reversed, holding that MRE 312(f)[192] applied to service members on the TDRL. The CAAF did not consider whether the results of the blood sample would be admissible, but the court did provide some guidance if the issue was raised.[193]

So how does *Ferguson* apply to the facts in *Stevenson*? Although NCIS involvement in *Stevenson* was not nearly as high as the police in *Ferguson*, without the NCIS request, the VA hospital would not have drawn the extra amount of blood. In addition, like the petitioners in *Ferguson*, Stevenson did not consent to providing his blood to law enforcement officials. Furthermore, the extra vial of blood was drawn for law enforcement purposes only, while the urine taken in *Ferguson* from the petitioners was used for medical treatment purposes (along with law enforcement purposes). More importantly, although the CAAF characterized the intrusion upon Stevenson as "*de minimis*," one could certainly argue that "extracting" blood from an individual is considerably more intrusive than "collecting" an individual's bodily waste. Regardless, the main point is that *Ferguson* may have implications that reach well beyond the Court's decision.

Another subtle implication of *Ferguson* relates to its potential impact on searches conducted for other administrative purposes. What effect does the case have in the military on gate inspections, unit urinalysis testing, and roadblocks? Again, only time will tell what impact *Ferguson* will have. The potentially broad scope of the case should at least put practitioners on notice that they need to review current drug testing programs and other programs or policies that are potentially impacted by *Ferguson*. The same review should also be done for any other government inspection or inventory policy that may implicate personal privacy interests protected under the Fourth Amendment. Specifically, legal advisers and staff judge advocates should review programs and policies, in light of *Ferguson.* The focus of this review should be on the primary purpose of each policy or program as well as the procedures used to implement them. The main reason for reviewing such programs and policies is that *Ferguson* potentially touches on a wide scope of search and seizure concerns. As Justice Scalia notes in his dissenting opinion, "the Court today opens a hole in our Fourth Amendment jurisprudence, the size and shape of which is entirely indeterminate."[194] The potential impact of *Ferguson* may be considerable.

185. 53 M.J. 257 (2000), *cert. denied*, 121 S. Ct. 1355 (2001). The Supreme Court denied certiorari in *Stevenson* just two days before *Ferguson* was decided on March 21, 2001.

186. *Id*. at 258.

187. *Id*.

188. *Id*.

189. *Id*.

190. *Id*. Two vials of blood were drawn from Stevenson. The first was used for medical treatment and the second was provided to NCIS. *Id*.

191. *Id*. at 257. Apparently, the military judge did not rule on whether or not the search was proper. The only issue addressed on appeal related to whether or not the Military Rules of Evidence applied to servicemembers on the TDRL.

192. MCM, *supra* note 9, MIL. R. EVID. 312(f). The rule is titled "Intrusions for valid medical purposes" and states:

> Nothing in this rule shall be deemed to interfere with the lawful authority of the armed forces to take whatever action may be necessary to preserve the health of a servicemember. Evidence or contraband obtained from an examination or intrusion conducted for a valid medical purpose may be seized and is not evidence obtained from an unlawful search or seizure within the meaning of Mil. R. Evid. 311.

Id.

193. The court characterized the taking of the second vial of blood as a "*de minimis* intrusion" and gave the military judge guidance as to how to analyze the intrusion in light of *United States v. Fitten*, 42 M.J. 179 (1995). *Stevenson*, 53 M.J. at 260.

194. Ferguson v. City of Charleston, 121 S. Ct. 1281, 1297-98 (2001) (Scalia, J., dissenting). Justice Scalia further comments that the Court's decision "leaves law enforcement officials entirely in the dark as to when they can use incriminating evidence obtained from 'trusted' sources." *Id*. at 1298. Chief Justice Rehnquist and Justice Thomas joined in the dissenting opinion.

United States v. Williams

The AFCCA in *United States v. Williams*[195] set aside appellant's conviction for wrongfully using cocaine. The modified findings were affirmed and the sentence was reassessed.[196] The court held that there was no proper basis for placing appellant in pretrial confinement and, accordingly, the positive urinalysis resulting from appellant's pretrial confinement in-processing should have been suppressed.[197]

The charges against appellant arose when he was arrested at a crack house by local police in Louisiana.[198] The arrest occurred outside the crack house after appellant dropped some cocaine on the ground.[199] After his arrest, appellant was placed in the local jail and OSI agents later notified his command of the incarceration.[200] Appellant's commander decided to place appellant in pretrial confinement despite the duty judge advocate's advice not to do so.[201] The commander's basis for pretrial confinement was that she feared for appellant's safety and because she did not know him well.[202] During in-processing at the military confinement facility, appellant was required to submit to urinalysis testing.[203] The following day, the commander released appellant after she was convinced to do so by the base staff judge advocate.[204]

At trial, appellant requested credit for illegal pretrial confinement and moved to suppress results of the positive urinalysis as the "fruit" of illegal pretrial confinement.[205] The military judge awarded appellant twenty-seven days sentence credit for three days of illegal pretrial confinement and denied the motion to suppress, but called it a "close call."[206]

Chief Judge Young, writing the court's opinion, went to great lengths to distinguish the case from *United States v. Sharrock*,[207] an Air Force case decided by the Court of Military Appeals[208] with facts similar to *Williams*. The military judge at trial applied *Sharrock* as authority to deny appellant's motion to suppress.[209] The Court of Military Appeals in *Sharrock* reversed the Air Force Court of Military Review, finding the lower court "erred in reversing the military judge's denial of the defense motion to suppress evidence obtained in a search of the accused after he was allegedly unlawfully confined."[210] Although Chief Judge Young in *Williams* noted that the three judges for the Court of Military Appeals in *Sharrock* wrote separate decisions, the reality is that *Sharrock* was a unanimous decision as to the suppression issue.[211]

All of the judges on the higher court were very clear in their separate decisions that the contraband found during Sharrock's in-processing for pretrial confinement was admissible, regardless of whether or not his pretrial confinement was unlawful. Specifically, Chief Judge Sullivan found that the pretrial confinement decision was proper and, even assuming that it was improper, exclusion of the evidence was not an available rem-

195. 54 M.J. 626 (A.F. Ct. Crim. App. 2001).

196. *Id*. at 628.

197. *Id*. at 633.

198. *Id*. at 628.

199. *Id*. at 633. At trial, two witnesses testified that they smoked crack cocaine with appellant for several hours. *Id*.

200. *Id*. at 628.

201. *Id*.

202. *Id*.

203. *Id*.

204. *Id*.

205. *Id*.

206. *Id*.

207. 32 M.J 326 (C.M.A. 1991).

208. The court was renamed the "Court of Appeals for the Armed Forces" on 5 October 1994 by the National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, 108 Stat. 2663 (1994). The Act also changed the name of the courts of military review to the courts of criminal appeals for each respective service (the Air Force Court of Criminal Appeals was formerly named the Air Force Court of Military Review).

209. *Williams*, 54 M.J. at 629.

210. *Sharrock*, 32 M.J. at 327.

211. *Williams*, 54 M.J. at 629.

edy.[212] Senior Judge Everett, concurring in part and dissenting in part, believed Sharrock should not have been placed in pretrial confinement, agreeing with the lower service court.[213] However, he also concluded that the lower court erred in finding that the evidence seized during Sharrock's in-processing should be suppressed.[214] He found that "the exclusionary rule *may not* be invoked merely because a commanding officer has erred in determining that '[c]onfinement is required by the circumstances.'"[215] Finally, Judge Cox, concurring in part and concurring in the result, agreed with the chief judge that the pretrial confinement was lawful, but also agreed with the senior judge that the lower service court had the authority to determine that it was not lawful.[216] More importantly, Judge Cox found that the conclusion by the lower service court that Sharrock's pretrial confinement was unlawful "did not create an exclusionary rule for suppression of evidence seized during in-processing."[217]

Disregarding the ultimate holding on the issue of suppression in *Sharrock*, Chief Judge Young concluded that, because the pretrial confinement of Williams was unlawful, evidence seized during his in-processing should have been suppressed.[218] His very thorough analysis provides practitioners with a superb search and seizure guide, particularly with regard to exceptions to the Fourth Amendment and the exclusionary rule.[219] However, his analysis is flawed in one important area.

Discussing exceptions to the exclusionary rule, Chief Judge Young found that "the good faith exception to the exclusionary rule does not apply in this case. Lt Col Eaves [the commander] had no substantial basis for concluding that pretrial confinement was appropriate or that it was required by the circumstances."[220] This finding is flawed because probable cause to believe that Williams committed an offense was clearly established before pretrial confinement. Chief Judge Young found the pretrial confinement unlawful because it was not "required by the circumstances."[221] The proper analysis established by the Court of Military Appeals in *Sharrock*, however, does not hinge on whether or not pretrial confinement is required by the circumstances. As noted already, Senior Judge Everett stated that "the exclusionary rule may not be invoked merely because a commanding officer has erred in determining that 'confinement is required by the circumstances.'"[222] In addition, Senior Judge Everett found that evidence discovered during a routine inventory while in-processing for pretrial confinement is admissible unless "no probable cause exists to believe that the person being confined has committed a crime."[223] Clearly, there was probable cause that Williams committed an offense that could be tried by a court-martial.[224] The existence of probable cause was not disputed in *Williams*. Regardless, the AFCCA did not follow the controlling precedent established by the Court of Military Appeals in *Sharrock.*

Conclusion

Aside from a handful of bright-line rules from the Supreme Court, the body of search and seizure law remained relatively stable during 2000 and early 2001. Although stable, it was not stale. The Supreme Court drew some definite lines demarcating the boundaries for roadblocks[225] and government seizures made without suspicion.[226] In addition, many cases discussed in this article provide military practitioners with valuable lessons learned while other cases have very useful discussions and

212. *Sharrock*, 32 M.J. at 332 n.4 (agreeing with Senior Judge Everett that the good faith exception to the exclusionary rule would apply).

213. *Id*. at 332 (Everett, J., concurring in part and dissenting in part).

214. *Id*. at 333.

215. *Id*. (citing MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 305 (1984)) (emphasis added). More importantly he concludes that "evidence seized in an inventory incident to confinement *should not* be suppressed solely because a court later determines that confinement was not required by the circumstances." *Id*.

216. *Id*. at 333-34.

217. *Id*. at 334. He added that "the lawfulness of this inventory stood on the same footing as a search incident to apprehension." *Id*.

218. *Williams*, 54 M.J. at 633.

219. Considering the strong similarity between this case and *Sharrock*, it is very possible that the CAAF will reverse this decision (that is, if the case is reviewed by the CAAF). Regardless, Chief Judge Young's reasoning in the decision is worth reading for those practicing military criminal law.

220. *Id*. at 632.

221. *Id*.

222. 32 M.J. at 333 (citing MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 305 (1984)). Although Senior Judge Everett concurred in part and dissented in part, both of the other judges agreed with him on this issue.

223. *Id*.

224. Chief Judge Young agreed "with the military judge's decision that Lt Col Eaves had reasonable grounds to believe that the appellant had committed an offense triable by court-martial." *Williams*, 54 M.J. at 631.

guidance on the current state of the law in search and seizure. Finally, there were no major statutory or regulatory changes affecting search and seizure in the military over the last year. Overall, Fourth Amendment jurisprudence remained a dynamic and healthy area of the law during the year.

225. *See* City of Indianapolis v. Edmond, 121 S. Ct. 447 (2000).

226. *See* Ferguson v. City of Charleston, 121 S. Ct. 1281 (2001); Illinois v. McArthur, 121 S. Ct. 946 (2001).

The *Miranda* Paradox, and Recent Developments in the Law of Self-Incrimination

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A paradox is "any person, thing, or situation exhibiting an apparently self-contradictory nature."[1] "So foul and fair a day I have not seen,"[2] and "It was the best of times. It was the worst of times,"[3] are two famous literary paradoxes. Although the tension of two or more contradictory states of being makes for good literature, it is to be avoided in the law. This past year in *Dickerson v. United States*,[4] the United States Supreme Court dealt with a long-simmering paradox in the area of self-incrimination law. Unfortunately, even after the decision, the contradiction remains.

The self-incrimination paradox addressed in *Dickerson* would be more easily diagrammed than described, since it involves the Fifth Amendment, Fourteenth Amendment, the authority of Congress, and the authority of the Court itself. The core contradiction to be resolved was how *Miranda v. Arizona*[5] can be a constitutional decision when a violation of the Miranda safeguards is not necessarily a violation of the Constitution. The resolution of this issue could have been dramatic. If the Court had concluded that *Miranda* was not a constitutional decision then Congress would have the power to overrule the procedural safeguards established in the case.[6] Even more significant, if *Miranda* was not a constitutional decision then states would not have to follow it.[7] On the other hand, if *Miranda* was a constitutional decision, then all the cases in which the Supreme Court has described the *Miranda* safeguards as "prophylactic"[8] would seem to be in error, and an unwarned statement could not be used for any purpose.

After a discussion of the Court's opinion in *Dickerson*, this article will review two other important self-incrimination cases decided by the Supreme Court this past year: *United States v. Hubbell*,[9] and *Portuondo v. Agard.*[10] The article will then turn to a review of two significant self-incrimination decisions issued by The Court of Appeals for the Armed Forces (CAAF): *United States v. Ruiz*[11] and *United States v. Swift.*[12]

The Supreme Court

The *Dickerson* case contained a perfect set of facts and circumstances to bring th contradiction in the *Miranda* line of cases to a head. On 27 January 1997, the First Virginia Bank in Alexandria, Virginia, was robbed.[13] An eyewitness to the robbery told Federal Bureau of Investigation (FBI) agents the license number of the getaway car. The car was registered to

1. RANDOM HOUSE WEBSTER'S UNABRIDGED DICTIONARY 1406 (2nd ed. 1998).

2. WILLIAM SHAKESPEARE, MACBETH, act 1, sc. 3.

3. CHARLES DICKENS, A TALE OF TWO CITIES 1 (Andrew Sanders, ed., Oxford Univ. Press 1988).

4. 530 U.S. 428 (2000).

5. Miranda v. Arizona, 384 U.S. 436, 499 (1965).

6. *Dickerson*, 530 U.S. at 437.

7. *Id.* at 437. *Miranda v. Arizona* is applicable to state court proceedings through the incorporation doctrine. The incorporation doctrine makes certain rights under the U.S. Constitution applicable to the states through the Fourteenth Amendment. One of the federal rights made applicable to state court proceedings is the Fifth Amendment right against self-incrimination. If *Miranda* was not interpreting the Fifth Amendment (or another right incorporated to the state), then the Supreme Court could not mandate that the states follow it.

8. Michigan v. Tucker, 417 U.S. 433 (1974).

9. 530 U.S. 27 (2000).

10. 529 U.S. 61 (2000).

11. 54 M.J. 138 (2000).

12. 53 M.J. 439 (2000).

13. United States v. Dickerson, 166 F.3d 667, 673 (4th Cir. 1999).

Charles Thomas Dickerson.[14] An FBI agent went to Dickerson's apartment and asked if he would come to the FBI field office for an interview. Dickerson agreed. While at the office, the agent was able to secure a search warrant for Dickerson's apartment. The agent informed Dickerson that agents were about to search his apartment. At that point, Dickerson said he wanted to make a statement. In the statement he admitted to driving the getaway car in the robbery.[15]

Dickerson was indicted for bank robbery, conspiracy and using a firearm during a violent crime.[16] Prior to trial, Dickerson's attorney moved to have his statement suppressed because the FBI agent who took the statement failed to advise Dickerson of his *Miranda* warnings.[17] The trial court granted the motion to suppress. The court also found, however, that the statement was voluntary. Because the statement was voluntary, any derivative evidence obtained as a result of the statement was admissible. In response to the district court suppressing Dickerson's statement, the government filed an interlocutory appeal to the United States Court of Appeals for the Fourth Circuit.[18] Although the Fourth Circuit agreed with the district court that Dickerson had not been informed of his *Miranda* warnings prior to making an in-custody statement, it still reversed the lower court.[19] The Fourth Circuit held that since Dickerson's confession was voluntary it was admissible. It based this conclusion on the language of 18 U.S.C. § 3501, which states that "a confession . . . shall be admissible in evidence if it is voluntarily given,"[20] and held that this statute had overruled *Miranda.* Also, 18 U.S.C. § 3501, and not *Miranda*, governed the admissibility of all confessions in federal court (whether custodial or not).[21]

Title 18 U.S.C. § 3501 is not a new statute. It was passed in 1968, and there is little debate over its purpose. It is generally accepted that the statute was intended to overrule *Miranda*.[22] The issue that has been in doubt for some time is whether Congress had the authority to enact such a statute. The reason doubt has lingered is because the Department of Justice (DOJ) has avoided relying on the statute in its briefs or arguments.[23] The DOJ's reluctance has been due, at least in part, to a belief that 18 U.S.C. § 3501 is not constitutional.[24] The DOJ's position was made clear in 1997, when then Attorney General Janet Reno asserted in a letter to Congress that the statute was unconstitutional.[25] Government attorneys did not even use 18 U.S.C. § 3501 in their argument to the Fourth Circuit Court in *Dickerson*. The court raised the applicability of the statute on its own.

The Fourth Circuit began its analysis by discussing the circumstances that would permit Congress to pass legislation overruling a holding of the Supreme Court. The Court stated that Congress was unable to supercede a decision of the Supreme Court where the Supreme Court was "construing the Constitution,"[26] but that Congress could overrule "judicially created rules of evidence and procedure that are not required by the Constitution."[27] Thus, "[w]hether Congress had the authority to enact § 3501 turn[ed] on whether the rule set forth by the Supreme Court in Miranda [was] required by the Constitution."[28] The Fourth Circuit concluded it was not.[29]

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14. *Id.*

15. *Id.*

16. Dickerson v. United States, 530 U.S. 428, 432 (2000).

17. *Id.*

18. *Id.*

19. *Dickerson*, 166 F.3d at 695.

20. *Id.* at 671 (citing 18 U.S.C. § 3501(a) (2000)).

21. *Id.*

22. *Id.* at 686; *see also Dickerson*, 530 U.S. at 436; Yale Kamisar, *Can (Did) Congress "Overule" Miranda?*, 85 CORNELL L. REV. 883, 886 (May 2000).

23. *Dickerson*, 166 F. 3d at 672.

24. The DOJ's position was made clear in 1997, when then Attorney General Janet Reno asserted in a letter to Congress that the statute was unconstitutional. Letter from Janet Reno, United States Attorney General, to United States Congress (Sept. 10, 1997). *See Dickerson*, 166 F. 3d at 672.

25. *Dickerson*, 166 F. 3d at 672.

26. *Id.* at 687.

27. *Id.*

28. *Id.*

29. *Id.*

The Fourth Circuit relied on the fact that in the sixty-page Miranda decision the Supreme Court never referred to the warnings as a constitutional right. Instead, the Court always described the warnings as procedural safeguards. The Fourth Circuit also cited to the passage in *Miranda* where the Supreme Court invited Congress and the state legislatures to create their own procedural safeguards to protect the privilege against self-incrimination.[30]

The court then examined the long string of Supreme Court cases decided after *Miranda* that have described the procedural safeguards established in *Miranda* as "prophylactic."[31] In particular, the court discussed *Harris v. New York*,[32] *Michigan v. Tucker*,[33] and *New York v. Quarles*.[34] In each of these cases, the Supreme Court drew a distinction between a violation of the Constitution and a violation of the procedural safeguards established in *Miranda.* In *Harris v. New York*, the Supreme Court ruled that a statement taken in violation of *Miranda* could nevertheless be used to cross-examine a defendant.[35] In *Michigan v. Tucker*, the court ruled that derivative evidence obtained from an unwarned statement could be used against an accused.[36] In *New York v. Quarles*, the court recognized an emergency exception to the requirement to provide *Miranda* warnings to a suspect.[37] In both *Tucker* and *Quarles*, the court stated that a violation of *Miranda* was not necessarily a violation of the Constitution.[38] After reviewing these cases, the Fourth Circuit concluded that the *Miranda* warnings were not constitutionally required. Since *Miranda* was not a constitutional interpretation, Congress had the authority to overrule it "pursuant to its authority to prescribe the rules of procedure and evidence in the federal courts."[39]

In a relatively short seven-to-two opinion, the Supreme Court rejected the Fourth Circuit's conclusion that Congress had the authority to supersede *Miranda*.[40] The majority agreed with the Fourth Circuit that "[the] case turns on whether the *Miranda* Court announced a constitutional rule or merely exercised its supervisory authority to regulate evidence in the absence of congressional direction."[411] The majority, however, concluded that *Miranda* was a constitutional decision.[42]

Justice Rehnquist, writing for the majority, focused his analysis on the *Miranda* decision itself. The two most powerful points made by the majority were, first, *Miranda* has always applied to the states, so it must have been a constitutional decision; and, second, several passages in *Miranda* make it clear that the case was announcing a constitutional rule.[43] The majority's first point is perhaps its strongest. Justice Rehnquist argued that *Miranda* must have been a constitutional decision because it has always been applicable to state court proceedings. The only time the Supreme Court is permitted to dictate rules to state courts is when it is interpreting the U.S. Constitution.[44] In *Smith v. Phillips*, the Court reiterated that "[f]ederal courts hold no supervisory authority over state judicial proceedings and may intervene only to correct wrongs of constitutional dimension."[45] As the Court stated in *Cupp v. Naughten*, "[b]efore a federal court may overturn a conviction resulting from a state court . . . it must be established not merely that the [state's action] is undesirable, erroneous, or even 'uni-

30. *Id.*

31. *Id.* at 672.

32. 401 U.S. 222 (1971).

33. 417 U.S. 433 (1974).

34. 467 U.S. 649 (1984).

35. 401 U.S. at 226.

36. 417 U.S. at 444.

37. 467 U.S. at 654.

38. *Id*. at 649; *Tucker*, 417 U.S. at 444.

39. United States v. Dickerson, 166 F.3d 667, 691 (4th Cir. 1999).

40. Dickerson v. United States, 530 U.S. 428, 432 (2000).

41. *Id.* at 437.

42. *Id.* at 438.

43. *Id.*

44. *Id.* at 439.

45. 455 U.S. 209, 211 (1981) (quoted in *Dickerson*, 530 U.S. at 438).

versally condemned' but that it violated some right which was guaranteed to the defendant by the Fourteenth Amendment."[46] Of the four cases reversed by the Supreme Court in the *Miranda* decision, three of the cases involved state judicial proceedings.[47]

The other argument made by the majority was that the *Miranda* decision itself "is replete with statements indicating that the majority thought it was announcing a constitutional rule."[48] The majority in *Dickerson* provided eight quotes from *Miranda* supporting the position that *Miranda* was a constitutional decision.[49] The most powerful of these quotes was one in which the *Miranda* court explained why they had granted certiorari in the case: "We grant certiorari . . . to explore some facets of the problems . . . of applying the privilege against self-incrimination to in-custody interrogation, and to give concrete constitutional guidelines for law enforcement agencies and courts to follow."[50]

After discussing the *Miranda* decision, Justice Rehnquist turned to the various cases that have established exceptions to the *Miranda* doctrine. As discussed earlier, the Fourth Circuit opinion was at its most convincing when it discussed these cases. The majority "concede[d] that there is language in some of our opinions [specifically citing *New York v. Quarles* and *Harris v. New York*] that supports the view taken by [the Fourth Circuit]."[51] However, Justice Rehnquist went on to state, "These decisions illustrate the principle—not that *Miranda* is not a constitutional rule—but that no constitutional rule is immutable."[52]

The majority's opinion is at its weakest in this section. Although Justice Rehnquist makes reference to *New York v. Quarles* and *Harris v. New York*, he failed to discuss these cases in any depth. The majority neither discusses nor explains the language in *Quarles* and *Michigan v. Tucker,* which states that "the prophylactic *Miranda* warnings . . . are 'not themselves rights protected by the Constitution but [are] instead measures to insure that the right against compulsory self-incrimination [is] protected."[53] The majority simply states that *Quarles*, *Tucker*, *Harris,* and similar decisions, are examples of the Court applying a general rule to specific circumstances, and that "the sort of modifications represented by these cases are as much a part of constitutional law as the original decision."[54]

Justice Rehnquist concludes the majority opinion with a brief discussion of the reasons behind their refusal to overrule *Miranda*.[55] The chief reason offered was that of *stare decisis.* Although the majority specifically refused to agree with the reasoning or results of *Miranda,* it did not find an adequate reason for overruling it. According to Justice Rehnquist "*Miranda* has become embedded in routine police practice to the point the warnings have become a part of our national culture."[56] Additionally, the majority seems to say that *Miranda* actually benefits law enforcement by providing a bright-line rule that is more easily applied than the totality of the circumstances test for voluntariness.[57]

Justices Thomas and Scalia dissented in *Dickerson*, with Justice Scalia writing the dissenting opinion. The dissent presents an extremely effective counter argument to the majority. Justice Scalia argues that *Miranda* was a constitutional decision but later cases effectively overruled the constitutional underpinnings of the original opinion. By arriving at this conclusion, the dissent agrees with the majority's strongest point, that *Miranda* was a constitutional decision. The dissent then attacks the majority's weakest point, those cases subsequent to *Miranda* that describe the *Miranda* warnings as prophylactic.

Although Justice Scalia clearly believes that the *Miranda* decision was misguided from its inception, by conceding that it was a constitutional decision he gains an enormous tactical advantage for the dissent. No time or credibility is wasted arguing against the majority's strongest point. Instead the dissent is

46. 414 U.S. 141, 146 (1973). *See also Phillips*, 455 U.S. at 221.

47. Miranda v. Arizona, 384 U.S. 436, 499 (1965).

48. *Dickerson*, 530 U.S. at 439.

49. *Id.* at 440.

50. *Miranda*, 384 U.S. at 441-42.

51. *Dickerson*, 530 U.S. at 438.

52. *Id.* at 441.

53. New York v. Quarles, 467 U.S. 649, 654 (1983); *see also* Michigan v. Tucker, 417 U.S. 433, 444 (1974).

54. *Dickerson*, 530 U.S. at 441.

55. *Id.* at 443.

56. *Id.*

57. *Id.*

able to devote most of its energy toward the majority's weakest point—those cases in which the Supreme Court has held a violation of *Miranda* is not a violation of the Constitution. The dissent ends its discussion of these cases by stating, "It is simply no longer possible for the Court to conclude, even if it wanted to, that a violation of *Miranda*'s rules is a violation of the Constitution."[58]

The dissent goes on to counter the majority's *stare decisis* argument, but the heart of the dissent lies in the argument that the Supreme Court overruled the constitutional basis of *Miranda* years ago. The dissent concludes by describing the majority opinion as a monument to "judicial arrogance,"[59] arguing that the majority has "impose[d] extra-constitutional constraints upon Congress and the States."[60]

Despite the majority's failure in *Dickerson* to resolve the contradiction in the *Miranda* line of cases, it did resolve other important issues. First and foremost, *Dickerson* announces in no uncertain terms that *Miranda* and its progeny still apply to the federal and state courts. The Court finally resolves the question of whether 18 U.S.C. § 3501 is constitutional—it is not. *Dickerson* also reaffirms all the cases that have carved out exceptions to *Miranda*. It seems unlikely that the Supreme Court will resolve the paradox that has developed in the *Miranda* line of cases anytime soon. First, a majority of the Court apparently does not feel there is a contradiction. Second, to resolve the contradiction, one way or another, would change the law of self-incrimination in a way which a majority of the court is unwilling to do.

The Supreme Court decided two other important self-incrimination cases this past term, *United States v. Hubbell*[61] and *Portuondo v. Agard*.[62] *Hubbell* discusses the extent to which producing documents is protected by the Fifth Amendment, in particular when those documents are produced pursuant to a grant of immunity.[63] *Agard* addresses whether it is appropriate during argument for a prosecutor to call the jury's attention to the fact that the accused has had the opportunity to watch all other witnesses testify before testifying himself.[64] Both cases evaluate whether the government attorneys in the case violated the Fifth Amendment rights of an accused. In *Hubbell*, the Court found prosecutors did, while in *Agard* the prosecutor did not. Both cases provide greater clarity on the range of permissible conduct under the Fifth Amendment and are important, particularly to prosecutors. *Hubbell* is a valuable reminder of the risks inherent in granting immunity. *Agard* arguably places another arrow in the prosecutor's quiver.

In *Hubbell*, the Supreme Court was asked to answer questions that cut to the core of what is protected by of the privilege against self-incrimination. In August 1994, Webster L. Hubbell was ensnared in the highly publicized Whitewater Development Corporation scandal. Ultimately, Hubbell was prosecuted for mail fraud and tax evasion by the Office of the Independent Counsel. Hubbell entered into a plea arrangement.[65] In exchange for pleading guilty and fully cooperating with the independent counsel's office, Hubbell received twenty-one months in prison.

While Hubbell was still in confinement, he received a subpoena duces tecum. The subpoena required the production of eleven categories of documents for a grand jury.[66] The documents were apparently requested to insure that Hubbell had fulfilled his obligation under the plea agreement.[67] At the grand jury investigation, Hubbell invoked his Fifth Amendment privilege. Hubbell refused to produce or confirm possession of documents conforming to the subpoena. The independent counsel's office secured immunity for Hubbell in accordance with 18 U.S.C. § 6003(a) and gave him a district court order directing him to produce the documents. Hubbell produced 13,120 pages of documents in response to the subpoena. The independent counsel's office took the information provided by Hubbell and used it to proceed with a second prosecution of Hubbell for tax crimes and mail and wire fraud.[68]

The district court dismissed the independent counsel's indictment. According to the court, the government's whole

58. *Id.* at 444 (Scalia, J., and Thomas, J., dissenting).

59. *Id.* at 465.

60. *Id.*

61. 530 U.S. 27 (2000).

62. 529 U.S. 61 (2000).

63. *Hubbell*, 530 U.S. at 29.

64. *Agard*, 529 U.S. at 63.

65. *Hubbell*, 530 U.S. at 30.

66. *Id.* at 31.

67. *Id.*

68. *Id.*

case was based on or derived from the documents Hubbell produced in response to the grant of immunity.[69] The district court concluded that Hubbell's act of turning over the documents described in the subpoena was testimonial and thus was protected by the Fifth Amendment and the grant of immunity. The court of appeals initially returned the case to the district court but ultimately affirmed the dismissal. The Supreme Court granted certiorari to determine the scope of the immunity granted and its effect on how the independent counsel's office could use the documents Hubbell produced.

In an eight to one decision, the Supreme Court affirmed the appellate court and district court rulings dismissing the case. The majority began its analysis by examining the scope of the privilege against self-incrimination. The Court pointed out that the term "privilege against self-incrimination" is an overly broad description of the constitutional rights contained in the Fifth Amendment. An individual's Fifth Amendment right regarding self-incrimination actually only protects that individual from being "compelled in any criminal case to be a witness against himself."[70] The term "witness" has a very specific meaning in the context of the Fifth Amendment: an individual is a "witness" only when he engages in communication which is "testimonial in character."[71]

The Supreme Court has decided a number of cases that address the distinction between conduct that is testimonial and communicative and that which is not. Testimonial or communicative conduct must convey, either expressly or impliedly, factual assertions or beliefs. Thus, the government can require an individual to engage in a host of activities that are incriminating while not in violation of that individual's rights under the Fifth Amendment. The *Hubbell* Court cites to cases in which individuals were required to provide handwriting exemplars,[72] blood samples,[73] or recordings of their voice without violating their privilege against self-incrimination.[74] In particular, the Court focused on a case decided in 1976, *United States v. Fisher*.[75] In *Fisher*, the Supreme Court determined that requiring an individual to turn over accounting documents used to prepare tax returns did not violate the Fifth Amendment. The *Fisher* Court concluded that the documents themselves were not protected. They were not protected because they were prepared voluntarily, long before any prosecution against *Fisher* was being considered. The Court then held that the act of turning the documents over was not protected either. In order for a physical act to be protected by the Fifth Amendment, it must be testimonial or communicative in nature. The Court reasoned that Fisher's act was not testimonial because it conveyed no factual information that the government did not already have. According to the Court, "The existence and location of the papers . . . [were] a forgone conclusion and the taxpayer adds little to nothing to the sum total of the Government's information."[76]

The Court in *Hubbell*, as in *Fisher*, concluded that the Fifth Amendment did not protect the documents Hubbell produced.[77] Just as in *Fisher*, the documents in *Hubbell* were prepared voluntarily. The majority then turned to the issue of whether the act of turning the documents over was protected. The Court concluded it was.[78] According to the Court, the facts in *Hubbell* were clearly distinguishable from *Fisher.* In *Fisher*, the government knew through independent sources the location, content, and authenticity of the documents they were seeking.[79] In *Hubbell*, the independent counsel's office had no knowledge of the existence, location, or authenticity of the 13,120 pages of documents it received from Hubbell. The district court called the independent counsel's subpoena "the quintessential fishing expedition,"[80] and the Supreme Court added that the "fishing expedition did produce fish, but not the one that the Independent Counsel expected to hook."[81] The Court went on to say,

69. United States v. Hubbell, 11 F. Supp. 2d 25, 33-37 (D.C. Cir. 1998).

70. U.S. CONST. amend. V.

71. *Hubbell*, 530 U.S. at 34.

72. Gilbert v. California, 388 U.S. 263 (1967).

73. Schmerber v. California, 384 U.S. 757 (1966).

74. United States v. Wade, 388 U.S. 218 (1967).

75. Fisher v. United States, 425 U.S. 391 (1976).

76. *Id.* at 411.

77. *Hubbell*, 530 U.S. at 36.

78. *Id.* at 43.

79. *Fisher*, 425 U.S. at 411.

80. United States v. Hubbell, 11 F. Supp. 2d 25, 33-37 (D.C. Cir. 1998).

81. *Hubbell*, 530 U.S. at 42.

"It is abundantly clear that the testimonial aspect of respondent's act of producing subpoenaed documents was the first step in a chain of evidence that led to this prosecution."[82]

After concluding that Hubbell's act of producing the documents was testimonial, the majority went on to hold that neither the documents nor any evidence derived from the documents could be used against Hubbell. The Court pointed out that under both 18 U.S.C. § 6002 and the Fifth Amendment, the government cannot use evidence obtained through or derived from, a grant of immunity for a later prosecution of the immunized individual.[83] In fact, 18 U.S.C. § 6002 expressly prohibits the use of testimony compelled pursuant to a grant of immunity under § 6003 or any information derived from such testimony, in a later prosecution. The burden of establishing that the evidence used in a case was not derived from immunized testimony falls on the government. The government must establish "that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony."[84] The independent counsel's office could not meet this burden and so the Court affirmed the dismissal of the government's case.

The *Hubbell* case is valuable in many respects. First, the case reminds prosecutors in all jurisdictions to be cautious when granting immunity. All the potential ramifications of a grant of immunity should be examined. If prosecutors seek to try an individual after granting him immunity, they will bear the burden of establishing the legitimacy and independence of their evidence. Next, *Hubbell* highlights the dramatic effect a violation of the Fifth Amendment can have on a prosecution. A violation of the Fifth Amendment will result in the compelled testimony being excluded, along with any derivative evidence.[85] This is distinct from the *Miranda-Tucker* line of cases. Under *Miranda-Tucker* a violation of the requirement to inform a suspect of their *Miranda* warnings may result in only the unwarned statements being excluded.[86] Finally, *Hubbell* is a valuable review of the boundaries of the Fifth Amendment privilege against self-incrimination, and a reminder that the privilege against self-incrimination is not as broad as the title implies. The right to not be compelled to be a witness against oneself only protects testimonial or communicative conduct. It is important to recognize that Hubbell's Fifth Amendment right against self-incrimination was not violated by the independent counsel's office taking the documents that were later used in the government's prosecution. The violation in this case occurred only when the independent counsel's office compelled Hubbell to engage in the testimonial act of finding documents that were responsive to the subpoena and turning those documents over.

In *Hubbell*, the Supreme Court provides greater clarity in an area of the Fifth Amendment that sorely needed it. Although it is hard to envision the Court concluding that the independent counsel's office had behaved properly, the holding in *Fisher* left some doubts. *Hubbell* leaves no doubt that the government's conduct was impermissible. While *Hubbell* has clarified what the government may not do, *Portuondo v. Agard*[87] has clarified what prosecutors can do.

In *Portuondo v. Agard*, the defendant, Ray Agard, was charged with multiple specifications of sodomy, assault, and weapons violations.[88] Agard was alleged to have assaulted, sodomized, and raped Nessa Winder, and threatened both Ms. Winder and a friend of hers with a handgun. Agard testified at trial, claiming he had consensual intercourse with Ms. Winder and she had made up the rape, sodomy, and weapons allegations because Agard hit her after an argument.[89] The case turned on who was more credible, Ms. Winder and her friend, or Agard. During closing argument the prosecutor stated:

> You know ladies and gentlemen, unlike all the other witnesses in this case the defendant has a benefit and the benefit that he has, unlike all other witnesses, is he gets to sit here and listen to the testimony of all the other witnesses before he testifies . . . . That gives you a big advantage, doesn't it. You get to sit here and think what am I going to say and how am I going to say it? How am I going to fit it into the evidence . . . . He's a smart man. I never said he was stupid . . . . He used everything to his advantage.[90]

82. *Id.*

83. *Id*. at 39.

84. *Id.* at 40; *see also* Kastigar v. United States, 406 U.S. 441, 460 (1972).

85. *Hubbell*, 530 U.S. at 43.

86. Michigan v. Tucker, 417 U.S. 433, 444 (1974).

87. 529 U.S. 61 (2000).

88. *Id.* at 63.

89. *Id.*

90. *Id.*

Agard was convicted of one of the sodomy specifications and two of the weapons violations.

After the government's argument, Agard's defense attorney objected. The defense claimed Agard's Sixth Amendment right to confront witnesses against him had been infringed upon.[91] The trial court disagreed. The case was appealed through the New York appellate courts and the federal district court with no relief being granted.[92] On appeal, Agard alleged a violation of both his Fifth and Sixth Amendment rights. It was not until the case reached the Second Circuit Court of Appeals that Agard was successful in claiming that his Fifth and Sixth Amendment rights had been violated. The Circuit Court also found a violation of Agard's Fourteenth Amendment rights.[93]

In a seven-to-two decision, the Supreme Court reversed the Second Circuit. The majority held that the prosecutor's comments were not a constitutional violation but, rather, were a fair comment on the defendant's credibility.[94] *Agard* presents a unique Fifth Amendment issue. Generally, when a defendant claims there has been a violation of his Fifth Amendment rights it is because the government has compelled the defendant to be a witness against himself. In this case, the defendant claimed that the government violated his Fifth Amendment rights by commenting on freely given testimony. Agard also claimed a violation of his Sixth Amendment right to confront witnesses against him. Agard alleged that the government infringed on his Fifth and Sixth Amendment rights by attacking his exercise of these rights in closing argument. This case highlights the inherent tension created when a defendant takes the stand. This tension exists between protecting the constitutional rights of the defendant and treating a testifying defendant like any other witness. Often these two objectives are at odds. In this case, the majority resolved this tension in favor of treating the defendant like any other witness.

The majority opinion rested on two positions. First, there is no precedent to support Agard's claim that his Fifth, Sixth, and Fourteenth Amendment rights were violated. Second, there is precedent to support the permissibility of the prosecutor's comments. Justice Scalia, writing for the majority, argued that the prosecutor in this case did nothing more than comment on the credibility of Agard's in-court testimony. The comment is permissible and is in accordance with Supreme Court precedent that states, "when [a defendant] assumes the role of a witness, the rules that generally apply to other witnesses—rules that serve the truth-seeking function of the trial—are generally applicable to him as well."[95]

The majority's first position is divided into two sections. The first section examines whether there is any historical foundation for Agard's claim. After a brief discussion of the history of a defendant's right to testify and a prosecutor's right to comment on that testimony, the majority concluded that "the respondent's claims have no historical foundation, neither in 1791, when the Bill of Rights was adopted, nor in 1868 when, according to our jurisprudence, the Fourteenth Amendment extended the strictures of the Fifth and Sixth Amendments to the States."[96] The second section of the majority's first position is devoted to analyzing the Court's holding in *Griffin v. California*.[97] Both the dissent and Agard relied heavily on *Griffin* to support their position that the prosecutor violated the respondent's constitutional rights. Justice Scalia stated simply, "That case [Griffin] is a poor analogue."[98]

In *Griffin*, the defendant was charged with murdering a young woman. There were no eyewitnesses, and the defendant did not testify during the findings phase of his trial.[99] During the government's closing, the prosecutor argued:

> The defendant certainly knows whether Essie Mae had this beat up appearance at the time he left her apartment . . . . He would know how she got down to the alley. He would know how the blood got on the bottom of the concrete steps . . . . He would know whether he beat her or mistreated her . . . . These things he has not seen fit to take the stand and deny or explain . . . . Essie Mae is dead, she can't tell you her side of the story. The defendant won't.[100]

After closing arguments, the judge instructed the jury that:

91. *Id*. at 64.

92. *Id*. at 65.

93. Agard v. Portuondo, 117 F.3d 696 (1997).

94. 529 U.S. at 73.

95. *Id*. at 69 (quoting Perry v. Leeke, 488 U.S. 272, 282 (1989)).

96. *Id*. at 65.

97. 380 U.S. 609 (1965).

98. *Agard*, 529 U.S. at 67.

99. *Griffin*, 380 U.S. at 609.

> if he [the defendant] does not testify or if, though he does testify, he fails to deny or explain such evidence, the jury may take that failure into consideration as tending to indicate the truth of such evidence and as indicating that among the inferences that may be reasonably drawn therefrom those unfavorable to the defendant are the more probable."[101]

The Court in *Griffin* concluded that both the prosecutor's argument and the judge's instruction violated the defendant's Fifth Amendment rights. The majority stated, "comment[ing] on the refusal to testify is a remnant of the 'inquisitorial system of criminal justice . . . which the Fifth Amendment outlaws. It is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly."[102]

Justice Scalia argued that *Griffin* is a poor analogue because *Griffin* forbids prosecutors and judges from encouraging juries to do what they are not permitted to do, while the prosecutor in *Agard* suggested that the jury do what it is entitled to do.[103] According to the majority, *Griffin* prohibits a judge or prosecutor from encouraging the jury to use the fact that the accused did not testify against him. This is impermissible because "[t]he defendant's right to hold the prosecution to proving its case without his assistance is not to be impaired by the jury's counting the defendant's silence against him."[104] The majority then contends that the prosecutor's conduct in *Agard* is nothing like that of the prosecutor in *Griffin*. The prosecutor in *Agard* was encouraging the jury to weigh the defendant's credibility based on his opportunity to tailor his testimony. This conduct is permissible because the jury is entitled and expected to judge the credibility of the testifying defendant just as they would any other witness. Justice Scalia also argued that to forbid the jury from considering the defendant's opportunity to tailor his testimony would be requiring the jurors to ignore a "natural and irresistible" conclusion.[105]

The second argument the majority relied on is that there is ample Supreme Court precedent to support the constitutionality of the prosecutor's comments in this case. The majority contends "the prosecutor's comments in this case . . . concerned respondent's credibility as a witness, and were therefore in accord with our longstanding rule that when a defendant takes the stand, 'his credibility may be impeached and his testimony assailed like that of any other witness.'"[106] Besides citing cases that support treating an accused like any other witness for impeachment,[107] the majority also cited to *Brooks v. Tennessee*.[108] In *Brooks*, the Supreme Court addressed a Tennessee statute that required a criminal defendant to testify at the outset of the defense case. The primary purpose of the statute was to avoid defendants tailoring their testimony.[109] The Court struck down that statute as unconstitutional. According to Justice Scalia, the *Brooks* Court suggests that the solution to defendants tailoring their testimony is the adversarial system itself which, "reposes judgement of the credibility of all witnesses in the jury." Justice Scalia went on to write, "The adversary system surely envisions—indeed, it requires—that the prosecutor be allowed to bring to the jury's attention the danger that the Court was aware of."[110]

Justice Stevens and Justice Breyer concurred with the majority but disagreed with Justice Scalia's "implicit endorsement of [the prosecutor's] summation."[111] Justice Stevens, who wrote the concurrence, felt that the prosecutor's argument "demeaned" the adversarial process, "violated" our system's respect for an individual's dignity, and "ignored" our "presumption of innocence that survives until a guilty verdict is returned."[112] Although the concurrence believed the prosecutor's argument should survive constitutional scrutiny, it suggests that in the future trial judges should either prevent such

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100. *Id.* at 610-11.

101. *Id.*

102. *Id.* at 614.

103. *Agard*, 529 U.S. at 67.

104. *Id.*

105. *Id.* at 68.

106. *Id.* at 69.

107. Perry v. Leeke, 488 U.S. 272 (1989); Brown v. United States, 356 U.S. 148 (1958); Reagan v. United States, 157 U.S. 301 (1895).

108. 406 U.S. 605 (1972).

109. *Id.* at 607.

110. *Agard*, 529 U.S. at 70.

111. *Id.* at 76 (Stevens, J., and Breyer, J., concurring).

arguments or instruct the jury on the necessity of the defendant's attendance at trial.

Justice Souter joined Justice Ginsburg in her dissent. The dissent contended that the majority transformed "a defendant's presence at trial from a Sixth Amendment right into an automatic burden on his credibility."[113] Surprisingly, the dissent's position is not as contrary to the majority as the above quote implies. Although the dissenting Justices believed that commenting on a defendant's opportunity to tailor testimony does place some burden on the defendant's constitutional rights, under the correct circumstances, such a burden is permissible. According to the dissent, burdening a defendant's Sixth Amendment confrontation right is permissible where the truth-seeking function of the trial demands it. The disagreement between the majority and dissent relates to the timing of the prosecutor's attack in *Agard*, rather than the attack itself.

The prosecutor in *Agard* made her allegation of testimony tailoring in her closing argument. The dissent notes that by waiting until summation the prosecutor prevented Agard from answering her allegation.[114] If the prosecutor had alleged that Agard tailored his testimony during cross-examination or rebuttal, Agard could have offered evidence to rebut the allegation. Justice Ginsburg argued that allowing this kind of a generalized allegation of testimony-tailoring in the government's summation does not further the truth-seeking function of the trial, and thus is impermissible.[115]

Agard resolves a substantial controversy that has existed in Fifth and Sixth Amendment law since *Griffin v. California*. Several state and federal courts have addressed the question raised in *Agard* with divergent results. The Court of Appeals for the Armed Forces (CAAF) dealt with this issue in *United States v. Carpenter*[116] and was unable to give clear guidance. In *Carpenter*, the CAAF refused to rule on whether the trial counsel's comments referring to the accused's opportunity to tailor his testimony were error, but they did write that "the prosecutor in [the] case was treading on dangerous ground."[117] Part of the reason the CAAF concluded the trial counsel was making a dangerous argument was because of a lack of consensus among the various state and federal courts which have addressed this question. The majority in *Agard* provides a clear unambiguous statement that "comment[ing] upon the fact that a defendant's presence in the courtroom provides him a unique opportunity to tailor his testimony is appropriate—and indeed . . . sometimes essential—to the central function of the trial, which is to discover the truth."[118]

The CAAF

Just as the Supreme Court decided several cases this past year that have advanced the law of self-incrimination, so has the CAAF. While the Supreme Court's decisions touched on a wide variety of self-incrimination issues, the CAAF cases generally focused on one area of self-incrimination law, Article 31 of the Uniform Code of Military Justice.[119] Two cases this past year, *United States v. Ruiz*[120] and *United States v. Swift*,[121] were particularly significant. In both cases, the CAAF provided greater definition to critical questions regarding Article 31. *United States v. Ruiz* focused on the definition of an interrogation and the point at which making a statement to a suspect becomes an interrogation. *Swift* discusses the distinction between questioning for a law enforcement or disciplinary purpose and questioning for an administrative purpose. *Swift* also addresses the use the government may make of a statement taken in violation of Article 31 and the application of the testimonial acts doctrine to Article 31.

United States v. Ruiz is the more controversial of the two cases dealing with Article 31. Certainly, within the court, it was the most controversial with Judges Effron and Sullivan dissenting.[122] In *Ruiz*, the CAAF had to resolve whether an interrogation had taken place. There is little disagreement between the dissent and majority about the law or the facts of this case. The disagreement seems to be one of perception. The

112. *Id.*

113. *Id.* (Ginsburg, J., and Souter, J., dissenting).

114. *Id.* at 79.

115. *Id.* at 77.

116. United States v. Carpenter, 51 M.J. 393 (1999).

117. *Id.* at 397.

118. *Agard*, 529 U.S. at 73.

119. UCMJ art. 31 (2000).

120. 54 M.J. 138 (2000).

121. 53 M.J. 439 (2000).

122. 54 M.J. at 145 (Effron, J., and Sullivan, J., dissenting).

majority felt the conduct in this case was not an interrogation,[123] while the dissent could see it as nothing but an interrogation.[124]

Senior Airman Roy Ruiz was convicted of a larceny at the Army and Air Force Exchange Services (AAFES) and was sentenced to a bad conduct discharge, confinement for two months, and reduction to the grade of E1.[125] The charge resulted from an incident at the Fitzsimmons Garrison Post Exchange (PX). On 23 November 1996, the AAFES store detectives witnessed Ruiz behaving suspiciously. After Ruiz left the PX, store detectives followed him to the parking lot. One of the detectives, Jean Rodarte, asked Ruiz if he would be willing to come back to the PX office. Ruiz agreed. Once in the PX office, Ms. Rodarte said to Ruiz, "There seems to be some AAFES merchandise that hasn't been paid for."[126] Ruiz responded, "Yes." He then pulled out a receiver, compact disk, and some razors and placed the items on the desk. Ruiz then said, "You got me."[127]

Before trial, Ruiz's defense counsel moved to suppress Ruiz's statement to Ms. Rodarte. The defense argued that the statement was the product of an unlawful interrogation because Ruiz was not read his Article 31 rights before being questioned by Ms. Rodarte. After a hearing in which the government presented evidence to establish the admissibility of Ruiz's statement, the military judge denied the defense motion to suppress concluding that Ms. Rodarte's statement regarding AAFES merchandise was not an interrogation.[128]

The CAAF reviewed the judge's decision de novo.[129] Judge Everett, writing for the majority, held that Ms. Rodarte was not conducting an interrogation when she spoke to Ruiz.[130] Before arriving at this conclusion, the majority acknowledged that an "interrogation involves more than merely putting questions to an individual."[131] Judge Everett cites to *Brewer v. Williams*[132] and the Military Rules of Evidence (MRE) in his discussion of the definition of interrogation.[133] According to the majority, the definition of interrogation under MRE 305(b)(2) is purposely broad "to thwart 'attempts to circumvent warnings requirements through subtle conversations.'"[134] However, Ms. Rodarte's conduct did not fall within this broad definition. Instead, the majority concluded that Ms. Rodarte was doing nothing more than informing Ruiz why he had been stopped and asked to return to the PX office.[135] The majority cites to several cases that have held that informing an individual of the reason for his detention or the crime of which he is suspected need not be preceded by an Article 31 rights advisement.[136]

Judge Sullivan and Judge Effron dissented in separate opinions. Judge Sullivan also joined in Judge Effron's dissent. Both judges were unconvinced that Ms. Rodarte's statement was intended to merely inform Ruiz why he had been asked to return to the PX office. Judge Sullivan and Judge Effron cite to Ms. Rodarte's testimony during the motion hearing to support their conclusion that her statement to Ruiz was designed to illicit an incriminating response. Ms. Rodarte testified that she was trained not to ask questions of a suspect but instead was to say, "there appears to be some AFFES merchandize that has not been paid for."[137] Ms. Rodarte understood that the purpose of this policy was to preclude the need to give suspects a rights advisement. Also, when Ms. Rodarte was asked whether she was expecting to get a response to her statement, she said she hoped for a response. Finally, Ms. Rodarte said the statement she directed at Ruiz was intended to give him "a chance to vol-

123. *Id.* at 142.

124. *Id.* at 148 (Effron, J., and Sullivan, J., dissenting).

125. *Id.* at 139.

126. *Id.* at 140.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id*. at 141.

131. *Id.*

132. 430 U.S. 387 (1977).

133. *Ruiz*, 54 M.J. at 141.

134. *Id.*

135. *Id.* at 142.

136. *Id.*

137. *Id.* at 145, 147 (Effron, J., and Sullivan, J., dissenting).

untarily place it [the stolen merchandise] on the desk if . . . [he] wanted to."[138] Based on Ms. Rodarte's testimony, and the circumstances under which Ms. Rodarte made her statement to Ruiz, Judges Effron and Sullivan concluded that an interrogation did occur. Both dissents also go on to specifically find prejudice resulting from the error of admitting Ruiz's unwarned statement.[139]

Ruiz is a frustrating opinion. It is difficult to understand how the majority concluded that Ms. Rodarte did not engage in the functional equivalent of an interrogation. The majority's holding that Ms. Rodarte was merely informing Ruiz why she stopped him seems to fly in the face of Ms. Rodarte's testimony and common sense. At no point did the majority cite to any evidence that Ms. Rodarte's statement was intended to inform Ruiz of why he was stopped. The dissents, on the other hand, cited to Ms. Rodarte's own testimony where she specifically stated that she hoped Ruiz would respond to her statement, and the purpose of her statement was to give Ruiz the opportunity to turn over the items he had stolen.

Although the ultimate holding of the majority opinion is dissatisfying, the analysis of the issue and the statement of the law are extremely helpful. The majority made it clear that, despite the court's holding in the case, government representatives cannot avoid warning requirements by simply turning their questions into statements. Judge Everett wrote, "[MRE] 305(b)(2) . . . was purposely drafted in a broad fashion to thwart 'attempts to circumvent warnings requirements through subtle conversation.'"[140] Also, the majority reaffirmed the holding in *United States v. Quillen*,[141] which requires AFFES store detectives to provide Article 31 warnings when questioning a military suspect.

Although *Swift* is not as controversial as *Ruiz*, it is at least as significant. *Swift* addresses two important Article 31 issues, and one combination Article 31 and Fifth Amendment issue. First, the CAAF addressed the distinction between questioning a soldier for a disciplinary or law enforcement purpose and for an administrative purpose. Second, the court examined when a statement taken in violation of Article 31 can be used as the basis for a false official statement charge. Finally, the CAAF resolved whether the respondent's act of turning over a divorce decree was a testimonial act.

Staff Sergeant (SSG) John Swift was convicted at a general court-martial for making false official statements, writing bad checks, bigamy, and impeding an investigation.[142] He was sentenced to a bad conduct discharge and reduction to E1. The case against Swift began with a phone call. On 8 March 1996, Swift's company commander, Captain Myatt, received a telephone call from Swift's wife (the first Mrs. Swift).[143] The first Mrs. Swift told Captain Myatt that she had just received a phone call from a woman claiming to be SSG Swift's present wife (the second Mrs. Swift). The second Mrs. Swift told the first Mrs. Swift that the first Mrs. Swift was no longer married to SSG Swift. She also told the first Mrs. Swift that she possessed a divorce decree from Pike County, Kentucky, that showed that the first Mrs. Swift and SSG Swift were divorced in 1994. The first Mrs. Swift told Captain Myatt that, to her knowledge, she was still married to SSG Swift, even though they had been separated since before 1994. The first Mrs. Swift also told Captain Myatt that she had contacted the Pike County Courthouse and learned that there was no divorce decree involving her and SSG Swift on file.[144]

After talking with the first Mrs. Swift, Captain Myatt informed his first sergeant, Master Sergeant (MSgt) Vernoski, of the phone call. The commander and first sergeant reviewed Swift's emergency data card and Defense Eligibility Enrollment Reporting System (DEERS).[145] Swift's emergency data card listed the first Mrs. Swift as the respondent's current wife. The DEERS, however, showed Swift had disenrolled the first Mrs. Swift in 1994 and enrolled the second Mrs. Swift at the same time. The DEERS personnel told Captain Myatt and MSgt Vernoski that Swift would have had to show a divorce decree to have the first Mrs. Swift removed from the DEERS. Next, the commander and first sergeant visited the base legal office and spoke with the chief of criminal law regarding the potential bigamy charge.[146] Captain Myatt and MSgt Vernoski decided to confront Swift about the situation.

Before the first sergeant met with Swift, he received a phone call from the first Mrs. Swift. She reiterated to him what she

138. *Id.* at 147.

139. *Id.* at 145, 147.

140. *Id.* at 141.

141. 27 M.J. 312 (1988).

142. United States v. Swift, 53 M.J. 439, 441 (2000).

143. *Id.*

144. *Id.* at 442.

145. *Id.*

146. *Id.*

had already told the company commander. Master Sergeant Vernoski then looked up bigamy in the *Manual for Courts-Martial* to verify the elements of the offense and maximum sentence.[147] Next, the first sergeant called Swift in to his office. Swift was not advised of his rights under Article 31, although he was told of the accusations that the first Mrs. Swift had been making. Swift told his first sergeant that he had been divorced in 1994, and gave the name of the attorney who handled the divorce. Swift claimed the first Mrs. Swift was just trying to make trouble for him. Master Sergeant Vernoski told SSG Swift that the first Mrs. Swift could make trouble for him and showed Swift the maximum punishment for bigamy.[148] The meeting ended with MSgt Vernoski directing SSG Swift to give him a copy of his divorce decree. Several days after being told to produce the divorce decree, Swift gave the first sergeant what he claimed was his divorce decree. The decree did not have the first Mrs. Swift's signature on it, and it contained several typographical errors and misspellings.[149] Additionally, the divorce decree stated it was on file at Pike County Courthouse in Kentucky. A call to the Pike County clerk's office verified that there was no such divorce decree filed with that court. Swift was charged with two false official statements, one obstruction of an investigation charge, bigamy, and two unrelated bad check specifications. At trial, Swift moved to suppress all statements made to MSgt Vernoski based on a violation of Article 31.[150] The military judge denied the motion, concluding "there was insufficient circumstances that caused or reasonably should have caused Sergeant Vernoski to suspect the accused of the criminal offense of bigamy."[151]

At the CAAF, the majority began its analysis with a discussion of the history and application of Article 31. The court described the unique aspects of the military that make Article 31 necessary to insure soldiers' rights against self-incrimination are protected.[152] Judge Effron, writing for the majority, focused on the inherent compulsion on soldiers to answer the questions of those superior in rank, and the "special feature of military life . . . [that causes] the blending of administrative and law enforcement roles in the performance of official duties."[153] According to the majority, these two features of military life make Article 31 necessary. A soldier may answer questions asked by his superior under the presumption that he must answer the question or that the question was asked for an administrative purpose when it is actually part of a criminal investigation.

The CAAF has established a two-tier analysis for determining whether Article 31 warnings are necessary. First, was the person being questioned a suspect at the time of questioning, and second, was the person asking the questions part of an official law enforcement or disciplinary investigation.[154] To answer the first question, the court must consider "all the facts and circumstances at the time of the interview to determine whether the military questioner believed or reasonably should have believed that the service member committed an offense."[155] To answer the second question, the court must assess "all the facts and circumstances at the time of the interview to determine whether the military questioner was acting or could reasonably be considered to be acting in an official law-enforcement or disciplinary capacity."[156] Additionally, the CAAF has established that questions will be presumed to be for a disciplinary purpose when the questioner is senior to the suspect and also is in the suspect's chain of command.[157]

After laying this foundation for its analysis, the majority took up the issue of whether SSG Swift was a suspect at the time MSgt Vernoski questioned him. Despite recognizing the administrative role a first sergeant plays in dependent entitlements, the majority ruled that MSgt Vernoski's questioning was for a disciplinary or law enforcement purpose. Judge Effron was able to cite a half-page worth of facts and circumstances that gave MSgt Vernoski "good reason to suspect [the] appellant of bigamy."[158] So, even before the majority applies the command presumption rule, the court found that "MSgt Ver-

147. *Id.* at 443.

148. *Id.*

149. *Id.*

150. *Id.* at 444.

151. *Id.*

152. *Id.* at 445.

153. *Id.*

154. *Swift*, 53 M.J. at 446; United States v. Moses, 45 M.J. 132 (1996).

155. *Swift*, 53 M.J. at 446; United States v. Good, 32 M.J. 105, 108 (C.M.A. 1991).

156. *Swift*, 53 M.J. at 446; United States v. Davis, 36 M.J. 337, 340 (C.M.A. 1993).

157. *Swift*, 53 M.J. at 446.

158. *Id.* at 447.

noski 'reasonably should have believed' that appellant was a suspect . . . prior to this interrogation."[159] Apparently for good measure, the majority examined whether the command presumption rule should apply in this case. After a brief restatement of the facts in the case, the majority concluded: "As a matter of law the Government failed to rebut the strong presumption that MSgt. Vernoski's interrogation was part of an investigation that included disciplinary purposes."[160] Thus, the majority found that the military judge erred in ruling that Article 31 warnings were not required in this case.

Next, the majority addressed the government's use of Swift's unwarned statements as the basis of its false official statement charges. Once again the court reviewed the history of Article 31, and also examined applicable MREs to determine what use can be made of an unwarned statement. The majority recognized two such situations. First, on cross-examination of a testifying accused, and second, in a later prosecution of the accused for perjury. The hallmarks of these two exceptions are that "the accused is the gatekeeper as to the admission of the unwarned statement and . . . only an inconsistent or perjurous statement by an accused who testifies at trial opens the gate."[161] The majority concluded that an unwarned statement can only be used as the basis of a false official statement charge where "the accused has opened the door to consideration of the unwarned statement by his or her in-court testimony."[162] In *Swift*, the accused never testified. Thus, the government was not permitted to use Swift's statements as the basis of a false official statement charge.

Practitioners should make a special note of this portion of the *Swift* ruling. The CAAF has clarified an ambiguity that exists in MRE 304(b)(1). Military Rule of Evidence 304(b)(1) describes the exceptions to the general rule that statements taken in violation of Article 31 are inadmissible at trial. Military Rule of Evidence 304(b)(1) states in part:

> Where the statement is involuntary only in terms of noncompliance with the requirements of Mil. R. Evid. 305(c) or 305(f) . . . 305(e) and 305(g), this rule does not prohibit use of the statement . . . in a later prosecution against the accused for perjury, false swearing, or the making of a false official statement.[163]

Swift clarifies that the government may only use a statement taken in violation of Article 31 in a later prosecution when the accused has taken the stand in an earlier prosecution. Practitioners may want to pen a change in their *Manuals for Courts-Martial* to highlight this clarification. Such a change might be: this rule does not prohibit use of the statement . . . in a later prosecution against the accused for perjury, false swearing, or the making of a false official statement, *provided the accused has testified at an earlier trial regarding the content of the statement.*

The third issue addressed in *Swift* was whether Swift's Fifth Amendment or Article 31 rights were violated when MSgt Vernoski demanded that Swift produce his divorce decree. In addressing this issue, the CAAF engaged in an analysis very similar to that of the United States Supreme Court in *United States v. Hubbell*, relying on *Hubbell* as precedent in its decision.[164] The CAAF ultimately concluded that Swift's Fifth Amendment and Article 31 rights were not violated by his first sergeant requiring him to turn over his divorce decree. *Swift* is an excellent juxtaposition to *Hubbell.* Because the CAAF decided that Swift's divorce decree was not taken in violation of his rights, the CAAF was required to go into greater detail than the *Hubbell* Court on certain aspects of this issue. The CAAF divided its analysis into two parts, first addressing the decree itself and then the act of turning it over to MSgt Vernoski.

The CAAF concluded that the divorce decree and its contents were not protected by the Fifth Amendment or Article 31. Like the Supreme Court in *Hubbell*, the CAAF focused on whether the content of the divorce decree was voluntarily prepared before Swift was required to produce the document. The court found that it was, and concluded that "the documents 'could not be said to contain compelled testimonial evidence.'"[165]

Next, the court addressed whether the act of turning over the divorce decree was testimonial. The CAAF does an excellent job of mustering the facts to support why the act of turning over the divorce decree was not testimonial, but the analysis is lacking detail. As discussed in *Hubbell* and *Fisher*, where the existence and location of a document is a "foregone conclusion," the act of turning over the document is not testimonial. In *Swift*, MSgt Vernoski knew of the existence and the location of the

159. *Id.*

160. *Id.* at 448.

161. *Id.* at 450.

162. *Id.* at 451.

163. MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 305(b)(1) (2000).

164. *Swift*, 53 M.J. at 452.

165. *Id.* at 453 (quoting United States v. Hubbell, 530 U.S. 27, 35 (2000) (quoting Fischer v. United States, 425 U.S. 391, 409-10 (1976))).

divorce decree. Because Swift's act of turning over the decree would add "little or nothing to the sum total of the Government's information"[166] it was not testimonial.

The CAAF goes on to state that even if Swift's act of turning over the divorce decree was testimonial it would fall into the required records exception to the Fifth Amendment and Article 31.[167] Under the required records exception, "[i]f the Government requires the documents to be kept for a legitimate administrative purpose, neither the content nor the act of production of these documents are protected by the Fifth Amendment."[168] The required records exception has also been applied to Article 31.[169] To be a required record the document must have a public aspect and the requirement to keep the record must be regulatory. Also, the record must be the kind of record that the regulated party has customarily kept. The CAAF had little trouble determining that Swift's divorce decree met the elements of a required record.

The *Swift* decision is three holdings in one. The case reminds trial counsel and chiefs of criminal law to be vigilant when advising company commanders and first sergeants. A well-placed caution given by the chief of criminal law in this case could have avoided the violation of Swift's Article 31 rights. The case also provides valuable clarification regarding what use may be made of statements taken in violation of Article 31. Defense counsel must insure that if their client takes the stand after giving an unwarned statement, they are aware of the risk that the unwarned statement can be used on cross-examination and for a possible later prosecution for perjury. Finally, *Swift,* like *Hubbell*, is another valuable case in the area of document production and the Fifth Amendment. Both cases assist practitioners in understanding when the act of producing a document is, and is not, protected by the Fifth Amendment.

Conclusion

The Supreme Court and the CAAF have provided practitioners with a clearer picture of how the privilege against self-incrimination is to be interpreted and applied. Decisions like *Agard*, *Hubbell*, and *Swift* have resolved vexing self-incrimination issues. Even *Dickerson* and *Ruiz,* although not completely satisfying opinions, are nonetheless valuable. In *Dickerson,* the Supreme Court removed any question as to *Miranda's* present viability. In *Ruiz,* the CAAF clearly states that "attempts to circumvent warning requirements through subtle conversations"[170] is no more permissible under Article 31 than it would be under the Fifth Amendment.

166. *Hubbell,* 530 U.S. at 44; *Fisher,* 425 U.S. at 411.

167. *Swift,* 53 M.J. at 453.

168. *Id.*

169. *Id.*

170. United States v. Ruiz, 54 M.J. 138, 141 (2000).

New Developments in Confrontation: Assessing the Impact of *Lilly v. Virginia*

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Introduction

In *Lilly v. Virginia*,[1] a plurality[2] of the United States Supreme Court concluded that statements against penal interest do not fall within a firmly rooted exception to the hearsay rule. In addition, the plurality held that the statements in question in *Lilly* were not sufficiently reliable to satisfy the Confrontation Clause.[3] The plurality's sweeping language suggested that statements against penal interest might never be admissible against a criminal defendant.[4] This article surveys the military and federal cases decided after *Lilly v. Virginia*. The survey shows that some statements against penal interest are reliable enough to survive constitutional scrutiny.

The appellate courts' application of *Lilly* has been predictable. However, to predict *Lilly's* impact, one had to sort through a very complicated opinion. The Court was unanimous in *Lilly*; however, no single rationale commanded a majority. The first part of this article reviews the facts and analysis of *Lilly.* Once the reader understands the different approaches of the justices, understanding the outcomes of this year's cases is as easy as adding four plus two and three plus two. The second part of this article surveys the military and federal appellate opinions which found statements against penal interest were erroneously admitted at trial, focusing on the Army Court of Criminal Appeals' decision in *United States v. Egan*.[5] The final section reviews several federal cases which found certain types of statements against penal interest were properly admitted. Two important factors emerge from this year's cases that will be very helpful to prosecutors offering statements against penal interest and to defense counsel opposing them. The first factor is to whom the statement was made. The second is whether the declarant attempted to shift the blame for criminality to others.

Lilly v. Virginia

In *Lilly v. Virginia*, a capital murder case, the Supreme Court considered whether the hearsay exception for statements against penal interest[6] is a firmly rooted hearsay exception. In December 1995, Benjamin Lilly, his brother Mark, and Mark's roommate burglarized a home. The next day, they robbed a small country store. When their vehicle broke down, they abducted a man, stole his car, drove him to a deserted area and killed him. The trio were later apprehended by police and questioned separately.[7]

Mark Lilly made several incriminating statements connecting him to the burglary and robbery, but not the murder. He admitted that he stole liquor during the initial burglary and a twelve-pack of beer in a later robbery. Mark admitted he was present during the robberies and the murder. He also made several statements that incriminated his brother in the murder. Mark said that his brother, Benjamin, instigated the carjacking and was the one who shot the victim.[8]

When Benjamin Lilly went to trial, the state attempted to call Mark as a witness, but he invoked his privilege against self-incrimination. The state offered the statements Mark had made to the police as statements against penal interest, and the court admitted the statements over defense objection.[9] The jury convicted Benjamin Lilly and recommended the death penalty, which the trial court imposed.[10]

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1. 527 U.S. 116 (1999).

2. Justice Stevens wrote the plurality opinion. Justices Souter, Ginsburg and Breyer joined Justice Stevens. However, Justice Breyer authored a concurring opinion "to point out that the fact that we do not reevaluate the link [between the Confrontation Clause and the hearsay rule] in this case does not end the matter. It may leave the question open for another day." *Id.* at 142-43 (Breyer, J., concurring).

3. U.S. CONST. amend VI.

4. "Most important, this third category of hearsay [confessions by an accomplice which incriminate a defendant] encompasses statements that are inherently unreliable. . . . [W]e have over the years 'spoken with one voice in declaring presumptively unreliable accomplices' confessions that incriminate defendants.'" *Lilly*, 527 U.S. at 131 (citation omitted).

5. 53 M.J. 570 (Army Ct. Crim. App. 2000).

6. FED. R. EVID. 804(b)(3); MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 804(b)(3) (2000) [hereinafter MCM].

7. *Lilly*, 527 U.S. at 120.

8. *Id.* at 121.

The United States Supreme Court reviewed the case to determine whether Mark Lilly's statements fell within a firmly rooted hearsay exception for purposes of satisfying the Sixth Amendment's Confrontation Clause.[11] *Lilly* is a complicated opinion. All nine justices agreed that the admission of out-of-court statements by Mark Lilly, the defendant's brother, violated Benjamin Lilly's right to confront witnesses, but they could not agree on a rationale. To determine the impact of *Lilly,* one must understand the differences between the three approaches taken by the justices.

Seven justices reviewed the case using the reliability test from *Ohio v. Roberts.*[12] The Court noted that the Confrontation Clause does not prohibit the introduction of all hearsay statements. However, when a prosecutor offers an out-of-court statement and the declarant does not testify, the Confrontation Clause is implicated. In previous decisions, the Supreme Court has created and refined a methodology for analyzing the constitutionality of hearsay statements.[13] As the Court stated in *Lilly*:

> [T]he veracity of hearsay statements is sufficiently dependable to allow the untested admission of such statements against an accused when (1) 'the evidence falls within a firmly-rooted hearsay exception' or (2) it contains 'particularized guarantees of trustworthiness' such that adversarial testing would be expected to add little, if anything, to the statements' reliability.[14]

The Plurality Opinion

A plurality of the Court held that Mark Lilly's statements did not fall within a firmly rooted hearsay exception and that the admission of the statements violated Benjamin Lilly's constitutional right to confront the witnesses against him.[15] Justice Stevens, writing for the plurality, found that statements against penal interest offered by a prosecutor to establish the guilt of an alleged accomplice of the declarant do not fall within a firmly rooted hearsay exception. Moreover, the plurality doubted that statements given under conditions that implicate the core concerns of the old ex parte affidavit practice could ever be reliable enough to satisfy the Confrontation Clause without adversarial testing.[16]

The plurality first considered whether statements against penal interest fall within a firmly rooted hearsay exception. Justice Stevens described what makes a hearsay exception firmly rooted.

> We now describe a hearsay exception as "firmly-rooted" if, in light of "longstanding judicial and legislative experience," . . . it "rest[s][on] such [a] solid foundatio[n] that admission of virtually any evidence within [it] comports with the 'substance of the constitutional protection'". . . . This standard is designed to allow the introduction of statements falling within a category of hearsay

9. The defense objected on two grounds. First, the statements were not against Mark's penal interest because they shifted the blame to Benjamin Lilly and Mark's roommate. Second, admission of the statements violated the Confrontation Clause of the Sixth Amendment, which has been incorporated against the states through the Fourteenth Amendment. *Id.* at 121-22.

10. *Id.* at 122.

11. The Supreme Court of Virginia found that the statements fell within the statement against penal interest exception to the Virginia hearsay rule. Moreover, the Supreme Court of Virginia found that this exception to the hearsay rule is firmly rooted. *Id.* The question for the United States Supreme Court was whether the statements satisfied the Confrontation Clause in the Sixth Amendment to the United States Constitution. *Id.* at 125.

12. 448 U.S. 56 (1980).

13. *See* White v. Illinois, 502 U.S. 346 (1992); Idaho v. Wright, 497 U.S. 805 (1990); Bourjaily v. United States, 483 U.S. 171 (1987); United States v. Inadi, 475 U.S. 387 (1986); Ohio v. Roberts, 448 U.S. 56 (1980).

14. *Lilly*, 527 U.S. at 124-25. The second prong of this test is commonly referred to as the residual trustworthiness test. *Id.* at 136.

15. *Id.* at 139-40.

16. "The primary object of the [Confrontation Clause] was to prevent depositions or ex parte affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross examination of the witness . . . ." Mattox v. United States, 156 U.S. 237, 242 (1895). The ex parte affidavit practice was an abuse common in England in the 16th and 17th Century.

> In 16th–century England, magistrates interrogated the prisoner, accomplices, and others prior to trial. These interrogations were intended only for the information of the court. The prisoner had no right to be, and probably never was, present . . . . At the trial itself, "proof was usually given by reading depositions, confessions of accomplices, letters, and the like; and this occasioned frequent demands by the prisoner to have his 'accusers,' i.e., the witnesses against him, brought before him face to face . . . ." The infamous trial of Sir Walter Raleigh on charges of treason in 1603 in which the Crown's primary evidence against him was the confession of an alleged co-conspirator (the confession was repudiated before trial and probably had been obtained by torture) is a well-known example of this feature of English criminal procedure.

White, 502 U.S. at 361 (Thomas, J., concurring in part and concurring in the judgment) (citations omitted). Under the ex parte affidavit practice, prosecutors proved their cases by presenting out-of-court statements without giving the accused the opportunity to cross-examine the declarant(s). *See Lilly*, 527 U.S. at 127.

> whose conditions have proven over time "to remove all temptation to falsehood, and to enforce as strict an adherence to the truth as would the obligation of an oath" and cross-examination at trial. . . . Established practice, in short, must confirm that statements falling within a category of hearsay inherently "carr[y] special guarantees of credibility" essentially equivalent to, or greater than, those produced by the Constitution's preference for cross-examined trial testimony.[17]

Justice Stevens pointed out that the "against penal interest" exception to the hearsay rule is not premised on the declarant's inability to reflect before making the statement.[18] He noted that the exception is of "quite recent vintage."[19] As a result of the shallowness of the legislative and judicial experience with this exception, and a long line of cases that declare accomplices' confessions that incriminate others "presumptively unreliable,"[20] the Court held that accomplices' confessions that inculpate others are not within a firmly rooted hearsay exception.[21] The Court also noted that this category of statements included statements that function similarly to those used in the ancient ex parte affidavit system.[22]

Hearsay that does not fall within a firmly rooted hearsay exception can still satisfy the Confrontation Clause if, from the facts and circumstances surrounding the making of the statement, the court is convinced that it is sufficiently reliable. Writing for the plurality, Justice Stevens evaluated Mark Lilly's statements under the residual trustworthiness test.[23] Hearsay that does not fall within a firmly rooted hearsay exception can be reliable enough to satisfy the Confrontation Clause "[w]hen a court can be confident . . . that 'the declarant's truthfulness is so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility[.]'"[24] Because Mark was in custody, made his statements under police supervision, responded to leading questions, had a motive to exculpate himself, and was under the influence of alcohol, the Court concluded that the statements were not so reliable that adversarial testing would add nothing to their reliability.[25] Since Mark Lilly's statements failed both prongs of the test, the Supreme Court found a violation of the Confrontation Clause.[26]

Justices Scalia and Thomas

Justice Scalia and Justice Thomas concurred in the judgment separately, but shared a similar view of the Confrontation Clause. Neither justice analyzed the issue in terms of firmly rooted hearsay or the residual trustworthiness test. According to these two justices, the Confrontation Clause should be used to prevent the abuse that gave rise to the clause. They would apply the Confrontation Clause only to witnesses who testify at trial and to "extrajudicial statements only insofar as they are contained in formalized testimonial material, such as affidavits, depositions, prior testimony, or confessions."[27] Justice Scalia characterized the admission of Mark Lilly's statements as a "paradigmatic Confrontation Clause violation" because Mark Lilly made the out-of-court statements to the police during a custodial interrogation and the prosecutor did not make Mark available for cross-examination.[28] Such statements resemble the abusive practice of trial by ex parte affidavit.

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17. *Lilly*, 527 U.S. at 126.

18. *Id.*

19. *Id.* at 130.

20. *Id.* at 131.

21. *Id.* at 134.

22. *Id.* at 131. *See supra* note 16 and accompanying text (describing the ex parte affidavit system).

23. *Id.* at 134.

24. *Id.* at 136 (citations omitted).

25. *Id.* at 139.

26. *Id.*

27. *Id.* at 143 (Scalia, J., concurring in part and concurring in the judgment). Justice Thomas doubts the Confrontation Clause was intended to regulate the admission of all hearsay statements. By limiting the reach of the Confrontation Clause to the testimonial materials that were historically abused by prosecutors to deprive defendants of the opportunity for cross-examination, "the Confrontation Clause would not be construed to extend beyond the historical evil to which it was directed." White v. Illinois, 502 U.S. 346, 365 (1992) (Thomas, J., concurring).

28. *Lilly*, 527 U.S. at 143 (Scalia, J., concurring in part and concurring in the judgment).

The Concurring Opinion[29]

Chief Justice Rehnquist, joined by two other justices, agreed that admission of the statements by Mark Lilly violated the Confrontation Clause. However, Chief Justice Rehnquist wrote that it was unnecessary for the Court to decide the issue of whether statements against penal interest fall within a firmly rooted hearsay exception, arguing that the statements at issue were not against the declarant's penal interest.[30] Therefore, the Court did not have to decide if the Confrontation Clause allows the admission of a "genuinely self-inculpatory statement that also inculpates a codefendant[.]"[31] The Chief Justice would leave open the possibility that some genuinely self-inculpatory statements against penal interest are firmly rooted hearsay. Specifically, the Chief Justice identified statements to fellow prisoners[32] and confessions to family members as reliable enough to satisfy the Confrontation Clause.[33]

In *Lilly*, the court made two distinctions that are important to watch when evaluating new cases interpreting the opinion. First, the plurality cited a line of Supreme Court precedents that treat accomplices' confessions that incriminate others as "presumptively unreliable," because the declarant has a motive to shift the blame to others.[34] Second, the plurality in *Lilly* subdivided statements against penal interest into three categories: (1) voluntary admissions against the declarant; (2) exculpatory evidence offered by the defense to show the declarant committed the crime; and (3) statements offered by the prosecution to prove the guilt of an alleged accomplice of the declarant.[35] The statements in *Lilly* fell into the third category. One way to characterize this year's federal cases is that they further divide *Lilly's* third category. The cases treat statements against interest made to the police as unreliable and inadmissible, but treat statements against interest made to people other than the police differently.[36]

Statements against interest made to the police during a custodial interview were at issue in *Lilly.* All nine of the justices found that the admission of these statements violated the Confrontation Clause either because the statements were unreliable or because such statements resemble the practice of trial by ex parte affidavit. The four justices in the plurality labeled confessions by an accomplice to the police as presumptively unreliable. Justices Scalia and Thomas labeled the use of Mark Lilly's statements to the police as a paradigmatic Confrontation Clause violation because use of his uncross-examined statements were exactly the type of abuse the Confrontation Clause was adopted to prevent. Six justices would be very skeptical of using an accomplice's confession to the police as evidence against a criminal defendant.

The concurring opinion by Chief Justice Rehnquist specifically left open the issue of whether statements against penal interest made to someone other than a government official fall within a firmly rooted hearsay exception. The three concurring justices specifically reserved judgment on this issue when a statement is made to a fellow prisoner or to a family member.[37] In addition, the approach of Justices Scalia and Thomas permits admission of statements in the third category when the government is not involved in the making of the statement; Justices Scalia and Thomas would not apply the Confrontation Clause to extrajudicial statements not contained in formalized testimo-

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29. Although there were several concurring opinions, this article refers to the concurring opinion written by Chief Justice Rehnquist as the concurring opinion. Justices O'Connor and Kennedy joined the Chief Justice. *Id.* at 144.

30. In his opinion, Justice Stevens points out:

> When asked about his participation in the string of crimes, Mark admitted that he stole liquor during the initial burglary and that he stole a 12-pack of beer during the robbery of the liquor store. . . . He claimed, however, that while he had primarily been drinking, petitioner [Benjamin Lilly] and Barker [Mark Lilly's roommate] had "got some guns or something" during the initial burglary. . . . Mark said that Barker had pulled a gun in one of the robberies. He further insisted that petitioner had instigated the carjacking and that he (Mark) "didn't have nothing to do with the shooting" of DeFilippis. . . . In a brief portion of one of his statements, Mark stated that [Benjamin Lilly] was the one who shot DeFilippis.

Id. at 121.

31. *Id.* at 146.

32. Looking to previous case law, Justice Rehnquist stated that "[t]he Court in [*Dutton v. Evans*] held that the admission of an accomplice's statement to a fellow inmate did not violate the Confrontation Clause under the facts of that case, . . . and I see no reason to foreclose the possibility that such statements, even those that inculpate a codefendant, may fall under a firmly rooted hearsay exception." *Id.* at 147 (citing Dutton v. Evans, 400 U.S. 74, 86-89 (1970)).

33. *Id.*

34. *Id.* at 131. In two cases, the Second Circuit Court of Appeals approved of the admission of accomplices' confessions as statements against penal interest because they were redacted so that the confessions did not shift the blame to the defendants. *See infra* notes 116-23 and accompanying text.

35. *Lilly*, 527 U.S. at 127-31.

36. *See infra* notes 86-115 and accompanying text.

37. "The Court in *Dutton* recognized that statements to fellow prisoners, like confessions to family members or friends, bear sufficient indicia of reliability to be placed before a jury without confrontation of the declarant." *Lilly*, 527 U.S. at 147 (citing Dutton v. Evans, 400 U.S. 74, 89 (1970).

nial material. Therefore, a working majority of justices would likely hold that reliable statements made to someone other than a government official would not violate the Confrontation Clause. Moreover, the plurality opinion does not categorically reject all statements against penal interest. The plurality would subject them to the residual trustworthiness test on a case by case basis. At a minimum, it appears the five concurring justices, and conceivably all nine, would sustain the admission of statements against penal interest in those cases where the statements were made to someone who is not a government official.

Statements Against Interest Made to Police

As recently noted by the Seventh Circuit:

> [T]he full scope of *Lilly* remains undefined, [at] least one treatise has explained that in *Lilly* "all nine justices of the Supreme Court indicated, more or less explicitly, that the admission of custodial statements to law enforcement personnel against penal interest . . . whether or not constituting a confession, that incriminate another person violated the confrontation clause when admitted against such other person in a criminal case."[38]

In all reported military and federal cases since *Lilly*, appellate courts have found error when trial judges admitted statements to the police as statements against penal interest. This section will review the facts and analyses of these cases. Trial counsel and defense counsel should understand the factors that led the courts to the conclusion that statements made to police are unreliable. These factors can help trial counsel advise law enforcement agencies during criminal investigations, and will also help trial counsel and defense counsel shape their arguments when offering or opposing statements against interest made to police. In addition, the Army Court of Criminal Appeals' comprehensive analytic framework is helpful to counsel because it accounts for a myriad of constitutional and evidentiary issues surrounding statements against penal interest.

United States v. Egan

The Army Court of Criminal Appeals was the first military appellate court to react to the Supreme Court's decision in *Lilly v. Virginia*. In *United States v. Egan*,[39] the Army court considered whether, after *Lilly*, statements against penal interest fall within a firmly rooted exception to the hearsay rule. The court's opinion also contains a well-organized and helpful summary of several related issues pertaining to statements against penal interest.

Specialist (SPC) Eric A. Egan was a soldier assigned to the United States European Command Joint Analysis Center in England. At trial SPC Egan was convicted of attempted distribution of ecstasy and wrongful use of marijuana. Specialist Egan confessed to an Air Force Office of Special Investigations (OSI) agent to numerous incidents of drug use and distribution. The OSI agent interviewed two individuals, Mr. Carter and Mr. Zellers, that SPC Egan had named in his confession. At trial, both individuals refused to answer questions for fear of incriminating themselves. The military judge admitted portions of their statements to OSI under Military Rule of Evidence (MRE) 804(b)(3) as statements against penal interest. The court held that the military judge erred by admitting these statements and, without these statements, SPC Egan's confession to one specification of distribution of ecstasy was insufficiently corroborated.[40]

The court's discussion contains an outstanding methodology for practitioners to follow when dealing with statements against penal interest. The court stated:

> In analyzing the admission of Mr. Carter's and Mr. Zellers' statements, we will determine first, whether the statements were made against penal interest; second, whether the statements needed to be and were trustworthy; third, whether the individual statements within the larger statements were admissible; and fourth, whether any improperly admitted statements harmed the appellant.[41]

The first issue is a question of evidentiary law. The second issue is the constitutional question addressed by *Lilly*. The third issue accounts for the "*Williamson* parsing process."[42] The fourth issue is a question of prejudice. The first three steps of this analysis will lead trial practitioners through the separate, yet related issues raised by statements against penal interest.

The court found that Mr. Carter's statement to OSI was not a statement against penal interest. The court noted that the evi-

38. United States v. Castelan, 219 F.3d 690, 695 (7th Cir. 2000) (citing 31 WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 6742 (2d ed. 2000)).

39. 53 M.J. 570 (Army Ct. Crim. App. 2000).

40. *Id.* at 571-72.

41. *Id.* at 574.

42. *Id.* at 576. This phase refers to the requirement established in *Williamson v. United States*, 512 U.S. 594 (1994), to examine each declaration that is part of a larger statement which is admitted as a statement against penal interest. In *Williamson*, the Supreme Court held that Federal Rule of Evidence (FRE) 804(b)(3) "does not allow admission of non-self-inculpatory statements, even if they are made within a broader narrative that is generally self-inculpatory." 512 U.S. at 601.

dentiary standard of MRE 804(b)(3) is whether a reasonable person in the position of the declarant would not have made the statement unless he believed the statement to be true. The standard the court applied, however, was subjective: "[t]he criterion, however, is not whether a declarant's statement might be admissible to help convict [the declarant] if at some later time he were brought to trial but, instead, whether the declarant would himself have perceived at the time that his statement was against penal interest."[43] After-the-fact constructions by clever lawyers that show a statement is somehow technically against a declarant's penal interest are not enough to satisfy MRE 804(b)(3). The focus is on whether the declarant perceived at the time the statement was made that the statement was against his penal interest.

The court looked at the facts and circumstances surrounding Mr. Carter's statement to the OSI agent. Mr. Carter was a British citizen.[44] The OSI agent did not advise Mr. Carter of the potential consequences of making a statement under American or British law, but did advise him that the United States had no jurisdiction over him. Mr. Carter told the defense counsel "that when [he] gave a statement to the Air Force investigator [he] did not expect that it would be used against [him]."[45] Moreover, Mr. Carter stated that he would not have made the statement if he thought it could be used against him. Despite the fact that the OSI agent contradicted some of these assertions, the court was not persuaded that Mr. Carter subjectively believed that his statement would have exposed him to criminal liability.[46]

Mr. Zellers also gave OSI a statement about SPC Egan's involvement with illegal drugs. Mr. Zellers was not advised of the consequence of making a statement under American or British law, and he was unaware that the United States had no jurisdiction over him. Mr. Zellers told the defense counsel "that when [he] gave a statement to the Air Force investigators [he] was under the belief that it would not subject [him] to criminal liability."[47] The OSI agent that interviewed Mr. Zellers said that Mr. Zellers told him he was willing to give a statement, but he was reluctant to testify in court because Egan was his friend and he was afraid the British police might prosecute him for anything to which he admitted. The court concluded that Mr. Zellers' statement, as opposed to Mr. Carter's, met the evidentiary standard.[48]

Next, the court considered the constitutional issue as set out by the Supreme Court in *Lilly v. Virginia*:

> [T]he veracity of hearsay statements is sufficiently dependable to allow the untested admission of such statements against an accused when (1) "the evidence falls within a firmly rooted hearsay exception" or (2) it contains "particularized guarantee of trustworthiness" such that adversarial testing would be expected to add little, if anything, to the statements' reliability.[49]

First, the court considered whether statements against penal interest fall within a firmly rooted hearsay exception.

In *United States v. Jacobs*,[50] a case decided before *Lilly*, the Court of Appeals for the Armed Forces held that statements

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43. *Egan*, 53 M.J. at 574 (citing United States v. Greer, 33 M.J. 426, 430 (C.M.A. 1991)). Notice the tension between MRE 804(b)(3) and *Greer*. Military Rule of Evidence 804(b)(3) implies an objective standard by requiring "that a *reasonable* person in the position of the declarant would not have made the statement unless the person believed it to be true." *Greer*, 33 M.J. at 429 (emphasis added) (quoting MCM, *supra* note 5, MIL. R. EVID. 803(b)(3)). *Greer*, however, clearly applied a subjective standard. In *Greer*, the court tried to reconcile this difference by pointing out that:

> [t]he requirement that the declarant believe that his statement is contrary to his penal or pecuniary interest stems from the common-sense proposition that "someone usually does not make a statement that may send him to jail or cost him money unless he believes it to be true." . . . On the other hand, in making statements from which a benefit may be derived, a declarant has less concern with truthfulness; so there is a special need to subject such statements to the safeguard of cross-examination.

Id. at 430 (citations omitted). *Cf.* United States v. Benton, 54 M.J. 717 (Army Ct. Crim. App. 2001). In *Benton*, the court stated:

> The evidentiary rule itself appears to incorporate aspects of both a subjective and an objective standard in determining this issue. It requires that the statement be so against one's interest that "a reasonable person *in the position of the declarant"* would not have made it unless the statement were true. . . . Our superior court has applied a subjective test, holding that the criterion is "whether the declarant would himself have perceived at the time that his statement was against his penal interest."

Id. at 726 (quoting both *Greer*, 33 M.J. at 430, and MCM, *supra* note 6, MIL. R. EVID. 803(b)(3)).

44. *Egan*, 53 M.J. at 572. Mr. Zellers was a British citizen as well. *Id.*

45. *Id.* at 575.

46. "The results of our analysis would be the same were we to use the objective standard[.]" *Id.*at 575 n.4.

47. *Id.*

48. *Id.* ("Under these circumstances, we conclude that Mr. Zellers perceived his unwarned statement to OSI about the appellant's criminal activities to so subject Mr. Zellers to criminal liability that he would not have made the statement unless he believed it to be true.").

against penal interest were a firmly rooted hearsay exception. However, in *Lilly v. Virginia*, a plurality of the Supreme Court ruled that admission of the type of statements admitted in *Jacobs* violated the Confrontation Clause.[51] The Army court is the first military appellate court to consider the impact of *Lilly* on *Jacobs.* The Army court did not explicitly find that *Lilly* overruled *Jacobs*, but did decline to follow *Jacobs* in light of *Lilly.*[52] The court did not treat Mr. Zellers' statements as firmly rooted hearsay; instead the court subjected the statements to the residual trustworthiness test.[53]

The Army court's decision not to follow *Jacobs* was correct. The CAAF's holding in *Jacobs* is vulnerable in light of *Lilly.* First, in *Jacobs*, an accomplice made the statements at issue to police during a custodial interview, and so they would fall within the third category of statements against penal interest described by *Lilly.*[54] Second, the CAAF's opinion in *Jacobs* contained no analysis. The court did not consider whether statements against penal interest were sufficiently reliable based on judicial and legislative experience. Rather the court held that statements against penal interest fell within a firmly rooted hearsay exception based on the weight of authority.[55] At the time CAAF decided *Jacobs*, six circuit courts of appeal treated declarations against penal interest as a firmly rooted hearsay exception and only two circuits did not.[56] However, several federal courts have reconsidered this issue since *Lilly*, and have held that statements against penal interest are not firmly rooted hearsay.[57]

The Army court subjected Mr. Zellers' statements to the residual trustworthiness test,[58] and found the statements were not reliable enough to satisfy the Confrontation Clause because the government was involved in the production of the statement, the statements described past events, and the statements were not subjected to cross-examination. Moreover, the statements were never intended to be used to prosecute Mr. Zellers; they were taken to prosecute SPC Egan. Since Mr. Zellers stood to benefit from his cooperation with the OSI, he had a motive to minimize his involvement and shift blame to SPC Egan.[59] Consequently, admission of Mr. Zellers' statements violated the Confrontation Clause. The court set aside one finding of guilty and dismissed the specification because, without the improperly admitted hearsay, the only remaining proof of

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49. 527 U.S. 116, 124-25 (1999) (citing Ohio v. Roberts, 448 U.S. 56, 66 (1980)). Citing *Roberts* for this proposition is problematic. In *Roberts*, the Court purported to establish a general approach to analyzing Confrontation Clause issues raised by hearsay, stating:

> [T]he Sixth Amendment establishes a rule of necessity. In the usual case (including cases where prior cross-examination has occurred) the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant . . . when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate "indicia of reliability." Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception.

448 U.S. at 65-66. However, later cases have limited the unavailability requirement. *See, e.g.*, White v. Illinois, 502 U.S. 346, 354 (1992) ("*Roberts* stands for the proposition that unavailability analysis is a necessary part of the Confrontation Clause inquiry only when the challenged out-of-court statements were made in the course of a prior judicial proceeding."); United States v. Inadi, 475 U.S. 387, 394 (1986) ("*Roberts* cannot fairly be read to stand for the radical proposition that no out-of-court statement can be introduced by the government without a showing that the declarant is unavailable.").

50. 44 M.J. 301 (1996).

51. 527 U.S. at 119.

52. Several federal courts have considered the impact of *Lilly* and have concluded that statements against penal interest made to the police do not fall within a firmly rooted hearsay exception. *See, e.g.*, United States v. McCleskey, 228 F.3d 640 (6th Cir. 2000); United States v. Gomez, 191 F.3d 1214 (10th Cir. 1999).

53. *Egan*, 53 M.J. at 575-76. *See supra* note 14 and accompanying text (quoting the two prong *Lilly* test).

54. *See supra* note 35 and accompanying text. The plurality opinion in *Lilly* stated that declarations against penal interest described a category that was too large for constitutional analysis. The plurality divided declarations against penal interest into three categories: (1) voluntary admissions against the declarant; (2) exculpatory evidence offered by the defense to show the declarant committed the crime; and (3) statements offered by the prosecution to prove the guilt of an alleged accomplice of the declarant. *Lilly*, 527 U.S. at 119.

55. *Jacobs*, 44. M.J. at 306.

56. *Id.*

57. *Compare* United States v. Gomez, 191 F.3d 1214 (10th Cir. 1999) (holding statements against penal interest do not fall within a firmly rooted hearsay exception) *with* Jennings v. Maynard, 946 F.2d 1502 (10th Cir. 1991) (holding statements against penal interest do fall within a firmly rooted hearsay exception).

58. The court also evaluated Mr. Carter's statements under the residual trustworthiness test even though they held that the statements did not fall within an exception to the hearsay prohibition. The court seemed uncomfortable evaluating statements against penal interest using the subjective standard. By finding that the statements fail the residual trustworthiness test, the court found a separate reason for finding error in this case. *See Egan*, 53 M.J. at 575-76. *See supra* note 43 (explaining the tension between the objective standard in the rule of evidence and the subjective standard in case law).

59. *Egan*, 53 M.J. at 576.

that specification was from the accused's uncorroborated confession.[60]

Egan is helpful to practitioners for two reasons. First, the court declined to follow *Jacobs.* Statements to police offered to establish the guilt of a declarant's accomplice do not fall within a firmly rooted hearsay exception, and proponents of statements against penal interest should not rely on *Jacobs*. Proponents of statements against interest must be prepared to satisfy the residual trustworthiness test. Second, the court's four-step analysis accounts for several issues raised when the government seeks to introduce statements against penal interest. Although the fourth step does not apply at the trial level, the first three steps form an outstanding analytic template.

United States v. McCleskey

In *United States v. McCleskey,*[61] the Sixth Circuit Court of Appeals reversed the decision of the trial court to admit statements against penal interest. The court held that the statements did not qualify for admission under FRE 804(b)(3) and admission of the statements violated the Confrontation Clause.[62]

In *McCleskey*, police stopped a vehicle near St. Louis, Missouri, for speeding. Because of the suspicious behavior of the occupants, the police requested permission to search the car. The occupants consented, and the police found six kilograms of cocaine in the trunk. The driver of the car agreed to cooperate with police. He made a written confession stating that he was a drug courier and he was taking the cocaine to Dayton, Ohio. The driver participated in an audiotaped phone call to McCleskey just prior to delivering the cocaine. The delivery to McCleskey was audiotaped and monitored by the police. However, ten days later, the driver recanted all portions of his previous confession that implicated McCleskey, and then disappeared. At trial, the government offered the driver's statements into evidence as statements against penal interest. The district court admitted the self-inculpatory statements of the driver, but excluded the parts of the confession that were not self-inculpatory.[63]

The Sixth Circuit held that the statements did not fall within the hearsay exception for statements against penal interest. According to the court:

> [T]he confession of an accomplice delivered while in police custody, inculpating a defendant, though the accomplice be unavailable at the time of trial, is classic, inadmissible hearsay, when offered by the government, *regardless* of the constitutional concern. Because of the incentive brought to bear upon such an accomplice to shift and spread blame to other persons, such a confession cannot be said to be "[a] statement which . . . so far tended to subject the declarant to . . . criminal liability . . . that a reasonable person in the declarant's position would not have made the statement unless believing it to be true."[64]

The court held that admission of these unreliable statements violated the Confrontation Clause for the same reasons.[65]

In reaching this conclusion, the court cast doubt on whether confessions taken by the police could ever be admissible against the declarant's accomplice:

> In the vast majority of instances in which Rule 804(b)(3) is relied upon, it is the defendant who relies upon the Rule to admit a statement, otherwise hearsay, which operates to exculpate him by inculpating the statement's declarant . . . . Under such circumstances, the out-of-court statement is marked by significant indicia of reliability: a reasonable person who was not guilty of a crime would not normally falsely inculpate himself for the purpose of falsely exculpating another. However, where, as here, it is the government which seeks to introduce a statement, otherwise hearsay, which inculpates its declarant but which, in its detail, also inculpates the defendant by spreading or shifting onto him some, much, or all of the blame, the out-of-court statement entirely lacks such indicia of reliability. It is garden variety hearsay as to the declarant. Indeed, an alleged coconspirator in the custody of law enforcement officials will generally have a salient and compelling interest in incriminating other persons, both to reduce the degree

60. *Id.* at 581.

61. 228 F.3d 640 (6th Cir. 2000).

62. *Id.* at 645.

63. *Id.* at 642.

64. *Id.* at 645 (quoting FED. R. EVID. 804(b)(3)) (emphasis in original).

65. *Id.*

> of his own apparent responsibility and to obtain leniency in sentencing.[66]

The Sixth Circuit held that statements against penal interest do not fall within a firmly rooted hearsay exception. To be admissible, the statements must contain "particularized guarantees of the declaration's trustworthiness."[67] The court noted that although parts of the driver's confession were corroborated by other evidence, "hearsay evidence used to convict a defendant must possess indicia of reliability by virtue of its *inherent* trustworthiness, not by reference to other evidence at trial."[68] Looking at the facts and circumstances surrounding the making of the confession, the court noted that the declarant was advised of his *Miranda* rights, the confession was voluntary, he was aware he was subjecting himself to criminal liability, and the police did not expressly promise leniency for his cooperation. However, the court found that these factors only make the confession reliable as to the declarant's conduct, but "they offer no basis for finding the necessary circumstantial guarantees of trustworthiness as to the portion inculpating McCleskey. Manifestly, [the declarant] had a strong interest in shifting at least some of the responsibility from himself and onto McCleskey."[69] If the Sixth Circuit is correct, it is hard to imagine a case where a confession taken by the police could be used against the declarant's accomplice.

United States v. Ochoa

In *United States v. Ochoa*,[70] the Seventh Circuit found a violation of the Confrontation Clause but did not reverse Ochoa's conviction because the court found the error was harmless.[71] Pablo Ochoa was having financial problems and could not make the payments on his car. Ochoa went to a friend, Dave McLaughlin, to see if he knew anyone that could make the car disappear. McLaughlin contacted his brother-in-law, Gaylen Strange, who in turn contacted Mark Hinkle. Hinkle, who had prior "chop shop" experience, was working as a Federal Bureau of Investigation (FBI) informant. Hinkle arranged for McLaughlin and Strange to deliver the car to an undercover FBI agent. Ochoa reported the car stolen to his insurance company.[72]

The government charged Ochoa and Strange. Ochoa pled not guilty, but Strange pled guilty and agreed to testify against Ochoa. To build the case against Ochoa, the FBI attempted to find McLaughlin.[73]

An FBI agent, Agent May, went to a house owned by Art Garza to look for McLaughlin. When May arrived he found two men sitting on the porch. One was Garza and the other was McLaughlin. However, May did not know the second man was McLaughlin. The agent told Garza and the unidentified McLaughlin that McLaughlin could benefit by cooperating with the FBI and that McLaughlin may not be charged. McLaughlin contacted May and later met with him. McLaughlin told May about his and Ochoa's involvement in the fraud. After talking to the FBI, McLaughlin disappeared.[74]

At trial, the government called the undercover FBI agent and Strange. The government offered McLaughlin's statements to Agent May, which the trial judge admitted as statements against penal interest under FRE 804(b)(3), residual hearsay under FRE 807, and under FRE 804(b)(6).[75] The Seventh Circuit found that McLaughlin's statements were insufficiently reliable to satisfy the Confrontation Clause and that the government had not proved misconduct by Ochoa.[76]

The court noted that McLaughlin's statements did not fall within a firmly rooted hearsay exception and, because Agent May was involved in the production of the statement, McLaughlin's statements were presumptively unreliable.[77] The court held the facts and circumstances surrounding the making

66. *Id*. at 644.

67. *Id*.

68. *Id*. at 645 (emphasis in original).

69. *Id*.

70. 229 F.3d 631 (7th Cir. 2000).

71. *Id*. at 641.

72. *Id*. at 634.

73. *Id*. at 635.

74. *Id*.

75. *Id*. "A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness" is not excluded by the prohibition on hearsay. FED. R. EVID. 804(b)(6). The government thought that Ochoa's misconduct procured McLaughlin's absence because after McLaughlin disappeared, McLaughlin made seven phone calls to his employer from Ochoa's house. *Ochoa*, 229 F.3d at 635.

76. *Id*. at 637-39.

of the statements did not overcome this presumption. The court said:

> When Agent May approached Garza and said that McLaughlin could benefit by talking to the FBI, McLaughlin was sitting on Garza's porch and heard this proposition. Agent May informed McLaughlin that he could either be charged or cooperate and possibly not be charged when the two met. McLaughlin was also told that he was considered a lesser target of the investigation compared to Ochoa and Strange. Agent May's presentation gave McLaughlin a strong incentive to curry favor with the FBI by falsely implicating his two co-conspirators so that he would not be charged. . . . Similarly, McLaughlin's story spread the blame to the other participants in the conspiracy and particularly Ochoa, whom McLaughlin claims came up with the idea of engaging in insurance fraud. . . . Agent May also informed McLaughlin of all the facts as May knew them before asking McLaughlin to tell his story. This gave McLaughlin an opportunity to prevaricate by confirming possibly false parts of Agent May's story and then shaping his own statements into what May wanted to hear rather than what really happened.[78]

United States v. Castelan

United States v. Castelan[79] is another case where an appellate court found error in the admission of statements against interest made by an accomplice to the police after being arrested. The evidence showed that Castelan was involved in a conspiracy to distribute cocaine. An accomplice, named Olivares, negotiated two sales of cocaine with an undercover police officer. Each time, Olivares contacted Castelan and Castelan got the cocaine from a third party. On one occasion, Olivares delivered the cocaine to the undercover agent; on the other occasion Castelan delivered it.[80]

After Olivares was arrested, he implicated the others during an interview with the police. In the interview, Olivares specifically asked what the DEA could do to help him. Olivares eventually entered into a plea agreement and agreed to testify against Castelan. When Olivares refused to testify against Castelan, the government offered Olivares' post-arrest interview by a DEA agent as a statement against penal interest.[81]

On appeal, Castelan claimed his right to confront Olivares was violated. Castelan argued that Olivares' statements were unreliable because they were made under the same conditions the statements in *Lilly* were made. Olivares spoke to the police in a custodial interview. Moreover, he asked what benefit he could receive for his cooperation.[82] The government tried to distinguish *Lilly* by arguing that Olivares did not shift blame from himself or minimize his role in the drug transactions.[83] The Seventh Circuit noted that "[o]ne of the most effective ways to lie is to mix falsehood with truth, especially truth that seems persuasive because it is self-inculpatory."[84] The court did not accept the government's argument because "the non self-inculpatory parts of a confession do not become more credible simple because the declarant inculpates himself as well.[85] The court concluded admission of the hearsay statements violated the Confrontation Clause, but the court held that the error was harmless beyond a reasonable doubt.[86]

The common denominator to all of these cases is that the hearsay offered as statements against interest were made to the police. Each of these courts interpreted *Lilly v. Virginia* to mean that statements against penal interest do not fall within a firmly rooted hearsay exception. When applying the residual trustworthiness test, each of these courts found that the admitted statements against interest were not sufficiently reliable to satisfy the evidentiary rule, the Confrontation Clause, or both. The dynamics of the custodial interview create an incentive for the declarant to shift some or all of the blame to others, and

77. *Id.* at 637-38.

78. *Id.* at 638 (citations omitted).

79. 219 F.3d 690 (7th Cir. 2000).

80. *Id.* at 692-93.

81. *Id.* at 693-94.

82. *Id.* at 695.

83. *Id.* This argument was successful at the trial level. *Id.*

84. *Id.* at 696 (citing Lilly v. Virginia, 527 U.S. 116, 133 (1999)).

85. *Id.* at 695-96.

86. *Id.* at 697-98.

courts have historically been very suspicious of these types of statements. These results are consistent with the plurality opinion in *Lilly*. Since the statements in these cases were made to the police, Justices Scalia and Thomas would find their admission violated the Confrontation Clause. At a minimum, six justices of the Supreme Court likely would find a violation of the Confrontation Clause if they reviewed these cases.

Cases Distinguishing *Lilly v. Virginia*

If a declarant makes statements against penal interest to someone other than the police the dynamics change dramatically. The declarant may no longer have an incentive to try to curry favor to obtain leniency. This year's cases show that statements against penal interest made to family members or friends are sufficiently reliable to satisfy the Confrontation Clause and the evidentiary rule.

Courts have distinguished *Lilly* in another way as well. In two cases, the Second Circuit Court of Appeals approved of using plea allocutions of one coconspirator against another coconspirator for the limited purpose of proving the existence of a conspiracy if the plea allocution is properly redacted to omit any statements where the declarant shifts blame toward the defendant. Courts have held that the elimination of the blame-shifting statements and a limiting instruction are enough to protect the defendant's Confrontation rights.

United States v. Tocco

In *United States v. Tocco*,[87] the defendant was convicted of conspiracy in violation of the Racketeer Influenced and Corrupt Organization Act[88] and the Hobbs Act.[89] The government believed Tocco was the boss of the Detroit mafia family.[90]

At trial, Angelo Polizzi testified against Tocco. Polizzi testified about statements that his father, Michael Polizzi, made to him. Among other things, Angelo Polizzi testified his father told him that Tocco had been the leader of the Cosa Nostra organization[91] in Detroit since 1979. Michael Polizzi also identified other members of the charged conspiracies and told his son of his own involvement in the charged offenses. Michael Polizzi had been convicted for his part in the conspiracies and died shortly before Tocco's trial. The trial court allowed the statements made by Michael Polizzi as statements against his penal interest.[92]

The Sixth Circuit Court of Appeals considered whether Michael Polizzi's statements qualified as statements against penal interest under FRE 804(b)(3). After concluding they did, the court focused on an issue that the appellant did not raise: whether admission of these statements violated the Confrontation Clause.[93] The court distinguished *Lilly* and held admission of the statements did not violate the Confrontation Clause:

> We find that the circumstances surrounding Polizzi's statements in this case indicate that the statements were trustworthy, particularly in light of the fact that Polizzi's statements were made to his son in confidence, rather than to the police or to any other authority for the purpose of shifting blame to Tocco.[94]

The fact that the government was not involved in the making of the statement enhanced the statements' reliability.

The Sixth Circuit rejected this and numerous other issues raised by Tocco on appeal. However, the court did remand the case for the trial court to resentence Tocco because of violations of the federal sentencing guidelines.

United States v. Boone

In *United States v. Boone*,[95] the Ninth Circuit Court of Appeals upheld the admission of statements against penal interest where the declarant made the statements to his girlfriend. Tarchanda Cunningham was arrested and charged with conspiracy to commit robbery. Shortly after being arrested, she began cooperating with the authorities. Over a six-month period, Cunningham surreptitiously recorded several conversations with her boyfriend, Lamar Williams. In these conversations,

87. 200 F.3d 401 (6th Cir. 2000).

88. 18 U.S.C. § 1962 (2000).

89. *Id.* § 1951.

90. *Tocco*, 200 F.3d at 410.

91. The "Cosa Nostra" is commonly known as "the Mafia." *Id.* at 410.

92. *Id.* at 414-15.

93. *Id.* at 415-16.

94. *Id.* at 416.

95. 229 F.3d 1231 (9th Cir. 2000).

Williams implicated himself and Boone in several crimes, including the robbery of a rug store in Carmel, California. Because Williams was still at large, the government offered the statements by Williams to Cunningham as statements against Williams' penal interest. The jury convicted Boone of conspiracy to commit robbery, robbery, and use of a firearm during a crime of violence.[96]

Distinguishing *Lilly*, the court found that admission of these statements did not violate the Confrontation Clause, stating:

> *Lilly* dealt with a confession obtained by police during an in-custody interrogation. . . . Here, the taped conversation between Williams and his girlfriend occurred in what appeared *to Williams* to be a private setting and in which, as far as *he* knew, there was no police involvement. He simply was confiding to his girlfriend, unabashedly inculpating himself while making no effort to mitigate his own conduct. The circumstances and setting of Williams' statements distinguish this case from *Lilly*, as does the *content* of Williams's statements. It was unselfconsciously self-incriminating and not an effort to shift the blame.[97]

The court cited *Tocco*, and noted that its decision and *Tocco* was consistent with the view expressed by the three concurring justices in *Lilly v. Virginia*: "[Chief Justice Rehnquist] noted that prior Supreme Court case law had 'recognized that statements to fellow prisoners, like confessions to family members or friends, bear sufficient indicia of reliability to be placed before a jury without confrontation of the declarant."[98]

United States v. Shea

In *United States v. Shea*,[99] the First Circuit Court of Appeals faced a much more complex factual situation. The government, in a joint trial, offered statements made to conspiring friends of the declarant against one defendant as an admission of a party opponent,[100] and as statements against penal interest against the other defendants. The court had to decide whether these statements violated the confrontation rights of the defendants that were not the declarant.

Shea and four co-defendants were convicted of numerous offenses relating to a conspiracy to rob armored cars from 1990 to 1996.[101] The government called as a witness a long time friend of two of the defendants. The witness had been recruited into the conspiracy in 1994 and was an acquaintance of all the defendants. This witness's testimony described the defendants' conduct during several offenses, their techniques, and admissions made by several defendants. The government also called several other witnesses that related admissions made by individual defendants to the charged offenses.[102]

The out-of-court statements made by individual defendants to the friends and associates that later testified at trial were offered as admissions of a party opponent. However, these statements were hearsay as to the other defendants unless they qualified as statements by a coconspirator or as statements against penal interest. Four defendants challenged admitted hearsay statements on evidentiary and constitutional grounds.[103]

The First Circuit found no evidentiary error, but considered whether the Supreme Court's decision in *Lilly* changed the constitutional analysis.[104] The court did not decide whether statements against penal interest fell within a firmly rooted hearsay exception after *Lilly.* The court noted that the trial judge admitted the statements as firmly rooted hearsay and, alternatively, found the statements passed the residual trustworthiness test.[105] The court distinguished *Shea* from *Lilly*, stating:

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96. *Id.* at 1232-33.

97. *Id.* at 1234 (citations omitted) (emphasis in original).

98. *Id.* at 1234 n.4 (citing United States v. Lilly, 527 U.S. 116, 147 (1999)).

99. 211 F.3d 658 (1st Cir. 2000). This case is the combined appeal of five co-defendants.

100. FED. R. EVID. 801(d).

101. *Shea*, 211 F.3d at 663.

102. *Id.* at 664.

103. *Id.* at 668.

104. Prior to *Shea*, the First Circuit had considered statements against penal interest to be a firmly rooted hearsay exception. *See* United States v. Saccoccia, 58 F.3d 754, 779 (1st Cir. 1995); *see also* United States v. Barone, 114 F.3d 1284 (1st Cir. 1997).

105. *Shea*, 211 F.3d at 669.

> *Lilly* disallowed the out-of-court statement of the defendant's brother who, under police questioning, conceded that he was involved in a shooting but identified the defendant as the triggerman; the court reasoned that the statement did not fall within a "firmly rooted" exception to the hearsay rule and thus failed under the Confrontation Clause. . . . *Lilly's* main concern was with statements in which, as is common in police-station confessions, the declarant admits only what the authorities are already capable of proving against him and seeks to shift the principal blame to another (against whom the prosecutor then offers the statement at trial). . . . While *Lilly's* full reach may be unclear—there was no single "majority" opinion—it does not in our view affect the admissibility of the statements at issue here: all those identified in this case were made to friends or companions, not to the police, and were not of the "blame shifting" variety.[106]

The fact that these statements were not made to the police and did not try to shift the blame to others changed the truth-telling dynamics considerably.

United States v. Papajohn

In *United States v. Papajohn*,[107] the Eighth Circuit Court of Appeals limited the impact of *Lilly* by distinguishing the facts and circumstances surrounding the making of the hearsay statements at issue in the case. Catherine Papajohn and her husband, Donald Lee Earles, were convicted of conspiring to burn down their convenience store in order to collect the insurance proceeds. They were also convicted of arson.[108]

At trial, Mr. Earles' son, Donald Scott Earles (Donnie), refused to testify. The trial judge allowed the government to read to the jury portions of Donnie's grand jury testimony. Although the court recognized that the grand jury testimony was not former testimony, the trial judge found it was residual hearsay.[109] Donnie testified before the grand jury three times. At his first grand jury appearance, Donnie testified that he did not know who burned down the convenience store. At his second appearance, Donnie testified that Ms. Papajohn and his father conspired to burn down the store to get the insurance money. At his third appearance, Donnie invoked his privilege against self-incrimination.[110] The jury convicted both defendants, but the trial court granted a judgment of acquittal. The government appealed, and the Eighth Circuit reinstated the convictions.[111]

The Eighth Circuit upheld the admission of Donnie's grand jury testimony as residual hearsay in the government's appeal of the judgment of acquittal.[112] Since the appeal was decided before the Supreme Court's decision in *Lilly v. Virginia*, Ms. Papajohn claimed that *Lilly* invalidated the court's decision.

The Eight Circuit distinguished Ms. Papajohn's case from *Lilly.* First, the court noted that Donnie was not an accomplice or charged with an offense at the time of his testimony. This is a distinction with little merit. If Donnie had set the fire by himself, he would have the same incentive to shift blame as he would if he were an accomplice. The court noted this weakness but tried to minimize it.[113] The only way the court could distinguish *Lilly* was to ignore totally the evidence that Donnie admitted to starting the fire.[114]

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106. *Id.* (citations omitted).

107. 212 F.3d 1112 (8th Cir. 2000).

108. *Id.* at 1115-16.

109. United States v. Earles, 113 F.3d 796, 799-800 (8th Cir. 1997).

110. *Papajohn*, 212 F. 3d at 1116.

111. *Id.* After the court reinstated the convictions, Donnie made a sworn statement that he did not know who was responsible for the fire and recanted his grand jury testimony inculpating his father and Ms. Papajohn. Moreover, the attorneys for Mr. Earles and Ms. Papajohn claimed that Donnie confessed to them that he had started the fire. *Id.*

112. *Id.* at 1118-19. *See Earles*, 113 F.3d at 799-801.

113. The court stated:

> We recognize that although Donnie was not charged with a crime at the time he made the statements, he might still have had some incentive to blame Ms. Papajohn and Mr. Earles, so that he would not later be charged with arson. It seems to us, however, that it can almost always be said that a statement made by a declarant that incriminates another person in a crime will make it less likely that the declarant will be charged for that crime. The extent to which this fact renders the declarant's statement untrustworthy is a matter of degree, and we think that it has not been shown that the clear incentive for the accomplice in *Lilly* is present here.

Papajohn, 212 F.3d at 1119.

The court was on more solid footing when it pointed out other differences between Donnie's testimony and the hearsay statements in *Lilly.* In *Lilly*, "the statements were made in response to leading police questions, asked during a custodial interrogation that took place very late at night, shortly after his arrest."[115] Donnie's statements were given under oath during a formal grand jury proceeding. Donnie was not charged with a crime, and was not in police custody at the time of his testimony. He answered open-ended questions with lengthy narrative answers. These differences convinced the court that Donnie's statements were sufficiently reliable, *Lilly* notwithstanding.

Although *Papajohn* is not a case about statements against penal interest, it does stand for the proposition that statements made to someone other than the police may be sufficiently reliable to satisfy the Confrontation Clause. Ms. Papajohn argued that the plurality's rationale of *Lilly*—that accomplice statements to police are unreliable because of the incentive to shift the blame—applied with equal force to Donnie's grand jury testimony.[116] The court rejected this argument because Donnie's statements were not made to police during a custodial interview. The Eighth Circuit concluded that this difference sufficiently distinguished the case from *Lilly.*

United States v. Petrillo

In *United States v. Petrillo,*[117] the Second Circuit Court of Appeals considered whether the admission of a co-conspirator's guilty plea allocution as a statement against penal interest violated the Confrontation Clause. Gerald Petrillo was convicted of mail fraud, conspiracy to defraud the Internal Revenue Service, filing false tax returns, and evading taxes.[118] To prove the conspiracy, the government offered the negotiated plea allocution of two co-defendants.[119] The plea allocutions were redacted so that they did not inculpate Petrillo. On appeal, Petrillo argued that the admission of the plea allocutions violated the Confrontation Clause.

After considering the facts and circumstances surrounding the making of the statement, the court concluded that the plea allocutions passed the residual trustworthiness test. Petrillo argued that the disparity in bargaining power between the government and a defendant makes a guilty plea allocution inherently untrustworthy. In addition, Petrillo argued that the two declarants had a motive to provide the government with evidence inculpating Petrillo because they were simultaneously negotiating a plea agreement for other charges.[120]

The court recognized that pretrial negotiations have the potential for coercion or misrepresentation, but the court concluded that the trial court did not abuse its discretion in admitting the plea allocutions.[121] The court was convinced that the statements were sufficiently reliable to satisfy the Confrontation Clause because the statements "were made in open court, under oath, before the sentencing judge, following extensive pre-trial proceedings, with the assistance of counsel, and against the declarant's penal interests."[122]

The court cited to another recent decision by the Second Circuit, *United States v. Moskowitz.*[123] In *Moskowitz*, the court considered whether a redacted plea allocution was admissible under FRE 804(b)(3). The Second Circuit noted:

> Given that the allocution was clearly against [the declarant's] interest, that the only blame-shifting portion of the allocution was redacted, and that the court gave a limiting instructions that we must presume the jury followed . . . the admission of [the declarant's] plea allocution under Rule 804(b)(3) was within the district court's discretion. . . . Although we have declined to decide whether a declaration against interest admitted under Rule 804(b)(3) is a firmly rooted exception to the hearsay rule, we have found particularized guarantees of trustworthiness where, inter alia, (1) the plea allocution undeniably subjected [the defendant] to

114. *See supra* note 110 (noting that some claim Donnie admitted starting the fire).

115. *Id.*

116. *Papajohn*, 212 F.3d at 1119.

117. 237 F.3d 119 (2d Cir. 2000).

118. *Id.* at 121.

119. *Id.* at 122.

120. *Id.*

121. *Id.* at 122-23.

122. *Id.* at 123.

123. 215 F.3d 265 (2d Cir. 2000).

> the risk of a lengthy term of imprisonment, even if it was also made in the hope of obtaining a more lenient sentence; (2) the allocution was given under oath; and (3) the district court instructed the jurors that they could consider [the defendant's] allocution only as evidence that a conspiracy existed and not as direct evidence that defendants were members of that alleged conspiracy or that they were otherwise guilty of the crimes charged against them.[124]

In both cases, the Second Circuit approved of admitting the redacted plea allocutions for this limited purpose.

Conclusion

This year's cases clearly make a distinction between statements against interest made to police during a custodial interview and statements against interest made to family members or friends. Finding error in the admission of statements made to the police during a custodial interview is consistent with the opinions of at least six justices of the *Lilly* court. Allowing statements made to family members or friends is consistent with the opinions of at least five members of the *Lilly* court. How the Court would rule on the admission of grand jury testimony and guilty plea allocutions is harder to predict. On one hand, they are statements produced by government actors and are formalized testimonial materials that resemble statements given under conditions that implicate the core concerns of the ancient ex parte affidavit practice. On the other hand, guilty plea allocutions and grand jury testimony are not statements taken by the police and are subject to the penalties for perjury. The admissibility of guilty plea allocutions and grand jury testimony will be decided using the residual trustworthiness test on a case by case basis, and the redaction of parts of the testimony that shifts blame will be an important factor.

Trial practitioners can make two generalizations about the impact of *Lilly v. Virginia*. First, if the proffered statement against penal interest was made to the police, it is unlikely the statement will be admissible. Second, if the proffered statement against penal interest was made to a family member or friend, the statement is much more likely to be reliable enough to satisfy the Confrontation Clause.

124. *Id.* at 269 (citing United States v. Gallego, 191 F.3d 156, 167 (2d Cir. 1999)) (internal alterations and quotation marks omitted). In *Petrillo*, the court noted that the third factor is unrelated to the trustworthiness of the statement. However, the court believed that limiting instructions further protect a defendant's rights under the Confrontation Clause. *Petrillo*, 237 F.3d at 123 n.1. In both cases the limiting instruction was given.

New Developments in Sentencing: The Fine Tuning Continues, but Can the Overhaul Be Far Behind?

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Introduction

It was another busy year in sentencing. The fine-tuning administered by the appellate courts last year was unable to keep sentencing humming on all cylinders.[1] A few misfires, some sputtering and coughing, and a little hesitation here and there confirmed the need for additional work in this area. Although the appellate courts made minor adjustments and continued what appeared to be more fine-tuning, some of the adjustments made to the sentencing machine may very well contribute to the need for a more substantial overhaul in the not too distant future.

This article discusses the developments in sentencing during the past year. The first section will address those areas that fall within the presentencing case, specifically, the government's case, unsworn statements, and sentencing arguments. The second section will address those sentencing cases that involve punishment, sentencing instructions, and sentence comparisons. Most of the cases presented in this article are decisions from the United States Court of Appeals for the Armed Forces (CAAF); however, where applicable, relevant service court decisions are also discussed.

Presentencing

Many of the presentencing issues addressed by the CAAF this past year have emanated from the admission of evidence during the government's sentencing case and the application of Rule for Courts-Martial (RCM) 1001(b).[2] Therefore, the first part of this section will discuss those decisions involving issues related to RCM 1001(b)(2) through 1001(b)(5).[3] The second part will discuss the recent developments regarding the accused's unsworn statement.[4] The last part of this section will look at the recent cases that have addressed the scope of permissible sentencing arguments.

The Government's Case

Any evidence the government introduces in its presentencing case must fall within one of the five categories listed in RCM 1001(b).[5] Four cases decided by the CAAF this year warrant discussion; each case touches on a different category of government sentencing evidence, and each will be discussed in the order of the respective rule it addresses.

The first case, *United States v. Vasquez*,[6] addresses the interplay between RCM 1001(b)(2) and Military Rule of Evidence (MRE) 410. Rule for Courts-Martial 1001(b)(2) allows the trial counsel to introduce evidence from the personnel records of the accused, while MRE 410 generally provides that statements made by the accused in the course of plea discussions with the government are not admissible in any court-martial proceeding against the accused.[7] The sentencing rule specifically states that "'[p]ersonnel records of the accused' includes any records made or maintained in accordance with departmental regulations that reflect the past military efficiency, conduct, performance, and history of the accused."[8] In *Vasquez*, the accused was convicted of stealing merchandise from the Navy Exchange.[9] During sentencing, the trial counsel offered evidence of the accused's request for an administrative discharge in lieu of trial by court-martial for a previous 212-day unautho-

1. *See* Major Timothy C. MacDonnell, *New Developments in Sentencing: A Year of Fine Tuning*, ARMY LAW., May 2000, at 78.

2. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1001(b) (2000) [hereinafter MCM].

3. Rule for Courts-Martial 1001(b) provides for five different areas of evidence that the prosecution can present during sentencing. Those five areas are: RCM 1001(b)(1), Service data from the charge sheet; RCM 1001(b)(2), Personal data and character of prior service of the accused; RCM 1001(b)(3), Evidence of prior convictions; RCM 1001(b)(4), Evidence in aggravation; and RCM 1001(b)(5), Evidence of rehabilitative potential. Id.

4. *See* MCM, *supra* note 2, R.C.M. 1001(c)(2)(C).

5. *See supra* note 3.

6. 54 M.J. 303 (2001).

7. MCM, *supra* note 2, R.C.M. 1001(b)(2); *id.* MIL. R. EVID. 410.

8. MCM, *supra* note 2, R.C.M. 1001(b)(2).

rized absence that was not charged at trial.[10] Included in the request was an admission by the accused that he was guilty of the unauthorized absence.[11] Over defense objection, the military judge admitted the evidence under RCM 1001(b)(2). The Navy-Marine Corps Court of Criminal Appeals (NMCCA) upheld the judge's ruling, stating that the evidence reflected "the administrative *disposition* of a prior unauthorized absence offense."[12] It further held that MRE 410 only applied to pending charges and, since the request for discharge had been approved, the unauthorized absence offense was no longer pending.[13] The CAAF disagreed with the Navy court on the application of MRE 410 and set aside the sentence. It held that, since MRE 410 was intended to "encourage the flow of information during the plea-bargaining process,"[14] the rule required a broad application and did not apply just to pending offenses.[15]

The CAAF's decision is primarily focused on application of MRE 410. However, this case is also significant for sentencing in that the CAAF did not find the document inadmissible under RCM 1001(b)(2). While the court emphasized that RCM 1001(b)(2) allows for admission of a wide range of documents from the accused's personnel records, it also reminded practitioners that the rule "does not provide blanket authority to introduce all information that happens to be maintained in the accused's personnel records."[16]

The second category of government presentencing evidence is prior convictions under RCM 1001(b)(3). This area of sentencing does not generate much case law, but surprisingly, it is not as well settled an area as that might imply.[17] A case decided this year, *United States v. Glover*,[18] does not resolve any unsettled issues, but does reconfirm two important points. In Glover, the accused was convicted of eighty-four specifications of uttering bad checks.[19] During its presentencing case, the government introduced evidence of two convictions the accused received ten years earlier for writing bad checks.[20] Over defense objection, the military judge admitted the prior convictions, although it was unclear on the record if he had applied the necessary balancing under MRE 403.[21] The CAAF held that the military judge should have conducted a MRE 403 balancing test in determining if the prior convictions were admissible but, assuming the judge had failed to apply the MRE 403 balancing test, it found any error harmless.[22]

Glover serves to confirm two points regarding prior convictions. First, there is no specific time limit on when prior con-

9. *Vasquez*, 54 M.J. at 303.

10. *Id.* at 304. The unauthorized absence was not part of this court-martial. The accused had previously submitted the request for discharge in lieu of trial by court-martial, for the 212-day unauthorized absence. Along with the request, he submitted a statement admitting he was guilty of the absence. The accused was awaiting execution of his discharge in lieu of trial by court-martial at the time he committed the larceny offense (the charge he was facing at trial). *Id.*

11. *Id.*

12. United States v. Vasquez, 52 M.J. 597, 599 (N-M. Ct. Crim. App. 1999) (emphasis in original). The service court held that an approved request for discharge in lieu of trial by court-martial was evidence of the disposition of an offense much the same way a promulgating order documented a prior conviction or a record of nonjudicial punishment documented the results of proceedings under Article 15 of the Uniform Code of Military Justice (UCMJ). *Id.*

13. *Id.*

14. *Vasquez*, 54 M.J. at 305 (quoting United States v. Barunas, 23 M.J. 71, 76 (C.M.A. 1986)).

15. The court stated:

> Mil. R. Evid. 410 does not require that protected plea bargaining statements be related to offenses "pending" before the court-martial at which they are offered. Such a construction of the rule would remove its protection from any accused who bargained for withdrawal or dismissal of certain charges and specifications.

Id.

16. *Id.* (citing United States v. Ariail, 48 M.J. 285, 287 (1998)).

17. *See, e.g.*, United States v. White, 47 M.J. 139 (1997) (noting that whether or not a state proceeding is a conviction for purposes of RCM 1001(b)(3) is a recurring problem in military sentencing that should be clarified); United States v. Browning, 29 M.J. 174 (C.M.A. 1989) (demonstrating the court's inability to agree whether traffic tickets are prior convictions under RCM 1001(b)(3) and urging revision of the rule to promote clarity).

18. 53 M.J. 366 (2000).

19. *Id.* at 366.

20. *Id.* at 367. It appears from the opinion that the prior convictions were for two bad checks for values less than $200. However, the trial counsel states on the record that the convictions were for seven counts in two different counties. In any event, the prior convictions were very minor when compared to the eighty-four specifications at trial amounting to over $10,000. *Id.* at 367-68.

21. *Id.* at 368. Military Rule of Evidence 403 provides in part: "[E]vidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." MCM, *supra* note 2, MIL. R. EVID. 403.

victions are excluded from consideration on sentencing.[23] Second, sentencing evidence, to include prior convictions, is subject to the MRE 403 balancing test like all other evidence. Military judges and trial counsel should ensure this balancing test occurs on the record and thereby eliminate the possibility of the appellate courts finding prejudicial error. Likewise, defense counsel should argue that the age of the conviction diminishes its probative value and that the MRE 403 balancing test requires the conviction be kept out.

The next two categories of government presentencing evidence, aggravation evidence under RCM 1001(b)(4) and rehabilitative potential evidence under RCM 1001(b)(5), will be discussed contemporaneously through two CAAF cases decided in September 2000: *United States v. Patterson*[24] and *United States v. McElhaney.*[25]

In *Patterson*, the accused was convicted of sexually abusing his nine-year-old daughter from the time she was five years old. During its case in aggravation the government called the Chief of Child Adolescent Family Psychiatry at Eisenhower Medical Center as an expert witness in the fields of general psychiatry and child psychiatry.[26] The doctor had previously met and talked with the accused's wife, examined the victim-daughter, and talked with her therapist. He stated he did so in order to testify about the impact the crimes may have on the victim and her family, and to learn about any possible conditions the accused may have.[27] The defense counsel objected to the doctor testifying about any conditions the accused might suffer from or making any prognosis about the accused because the doctor lacked sufficient personal knowledge of the accused. The military judge sustained the objection.[28] The doctor then testified regarding the problems he felt the victim would suffer from in the future as a result of the sexual abuse.[29] He also testified about "grooming," the theory that pedophiles prepare their victims by bringing them along slowly, starting with simple touching and eventually working up to the more serious sexual abuse.[30] Over defense objection, the military judge allowed the testimony, stating that it helped explain "what goes into committing [the offenses]." Further, the judge held that the witness was not specifically testifying about the accused, but was testifying about "how these offenses were probably committed."[31] The doctor testified that he observed a pattern of grooming in the accused's case, and then testified that he had not seen any successful cure for one who manifests the conduct of grooming.[32]

On appeal, the accused argued it was error for the military judge to allow the testimony concerning pedophilia and the lack of successful treatment for pedophiles.[33] The CAAF affirmed, confident that the military judge did not consider the testimony on the issue of the accused's psychological state or his rehabilitative potential.[34] Judge Sullivan wrote the majority opinion, noting that the doctor did not expressly testify that the accused was a pedophile, and that the military judge made clear he was not going to consider the doctor's testimony on the accused's psychiatric or psychological condition.[35] The opinion further stated that the testimony regarding "grooming" conduct was

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22. *Glover*, 53 M.J. at 368.

23. *See* United States v. Tillar, 48 M.J. 541 (A.F. Ct. Crim. App. 1998) (holding an eighteen-year- old special court-martial conviction admissible as a prior conviction subject only to MRE 403 balancing).

24. 54 M.J. 74 (2000).

25. 54 M.J. 120 (2000).

26. *Patterson*, 54 M.J. at 76.

27. *Id.*

28. *Id.*

29. *Id.* at 78.

30. *Id.* at 76.

31. *Id.*

32. *Id.* at 77. There was no defense objection to this specific testimony.

33. *Id.*

34. *Id.* at 79. The trial forum was military judge alone.

35. *Id.* at 77. Specifically addressing the testimony that those who groom children for sexual abuse are not capable of rehabilitation, the CAAF noted that this may have violated the military judge's ruling "to the extent that it addresse[d] appellant's psychological state and suggest[ed] that he could not be rehabilitated." However, since there was no defense objection, the court concluded the admission of such evidence was not plain error. The CAAF cites to RCM 1001(b)(4), noting that "evidence of rehabilitation potential [is] generally admissible." *Id.* at 78-79. The reference to RCM 1001(b)(4) appears to be a typographical error, since RCM 1001(b)(5) is the rule that addresses rehabilitation potential.

admissible under RCM 1001(b)(4) as "psychological impact of [the accused's] offenses on the victim in this case."[36]

Judges Gierke and Cox concurred in the result, but disagreed with the majority's conclusion that the defense had failed to preserve the issue for appeal.[37] Judge Gierke wrote, "I am also satisfied that the military judge erred" in permitting the expert to "testify about his 'assumption' that [the accused] had groomed the victim and about the rehabilitative potential of 'those who groom young children.'"[38] Judge Gierke felt that the doctor's testimony was an opinion about the accused's rehabilitative potential and was impermissible since the government had not laid a proper foundation.[39] However, he was satisfied that the convening authority cured any error by reducing the adjudged confinement of forty-five years to twenty-five years.[40]

The second case that addresses government evidence under RCM 1001(b)(4), aggravation evidence, and RCM 1001(b)(5), rehabilitative potential evidence, is *United States v. McElhaney*.[41] Similar to the facts in *Patterson*, the accused in *McElhaney* was convicted of sexually abusing his minor niece and, on sentencing, the government presented a child psychiatrist to testify regarding victim impact and the accused's rehabilitative potential.[42] Defense objected to the testimony regarding rehabilitative potential on the basis of an inadequate foundation.[43] The military judge allowed the evidence about victim impact and future dangerousness of the accused, permitting the doctor to testify that the accused's "behavior was 'consistent' with the 'profile' of a pedophile."[44] However, the military judge ruled that the doctor could not testify that the accused had been diagnosed as a pedophile.[45] During his testimony, the doctor discussed pedophilia in general, saying it has a very poor prognosis, and that people around a pedophile are always at risk. When the military judge asked the witness to talk specifically about the accused, the doctor testified that the accused met the criteria for somebody with a poor prognosis.[46]

In a three to two decision, the CAAF held that it was inappropriate for the witness to offer an opinion on the accused's rehabilitative potential. The court looked to RCM 1001(b)(5)(B) which requires that evidence of rehabilitative potential be based on a proper foundation, and determined it was error for the military judge to allow testimony about "the future dangerousness of [the accused] as related to pedophilia."[47] The witness was a child psychiatrist, and not a forensic psychiatrist; the witness had not examined the accused; the witness had no information about the accused's medical history and had not reviewed the accused's medical or personnel records; the witness had testified that he was unable to render a diagnosis of pedophilia without examining the accused; and the witness gave generalized testimony about pedophiles that he failed to specifically link with the accused. These were all factors in the court's determination that the witness lacked the proper foundation to render an opinion.[48]

Chief Judge Crawford and Judge Sullivan dissented on this issue. Chief Judge Crawford felt the doctor's testimony con-

36. *Id*. at 78. The witness had explained that "the victim's unusual flirtatious or provocative actions could be traced to appellant's 'grooming' conduct." *Id.* "We see no abuse of discretion in the admission of Doctor Evans' testimony on 'grooming' for this purpose." *Id.* Rule for Courts-Martial 1001(b)(4) in effect at the time provided in part: "Evidence in aggravation. The trial counsel may present evidence as to any aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty." MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1001(b)(4) (1998). The discussion to the rule (which has since become part of the rule effective 1 November 1999) provides in part: "Evidence in aggravation may include evidence of financial, social, psychological, and medical impact on or cost to any person or entity who was the victim of an offense committed by the accused." *Id.* R.C.M. 1001(b)(4) discussion.

37. Judge Gierke wrote that "defense counsel's two specific objections were sufficient to preserve the issue for appellate review." *Patterson*, 54 M.J. at 79 (Gierke, J., concurring in the result). Thus, he disagrees with the majority view that the standard of review is plain error.

38. *Id*.

39. *Id*. Judge Gierke quotes from *United States v. Ohrt*, 28 M.J. 301, 304 (C.M.A. 1989), which held that a foundation must be laid to demonstrate that the witness possesses sufficient information and knowledge about the accused to provide a rationally-based opinion regarding the accused's rehabilitative potential. See MCM, *supra* note 2, R.C.M. 1001(b)(5)(B).

40. *Patterson*, 54 M.J. at 79 (Gierke, J., concurring in the result).

41. 54 M.J. 120 (2000).

42. *Id*. at 122.

43. *Id*. at 133. The doctor had not examined the accused, had not reviewed any of the accused's medical or personnel records, and had gained all his information about the accused from the victim and through observation of the accused in court. *Id.*

44. *Id*.

45. *Id*.

46. *Id*. The doctor testified that the accused met the Diagnostic and Statistical Manual of Mental Disorders' (DSM IV) criteria for pedophilia. *Id.* at 136.

47. *Id.* at 133-34. Rule for Courts-Martial 1001(b)(5)(B) provides in part: "Foundation for opinion. The witness . . . providing opinion evidence regarding the accused's rehabilitative potential must possess sufficient information and knowledge about the accused to offer a rationally-based opinion that is helpful to the sentencing authority." MCM, *supra* note 2, R.C.M. 1001(b)(5)(B).

cerning the future dangerousness of the accused was proper rehabilitative potential testimony under RCM 1001(b)(5).[49] She argued that his status as an expert witness enabled him to offer an opinion as to the accused's future dangerousness, noting that the witness never diagnosed the accused as a pedophile.[50] Furthermore, even if the doctor's testimony was inadmissible under RCM 1001(b)(5), the Chief Judge added it was still admissible as aggravation evidence under RCM 1001(b)(4) "because the future dangerousness of appellant was related to the impact on the victim."[51] Judge Sullivan also dissented, opining that the military judge did not abuse his discretion in allowing the doctor to testify regarding the accused's lack of rehabilitative potential.[52]

The discussion of the *Patterson* and *McElhaney* decisions would not be complete without a comparison of the two cases. Both provide very similar situations, but the respective outcomes are very much different. In *Patterson*, the majority held that the expert testimony regarding "grooming" was appropriate aggravation evidence under RCM 1001(b)(4), while Judges Gierke and Cox disagreed. In *McElhaney*, the majority found that the expert lacked an adequate foundation to opine on the accused's rehabilitative potential under RCM 1001(b)(5), while Chief Judge Crawford and Judge Sullivan disagreed. Judge Effron was the third vote in both cases. Judges Gierke and Cox felt both cases improperly allowed in rehabilitative potential evidence at trial. On the other hand, Chief Judge Crawford and Judge Sullivan felt the testimony in both cases was permissible aggravation evidence. It is also worth noting that the *Patterson* decision was based upon a determination that the military judge "adhered to his own ruling and did not consider the expert's testimony on the question of [the accused's] . . . rehabilitative potential."[53] Therefore, had *Patterson* been a members trial, Judge Effron may not have sided with the majority. With this in mind, the law in *McElhaney* is probably closer to the court's position as a whole, at least with regard to RCM 1001(b)(5) and the introduction of rehabilitative potential evidence by the government. As Judge Effron cautions in *McElhaney*, "the Government should be mindful of the need to establish an appropriate foundation for an expert's testimony on rehabilitative potential."[54]

If confronted with expert testimony offered under RCM 1001(b)(4) or 1001(b)(5), counsel for both sides should juxtapose these cases and take a good look at the evidence in question. What may appear to be rehabilitative potential evidence may be more appropriately admitted as aggravation evidence, and what may not come in under one rule may be permitted under the other. For example, an expert witness who has not examined the accused may lack the proper foundation to testify under RCM 1001(b)(5), but may be allowed to testify under RCM 1001(b)(4) about the accused's future dangerousness as it relates to the impact on the victim. Counsel and judges need to be mindful of the different requirements of each rule.

The Defense Case—Unsworn Statements

Whereas RCM 1001(b) addresses *government* evidence, RCM 1001(c) addresses *defense* evidence. There are generally three categories of evidence that the defense is permitted to present at trial during presentencing. Those categories are matter in extenuation, matter in mitigation, and a statement by the accused.[55] The accused has the right to give an unsworn statement, which is not under oath and is not subject to cross-examination by the government. However, the government can rebut any statements of fact made by the accused in the unsworn statement.[56] The cases that have addressed unsworn statements over the past years have focused generally on one of two questions: What can the accused say in an unsworn statement?[57] and, What qualifies as a "statement of fact" for purposes of rebuttal?[58] Cases decided this year have touched on both these issues and are discussed below.

The first issue, regarding the limits of the accused's unsworn statement, has been extensively addressed in recent years.[59]

48. *McElhaney*, 54 M.J. at 134.

49. *Id*. at 135 (Crawford, C.J., concurring in part and dissenting in part).

50. *Id*. at 136. The majority opinion responds that, although the witness never diagnosed the accused as a pedophile, he testified that the accused met the Diagnostic and Statistical Manual of Mental Disorders' criteria for pedophilia. "In terms of the effect on the court-martial panel, there is no practical difference between a statement opining that a person is a pedophile and a statement opining that a person meets the recognized diagnostic criteria for pedophilia." *Id.* at 134 n.3.

51. *Id*. at 135.

52. *Id*. at 137 (Sullivan, J., concurring in part and dissenting in part). Judge Sullivan simply states, "[t]here is no requirement that a psychotherapist expert personally evaluate an accused before rendering an opinion on his rehabilitative potential." *Id.* (citations omitted).

53. United States v. Patterson, 54 M.J. 74, 79 (2000).

54. *McElhaney*, 54 M.J. at 134.

55. *See* MCM, *supra* note 2, R.C.M. 1001(c). Matter in extenuation is evidence that serves to explain the circumstances surrounding the commission of the offense. *Id.* R.C.M. 1001(c)(1)(A). Matter in mitigation is any evidence which might tend to lessen the punishment adjudged by the court-martial. *Id*. R.C.M. 1001(c)(1)(B). The statement by the accused can be given under oath, or the accused can elect to give an unsworn statement. *Id*. R.C.M. 1001(c)(2).

56. *See id.* R.C.M. 1001(c)(2)(C).

This past year, however, the Air Force service court considered some additional twists to this question. Two cases, *United States v. Satterley*[60] and *United States v. Friedmann*,[61] deserve discussion. In *Satterley*, the defense counsel requested to reopen the defense case in order to answer a court member's question in the form of a second unsworn statement. The military judge stated he would allow the accused to testify under oath, but he denied the defense request to answer the question via an unsworn statement.[62] The Air Force Court of Criminal Appeals (AFCCA) agreed, holding that while an unsworn statement is an authorized means to bring information before the court during presentencing, it is not evidence because the accused is not testifying under oath.[63] This raises several interesting issues. The accused cannot be examined on an unsworn statement by the trial counsel or the court-martial, but what if the accused *wants* to entertain questions of the court-martial? Should the accused be allowed to answer questions if the court is reminded that the answers are part of the unsworn statement and not sworn testimony? Is the accused entitled to a second unsworn statement? If not, what if the court member's question was asked prior to him making his unsworn statement? Could he answer it then? If the unsworn statement is not evidence, should counsel be allowed to discuss the contents of the unsworn statement in their arguments? Counsel for both sides routinely do this, but is this not arguing facts that are not in evidence? The CAAF granted review of this case on 10 May 2000.[64] It will be interesting to see how it decides this issue.

In *Friedmann*, the accused was convicted of absence without leave, dereliction of duty, and drug use.[65] During his unsworn statement he asked the members to permit his commander to administratively discharge him. He told the members that others in his unit had received Article 15 nonjudicial punishments and administrative discharges for their drug use.[66] After the unsworn statement, the military judge provided a lengthy sentencing instruction that sought to clarify for the members the administrative discharge process, the irrelevance of using sentencing comparisons to adjudge an appropriate sentence, and the convening authority's ability to lessen a harsh sentence.[67] The AFCCA held that the military judge did not restrict the accused's right to make an unsworn statement by providing this instruction to the members. It is worth noting that the CAAF recently denied a petition for grant of review in *Friedmann*.[68] This is significant as it may indicate that sentencing instructions are the preferred method of addressing the contents of the unsworn statement. As was suggested in *United States v. Grill*,[69] military judges can counterbalance the broad latitude the accused now has (following the decisions in *Grill*,

57. *See, e.g.*, United States v. Grill, 48 M.J. 131 (1998) (accused wanted to inform members how co-conspirators' cases were resolved); United States v. Jeffery, 48 M.J. 229 (1998) (accused wanted to discuss his potential loss of retirement benefits and inform members that he might receive an administrative discharge if the court did not impose a punitive discharge); United States v. Britt, 48 M.J. 233 (1998) (accused wanted to inform members that if the court did not punitively discharge him, his commander would administratively discharge him).

58. *See, e.g.*, United States v. Partyka, 30 M.J. 242 (C.M.A. 1990) (holding that a statement indicating the victim's trauma was mostly a result of the stepfather's sexual abuse and not the accused's would not be a statement of fact); United States v. Cleveland, 29 M.J. 361 (C.M.A. 1990) (holding statement "I feel that I have served well" to be a statement of opinion); United States v. Willis, 43 M.J. 889 (A.F. Ct. Crim. App. 1996) (holding statement of remorse could be rebutted by prior recorded statements indicating lack of remorse).

59. *See supra* note 57.

60. 52 M.J. 782 (A.F. Ct. Crim. App. 1999).

61. 53 M.J. 800 (A.F. Ct. Crim. App. 2000).

62. *Satterley*, 52 M.J. at 783.

63. *Id.* at 785.

64. United States v. Satterley, 53 M.J. 427 (2000). The CAAF granted review of the following issue: "Whether the military judge abused his discretion by denying defense counsel's request to reopen the defense case to make an additional unsworn statement to address a court member's question." *Id.*

65. *Friedmann*, 53 M.J. at 800.

66. *Id.* at 801.

67. *Id.* at 801-02.

68. United States v. Friedmann, No. 01-0074/AF, 2001 CAAF LEXIS 148 (Feb. 1, 2001).

69. 48 M.J. 131 (1998). In *Grill*, the CAAF stated:

> Although the court below expressed concern that information contained in appellant's unsworn statement could be "confusing and misleading to the members," . . . we have confidence that properly instructed court-martial panels can place unsworn statements in the proper context, as they have done for decades. A military judge has adequate authority to instruct the members on the meaning and effect of an unsworn statement.

Id. at 133. *See also infra* note 90 and accompanying text.

Britt, and *Jeffrey*) through sentencing instructions.[70] When the accused provides confusing, misleading, or irrelevant information during the unsworn statement, the military judge can provide a sentencing instruction to assist the members in keeping the unsworn statement in proper perspective.[71]

Another method of addressing information in an unsworn statement is by allowing the government to introduce rebuttal evidence. This is specifically provided for in the rule; however, the prosecution may rebut only statements of fact.[72] As mentioned above, what constitutes a statement of fact and what is merely an expression of opinion have been recurring questions. The CAAF recently addressed this again in *United States v. Manns*.[73]

In *Manns*, the accused was convicted of indecent acts, attempted indecent acts, and indecent assault against his stepdaughter while she was between fourteen and sixteen years of age.[74] During the sentencing case, the accused made an unsworn statement wherein he said, "I have tried throughout my life, even during childhood, to stay within the laws and regulations of this country."[75] Over defense objection, the government offered in rebuttal a psychological evaluation report that contained the accused's admissions to "using marijuana before enlisting in the Navy, committing adultery, using prostitutes on four occasions, and looking at pornography."[76] The military judge admitted the evidence as relevant for consideration in determining an appropriate sentence but failed to conduct a MRE 403 balancing test.[77] On appeal, the accused argued that his statement, "I tried to obey the law," was a not a statement of fact.[78] The CAAF disagreed and found the statement an assertion of fact that the prosecution was entitled to rebut.[79] With regard to whether the psychological evaluation report was proper rebuttal, the CAAF held that all the admissions in the report were admissible to rebut the accused's assertion that he tried to obey the law. Further, the CAAF held that the admissions to committing adultery, using prostitutes, and his obsession with sex, were also "admissible under RCM 1001(b)(4) to show the depths of his sexual problems."[80] Finally, the court addressed whether or not this evidence should have been excluded under MRE 403. It answered the question in the negative, stating because it was a trial with a military judge alone, "the potential for unfair prejudice was substantially less than it would be in a trial with members."[81]

However, it was in the concurring opinions that an entertaining disagreement revealed the remaining uncertainty of this issue. Judge Sullivan concurred with a reservation. He agreed with the majority that the statement, "I have tried . . . ," was a statement of fact which opened the door to government rebuttal.[82] Judge Sullivan believed the statement was no different than the statement made by the accused in an unsworn statement in *United States v. Cleveland*.[83] In *Cleveland*, the accused stated in his unsworn statement that: "Although I have not been perfect, I feel that I have served well."[84] Although the majority viewed this as a statement of opinion that did not open the door to government rebuttal, Judge Sullivan disagreed.[85] In *Manns*, Judge Sullivan's reservation was with the majority's attempt to

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70. *See supra* note 57.

71. *See Friedmann*, 53 M.J. at 804. This is discussed further in the Sentencing Instructions section, infra notes 129-36 and accompanying text.

72. *See* MCM *supra* note 2, R.C.M. 1001(c)(2)(C).

73. 54 M.J. 164 (2000).

74. *Id*. at 165.

75. *Id*.

76. *Id*. The psychological evaluation report was part of a thirty-four page document the government offered in rebuttal. The admissions by the accused were made to a clinical psychologist during an interview. The report also contained an admission by the accused that he was obsessed with sex, and the psychologist's conclusion that the accused failed to accept full responsibility for his behavior. *Id.*

77. *Id*. at 166. "Sentencing evidence, like all other evidence, is subject to the balancing test of Mil. R. Evid. 403." *Id.* (citing United States v. Rust, 41 M.J. 472, 478 (1995)).

78. *Id*. at 166.

79. *Id*. Judge Gierke wrote, "we hold that the prosecution was entitled to produce evidence that appellant had not tried, or at least had not tried very hard." *Id.*

80. *Id*.

81. *Id*. at 167. The CAAF continued, "We are satisfied that the military judge was able to sort through the evidence, weigh it, and give it appropriate weight." *Id.*

82. *Id*. (Sullivan, J., concurring with a reservation).

83. 29 M.J. 361 (C.M.A. 1990).

84. *Id*. at 362.

distinguish the statement in *Manns* from the statement in *Cleveland*. He argued that the two statements could not be reasonably differentiated.[86]

On this point Senior Judge Cox agreed with Judge Sullivan.[87] However, as to whether the statements were expressions of opinion or statements of fact, he had a contrary view. He believed the statements were nothing more than "an expression of a subjective belief by appellant."[88] Senior Judge Cox went even further and characterized the government desire to treat an unsworn statement as evidence, and to hammer an accused, as showing a lack of confidence in the court members and military judges.[89] He suggested that rather than attack the accused "who is seeking mercy through his last desperate plea to the sentencing authority," the appropriate way to deal with an unsworn statement is through a proper sentencing instruction from the judge.[90]

This case may have been decided differently if it were tried before a panel.[91] However, that does not appear to be the distinguishing factor between this holding and the holding in *Cleveland*. The CAAF simply held one statement is factual while the other is not. As Judge Sullivan succinctly states, "when someone says, 'I feel I have served well,' - that is an *opinion* which would not allow rebuttal. But when someone says, 'I have tried to stay within the law,' - that is a *statement of fact* which would allow rebuttal."[92] Unfortunately, the decision in Manns has provided more confusion than clarity. Past decisions like *Cleveland* drew a recognizable distinction between fact and opinion. In *Manns*, the distinction is now blurred. It would appear "today's achievement is only tomorrow's confusion."[93]

Counsel need to know the case law and understand the subtle nuances between statements of fact and expressions of opinion. Defense counsel must be careful to review their client's unsworn statement and try to avoid the hazy line drawn by the *Manns* opinion. Also, defense counsel should be aware of any potential rebuttal evidence that exists and consider the possibility that the government may try to introduce it to rebut comments made in the unsworn statement. Trial counsel should be prepared to rebut statements of fact, but should be careful not to be too aggressive in rebutting comments that might be construed as expressions of opinion.

Sentencing Arguments

Once the prosecution and the defense have introduced matters, RCM 1001(g) provides both sides the opportunity to argue.[94] If the opposing counsel fails to object to an improper argument before the military judge begins to instruct the members on sentencing, the objection is waived, absent plain error.[95] This past year the CAAF addressed sentencing arguments in a number of cases, one of which, United States v. Baer,[96] is discussed below.[97]

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85. *See id.* at 364 (Sullivan, J., dissenting).

86. *Manns*, 54 M.J. at 167 (Sullivan, J., concurring with a reservation). Judge Sullivan wrote, "I think a reasonable person would hold that both statements (that is, 'I feel' and 'I have tried') say the same thing." *Id.*

87. *Id.* (Cox, S.J., concurring in the result). Senior Judge Cox wrote, "Judge Sullivan has hit the nail on the head in his separate opinion. There is no difference between 'I feel' and 'I tried.' . . . The only problem is that Judge Sullivan got it wrong in *Cleveland*." *Id.*

88. *Id.*

89. *Id.*

90. *Id.* His quote on this point is reprinted in a footnote in the Sentencing Instructions section. *See infra* note 136. His recommendation to handle an unsworn statement in this manner was suggested by the CAAF in Grill. *See supra* note 69. The military judge in Friedmann used this method in dealing with an unsworn statement. *See supra* notes 67-71 and accompanying text and *infra* notes 130-32 and accompanying text.

91. *See supra* note 81 and accompanying text.

92. *Id.* (Sullivan, J., concurring with a reservation).

93. William Dean Howells, Pordenone, IV, *reprinted in* JOHN BARTLETT, FAMILIAR QUOTATIONS 771b (1968).

94. MCM, *supra* note 2, R.C.M. 1001(g).

95. *See id.*; United States v. Ramos, 42 M.J. 392 (1995). If a timely objection is made to the improper argument, the standard of review is whether the argument is erroneous and materially prejudices the substantial rights of the accused. *See* UCMJ art. 59(a) (2000); United States v. Shamberger, 1 M.J. 377 (C.M.A. 1976). Absent an objection, the accused must show plain error; this requires a showing that: (1) there was error, (2) such error was plain or obvious, and (3) that the error materially prejudiced the accused's substantial right. *See* United States v. Jenkins, 54 M.J. 12, 19 (2000) (citing United States v. Powell, 49 M.J. 460, 464-65 (1998)).

96. 53 M.J. 235 (2000).

97. Additional cases that addressed sentencing arguments were *United States v. Garren*, 53 M.J. 142 (2000), and *United States v. Jenkins*, 54 M.J. 12 (2000).

In *Baer*, the accused pled guilty to robbery, aggravated assault, kidnapping, conspiracy, and murder.[98] The charges resulted from the accused's involvement in the beating, kidnapping and murder of a fellow Marine in Hawaii. The accused and three other Marines invited the victim to a house under the pretense of repaying him money.[99] When the victim arrived, the four Marines beat him into unconsciousness; taped the victim's mouth, hands, arms, and legs; wrapped him in a canvas cover; and drove him to a remote site on Oahu.[100] At the remote site, one of the co-conspirators killed the victim by shooting him in the head and his body was then dumped into a deep ravine.[101]

During the sentencing argument the assistant trial counsel argued the following:

> Imagine him entering the house, and what happens next? A savage beating at the hands of people he knows, fellow Marines, to which the accused was a willing participant. He's grabbed, he's choked, he's beaten, he's kicked, he's hit with a bat, small baseball bat. *Imagine being [the victim] sitting there* as these people are beating him.
> . . . .
> Imagine. Just imagine the pain and the agony. *Imagine the helplessness and the terror, I mean the sheer terror of being taped and bound, you can't move. You're being taped and bound almost like a mummy. Imagine as you sit there as they start binding.*[102]

The defense objected to the argument on the grounds that it was improper to ask the jury to imagine themselves in the victim's position, but the military judge disagreed and permitted the argument to continue.[103]

The CAAF stated that "Golden Rule arguments"[104] are designed to inflame the passions and possible prejudices of the members and, therefore, are impermissible. However, "asking the members to imagine the victim's fear, pain, terror, and anguish is permissible, since it is simply asking the members to consider victim impact evidence."[105] Although the court agreed that the argument as a whole was not intended to improperly inflame the passions or prejudices of the panel, it did not agree that the military judge was entirely correct in failing to sustain the defense objection. The government statements "on their face" crossed the line into improper argument.[106] However, the CAAF stated that in determining whether an argument was improper the focus must be on the argument viewed in its entire context, and not on the statements viewed in isolation.[107] When viewing these statements within the context of the entire argument, the CAAF agreed that the direction, tone, and theme of the argument was not intended to inflame the members' passions or possible prejudices. Rather, the trial counsel was only "attempting to describe the particular situation in which the victim was placed."[108] Notwithstanding its decision, the court sent this warning: "Trial counsel who make impermissible golden rule arguments and military judges who do not sustain proper objections based upon them do so at the peril of reversal."[109]

It is interesting to note that although the CAAF found the argument was not erroneous, it added that even if it was "technically erroneous," the error did not materially prejudice the accused's substantial rights; and therefore, would have

98. *Baer*, 53 M.J. at 236.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* at 237 (emphasis added).

103. *Id.* The military judge disagreed and stated, "What the trial counsel is trying to do is describe the particular situation in which the victim was in, and that's an appropriate consideration for the members to consider in determining an appropriate sentence." *Id.*

104. A "golden rule argument" is one that asks the members to put themselves in the place of the victim or in the place of a near relative of the victim. Such arguments are improper in the military justice system since they encourage panel members to adjudge a sentence based upon emotion and personal feelings rather than an objective consideration of the evidence. *See id.* at 237-38.

105. *Id.* at 238.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* at 239. With regard to the trial counsel, the CAAF stated that "counsel must . . . take responsibility . . . to avoid all improper argument, rather than to rely on their own noble intentions as a defense . . . of such arguments. The best and safest advocacy will stay well clear of the 'gray zone.'" *Id.* With regard to military judges, the CAAF cautioned, "judges, as well, should enforce the letter as well as the spirit of the law by sustaining objections to Golden Rule arguments." *Id.*

affirmed the case in any event.[110] It is also worth noting that Judge Effron (with whom Judge Sullivan joined) concurred with the result but felt it was error to allow the trial counsel's argument. However, he viewed the error as harmless under the facts and circumstances of this case.[111] The CAAF may have decided this case differently if the charges were not of such a serious nature, so it may be wise for practitioners to view the argument in *Baer* as improper and stay clear of the "gray zone."

Sentencing

After the evidence has been introduced and the counsel have finished their arguments, their work is done and the trial moves into the hands of the judge and members. It is then time to provide instructions and, following a proper deliberation, determine an appropriate sentence. This next section provides a review of the decisions that have addressed three areas of sentencing this past year. It discusses one significant decision dealing with permissible punishments, two decisions addressing sentencing instruction issues, and one recent decision involving sentence comparisons.

Permissible Punishments

The permissible punishments available at a court-martial are a relatively well-settled area of sentencing.[112] However, this past year an issue regarding the permissible punishments of forfeiture of pay and fines at a special court-martial was addressed in *United States v. Tualla*.[113]

In *Tualla*, the accused was sentenced at a special court-martial for numerous offenses, to include obtaining government services of a value of $996.60 by false pretenses.[114] The sentence adjudged included forfeiture of one-third pay per month for six months and a fine of $996.60.[115] The convening authority approved both the forfeitures and the fine.[116] The Coast Guard Court of Criminal Appeals (CGCCA) approved the findings and affirmed in part and set aside in part the sentence.[117] It determined that RCM 1003(b) did not authorize a special court-martial to adjudge a sentence that included both a fine and forfeitures.[118] The Department of Transportation's General Counsel certified the case to the CAAF for review.[119]

The CAAF reversed the CGCCA's decision and held that RCM 1003(b)(3) does not prevent a special court-martial from imposing a sentence that includes both a fine and forfeitures.[120] Although the language in RCM 1003(b)(3)[121] would indicate that only a general court-martial could adjudge both a fine and forfeitures, the CAAF looked to Article 19, UCMJ, which authorizes special courts-martial punishment to adjudge forfeitures of two-thirds pay per month for up to six months.[122] The court pointed out that Article 19 "does not expressly limit the other types of punishment adjudged in this case, including fines and reductions in grade."[123] The court then turned back to RCM 1003(b)(3), which specifically limits the amount of a fine a special court-martial can adjudge to "the total amount of forfei-

110. *Id.* at 237.

111. *Id.* at 239 (Effron, J., concurring in part and in the result). Judge Effron believed the trial counsel's request that the members imagine themselves as the victim was an impermissible request of the members to judge the issue from the personal interest perspective. *Id.*

112. The permissible punishments available at a court-martial are found in MCM, *supra* note 2, R.C.M. 1003.

113. 52 M.J. 228 (2000). Forfeitures are authorized in RCM 1003(b)(2) and fines are authorized in RCM 1003(b)(3). MCM, *supra* note 2, R.C.M. 1003(b).

114. 52 M.J. at 229.

115. *Id.* The complete sentence given by the military judge was a bad-conduct discharge, five months confinement, reduction to pay grade E2, forfeiture of one-third pay per month for six months, and a $996.60 fine, with the provision of one month of additional confinement if the fine was not paid. *Id.*

116. *Id.* The sentence was approved as adjudged except for the fine-enforcement provision, which was disapproved. *Id.*

117. The CGCCA affirmed only so much of the sentence that provided for a bad-conduct discharge, confinement for five months, reduction to E2, and forfeitures of $326 pay per month for six months. The fine of $996.60 was set aside. United States v. Tualla, 50 M.J. 563 (C.G. Ct. Crim. App. 1999). The forfeitures should have been stated in whole dollars, so "one-third" was changed to $326. *See* United States v. Tualla, 49 M.J. 554 (C.G. Ct. Crim. App. 1999); MCM, *supra* note 2, R.C.M. 1003(b)(2).

118. *Tualla*, 50 M.J. at 565. Rule for Courts-Martial 1003(b)(3) provides in part: "Any court-martial may adjudge a fine instead of forfeitures. General courts-martial may also adjudge a fine in addition to forfeitures. Special and summary courts-martial may not adjudge any fine in excess of the total amount of forfeitures which may be adjudged in that case." MCM, *supra* note 2, R.C.M. 1003(b)(3).

119. *Tualla*, 52 M.J. at 229. Review was requested concerning two issues: (1) whether the CGCCA erred in failing to apply *United States v. Harris*, 19 M.J. 331 (C.M.A. 1985), as binding precedent; and (2) whether the CGCCA erred in holding that RCM 1003(b)(3) prevents a special court-martial from imposing a sentence to a fine in addition to forfeitures where the combined fine and forfeitures do not exceed the maximum two-thirds forfeitures authorized for a special court-martial. The CAAF answered the second issue and found the first certified issue moot. *Id.*

120. *Id.*

121. *See supra* note 118.

tures which may be adjudged in that case."[124] Therefore, if the maximum forfeitures that can be adjudged are two-thirds pay per month for six months, then the only limit on adjudging both a fine and forfeitures is that the *combined total of fine and forfeitures* may not exceed two-thirds pay times six months.[125]

As an interesting side note, the decision in *Tualla* has prompted the Joint Service Committee on Military Justice to propose an amendment to RCM 1003(b)(3), which would clarify the authority of special and summary courts-martial to adjudge both fines and forfeitures in the same case.[126] The proposed changes also include adding a sentence to RCM 1107(d) entitled "*Limitations on sentence of a special court-martial where a fine has been adjudged*," to help ensure that convening authorities do not approve sentences where the cumulative effect of the fine and forfeitures would exceed the two-thirds that may be adjudged at a special court-martial.[127] Regardless of whether or not the proposed changes are made, it is important that staff judge advocates, chiefs of justice, and counsel carefully review any special or summary court-martial that adjudges a fine. When the final action is prepared they should ensure that the total dollar amount the accused will lose does not exceed the maximum amount of forfeitures that the court can adjudge and, if it does, take the steps necessary to ensure the convening authority does not approve a sentence that exceeds the jurisdictional limits of the court.

Sentencing Instructions

Prior to the members deliberating on an appropriate sentence, the military judge must provide them with the appropriate sentencing instructions.[128] Determining what to tell the members and what not to tell them may not be as easy as it might seem. The panel members often have questions regarding the imposition of sentence or may simply want to consider matters that are collateral to the court-martial. Sometimes the military judge finds it necessary to explain an event or procedure to prevent confusion of the members. This latter situation occurred in *Friedmann* when the accused gave his unsworn statement.[129]

As previously discussed, during Friedmann's unsworn statement, he told the panel members that others in his unit received nonjudicial punishment and general discharges for their drug use. He asked the members to let his commander administratively discharge him rather than give him a punitive discharge.[130] The military judge provided a sentencing instruction that addressed both comments by the accused. First, the judge instructed the members that the issue is not whether the accused should remain in the Air Force, but rather, whether the accused should be *punitively* separated. He told them it was of no concern to them whether someone else might initiate a separation action.[131] Second, the judge explained that the disposition of

122. Article 19 that was in effect at the time stated, in part:

> Special courts-martial may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this chapter, except death, dishonorable discharge, dismissal, confinement for more than six months, hard labor without confinement for more than three months, forfeiture of pay exceeding two-thirds pay per month, or forfeiture of pay for more than six months.

UCMJ art. 19 (1998). Congress amended Article 19 in October 1999 to increase the maximum authorized period of confinement and forfeitures that a special court-martial can adjudge to one year. *See* 10 U.S.C. § 819 (2000). However, a special court-martial is still limited to adjudging no more than six months confinement and forfeitures until the President changes the same limitation in RCM 201(f)(2)(B). *See* MCM, *supra* note 2, R.C.M. 201(f)(2)(B). *See also* MacDonnell, *supra* note 1, at 78 for additional discussion regarding this change.

123. *Tualla*, 52 M.J. at 229.

124. *Id.* at 229-30. *See also supra* note 118.

125. Another related issue discussed by the CAAF concerned the relationship between Article 58b, the automatic forfeiture of pay provision, and RCM 1003(b)(3). In the event that an accused receives two-thirds forfeitures of pay based upon the automatic forfeiture provisions in Article 58b (that is, the accused receives a punitive discharge and any confinement) and also receives an adjudged fine, the possibility exists that the combined forfeitures and fine could exceed the jurisdictional limits of the court. *See* UCMJ art. 58b (2000). While the court declined "to offer a definitive interpretation," it did say the two provisions "are not necessarily in conflict." *Tualla*, 52 M.J. at 232. The Air Force Court of Criminal Appeals recently addressed this issue in *United States v. Kallmeyer*, 54 M.J. 685 (A.F. Ct. Crim. App. 2001), and held that the cumulative amount of the fine and automatic forfeitures cannot exceed the maximum forfeitures that can be adjudged at a special court-martial. In addition, the Joint Service Committee on Military Justice has proposed a change to RCM 1107(d) that would limit the "cumulative impact of the fine and forfeitures, whether adjudged or by operation of Article 58b . . . [to the] maximum dollar amount of forfeitures that may be adjudged at the court-martial." Notice of Advisory Committee Meetings, 65 Fed. Reg. 76,999 (Dec. 8, 2000).

126. *See* Notice of Advisory Committee Meetings, 65 Fed. Reg. 76,999 (Dec. 8, 2000). The proposed RCM 1003(b)(3) would read "[a]ny court-martial may adjudge a fine *in lieu of or in addition to* forfeitures." *Id.* (emphasis added). *Cf. supra* note 118.

127. Notice of Advisory Committee Meetings, 65 Fed. Reg. 76,999 (Dec. 8, 2000).

128. *See* MCM, *supra* note 2, R.C.M. 1005.

129. United States v. Friedman, 53 M.J. 800 (A.F. Ct. Crim. App. 2000). This case was discussed in the Unsworn Statements section earlier. *See supra* notes 65-71 and accompanying text.

130. *Id.* at 801.

other cases was irrelevant in adjudging an appropriate sentence for the accused. He advised the members that "any meaningful comparison of the accused's case to those of others similarly situated" would come from the convening authority when he takes action on the sentence.[132]

As stated earlier, the AFCCA found the instruction proper, and the CAAF denied a petition for grant of review in this case.[133] The AFCCA noted that the military judge could have permitted the government to rebut the accused's unsworn statement,[134] but indicated that there was "no need for the military judge to waste the court's time by turning the sentencing proceeding into a hearing."[135] The court relied on the decision in *Grill* where the CAAF expressed its confidence that military judges could prevent unsworn statements from confusing the members through appropriate sentencing instructions.[136]

The CAAF also addressed sentencing instructions in a decision handed down this past year. But unlike *Friedmann*, in *United States v. Duncan*,[137] the issue involved the military judge's response, over a defense objection, to questions asked by the members concerning collateral consequences.

In *Duncan*, the accused was convicted of numerous offenses, including three specifications of attempted murder, three specifications of rape, six specifications of forcible sodomy, and two specifications of kidnapping.[138] On sentencing, the members interrupted their deliberations to ask the court the following questions: (1) "In military justice, is parole granted or are sentences reduced for good behavior? If so, do these reductions apply to a life sentence?" and (2) "Will rehabilitation/therapy be required if PFC Duncan is incarcerated?"[139] Although the defense objected to answering these questions, the military judge provided an instruction to the members. He reminded the members of the purpose of the court-martial and the members' duty to impose an appropriate sentence, telling them to "do what you think is right today."[140] Regarding the first question, the judge told the members that parole was available to those sentenced at courts-martial, including those sentenced to life imprisonment. However, he cautioned them not to be concerned about parole.[141] With regard to the second question, he advised them that there are "appropriate alcohol and sex offense rehabilitation programs available to the accused should he be confined . . . ."[142]

The accused argued on appeal that it was error for the military judge to give these instructions because they involved collateral consequences of a court-martial.[143] The CAAF held it was appropriate for the military judge to provide instructions on these questions and reiterated its previous holding in *United States v. Greaves* that there is no "bright line rule prohibiting instructions on collateral consequences of a court-martial."[144] A better approach, it stated, is to focus on the military judge's "responsibility to give 'appropriate instructions.'" Should the

131. *Id.* at 802. The military judge also explained the regulatory requirement to obtain Service Secretary approval to give an Other Than Honorable discharge to an accused where the sole basis for separation is the same misconduct that resulted in a court-martial conviction but no punitive discharge was adjudged. *Id.* at 801.

132. *Id.* at 802. The military judge explained that a convening authority can lighten a harsh sentence, but cannot increase a light sentence, and added that the panel may not adjudge an excessive sentence in reliance on any mitigating action by the convening authority. *Id.*

133. *See supra* note 68 and accompanying text.

134. *See supra* note 72 and accompanying text.

135. *Friedmann*, 53 M.J. at 803.

136. *Id.* at 804. *See also supra* note 69. The AFCCA decided Friedmann on 25 August 2000. It is interesting to note that on 25 September 2000, Senior Judge Cox encouraged military judges to use this approach in handling unsworn statements in his concurring opinion in Manns. He wrote, "[t]he proper way to deal with an unsworn statement is for the military judge to give a proper instruction to the members regarding the accused's right of allocution, including a reminder to the members that the statement is 'unsworn' and that the accused is not subject to cross-examination." United States v. Manns, 54 M.J. 164, 167 (2000) (Cox, S.J., concurring in the result).

137. 53 M.J. 494 (2000).

138. *Id.* at 495. He was sentenced to confinement for life, a dishonorable discharge, total forfeitures, a fine of $200 and reduction to E1. *Id.*

139. *Id.* at 498.

140. *Id.* at 499.

141. *Id.* The judge stated, "[y]ou should determine, in terms of confinement what you feel is appropriate for this accused. Under these circumstances, do not, and I say again, do not be concerned about the impact of parole." *Id.*

142. *Id.* The judge added, "[t]he accused is not required to participate in any program . . . but there are strong and usually effective incentives for him to do so while confined." *Id.*

143. *Id.*

144. *Id.* (citing United States v. Greaves, 46 M.J. 133 (1997)).

military judge decide to instruct on collateral matters, he must "give legally correct instructions that are tailored to the facts and circumstances of the case."[145]

The CAAF also emphasized the fact that the members requested the information, holding that it is appropriate in such cases to provide answers if the judge can "draw upon a body of information that is reasonably available and which rationally relates to the sentencing considerations in RCM 1005(e)(5)."[146] Rule for Courts-Martial 1005(e) lists required instructions that the judge must give and RCM 1005(e)(5) requires informing the members that they should "consider all matters in extenuation, mitigation, and aggravation, whether introduced before or after findings, and matters introduced under RCM 1001(b)(1), (2), (3), and (5)."[147] The CAAF found that these issues, parole and rehabilitation programs, were rationally related to aggravation evidence and rehabilitative potential evidence.[148]

The military judge's discretion to provide sentencing instructions on collateral matters, when appropriate, appears to be at least one area of sentencing where all five judges at CAAF are in agreement. The unanimous decision in *Duncan* and the decision not to grant review of the *Friedmann* case support this conclusion. So, while the CAAF may be split on many other sentencing issues, it is clear that sentencing instructions are often a necessary way to clarify confusing or misleading information, as well as a proper way to provide additional information requested by the members.

Sentence Comparison

Sentence comparison, the last area of discussion, was recently addressed by the CAAF in *United States v. Sothen.*[149] This case serves to confirm the applicable standard in reviewing a case for sentence appropriateness. The CAAF has previously held that the power to review a case for sentence appropriateness rests with the service courts and will only be reviewed by the CAAF for an obvious miscarriage of justice or an abuse of discretion.[150] Sentence appropriateness is normally determined without comparing the sentence with sentences received by others.[151] However, there are rare cases where sentence appropriateness can only be determined by comparing disparate sentences from closely related cases.[152]

In *Sothen*, the accused had been married for approximately seventeen years when he started having an intimate relationship with another woman, Ms. Steen.[153] As the relationship progressed, the accused wanted out of his marriage, so he and Ms. Steen devised a plan to kill the accused's wife.[154] They began looking for someone to commit the murder and were introduced to Mr. Holland, which resulted in a series of meetings. The accused was unaware that Mr. Holland was an informant for the county police department.[155] At these meetings, the accused and Ms. Steen discussed the proposed murder with Mr. Holland, who wore a hidden recording device.[156] Both the accused and Ms. Steen were arrested and, while Ms. Steen pled guilty in state court to one count of solicitation to commit murder, the accused was convicted by court-martial of conspiracy to commit murder, solicitation to commit murder, and adultery.[157] Ms. Steen was sentenced to three years confinement and a $500 fine. The accused received twenty-five years confinement, total forfeitures, reduction to E1, and a dishonorable discharge.[158]

The CAAF reiterated the burden for the accused in a sentence comparison case. The accused has the burden of demonstrating that (1) the cited cases are closely related to the

145. *Id.*

146. *Id.* at 500.

147. *See* MCM, *supra* note 2, R.C.M. 1005(e)(5). Rule for Courts-Martial 1001(b)(1), (2), (3), and (5), provide for data from the charge sheet, personal data and character of the accused's prior service, prior convictions, and rehabilitative potential evidence, respectively, to be introduced by the government. *See id.* R.C.M. 1001(b).

148. *Duncan*, 53 M.J. at 500.

149. 54 M.J. 294 (2001).

150. *See* United States v. Lacy, 50 M.J. 286, 288 (1999).

151. *See* United States v. Ballard, 20 M.J. 282 (C.M.A. 1985).

152. *Id.*

153. *Sothen*, 54 M.J. at 295.

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.* at 295-96.

accused's case, and (2) that the sentences are highly disparate.[159] If the accused meets that burden, then the burden shifts to the government to show a rational basis for the disparity.[160] The Navy court found that the accused's case was closely related to Ms. Steen's case and that the respective sentences were highly disparate; however, the court found "many good and cogent reasons in the record of trial that explain the disparity between the two sentences awarded."[161] The court cited several reasons for the disparity: The cases were from different sovereigns; there is a difference between military and civilian approaches to sentencing and punishment; the accused was convicted of multiple offenses while Ms. Steen was convicted of one offense; the accused's trial was contested while Ms. Steen pled guilty; and, the lighter sentence reflected Ms. Steen's agreement to testify against the accused.[162] In reviewing the service court's decision, the CAAF found there was no abuse of discretion or miscarriage of justice. Further, it held that these reasons were "legally sufficient justification for the disparity between the two sentences," thereby satisfying the rational basis standard set forth in *Lacy.*[163]

While *Sothen* confirms the applicable standard in sentence comparison cases, it also goes a step further than recent cases in that it involves comparison of a military sentence to a disparate civilian sentence.[164] The CAAF specifically noted that sentence comparison with a closely related case that has a highly disparate sentence was not limited to just military co-actors. The court stated that cases involving military and civilian co-actors could be considered.[165] However, counsel faced with making the argument for sentence comparison need to be aware of the difficult standard that exists, especially when comparing civilian and military sentences. As *Sothen* demonstrates, the fact that one sentence emerges from a civilian system while the other from a military system, is in and of itself one reason for the disparity.

Conclusion

While sentencing may not have undergone a major overhaul this past year, there were areas that received considerable attention. Although progress was made in some areas, a lack of progress was evident in other areas. The CAAF's obvious split on the use of rehabilitative potential evidence and the parameters of aggravation evidence made for spirited reading, but mandate a revisiting of these issues in the future. The unsworn statement received considerable attention from the appellate courts, but with the decision in *Manns*, it is now unclear exactly what constitutes a statement of fact. Sentencing arguments were reviewed in quantitative fashion, but most were decided on a case-by-case basis and little changed, unless the decision in *Baer* is broadly interpreted and the warnings to stay out of the "gray zone" are ignored. In which case, *Baer* will mandate a future revisit as well.

Despite the wheel spinning in these areas, advances have been made in other areas of sentencing. *Tualla* has clarified the issue of fines and forfeitures in special court-martial cases, the CAAF was united in *Duncan* on the question of providing sentencing instructions on collateral consequences, and *Sothen* signifies the permissibility of comparing military sentences with co-accused civilian sentences. Upon further reflection, the question becomes, has this been another year of fine-tuning in sentencing, or has this been a year of preparation for a major overhaul to come?

158. *Id.* at 296. The convening authority suspended all adjudged forfeitures greater than $600 per month for six months and waived the automatic forfeitures of pay for six months, directing that it be paid to the accused's wife. *Id.* at 295.

159. *Id.* at 296 (citing United States v. Lacy, 50 M.J. 286 (1999)).

160. *Id.*

161. *Id.* (quoting lower court's unpublished opinion).

162. *Id.*

163. *Id.* at 297.

164. *See Lacy*, 50 M.J. 286; *see also* United States v. Fee, 50 M.J. 290 (1999).

165. *Sothen*, 54 M.J. at 297.

The Journey Is the Gift: Recent Developments in the Post-Trial Process

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The post-trial process serves many purposes in the military justice system. It insures that an accurate record of trial is produced,[1] that the accused is permitted to request clemency,[2] and that the convening authority receives accurate and relevant legal advice,[3] among other purposes. Because the post-trial process is intended to fulfill so many important and varied functions, Congress and the President have established a detailed process that must be followed before records of trial can be reviewed by military appellate courts. In effect, Congress and the President have created a detailed map showing the journey a record must make before appellate review.

Much of the case law dealing with the post-trial process focuses on whether the government has followed the map provided, rather than the actual outcome of the journey. In general, this focus makes sense. Almost all of the post-trial process is oriented toward the convening authority action. The Court of Appeals for the Armed Forces (CAAF) has stated repeatedly that, given the highly discretionary nature of the convening authority decision, it will not speculate on how the convening authority would have reacted had there been no error.[4] This focus is reflected in the standard of appellate review applied to most allegations of error in the post-trial stage of a case. Military appellate courts will apply a "colorable showing of material prejudice to a substantial right" standard for most post-trial error.[5] This is clearly a lower standard than the "material prejudice to a substantial right" standard applied to most pretrial and trial errors.[6] There was even a decision this year, *United States v. Collazo*,[7] in which the appellate court found no prejudicial error and still granted relief. *Collazo* and other cases decided this year have made it clear that to military appellate courts, post-trial is about the journey and not the destination.

One of the first stops on the post-trial journey of a record of trial is deferment. A deferment request is sometimes the first post-trial document that a chief of criminal law will receive, submitted even before the result of trial has been signed by trial counsel. An accused is permitted to request deferment (which simply means postponement) of any "sentence to confinement, forfeitures, or reduction in grade that has not been ordered executed."[8]

Granting deferment requests became much more complicated in 1996 when Congress passed Articles 57(a) and 58b of the Uniform Code of Military Justice (UCMJ).[9] Articles 57(a) and 58b were enacted after a series of newspaper articles highlighted that military confinees often received pay while in confinement.[10] Prior to Articles 57(a) and 58b, soldiers who were sentenced to forfeitures and a reduction in grade would not suffer the consequences of that portion of their punishment until the convening authority took action. This resulted in soldiers, even those in confinement, being paid at their pre-court-martial pay grade until the convening authority took action. Also, if a soldier received a punishment that included confinement but no forfeitures, that soldier would continue to be paid while serving confinement.[11]

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1. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1103 (2000) [hereinafter MCM].

2. UCMJ art. 60(b)(1) (2000); MCM, *supra* note 1, R.C.M. 1105.

3. UCMJ art. 60(d); MCM, *supra* note 1, R.C.M. 1106.

4. United States v. Anderson, 53 M.J. 374, 378 (2000); United States v. Wheelus, 49 M.J. 283, 289 (1998); United States v. Chatman, 46 M.J. 321, 324 (1997).

5. *Wheelus*, 49 M.J. at 289.

6. UCMJ art. 59.

7. United States v. Collazo, 53 M.J. 721 (2000).

8. MCM, *supra* note 1, R.C.M. 1101(c).

9. Pub. L. No. 104-106, 110 Stat. 186 (1986).

10. Office of The Judge Advocate General, *Joint Service Committee on Military Justice Report: Analysis of the National Defense Authorization Act Fiscal Year 1996 Amendments to the Uniform Code of Military Justice*, ARMY LAW., Mar. 1996, at 141.

11. *Id*. at 142.

Article 57(a) altered the effective date of certain punishments. Under Article 57(a), sentences that include forfeitures or a reduction in grade now go into effect "on the earlier of—(A) the date that is 14 days after the date on which the sentence is adjudged; or (B) the date on which the sentence is approved by the convening authority."[12] Because Article 57(a) caused adjudged forfeitures and reductions in grade to go into effect fourteen days after trial, Congress amended Article 57a to allow for the deferment of either punishment. The President, in turn, changed Rule for Courts-Martial (RCM) 1101 to allow the convening authority to defer either punishment. Based on these changes, after 1996 an accused could request that the convening authority defer three punishments: forfeitures, reduction in grade, and confinement.

Article 58b put an end to soldiers receiving pay while serving extended terms of confinement by creating automatic forfeitures. Automatic forfeitures under Article 58b go into effect when a soldier receives a prescribed punishment. Soldiers receiving a punishment that includes confinement for more than six months, or a punishment that includes any confinement and a punitive discharge, will face automatic forfeitures.[13] How much a soldier will forfeit depends on the type of court-martial. "The pay and allowances forfeited in the case of a general court-martial, shall be all pay and allowances due the member during such periods [of confinement or parole] and, in the case of a special court-martial, shall be two-thirds of all pay due the member during such period."[14] Article 58b also contains provisions that authorize the convening authority to defer or waive automatic forfeitures. The rules for deferring automatic forfeitures are the same as the rules for deferring any punishment. If the convening authority waives automatic forfeitures, the money must be directed to the dependents of the accused, and the waiver can last for no more than six months.[15]

Against this backdrop, two important cases were decided this past year dealing with deferments. One of the decisions, *United States v. Kolodjay*,[16] attempted to clarify how deferments and waivers are intended to work together. In the other decision, *United States v. Brown*,[17] the CAAF advocated for further expansion of the post-trial review process.

United States v. Kolodjay illustrates the difficulty that some staff judge advocate (SJA) offices are having with interpreting Articles 57(a) and 58b. In *Kolodjay*, the accused was convicted of various drug-related charges and was sentenced to a dishonorable discharge, forfeiture of all pay and allowances, confinement for thirty-nine months, and reduction to E1.[18] Based on Kolodjay's adjudged sentence, automatic forfeitures were assessed along with his adjudged forfeitures. The accused submitted a request for deferment and waiver of the forfeiture of all pay and allowances fourteen days after his sentence was announced.

The government received the defense's deferment request on 26 March 1997. They did not bring that request to the convening authority until 23 August 1997, the same day the convening authority took action.[19] On 23 August 1997, the convening authority approved the accused's request for deferment and waiver of forfeitures, and took action on the accused's sentence. In his approval of the accused's deferment request, the convening authority stated that the deferment was approved "until the date the sentence is approved."[20] The convening authority also granted the accused's request for waiver of "forfeiture of pay and allowances adjudged in this case until 10 September 1997, a period of six months."[21] In his action, the convening authority approved the total forfeitures that were adjudged and suspended the forfeiture of allowances through 10 September 1997.[22]

The timing of the convening authority's actions in *Kolodjay* is important. The convening authority took action and granted the accused's request for deferment and waiver four months and twenty-eight days after the accused's adjudged and automatic forfeitures began to run. The convening authority's deferment and waiver clearly indicate that they were to be retroactive, taking effect on the day the sentence was announced.[23] The deferment and waiver were to run through 10 September 1997. The

12. UCMJ art. 57(a)(1).

13. *Id.* art. 58b(a).

14. *Id.*

15. *Id.* art. 58b(c).

16. 53 M.J. 732 (Army Ct. Crim. App. 2000).

17. 54 M.J. 289 (2000).

18. *Kolodjay*, 53 M.J. at 733.

19. *Id.* at 734.

20. *Id.* at 735.

21. *Id.*

22. *Id.* at 733.

convening authority's suspension of the accused's adjudged forfeiture of allowance was to run from action through 10 September 1997.[24]

The Army Court of Criminal Appeals (ACCA) was kind when it described the facts above as "problematic."[25] The court set aside the convening authority's action and returned the case for a new post-trial recommendation (PTR) and action.[26] Judge Kaplan, who wrote the opinion, focused his analysis on defining a few basic post-trial terms and applying them to the instant case. Deferment, automatic forfeiture, waiver, and suspension are the critical terms defined and discussed by the court. Judge Kaplan emphasized that each of these terms are "legal term[s] of art,"[27] with a distinct meaning and effect. A failure to fully understand the meaning and effect of these terms can have a variety of adverse effects. In *Kolodjay*, the result was confusion regarding the intent of the convening authority. Based on the inconsistency between the convening authority's action, deferment, and waiver, the ACCA concluded that "the action in th[e] case [was] ambiguous or erroneous."[28]

The court defined deferment as simply a postponement of the running of a sentence. In almost all situations the convening authority action will end any deferment that has been granted.[29] A waiver, on the other hand, is an order directing that the money an accused forfeited as a result of Article 58b be paid to the accused's dependents. The convening authority is the only individual authorized to grant a waiver and waivers only affect automatic forfeitures.[30] A suspension is a "probationary period during which the suspended part of an approved sentence is not executed."[31] Critical to this definition is that suspensions only affect approved sentences. Finally, automatic forfeitures are those forfeitures that go into effect by operation of Article 58b. As discussed earlier, automatic forfeitures go into effect if the accused receives a sentence that includes confinement and a punitive discharge or confinement in excess of six months. Automatic forfeitures only go into effect when a service member is due pay or allowances, "[that is], either no forfeitures were adjudged or any adjudged forfeitures were deferred, suspended, or disapproved."[32]

The convening authority's intent in this case was unclear for two reasons. First, the convening authority's action contradicted portions of the deferment and waiver. Second, because the convening authority started the waiver of automatic forfeitures from the date the sentence was adjudged, he effectively cut the waiver off at five and a half months rather than the six months stated in the document granting the waiver.

In his action, the convening authority approved the forfeiture of all pay and allowances adjudged against Kolodjay and granted a suspension of the forfeiture of allowances. At the same time, he granted a waiver for the benefit of Kolodjay's dependents, which was to run until 11 September 1997. In the waiver, the convening authority ordered the forfeiture of all pay and allowances be directed to the accused's dependents. Based on the action and the waiver, it is impossible to know how much money the convening authority intended to go to Kolodjay's dependents. The convening authority's waiver states that all pay and allowances were to go to the accused's dependents. However, because the convening authority approved the accused's adjudged forfeiture of all pay without suspending it, from 23 August to 10 September the accused's dependents would only receive a waiver of allowances rather than pay and allowances.

Besides being unclear regarding how much money Kolodjay's dependents were to receive, the convening authority was unclear about how long they were to receive the money. The ACCA points out that even if a convening authority could grant a retroactive waiver and deferment, the waiver and deferment should not begin the day the sentence is announced.[33] Neither adjudged nor automatic forfeitures go into effect the day the sentence is adjudged. Both punishments begin fourteen days

23. The Army court opted not to resolve whether a convening authority could retroactively defer and waive forfeitures. Rather than address this issue head on the court stated that "even if [it] gave retroactive effect" to the deferment and waiver it would still be error. *Id.* at 736. It is not at all clear that under the UCMJ or the *MCM* a convening authority can retroactively grant a deferment and waiver. Nothing in Articles 57a and 58b, or RCM 1101 indicates that a convening authority has the power to retroactively defer a portion of an accused's punishment.

24. *Id.* at 733 n.3.

25. *Id*. at 736.

26. *Id*. at 737.

27. *Id*. at 735-36.

28. *Id*. at 736.

29. The only situation where it would not end a deferment is if the convening authority were to exercise his power under RCM 1107(d)(3). Rule for Court-Martial 1107(d)(3) authorizes the convening authority to continue a deferment of confinement until the accused was returned to military control by a state or foreign country.

30. MCM, *supra* note 1, R.C.M. 1101(d).

31. *Id.* R.C.M. 1108(a).

32. *Kolodjay*, 53 M.J. at 736.

after an accused's sentence is announced. In *Kolodjay*, the convening authority wrote in his deferment-waiver approval that he wanted the waiver to run for six months. However, because the convening authority started the waiver on the day the sentence was adjudged, the accused's dependents would only receive the benefit of the waiver for five and a half months.[34]

Perhaps the most important part of *Kolodjay* is the court's discussion of which type of forfeiture is applied first, automatic or adjudged. Judge Kaplan concluded, based on the plain language of Article 58b, that adjudged forfeitures take effect before automatic forfeitures.[35] This discussion is important for two reasons. First, this distinction can have a dramatic effect on what must be done to insure an accused's dependents receive money. Second, the ACCA has interpreted Article 58b very differently than the Air Force Court of Criminal Appeals.[36]

To illustrate the importance of the court's decision, assume an accused has received a punishment that includes adjudged and automatic forfeitures, and the convening authority wants to waive forfeitures fourteen days after the sentence is announced. If the convening authority simply executes a waiver and nothing more, the dependents of the accused will receive nothing. The waiver will be ineffective because the adjudged forfeitures in the case will have already gone into effect. For the waiver to be effective, the execution of the adjudged forfeitures must be stayed or eliminated.

Kolodjay highlights that there are two possible barriers to an accused or his dependents receiving pay and allowances after a court-martial conviction. An accused can be subject to adjudged and automatic forfeitures. If an accused receives a sentence that includes both, as was the case in *Kolodjay*, both barriers have to be removed to insure the accused's dependents receive money. How a defense counsel or chief of criminal law go about removing these barriers will depend on when the payment is to begin and end.

If the convening authority wants his waiver to go into effect immediately, he can grant a deferment of the adjudged forfeitures and a waiver of the automatic forfeitures. Such a deferment and waiver should not be granted until fourteen days after trial. It is also important for counsel to understand that if the convening authority defers both the automatic and adjudged forfeitures, as he is authorized to do, the money will go directly to the accused and not the accused's dependents.

If the convening authority wants a waiver to go into effect at action, he must either suspend or disapprove the adjudged forfeitures in his action and waive the automatic forfeitures. If the convening authority does not suspend or disapprove the adjudged forfeitures, there will be no automatic forfeitures to waive.[37] Thus there will be no money for the convening authority to direct to be paid to the accused's dependents. Some convening authorities may be concerned that if they disapprove the accused's forfeitures, the accused will be paid while in confinement. So long as automatic forfeitures have been triggered due to the accused's punishment, once the convening authority's waiver has run its course, the automatic forfeitures will be reinstated and the accused will receive no money.

It is seldom that government and defense counsel have the opportunity to seek the same outcome. However, when it comes to insuring the dependents of a convicted soldier have some financial means to transition out of the military, defense and government counsel and the convening authority are often of the same mind. In order to ensure that the intent of all parties is fulfilled, both sides must understand the meaning and effect of the terms of art discussed in *Kolodjay.*

The next case dealing with deferment, *United States v. Brown*,[38] is likely to be seen by government counsel as a dark and foreboding harbinger of an increase in their post-trial responsibilities. Defense counsel, on the other hand, will probably hail the decision as the first tentative step in the right direction regarding the due process an accused should receive when requesting a deferment or waiver of forfeitures.

In *Brown*, the accused was convicted of assault and aggravated assault on a child under the age of sixteen, and was sentenced to a dishonorable discharge, confinement for eight years, forfeiture of all pay and allowances and reduction to E1.[39] Twelve days after Brown's sentence was announced, his defense attorney submitted a deferment request. The request sought to have the convening authority defer forfeitures until action. In his written request for deferment, Brown's attorney pointed out that Brown had two children in foster care and that his wife was pregnant and without means of financial support.

33. *Id*.

34. *Id.*

35. *Id.*

36. The Air Force Court of Criminal Appeals has held that adjudged forfeitures do not "trump" or precede automatic forfeitures. So, if a convening authority approves a sentence including adjudged forfeitures and then waives automatic forfeitures, the dependents of the accused will still receive the benefit of the waiver. United States v. Owens, 50 M.J. 629 (A.F. Ct. Crim. App. 1999).

37. *Id.*

38. 54 M.J. 289 (2000).

39. *Id*. at 289.

The SJA reviewed the deferment request and provided the convening authority with a written recommendation that the deferment request be denied. The SJA wrote that the children in foster care were probably never going to be returned to the Browns, and that Brown's wife was under investigation for the same offense of which Brown was convicted.[40] Additionally, the SJA pointed out that Mrs. Brown's third child was due after the six-month waiver would have expired, so the child would never receive any direct benefit from the money.[41] The SJA recommendation was never served on the accused or defense counsel. The convening authority denied the deferment request, and did not take action until approximately six months after the deferment request was denied.[42]

The granted issue in *Brown* was whether the SJA committed prejudicial error by submitting a recommendation to the convening authority that contained new matter. The defense claimed that the accused should have been given notice and an opportunity to respond.[43] Although the issue presented to the CAAF in *Brown* was not unique, the approach taken by the court was. Rather than simply resolving this issue on the basis of the CAAF's extensive precedent dealing with new matter, the court discussed whether a new series of procedural steps are necessary in the post-trial process.

The opinion focused on whether there should be a change to the Rules for Courts-Martial in how deferment or waiver requests are processed. The change the court advocated would require SJAs to give convening authorities a recommendation regarding any deferment or waiver of forfeiture request.[44] This change would also require SJAs to provide defense with notice and an opportunity to respond to the recommendation. In effect, this new provision would create a post-trial deferment-waiver recommendation that would follow the same procedures as the SJA post-trial recommendation. The court even implies that the change they envision could, under certain circumstances, give the dependents of the accused the right to submit matters to the convening authority.[45]

It is important to note that the CAAF never states unequivocally that the changes discussed above are required, but the smoke signals are easy enough to read. The CAAF ultimately ruled they did not have to decide whether the above changes were necessary because the accused failed to make a colorable showing of material prejudice to a substantial right. The court stated,

> The issue before us raises questions involving constitutional due process and statutory interpretation. Because the appellant has not met the applicable standards for finding prejudicial error . . . we need not decide at this time whether the requirements of notice and an opportunity to comment apply to requests for deferment . . . or waiver.[46]

The CAAF goes on to write:

> Rather than attempt to resolve [the questions raised by Brown] . . . in the present case we believe the most prudent course is for the Executive Branch to consider whether, as a matter of law or policy, and consistent with due process considerations, such requests to the convening authority should be followed by a recommendation from the SJA and service on the accused with an opportunity to respond.[47]

There are a number of problems with the CAAF's position in *Brown* regarding the expansion of the post-trial process. The court's opinion relies on the foundational conclusion that the deferment of forfeitures and waiver of forfeitures are analogous to the convening authority's action. Clearly there are significant differences. The court's position is most tenuous on the issue of waiver. The argument that due process requires a post-trial recommendation be prepared by the SJA and served on the accused when the accused requests waiver seems unsupportable. The accused has no property interest at stake in the waiver, and Article 58b does not create a right to submit matters like that provided in Article 60(b)(1). The court did not address either of these issues directly. The CAAF only stated that Article 58b and the *Manual for Courts-Martial* (MCM) are silent on whether an SJA recommendation is necessary or whether the

40. *Id*. at 290.

41. This portion of the SJA recommendation was incorrect. Brown had requested a deferment not a waiver. As discussed earlier, deferments generally run from the time they are granted until the convening authority takes action. There is no six-month cap on deferments, but only on waivers. The CAAF points this out in *Brown*. *Id.* at 290 n.1.

42. *Id*.

43. *Id.*

44. *Id.* at 292.

45. *Id.*

46. *Id.*

47. *Id*.

accused should be given notice and an opportunity to respond to any advice that is given.[48] The court also pointed out that "Congress has recognized the serious impact that such forfeitures would have on the family of the accused by providing the authority for deferment and waiver."[49] Neither of these comments explains why the court concluded the accused had a due process right in a waiver request. The court's comment regarding Article 58b and the *Manual* being silent on a requirement for an SJA recommendation and subsequent notice and opportunity to be heard is perplexing. The court failed to explain what it makes of the fact that neither the statute nor *Manual for Courts-Martial* contain these requirements. A reasonable conclusion is that neither Congress nor the President recognize a due process right in a waiver request and never intended to create these additional procedural requirements.

The next step in the post-trial process is the compilation and authentication of the record of trial. Over the past two years there have been several cases addressing what is a complete record of trial and who may authenticate the record. Two cases, *United States v. White*[50] and *United States v. Ayers*,[51] highlight some of the highly technical issues that can surface in this portion of the post-trial process.

United States v. White addresses two important issues regarding the record of trial. First, what is the difference between a verbatim record of trial and a complete record of trial, and why does it matter. Second, *White* deals with the distinction between a substantial and insubstantial omission from a record. Both issues are significant because they can dramatically impact the sentence an accused will ultimately serve.

The accused in *White* was convicted of willfully disobeying a lawful command and indecent assault.[52] He was sentenced to reduction to E1, forfeiture of all pay and allowances, confinement for a year, and a bad conduct discharge. The victim in the case claimed White sexually assaulted her while she was in his car. According to the victim, she was in the front passenger seat of White's car when White entered the car by the passenger door. White forced her down across the front seats of the car and sexually assaulted her.[53] White claimed the sexual encounter was consensual. In an effort to attack the credibility of the victim's story, the defense argued the interior of the accused's car made the victim's version of events implausible. The accused's car had a floor-mounted stick shift, bucket seats, and a center console.[54] To support its claim the defense offered a homemade videotape into evidence. The videotape was of the interior of a car similar to the accused's car. Inexplicably, the videotape was not included in the record of trial. Appellate defense counsel claimed the failure to include the videotape in the record of trial rendered the record non-verbatim and incomplete.

The ACCA first addressed the defense claim that the record was not verbatim. The court concluded, "the appellant confuses the requirements for a verbatim record and a complete record."[55] The distinction between a verbatim record of trial and a complete record is considerable. A verbatim record means a record that contains a verbatim transcript of the trial.[56] The ACCA stated that "the requirement for a verbatim record refers to words that are said in the courtroom while the court is in session."[57] For a record to be complete, it must contain several documents beyond the transcript of the court proceedings.[58] Exhibits, the original or duplicate charge sheet, a copy of the

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48. *Id.* at 290.

49. *Id.* at 292.

50. 52 M.J. 713 (Army Ct. Crim. App. 1999).

51. 54 M.J. 85 (2000).

52. 52 M.J. at 714.

53. *Id.*

54. *Id.* at 715.

55. *Id.*

56. Rule for Court-Martial 1103(b)(2)(B) states that:

> A verbatim transcript includes: all proceedings including sidebar conferences, argument of counsel, and rulings and instructions by the military judge; matters which the military judge orders stricken from the record or disregarded; and when a record is amended (*see* R.C.M. 1102), the part of the original record changed and the changes made, without physical altercation of the original record. Conferences under R.C.M. 802 need not be recorded but matters agreed upon at such conferences must be included in the record. If testimony is given through an interpreter, a verbatim record must so reflect.

MCM, *supra* note 1, R.C.M. 1103(b)(2)(B) discussion.

57. *White*, 52 M.J. at 715.

58. MCM, *supra* note 1, R.C.M. 1103(b)(2)(D).

convening order and any amendments, and the original dated and signed convening authority action are necessary to make the record of trial complete.[59] In *White*, the record was verbatim because there was a word-for-word transcript, but because the record was missing an exhibit, it was incomplete.

The impact of being unable to provide a verbatim record of trial versus a complete record of trial is significant. Rule for Court-Martial 1103(b)(2)(B) states that a verbatim record is necessary if any part of the adjudged sentence exceeds that which a special court-martial could impose or a punitive discharge is adjudged. If an accused receives a punishment described in RCM 1103(b)(2)(B) and the government cannot produce a verbatim transcript, the convening authority has two options. He can approve only so much of the sentence as could be adjudged at a straight special court-martial or he can order a rehearing on any charge of which the accused was found guilty.[60] If, on the other hand, the government fails to produce a complete record, an appellate court must determine whether the omission from the record is substantial.[61] If it is substantial, the government must overcome the presumption that the accused was prejudiced.[62] If the government is unable to overcome that presumption, the court will determine if the omission relates to findings or sentencing. If the omission affects findings, the charges affected by the omission will be dismissed.[63] If the omission affects sentencing, the appellate court can either approve the non-verbatim record punishment or send the record back to the convening authority for corrective action.[64]

After concluding that the record of trial was verbatim, the court in *White* turned to the issue of whether the failure to include the defense exhibit rendered the record substantially incomplete.[65] The ACCA held that the omission was insubstantial.[66] The court lists several facts that led it to this conclusion. Among these facts were: the videotape was merely demonstrative evidence; the internal configuration of the accused's car was not in dispute; and the interior of the accused's car was portrayed in the testimony of three witnesses. Although the court does a thorough job describing the facts it used to conclude the omission in this case was insubstantial, the court is not very clear regarding the standard for establishing a substantial omission. The court began by concluding that the record contained a sufficient amount of evidence to adequately describe the accused's car, stating that "[t]aken as a whole, [the testimony of three witnesses] provided an adequate description of the appellant's car."[67] Next, the ACCA held that "the evidence . . . relating to the indecent assault charge [was] 'compelling' and 'persuasive'. . . [and] [t]he videotape when viewed in the light most favorable to the accused, would not have changed in any degree the weight of the evidence which was accumulated against the appellant"[68] Finally, the court stated the videotape was "'unimportant' and 'uninfluential' when viewed in the light of the entire record."[69] The court seems to have applied four tests for determining whether the omission in this case was substantial.[70] It is unclear whether the ACCA believed each of these tests was necessary. Unfortunately the case law in this area is also unclear. So, until the court provides greater guidance, counsel need to be prepared to address all four tests.

Even though the ACCA held that the omission in this case was not substantial, the court went on to hold that even if the omission was substantial the government had overcome the presumption of prejudice.[71] There are two questions a court must address in deciding whether the government has overcome the presumption of prejudice. First, how important was the omitted piece of evidence to the outcome of the trial. Second, did the omission impede the appellate review of the case?

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59. *Id.*

60. *Id.* R.C.M. 1103(f).

61. *White*, 52 M.J. at 715.

62. *Id.*

63. United States v. McCullah, 11 M.J. 234, 237 (C.M.A. 1981).

64. United States v. Seal, 38 M.J. 659, 663 (A.C.M.R. 1993).

65. *White*, 52 M.J. at 715.

66. *Id.*

67. *Id.* at 716.

68. *Id.*

69. *Id.*

70. It could be argued the court was applying a totality of the circumstances test and the four categories of information the court discussed were not separate tests but considerations.

71. *White*, 52 M.J. at 715.

In answering the first question, the court addressed all the possible uses the defense could have made of the videotape. The court concluded that "the videotape . . . [was] of minimal value to the outcome of the case"[72] and "would have added little or nothing to the testimony found elsewhere in the record."[73] Next, the court concluded that the omission of the videotape "in no way impedes our appellate review."[74] The court stated several times in the opinion that the videotape was not the only evidence regarding the configuration of the accused's car. The three witnesses who testified regarding the interior of the accused's car had provided an adequate description of the car's interior.

Few errors in the post-trial processing can have as dramatic an effect on a case as failing to produce either a verbatim record of trial or a complete record. Failure to produce a verbatim record will, more than likely, cause the accused to receive a lighter sentence than was adjudged. Failure to produce a complete record can cause an entire case to be dismissed. Despite the holding in *White*, the case demonstrates the high standard that must be met if a record is missing required documents. It is the trial counsel and chief of criminal law's responsibility to insure the record of trial is complete. It is only through their focused attention to the completeness of the record of trial that cases like *White* can be avoided.

Besides record completeness, the other issue that consistently arises regarding records of trial is whether the record has been properly authenticated. *United States v. Ayers*[75] addresses the latter issue. In *Ayers* the accused was convicted of multiple specifications of disobeying a lawful general order, adultery, and indecent assault.[76] The charges stemmed from the accused's sexual liaison with two female trainees while he was a drill instructor. The accused was sentenced to reduction to E1, total forfeiture of all pay and allowances, four years confinement, and a dishonorable discharge.[77] After the accused's trial was over, the judge who presided over the majority of the trial retired. The record was compiled and Captain Lynch, the assistant trial counsel of record, authenticated the record. Captain Lynch produced four pages of correction to the record as part of his authentication. In the document authenticating the record, Captain Lynch was identified as the trial counsel. Additionally, the authentication document stated "I have examined the record of trial in the forgoing case."[78]

Appellate defense attacked the authentication in this case on two bases. First, Captain Lynch was not authorized to authenticate the record of trial, and second, the authentication itself was defective.[79] Based on these two assignments of error the defense claimed that the post-trial process was invalid.[80] Both allegations of error in this case are highly technical. Defense did not allege that the record was inaccurate, only that it was not properly authenticated.

The first allegation of error focuses on a rarely-discussed distinction between the assistant trial counsel and trial counsel. Defense claimed that according to RCM 502(d)(2) an assistant trial counsel is only permitted to perform the duties of trial counsel while under the supervision of trial counsel. Because the authentication in this case was signed by Captain Lynch only, with no evidence that he was acting under the supervision of the trial counsel, the authentication was invalid. The CAAF examined Article 38, Article 54, RCM 502, and RCM 1104 to determine the validity of the defense's claim. The court began with the recognition that Article 54 of the UCMJ and RCM 1104(a)(2)(B) authorize trial counsel to authenticate the record of trial in the event the military judge is unable to do so.[81] Next, the court noted that Article 38(d) authorizes an assistant trial counsel to perform any of the duties of trial counsel so long as he is qualified under Article 27.[82] This Article is modified by RCM 502(d)(2), which states the assistant trial counsel may perform any of the duties of trial counsel when "[u]nder the supervision of trial counsel."[83]

After examining the evidence presented and the applicable UCMJ and *MCM* provisions, the court ruled the authentication

72. *Id.*

73. *Id.*

74. *Id.*

75. 54 M.J. 85 (2000).

76. *Id.* at 87.

77. *Id.*

78. *Id.* at 91.

79. *Id.*

80. *Id.*

81. *Id.* Rule for Court-Martial 1104(a)(2)(B) states: "If the military judge cannot authenticate the record of trial because of the military judge's death, disability, or absence, the trial counsel present at the end of the proceedings shall authenticate the record of trial." MCM, *supra* note 1, R.C.M. 1104(a)(2)(B).

82. UCMJ art. 27 (2000).

was proper. Even if it were not, any error would have been harmless. The court pointed out the objective of the authentication process is to insure an accurate record of trial is produced, and that happened in this case. Any technical violation of RCM 502 was eclipsed by the fact that "[t]he purposes of Article 54 and RCM 1104 have been satisfied."[84]

Next, the CAAF addressed the defense claim that Captain Lynch's authentication was defective because it stated that Captain Lynch had examined the record, rather than stating that "the record accurately reports the proceedings."[85] The court wasted no time rejecting this allegation of error. The court ruled that when an individual signs the record of trial as the authenticating official that individual is declaring, through his signature, that the record accurately reports what happened at trial.[86]

Ayers and *White* highlight that when it comes to compiling and authenticating a record of trial, what appears to be a minor misstep can become a major problem on appeal. It is easy to forget that the service courts have a responsibility to only approve those findings of guilty and the sentence "it finds correct in law and fact . . . on the basis of the entire record."[87] Without an entire record to review or a properly authenticated record, one of the cornerstones of the military justice system, the independent review of the entire record by a court of criminal appeal is undercut.

The next stop on the odyssey of the post-trial process is at the SJA PTR. If there is a Scylla[88] in the post-trial process, the SJA PTR is it. More errors in the post-trial seem to originate in this part of the process then anywhere else. The errors fall into two major categories, "defective staff work"[89] and authorship. This past year the CAAF decided two cases that touch on these areas, *United State v. Kho*[90] and *United States v. Wilson*.[91]

Errors caused by defective staff work dominate the mistakes that are made in the SJA PTR. These errors range from mischaracterizing the charges of which the accused was convicted,[92] to omitting clemency recommendations of the sentencing authority,[93] to mischaracterizing the accused's service record.[94] In *United States v. Kho*, the SJA made two of the above mentioned staff work errors.[95] The SJA mischaracterized one of the charges the accused was found guilty of, and failed to mention a clemency recommendation from the sentencing authority.

In *Kho*, the accused was convicted at a special court-martial of using and possessing marijuana, violation of a lawful general order, and three specifications of assaulting his five-year-old daughter.[96] He was sentenced to 120 days of confinement, reduction to E1, and a bad conduct discharge. The military judge who sentenced the accused recommended the convening authority suspend thirty days of the adjudged confinement. One of the assaults Kho committed against his daughter involved him spraying cold water at his daughter with the intent to inflict pain. The SJA PTR stated that the accused had placed his daughter in a cold bath and sprayed her with cold water.[97] Also, the PTR failed to reflect the military judge's recommendation that thirty days of Kho's confinement be suspended. The defense did not object to the SJA PTR. The convening authority approved the sentence as adjudged, but granted the

83. MCM, *supra* note 1, R. C. M. 502(d)(2).

84. *Ayers*, 54 M.J. at 92.

85. MCM, *supra* note 1, R.C.M. 1104(a)(1).

86. *Id.*

87. UCMJ art. 60(c).

88. Scylla was one of the sea monsters Odysseus and his crew faced in Homer's *The Odyssey.* Scylla had six heads with three rows of teeth each and was capable of plucking a man from a ship with each head.

89. United States v. Lee, 50 M.J. 296, 298 (1999).

90. 54 M.J. 63 (2000).

91. 53 M.J. 57 (2000).

92. United States v. Diaz, 40 M.J. 335 (C.M.A. 1994).

93. United States v. Magnan, 52 M.J. 56 (1999).

94. United States v. Leslie, 49 M.J. 517 (N-M. Ct. Crim. App. 1998).

95. *Kho*, 54 M.J. at 64.

96. *Id*.

97. *Id*.

accused's request for voluntary appellate leave after serving only fifty-five days of his confinement.[98]

Because defense failed to object to the SJA PTR, the errors contained in it were waived absent plain error. In applying the plain error doctrine to post-trial matters that affect the convening authority action, the court answers three questions: first, was there error; second, was it plain or obvious, and; third, did the appellant make some colorable showing of possible prejudice.[99]

In *Kho*, the CAAF had no difficulty determining that both the mischaracterization and the omission were errors and the errors were plain and obvious.[100] The court, however, did not find the defense had made a colorable showing of prejudice regarding either error. The defense claimed that the prejudice was manifest, but the CAAF was not convinced. The court noted that the defense did not allege or demonstrate any specific prejudice from the SJA's mischaracterization of the assault committed by the accused.[101] The CAAF stated, "There is no legal difference and little qualitative difference between placing the little girl in cold water and spraying her with cold water."[102] Regarding the failure to mention the clemency recommendation, the record reflected that the convening authority released the accused thirty-five days earlier than the judge had recommended. Based on this fact, the court held that "appellant . . . failed to carry his burden of making a colorable showing of prejudice."[103]

Kho emphasizes that plain and obvious error is not enough for the granting of relief in the post-trial. If appellate defense counsel are to be successful they must show prejudice. It is, of course, difficult to see how the appellate defense counsel could establish prejudice in *Kho*, when the convening authority let Kho out of confinement thirty-five days earlier than the judge recommended. Post-*Wheelus*, the CAAF has seldom found the prejudicial impact of a post-trial error was manifest. In order to reach that conclusion the court must find that the "error seriously affects the fairness, integrity and public reputation of the proceedings."[104] Apart from an extreme situation it is unlikely the court will find that the prejudice from a post-trial error was manifest.

In the past two years, the CAAF has addressed authorship of the SJA PTR three times in *United States v. Finster*,[105] *United States v. Hensley*,[106] and now, *United States v. Wilson*.[107] In each case the court provided greater clarity on this issue. *Finster* stated unequivocally that the accused has a right to a post-trial recommendation prepared by a qualified officer.[108] *Hensley* elaborated on *Finster* by stating that although the accused has a right to a qualified officer, he does not have the right to a particular officer.[109] *Wilson* also deals with the situation where a statutorily-qualified officer executed the SJA PTR.

In *Wilson*, the accused pled guilty to assault, aggravated assault, and kidnapping.[110] Wilson was sentenced to forfeiture of all pay and allowances, reduction to E1, a dishonorable discharge, and confinement for seven years. Pursuant to a pretrial agreement, the convening authority suspended all confinement in excess of thirty months. After the record of trial was properly authenticated, the SJA PTR was signed and submitted to the convening authority by Lieutenant (LT) Curran. Lieutenant Curran signed the PTR as the "Assistant Staff Judge Advocate."[111] The document was served on the accused and defense counsel and neither commented on the recommendation.

On appeal Wilson claimed that he had a right to an SJA PTR prepared by "a senior officer with greater legal and life experi-

98. *Id.*

99. United States v. Wheelus, 49 M.J. 283, 288 (1998).

100. *Kho*, 54 M.J. at 65.

101. *Id.*

102. *Id.*

103. *Id.*

104. United States v. Cunningham, 44 M.J. 758, 764 (1996); *see also* United States v. Finster, 51 M.J. 185, 188 (1999).

105. 51 M.J. 195 (1999).

106. 52 M.J. 391 (2000).

107. 53 M.J. 57 (2000).

108. *Finster*, 51 M.J. at 187.

109. *Hensley*, 52 M.J. at 393.

110. *Wilson*, 54 M.J. at 58.

111. *Id.*

ence"[112] than LT Curran. The CAAF applied the same plain error standard in *Wilson* as it did in *Kho*, once again finding plain and obvious error.[113] The CAAF examined the error in *Wilson* and came to the conclusion that one of two events occurred. Either LT Curran was the acting SJA and the PTR signature block was incorrect or the SJA was available and simply did not prepare the PTR. The court found that regardless of which event occurred, the defense failed to demonstrate a colorable showing of prejudice. The court reasoned that if LT Curran was the acting SJA, then the error was a minor clerical error. Further, even if the SJA was present and available to sign the SJA PTR, "there is no reasonable likelihood that the SJA would have recommended clemency . . . or that the convening authority would have granted it."[114] It is important to note that the court did state that under the right circumstances prejudice might be established by showing that the assistant SJA signed the PTR when the SJA was available. The standard the court applied was whether there is a reasonable likelihood that a more favorable recommendation would have come from the SJA.

Judge Effron wrote a concurring opinion in which he takes the majority opinion one step further. According to Judge Effron, a judge advocate that is habitually called upon to be the acting SJA in the SJA's absence "has been placed in the type of command relationship contemplated by Article 60(d)."[115] Thus, even if the SJA were available and the assistant SJA signed the PTR, the defense could not establish prejudicial plain error because the accused's right to an SJA PTR would have been fulfilled.

Finster, *Hensely*, and now *Wilson* provide practitioners with a clear picture of the CAAF's concerns regarding the authorship of the SJA PTR. The accused has a right to an SJA PTR prepared by a qualified officer, and the court will be uncompromising on this point. The court, in particular Judge Effron, prefers that the officer making the post-trial recommendation have a command-staff organizational relationship with the convening authority, but it is not absolutely necessary.

Another potentially dangerous stop along the post-trial process is at the addendum. Although SJAs are only required to write an addendum when the accused or defense counsel has alleged a legal error,[116] the addendum has become a standard part of the post-trial process in most jurisdictions. Besides addressing allegations of legal error, the addendum can be used as a tracking document, and as a method of responding to defense clemency matters. The most common error at the addendum stage of the post-trial process is the interjection of new matter. Rule for Court-Martial 1106(f)(6) authorizes SJAs to include new matter in the addendum, but defense counsel and the accused must be given notice of the new matter and an opportunity to respond.

In addition to RCM 1106(f)(6), RCM 1107(b)(3)(B)(iii) also addresses new matter. According to RCM 1107(b)(3)(B)(iii) the convening authority can consider "such matters as the convening authority deems appropriate,"[117] but if those matters are "adverse to the accused from outside the record, with knowledge of which the accused is not chargeable, the accused shall be notified and given an opportunity to rebut."[118] Last year the CAAF decided one case, *United States v. Anderson*,[119] which discussed new matter both under RCM 1106 and 1107.

To fully understand the significance of *Anderson*, it is necessary to briefly discuss a 1999 CAAF decision, *United States v. Cornwell*.[120] In *Cornwell*, the accused was convicted of false official statement, damaging military property, and conduct unbecoming an officer.[121] Cornwell was sentenced to two months of confinement, forfeiture of $1000 pay per month for two months, and a dismissal. During the post-trial process, the accused and counsel were served with the PTR, the SJA received the defense submissions, and the SJA executed an addendum.[122] When the SJA went to the convening authority with a proposed action, the convening authority asked the SJA to find out what the accused's subordinate commanders thought about clemency for the accused. The SJA called Cornwell's chain of command and received their recommendations, but

112. *Id.* at 59.

113. *Id.*

114. *Id.* at 60.

115. *Id.*

116. According to RCM 1106(d)(4), a staff judge advocate must respond to allegations of legal error raised in RCM 1105 matters. Since RCM 1105 matters are most often submitted, and the SJA PTR has been served on the accused and counsel, the SJA response to legal error is usually executed in an addendum to the PTR.

117. MCM, *supra* note 1, R.C.M. 1107(b)(3)(B)(iii).

118. *Id.*

119. 53 M.J. 374 (2000).

120. 49 M.J. 491 (1998).

121. *Id.* at 492.

122. *Id.*

none of the accused's commanders recommended clemency.[123] The SJA verbally informed the convening authority of the recommendations, but never gave notice or an opportunity to respond to the accused or defense counsel.

The granted issue in *Cornwell* was whether the information the SJA provided to the convening authority was new matter.[124] The CAAF addressed this question from a RCM 1106 and 1107 perspective. Beginning with RCM 1106, the CAAF stated: "In our view, RCM 1106(f)(7) does not apply to the types of oral conversations between the convening authority and his SJA that took place in this case."[125] The court went on to state that "[t]here is nothing in Article 60(d) or RCM 1106 requiring that oral post trial dialog between the SJA and convening authority be reduced to writing and served on the accused."[126] This announcement was significant. This was the first time the CAAF ever stated that conversations between SJAs and convening authorities were not subject to the new matter restrictions of RCM 1106.

Next, the court addressed the question of whether the SJA's conversation with the convening authority was new matter within the meaning of RCM 1107(b)(3)(B)(iii). The CAAF began its analysis by pointing out that nothing in RCM 1107 prevents the convening authority from consulting his subordinate commanders on issues of clemency.[127] The only limitation on the convening authority is that he may have to give notice and an opportunity to respond to defense if the matters meet the definition in RCM 1107(b)(3)(B)(iii). The court never reached the question of whether the SJA's oral conversation with the convening authority was new matter under RCM 1107. Instead, the CAAF held that, even assuming the conversation was new matter, the defense had failed to establish prejudice. Although the court did not rule on whether the SJA's conversation was new matter, they imply that it was not. The court stated that "[c]onversations among commanders concerning significant personnel actions are routine" and "[u]nder the circumstances, it [was] not at all clear that this was what the drafters had in mind."[128]

Cornwell raised as many questions as it answered. On the one hand, the case answered whether SJAs must rely solely on the PTR and addendum as the only method of providing legal advice to the convening authority. According to the CAAF, "[t]he skeletal post trial recommendation required after 1984 necessarily contemplates that a convening authority may ask questions and expect his SJA to answer them."[129] On the other hand, *Cornwell* left open whether a subordinate commander's unfavorable recommendation regarding clemency was new matter. The CAAF seemed to be cracking the seal on a Pandora's box in the area of new matter.

Almost on cue, the Navy-Marine Court of Criminal Appeals (NMCCA) decided *United States v. Anderson*.[130] The facts in *Anderson* provided the CAAF with an excellent springboard to clarify the *Cornwell* decision. In *Anderson*, the accused pled guilty to unauthorized absence, conspiracy, aggravated assault, and robbery.[131] He was sentenced to total forfeitures, reduction to E1, confinement for twenty years, and a dishonorable discharge. The defense submitted a lengthy clemency request. The SJA summarized the defense matters and informed the convening authority that he must consider the accused's clemency request prior to taking action.[132] The SJA recommended the convening authority approve the sentence as adjudged. Defense made no comment on the SJA PTR. At some point after the SJA submitted his PTR, the defense matters, and a proposed action to the convening authority, the convening authority's chief of staff attached a note to the SJA PTR. The note said, "Lucky he didn't kill the SSgt. He's a thug Sir."[133]

On appeal, the defense claimed that the chief of staff's note was new matter under RCM 1107(b)(3)(B)(iii). The NMCCA found that it was not.[134] According to the court, the note contained "[f]air comments derived from the record of trial about

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* at 493.

127. *Id.*

128. *Id.*

129. *Id.*

130. 50 M.J. 856 (N-M. Ct. Crim. App. 1999).

131. *Id.*

132. *Id.* at 860.

133. *Id.* at 859.

134. *Id.* at 861.

the offenses of which the appellant was convicted and his character."[135] Also "the [chief of staff's] comments . . . offered no recommendation or addressed any issue not previously discussed."[136] The court went on to state that "nothing in the comments was false, misleading, incomplete, or highly detrimental to the accused."[137] Like the CAAF in *Cornwell*, the NMCCA also held that even if the chief of staff's note was new matter, the accused had failed to establish prejudice.[138]

The CAAF reversed the NMCCA and ordered the record returned to the convening authority for a new SJA PTR and action.[139] A majority of the CAAF found three errors in *Anderson*. First, the chief of staff's note impermissibly supplemented the SJA PTR.[140] Second, the note was new matter under RCM 1106(f)(7).[141] Third, the note was new matter under RCM 1107(b)(3)(B)(iii).[142] The first error the court found was that the chief of staff's note was an addendum to the SJA PTR. This was an error because RCM 1106(f)(7) permits only the SJA to supplement the SJA PTR. The court likened the note to the situations in *United States v. Finster* and *United States v. Hensley* where individuals other than the SJA executed the SJA PTR.[143] Thus, the court concluded that it was error for someone other than the SJA to supplement the SJA PTR.

Next, the CAAF addressed whether the chief of staff's note was new matter within the meaning of RCM 1106(f)(7). The court began its analysis by recognizing that it has "not comprehensively defined" new matter.[144] So, without a comprehensive definition, the court examined its own precedent regarding new matter. After examining and discussing *United States v. Buller*,[145] *United States v. Young*,[146] *United States v. Catalani*,[147] and *United States v. Chatman*,[148] the majority concluded that the "overarching concern . . . [of RCM 1106(f)(7)] was fair play."[149] According to the majority "fair play dictates that the belated comments on the appellant's case by a command officer be considered new matter."[150]

Finally, the CAAF examined whether the chief of staff's note was new matter under RCM 1107(b)(3)(B)(iii). The majority unequivocally concluded the note was new matter within the meaning of RCM 1107(b)(3)(B)(iii).[151] The court ruled the chief of staff's comments "were clearly adverse matters from outside the record."[152] Also "[the note] constituted an unfavorable opinion on appellant's rehabilitative potential from the second most important officer of the command, a matter of devastating import."[153]

Next, the CAAF disagreed with the NMCCA regarding whether the accused had established prejudice. The CAAF

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. United States v. Anderson, 53 M.J. 374, 378 (2000).

140. *Id.* at 377.

141. *Id.*

142. *Id.* at 378.

143. *Id.* at 376.

144. *Id.* at 377.

145. 46 M.J. 467 (1997).

146. 26 C.M.R. 232 (1958).

147. 46 M.J. 325 (1997).

148. 46 M.J. 321 (1997).

149. *Anderson*, 53 M.J. at 377.

150. *Id.*

151. *Id.* at 378.

152. *Id.* at 377.

153. *Id.*

emphasized that the threshold for establishing prejudice in matters affecting the convening authority action is low. Appellate defense counsel need only establish "some colorable showing of possible prejudice"[154] to be successful. The defense claimed that they would have opposed the chief of staff's characterization of the accused as a thug and the implication that the victim was nearly killed. The defense would do this through evidence that the accused's conduct in this crime was an aberration and that the victim had "returned to duty and was fully deployable."[155] The defense also emphasized that the accused received no clemency, despite receiving a near maximum sentence. The CAAF ruled that based on the low standard for establishing prejudice and the evidence defense would have presented to rebut the chief of staff's contentions, the defense had established some colorable showing of prejudice.[156]

Judge Crawford dissented from the majority. Although she did not condone the chief of staff's conduct in *Anderson*, she argued that based on *Cornwell*, the chief of staff's note was not new matter.[157] Judge Crawford argued that under *Cornwell*, the convening authority could have given the chief of staff a copy of the SJA recommendation and asked for the chief of staff's input. The chief of staff could then orally communicate the exact same message to the convening authority as he wrote in *Anderson* without creating new matter or error.[158] How could such a non-substantive difference in facts create such a dramatically different result? The dissent goes on to argue that even if the chief of staff's note was new matter, "the language used by the chief of staff [was] . . . a fair inference arising from and based upon the facts contained within the record of trial."[159]

The majority opinion in *Anderson* seems to have sealed any fractures created by *Cornwell* regarding whether there would be a new exception to the new matter rules of RCM 1106 and 1107. For practitioners, there are at least two lessons to be taken from *Anderson*. First, no one should interject themselves between the SJA and the convening authority when it comes to the PTR or addendum. Congress and the President envision a special relationship between the SJA and convening authority when it comes to the convening authority action. This vision is embodied in Article 60(d) and Article 6(b) of the UCMJ and RCM 1106 of the *MCM*, and no substitutions are authorized. Second, the overarching concern regarding new matter is fair play. The majority in *Anderson* pointed out that they have never provided a comprehensive definition of new matter. Instead, the court has given a general description of its purpose. Based on the majority opinion in *Anderson*, SJAs and chiefs of criminal law would be wise not to split hairs about new matter. Although providing notice and an opportunity to respond to matters which are arguably not new matter may slow the post-trial process, there will never be any question about whether the government has engaged in fair play.

The last case discussed in this article does not address any particular stop along the post-trial journey. Instead the case addresses the time it takes to make the journey. *United States v. Collazo*[160] deals with an area of growing concern for the courts of criminal appeal: excessive post-trial processing delays. For years, the ACCA has seen a rise in the time it takes to process records of trial from announcement of the sentence to dispatch to the court.[161] Clearly frustrated by this trend, the Army court decided to take action to stem the tide of this particular problem. For Army practitioners, *Collazo* is easily the most significant case decided this year regarding post-trial processing.

To understand *Collazo*, it is necessary to briefly discuss the evolution of how military appellate courts have addressed excessive post-trial processing time. In 1974, the Court of Military Appeals (CMA) decided *Dunlap v. Convening Authority*,[162] where the CMA announced what is now generally referred to as the draconian *Dunlap* rule.[163] Under the *Dunlap* rule, "a presumption of a denial of speedy disposition of the case will arise when the accused is continuously under restraint after trial and the convening authority does not promulgate his formal and final action within ninety days of the date of such restraint after completion of trial."[164] If the government violated the ninety-day presumed prejudice rule, charges and spec-

154. *Id.* at 378.

155. *Id.*

156. *Id.*

157. *Id.* (Crawford, J., dissenting).

158. *Id.* at 379.

159. *Id.*

160. 53 M.J. 721 (Army Ct. Crim. App. 2000).

161. As of 28 August 2000, the average post-trial processing time for a general court-martial was 119 days and 115 for a special court-martial, as compared to ninety-three days and seventy-nine days respectively, five years ago. The above statistics address those cases that were still outstanding as of 1 September 2000. Interview with Mr. Joseph Neurauter, the Clerk of Court for the United States Army Court of Criminal Appeals (Sept. 1, 2001).

162. Dunlap v. Convening Authority, 48 C.M.R. 751 (C.M.A. 1974).

163. *Collazo*, 53 M.J. at 725.

ifications could be dismissed. The *Dunlap* rule existed for five years until it was overruled by *United States v. Banks*.[165] Under *Banks*, the accused would have to establish some form of prejudice before an appellate court would grant relief. It is important to note that although *Banks* overruled the presumed prejudice rule of *Dunlap*, it did not affect the relief available to an accused. So, under *Banks*, if an accused was able to establish prejudice due to post-trial delay the remedy of dismissal of charges and specifications was still available. Since *Banks*, military appellate courts, in particular the CAAF, have become less willing to grant relief for post-trial delay. With the likelihood of prejudicial error being found on appeal greatly reduced, post-trial processing time increased to its present state.

In *Collazo*, the ACCA fashioned a new method of dealing with undue post-trial delay. Under this new method, the court can grant relief for excessive post-trial processing time without finding any actual prejudice. By granting relief without finding prejudice, the court can punish delinquent jurisdictions for excessive post-trial delay without being forced to dismiss charges as was arguably required by *Dunlap* and *Banks*.

The accused in *Collazo* was convicted of rape and carnal knowledge and sentenced to a dishonorable discharge, forfeiture of all pay and allowances, reduction to E1, and confinement for eight years. Collazo claimed, among other allegations of error, that he had been prejudiced by the time it took to process the record of trial to action. Collazo also pointed out other administrative errors in the processing of the record of trial that had adversely impacted him. These administrative errors included failing to provide him or his counsel with a complete authenticated record of trial until after action was taken, and failing to provide him and his counsel with a copy of the convening authority's action in a timely manner.

Collazo was convicted on 25 September 1997, but the 519-page record of trial was not authenticated until 4 August 1998.[166] The SJA PTR was served on defense counsel on August 18 and a defense request for delay in submitting RCM 1105 matters was granted until September 16.[167] Although the government failed to serve Collazo or his defense counsel with a properly authenticated record of trial, appellant's counsel was provided an electronic version of the transcript to assist in the preparation of the RCM 1105 matters. Collazo's counsel submitted the RCM 1105 matters on 16 September and action was taken on 30 September 1998.[168] A complete authenticated record of trial was not served on Collazo's defense counsel until 7 October 1998.[169]

The ACCA's dissatisfaction with the unexplained post-trial delay in *Collazo* was apparent. The court began its discussion of the excessive post-trial delay in this case by stating that "ten months to prepare and authenticate a 519-page record of trial is too long."[170] The ACCA went on to remind staff judge advocates that it was not so long ago that post-trial delays like the ones in *Collazo* brought about the *Dunlap* ninety-day rule.[171] Next, the court specifically found the appellant suffered no actual prejudice due to the post-trial delay. Had the court found prejudice, under a *Dunlap-Banks* analysis, it is likely it would have felt compelled to dismiss the charges. Finally, the court created a new remedy for inordinate post-trial delay, one which included sentence relief.

The new remedy created by the ACCA is based on the proposition that "fundamental fairness dictates that the government proceed with due diligence to execute a soldier's regulatory and statutory post-trial processing rights and to secure the convening authority's action as expeditiously as possible."[172] When the government fails to fulfill this obligation, the accused is entitled to relief even if no prejudice has been shown. The court applied a "totality of the circumstances" test,[173] and concluded that the government did not proceed with due diligence. Based on the government's failure to proceed with due diligence, Collazo was entitled to some relief. Collazo had been sentenced to ninety-six months of confinement. The court only approved ninety-two months.[174]

164. *Dunlap*, 48 C.M.R. at 754.

165. 7 M.J. 92 (1979).

166. *Collazo*, 53 M.J. at 724.

167. *Id.* at 725.

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.* at 727.

173. *Id.*

174. *Id.*

The Army court's decision in *Collazo* has been followed in six other ACCA opinions: *United States v. Marlow*,[175] *United States v. Fussell*,[176] *United States v. Hernandez*,[177] *United States v. Sharp*,[178] *United States v. Acosta-Rondon*,[179]and *United States v. Bauerbach*.[180] In *Marlow*, the court reduced the accused's approved eighteen months of confinement to fifteen months because it took the government approximately 260 days to get a 168-page record of trial authenticated and approximately eleven months to get from sentence to action. In *Fussell*, where it took the government 242 days to prepare a 133-page record of trial, the court reduced the accused's twenty months of confinement to eighteen months and the accused's total forfeitures for twenty-four months to total forfeitures for fourteen months. In *Hernandez*, where it took the government seven months to transcribe the ninety-eight page record of trial, the court reduced the accused's sentence from six months confinement and forfeiture of $500 per month for six months to one month of confinement and one month of forfeitures. In *Sharp*, a case that took the government 399 days to get from trial to authentication, and an additional ninety-nine days to get to action, the court reduced the accused's sentence of twenty years confinement by six months. Finally, in *Bauerbach*, the court reduced the accused's confinement from three months to two months based on the government taking 288 days to process the record of trial through action.

Collazo and its progeny raise two critical questions. First, do the service courts have the authority to grant relief for non-prejudicial legal error, and second, should they? One of the problems with the *Collazo* decision is the court's failure to explain how it could grant relief for a legal error after expressly finding no prejudice. In *Collazo*, the court cited Article 66(c) and *United States v. Wheelus*[181] as authority for the its decision.[182] Article 66(c), UCMJ, vests the service courts with the unique responsibility to "affirm only such findings of guilty and such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record should be approved."[183] *United States v.* Wheelus states that "the Courts of Criminal Appeal have broad power to moot claims of prejudice"[184] by exercising their authority under Article 66(c). Although it is clear that the ACCA relied on Article 66(c) in *Collazo*, it is unclear which portion of Article 66(c) it focused on. This question is answered in *Bauerbach.*

In *Bauerbach*, the ACCA makes it clear that in *Collazo* and its progeny, the court was exercising its authority to "affirm only . . . such part or amount of the sentence, as it . . . determines, on the basis of the entire record should be approved."[185] Thus, the court was granting relief because the sentence was inappropriate, not because of legal error. Although the court has clarified its reasoning in *Collazo*, the parameters of the court's Article 66(c) authority to resolve issues of non-prejudicial post-trial delay warrants further analysis.

Beyond the question of whether the ACCA possesses the authority to grant relief for non-prejudicial legal error is the question of whether they should. The ACCA states in *Collazo*, "Untimely post-trial processing damages the confidence of both soldiers and the public in the fairness of military justice."[186] Undoubtedly, delays like those in *Collazo* can have an adverse effect on soldier and public confidence in the military justice system. That being said, what effect does reducing a rapist's sentence by 120 days have on public and soldier confidence when the reason for the reduction is that the government did not type the record of trial quickly enough?

Regardless of the arguments for and against the Army court's holding in *Collazo*, practitioners must be prepared to deal with the consequences of the case. The ACCA has made it clear in *Bauerbach* and its memorandum opinions that *Collazo* was just the first in a line of cases. Of course, the obvious method of avoiding *Collazo* relief is to prepare records of trial more quickly; that is easier said than done. Chiefs of criminal law have to apply some of the solutions used during the *Dunlap*

175. No. 9800727 (Army Ct. Crim. App. Aug. 31, 2000) (unpublished).

176. No. 9801022 (Army Ct. Crim. App. Oct. 20, 2000) (unpublished).

177. No. 9900776 (Army Ct. Crim. App. Feb. 23, 2001) (unpublished).

178. No. 9701883 (Army Ct. Crim. App. Apr. 16, 2001) (unpublished).

179. No. 9900458 (Army Ct. Crim. App. Apr. 30, 2001) (unpublished).

180. No. 9900287 (Army Ct. Crim. App. May 15, 2001).

181. 49 M.J. 283 (Army Ct. Crim. App. 1998).

182. *Collazo*, 53 M.J. at 727.

183. *Id.*

184. 49 M.J. 283, 288 (1998).

185. *Bauerbach*, No. 9900287 at 2 (Army Ct. Crim. App. May 15, 2001).

186. *Collazo*, 53 M.J. at 726.

era to correct today's post-trial delay problems. For example, nothing in RCM 1103 or Article 65 or *Army Regulation 27-10* requires the court reporter to actually prepare all of the record of trial. Chiefs of criminal law can distribute the typing responsibilities to other members of the criminal law section and have the court reporter simply verify the record is correct. Chiefs of criminal law also need to establish page quotas for court reporters and insure the quotas are being met.

Besides typing faster, SJAs can beat the ACCA to the punch on granting *Collazo* relief. In *United States v. Benton*,[187] the SJA recognized that there had been an undue delay in the post-trial process and recommended the convening authority grant the accused sentence relief based on the delay. The convening authority reduced the accused's sentence from three years to two and a half. The Army court praised the SJA in *Benton* and recommended this technique for dealing with undue post-trial delay. Although this method may avoid the ACCA granting *Collazo*-type relief, it may be difficult to convince some convening authorities to reduce an otherwise valid sentence because it took too long to type the record of trial. Another problem with this method, and *Collazo* relief in general, is determining how much relief is enough. In *Collazo*, the court reduced the confinement by 4.16 percent of that approved by the convening authority. Since *Collazo*, the confinement relief being granted by the ACCA has been increasing: *Fussell*, ten percent; *Marlow*, sixteen percent; *Sharp*, thirty percent; and *Hernandez*, 83 percent. The ACCA has explained the reason for this disparity by stating, "There is no precise yardstick for measuring sentence appropriateness determinations."[188] This lack of guidance on assessing *Collazo* relief may make it more difficult to convince convening authorities to grant it.

It is easy to relegate the post-trial process to an administrative after thought. Counsel in the field may argue that given the rarity of clemency being granted, the post-trial process is unimportant. Thus, post-trial issues should become a priority when all other priorities have been satisfied. This attitude cannot prevail. It is clear from the cases decided this year that there is potential for error at virtually every step along the post-trial journey. There is even potential for error in how long the process takes. Given the focus of military appellate courts on the post-trial journey and not its destination, chiefs of criminal and SJAs must be scrupulously attentive to the post-trial process in their jurisdiction.

187. No. 9701402 (Army Ct. Crim. App. Aug. 10, 2000) (unpublished).

188. *Bauerbacch*, No. 9900287 at 8 (Army Ct. Crim. App. May 15, 2001).

CLE News

1. Resident Course Quotas

Attendance at resident continuing legal education (CLE) courses at The Judge Advocate General's School, United States Army (TJAGSA), is restricted to students who have confirmed reservations. Reservations for TJAGSA CLE courses are managed by the Army Training Requirements and Resources System (ATRRS), the Army-wide automated training system. If you do not have a confirmed reservation in ATRRS, you do not have a reservation for a TJAGSA CLE course.

Active duty service members and civilian employees must obtain reservations through their directorates of training or through equivalent agencies. Reservists must obtain reservations through their unit training offices or, if they are nonunit reservists, through the United States Army Personnel Center (ARPERCEN), ATTN: ARPC-ZJA-P, 9700 Page Avenue, St. Louis, MO 63132-5200. Army National Guard personnel must request reservations through their unit training offices.

When requesting a reservation, you should know the following:

TJAGSA School Code—181

Course Name—133d Contract Attorneys Course 5F-F10

Course Number—133d Contract Attorney's Course 5F-F10

Class Number—133d Contract Attorney's Course 5F-F10

To verify a confirmed reservation, ask your training office to provide a screen print of the ATRRS R1 screen, showing by-name reservations.

The Judge Advocate General's School is an approved sponsor of CLE courses in all states that require mandatory continuing legal education. These states include: AL, AR, AZ, CA, CO, CT, DE, FL, GA, ID, IN, IA, KS, LA, MN, MS, MO, MT, NV, NC, ND, NH, OH, OK, OR, PA, RH, SC, TN, TX, UT, VT, VA, WA, WV, WI, and WY.

2. TJAGSA CLE Course Schedule

2001

May 2001

7 - 25 May	44th Military Judge Course (5F-F33).
14-18 May	48th Legal Assistance Course (5F-F23).

June 2001

4-7 June	4th Intelligence Law Workshop (5F-F41).
4-8 June	166th Senior Officers Legal Orientation Course (5F-F1).
4 June-13 July	8th JA Warrant Officer Basic Course (7A-550A0).
4-15 June	6th RC Warrant Officer Basic Course (Phase I) (7A-550A0-RC).
5-29 June	155th Officer Basic Course (Phase I, Fort Lee) (5-27-C20).
6-8 June	Judge Advocate Recruiting Conference (JARC-181).
11-15 June	31st Staff Judge Advocate Course (5F-F52).
18-22 June	5th Chief Legal NCO Course (512-71D-CLNCO).

July 2001

8-13 July	12th Legal Administrators Course (7A-550A1).
9-10 July	32d Methods of Instruction Course (Phase I) (5F-F70).
16-20 July	76th Law of War Workshop (5F-F42).
16 July-10 August	2d JA Warrant Officer Advanced Course (7A-550A2).
16 July-31 August	5th Court Reporter Course (512-71DC5).
30 July-10 August	147th Contract Attorneys Course (5F-F10).

August 2001

6-10 August	19th Federal Litigation Course (5F-F29).
13 August-23 May 02	50th Graduate Course (5-27-C22).
20-24 August	7th Military Justice Managers Course (5F-F31).
20-31 August	36th Operational Law Seminar (5F-F47).

September 2001

10-14 September	2d Court Reporting Symposium (512-71DC6).
10-14 September	2001 USAREUR Administrative Law CLE (5F-F24E).
10-21 September	16th Criminal Law Advocacy Course (5F-F34).
17-21 September	49th Legal Assistance Course (5F-F23).
18 September-12 October	156th Officer Basic Course (Phase I, Fort Lee) (5-27-C20).
24-25 September	32d Methods of Instruction Course (Phase II) (5F-F70).

October 2001

1-5 October	2001 JAG Annual CLE Workshop (5F-JAG).
1 October-20 November	6th Court Reporter Course (512-71DC5).
12 October-21 December	156th Officer Basic Course (Phase II, TJAGSA) (5-27-C20).
15-19 October	167th Senior Officers Legal Orientation Course (5F-F1).
23-26 October	FY 2002 USAREUR Legal Assistance CLE (5F-F23E).
29 October-2 November	61st Fiscal Law Course (5F-F12).

November 2001

12-16 November	25th Criminal Law New Developments Course (5F-F35).
26-30 November	55th Federal Labor Relations Course (5F-F22)
26-30 November	168th Senior Officers Legal Orientation Course (5F-F1).
26-30 November	2001 USAREUR Operational Law CLE (5F-F47E).

December 2001

3-7 December	2001 USAREUR Criminal Law Advocacy CLE (5F-F35E).
3-7 December	2001 Government Contract Law Symposium (5F-F11).
10-14 December	5th Tax Law for Attorneys Course (5F-F28)

2002

January 2002

2-5 January	2002 Hawaii Tax CLE (5F-F28H).
7-11 January	2002 PACOM Tax CLE (5F-F28P).
7-11 January	2002 USAREUR Contract & Fiscal Law CLE (5F-F15E).
7 January-26 February	7th Court Reporter Course (512-71DC5).
8 January-1 February	157th Officer Basic Course (Phase I, Fort Lee) (5-27-C20).
15-18 January	2002 USAREUR Tax CLE (5F-F28E).
16-18 January	8th RC General Officers Legal Orientation Course (5F-F3).
20 January-1 February	2002 JAOAC (Phase II) (5F-F55).
28 January-1 February	169th Senior Officers Legal Orientation Course (5F-F1).

February 2002

1 February-12 April	157th Officer Basic Course (Phase II, TJAGSA) (5-27-C20).
4-8 February	77th Law of War Workshop (5F-F42).
4-8 February	2001 Maxwell AFB Fiscal Law Course (5F-F13A).

25 February-1 March	62d Fiscal Law Course (5F-F12).
25 February-8 March	37th Operational Law Seminar (5F-F47).

March 2002

4-8 March	63d Fiscal Law Course (5F-F12).
18-29 March	17th Criminal Law Advocacy Course (5F-F34).
25-29 March	4th Contract Litigation Course (5F-F103).
25-29 March	170th Senior Officers Legal Orientation Course (5F-F1).

April 2002

1-5 April	26th Admin Law for Military Installations Course (5F-F24).
15-19 April	4th Basics for Ethics Counselors Workshop (5F-F202).
15-19 April	13th Law for Legal NCOs Course (512-71D/20/30).
22-25 April	2002 Reserve Component Judge Advocate Workshop (5F-F56).
29 April-10 May	148th Contract Attorneys Course (5F-F10).
29 April-17 May	45th Military Judge Course (5F-F33).

May 2002

13-17 May	50th Legal Assistance Course (5F-F23).

June 2002

3-7 June	171st Senior Officers Legal Orientation Course (5F-F1).
3-14 June	7th RC Warrant Officer Basic Course (Phase I) (7A-550A0-RC).
3 June-12 July	9th JA Warrant Officer Basic Course (7A-550A0).
4-28 June	158th Officer Basic Course (Phase I, Fort Lee) (5-27-C20).
10-14 June	32d Staff Judge Advocate Course (5F-F52).
17-21 June	13th Senior Legal NCO Management Course (512-71D/40/50).
17-22 June	6th Chief Legal NCO Course 512-71D-CLNCO).
17-28 June	7th RC Warrant Officer Basic Course (Phase II) (7A-550A0-RC).
24-26 June	Career Services Directors Conference.
28 June-6 September	158th Officer Basic Course (Phase II, TJAGSA) (5-27-C20).

July 2002

8-9 July	33d Methods of Instruction Course (Phase I) (5F-F70).
8-12 July	13th Legal Administrators Course (7A-550A1).
15 July-9 August	3d JA Warrant Officer Advanced Course (7A-550A2).
15-19 July	78th Law of War Workshop (5F-F42).
15 July-30 August	8th Court Reporter Course (512-71DC5).
29 July-9 August	149th Contract Attorneys Course (5F-F10).

August 2002

5-9 August	20th Federal Litigation Course (5F-F29).
12 August-May 2003	51st Graduate Course (5-27-C22).
19-23 August	8th Military Justice Managers Course (5F-F31).
19-30 August	38th Operational Law Seminar (5F-F47).

September 2002

4-6 September	2002 USAREUR Legal Assistance CLE (5F-F23E).

9-13 September	2002 USAREUR Administrative Law CLE (5F-F24E).
9-20 September	18th Criminal Law Advocacy Course (5F-F34).
11-13 September	3d Court Reporting Symposium (512-71DC6).
16-20 September	51st Legal Assistance Course (5F-F23).
23-24 September	33d Methods of Instruction Course (Phase II) (5F-F70).

3. Civilian-Sponsored CLE Courses

15-19 Oct	Military Administrative Law Conference and The Honorable Walter T. Cox, III, Military Legal History Symposium Spates Hall, Fort Myer, Virginia

4. Mandatory Continuing Legal Education Jurisdiction and Reporting Dates

Jurisdiction	**Reporting Month**
Alabama**	31 December annually
Arizona	15 September annually
Arkansas	30 June annually
California*	1 February annually
Colorado	Anytime within three-year period
Delaware	31 July biennially
Florida**	Assigned month triennially
Georgia	31 January annually
Idaho	December 31, Admission date triennially
Indiana	31 December annually
Iowa	1 March annually
Kansas	30 days after program
Kentucky	30 June annually
Louisiana**	31 January annually
Maine**	31 July annually
Minnesota	30 August
Mississippi**	1 August annually
Missouri	31 July annually
Montana	1 March annually
Nevada	1 March annually
New Hampshire**	1 August annually
New Mexico	prior to 30 April annually
New York*	Every two years within thirty days after the attorney's birthday
North Carolina**	28 February annually
North Dakota	31 July annually
Ohio*	31 January biennially
Oklahoma**	15 February annually
Oregon	Anniversary of date of birth—new admittees and reinstated members report after an initial one-year period; thereafter triennially
Pennsylvania**	Group 1: 30 April Group 2: 31 August Group 3: 31 December
Rhode Island	30 June annually
South Carolina**	15 January annually
Tennessee*	1 March annually
Texas	Minimum credits must be completed by last day of birth month each year
Utah	31 January
Vermont	2 July annually
Virginia	30 June annually

Washington	31 January triennially
West Virginia	30 June biennially
Wisconsin*	1 February biennially
Wyoming	30 January annually

* Military Exempt

** Military Must Declare Exemption

For addresses and detailed information, see the March 2001 issue of *The Army Lawyer.*

5. Phase I (Correspondence Phase), RC-JAOAC Deadline

The suspense for first submission of all RC-JAOAC Phase I (Correspondence Phase) materials is ***NLT 2400, 1 November 2001***, for those judge advocates who desire to attend Phase II (Resident Phase) at The Judge Advocate General's School (TJAGSA) in the year 2001 (hereafter "2001 JAOAC"). This requirement includes submission of all JA 151, Fundamentals of Military Writing, exercises.

Any judge advocate who is required to retake any subcourse examinations or "re-do" any writing exercises must submit the examination or writing exercise to the Non-Resident Instruction Branch, TJAGSA, for grading with a postmark or electronic transmission date-time-group ***NLT 2400, 30 November 2001***. Examinations and writing exercises will be expeditiously returned to students to allow them to meet this suspense.

Judge advocates who fail to complete Phase I correspondence courses and writing exercises by these suspenses will not be allowed to attend the 2001 JAOAC. To provide clarity, all judge advocates who are authorized to attend the 2001 JAOAC will receive written notification. Conversely, judge advocates who fail to complete Phase I correspondence courses and writing exercises by the established suspenses will receive written notification of their ineligibility to attend the 2001 JAOAC.

If you have any further questions, contact Lieutenant Colonel Dan Culver, telephone (800) 552-3978, ext. 357, or e-mail Daniel.Culver@hqda.army.mil. Lieutenant Colonel Goetzke.

Current Materials of Interest

1. The Judge Advocate General's On-Site Continuing Legal Education Training and Workshop Schedule (2000-2001 Academic Year)

DATE	TRAINING SITE AND HOST UNIT	AC GO/RC GO	SUBJECT	ACTION OFFICER
5-6 May	Gulf Shores, AL	BG Marchand COL (P) Pietsch	Administrative and Civil Law; Environmental Law; Contract Law	POC: MAJ John Gavin (205) 795-1512 1-877-749-9063, ext. 1512 (toll-free) John.Gavin@se.usar.army.mil
18-20 May	St. Louis, MO 89th RSC, 6025th GSU 8th MSO	BG Romig COL (P) Pietsch	Legal Assistance; Military Justice	POC: LTC Bill Kumpe (314) 991-0412, ext. 1261

2. TJAGSA Materials Available through the Defense Technical Information Center (DTIC)

For a complete listing of TJAGSA Materials Available through DTIC, see the March 2001 issue of *The Army Lawyer.*

3. Regulations and Pamphlets

For detailed information, see the March 2001 issue of *The Army Lawyer.*

4. The Legal Automation Army-Wide Systems XXI—JAGCNet

a. The Legal Automation Army-Wide Systems XXI (LAAWS XXI) operates a knowledge management and information service called JAGCNet primarily dedicated to servicing the Army legal community, but also provides for Department of Defense (DOD) access in some case. Whether you have Army access or DOD-wide access, all users will be able to download the TJAGSA publications that are available through the JAGCNet.

b. Access to theJAGCNet:

(1) Access to JAGCNet is restricted to registered users, who have been approved by the LAAWS XXI Office and senior OTJAG staff.

(a) Active U.S. Army JAG Corps personnel;

(b) Reserve and National Guard U.S. Army JAG Corps personnel;

(c) Civilian employees (U.S. Army) JAG Corps personnel;

(d) FLEP students;

(e) Affiliated (that is, U.S. Navy, U.S. Marine Corps, U.S. Air Force, U.S. Coast Guard) DOD personnel assigned to a branch of the JAG Corps; and, other personnel within the DOD legal community.

(2) Requests for exceptions to the access policy should be e-mailed:

LAAWSXXI@jagc-smtp.army.mil

c. How to logon to JAGCNet:

(1) Using a web browser (Internet Explorer 4.0 or higher recommended) go to the following site: http://jagcnet.army.mil.

(a) Follow the link that reads "Enter JAGCNet."

(b) If you already have a JAGCNet account, and know your user name and passwor, select "Enter" from the next menu, then enter your "User Name" anbd "password" in the appropriate fields.

(c) If you have a JAGCNet account, *but do not know your user name and/or Internet password,* contact your legal administrator or e-mail the LAAWS XXI HelpDesk at LAAWSXXI@jagc-smtp.army.mil.

(d) If you do not have a JAGCNet account, select "Register" from the JASGCNet Intranet menu.

(e) Follow the link "Request a New Account" at the bottom of the page, and fill out the registration form completely. Allow seventy-two hours for your request to process.' Once your request is processed, you will receive an e-mail telling you that your request has been approved or denied.

(f) Once granted access to JAGCNet, follow step (b),

above.

5. TJAGSA Publications Available Through the LAAWS XXI JAGCNet

For detailed information, see the March 2001 issue of *The Army Lawyer.*

6. TJAGSA Legal Technology Management Office (LTMO)

The Judge Advocate General's School, United States Army, continues to improve capabilities for faculty and staff. We have installed new computers throughout the School. We are in the process of migrating to Microsoft Windows 2000 Professional and Microsoft Office 2000 Professional throughout the School.

The TJAGSA faculty and staff are available through the MILNET and the Internet. Addresses for TJAGSA personnel are available by e-mail at jagsch@hqda.army.mil or by calling the LTMO at (804) 972-6314. Phone numbers and e-mail addresses for TJAGSA personnel are available on the School's web page at http://www.jagcnet.army.mil/tjagsa. Click on directory for the listings.

All students that wish to access their office e-mail, please ensure that your office e-mail is web browser accessible prior to departing your office. Please bring the address with you when attending classes at TJAGSA. If your office does not have web accessible e-mail, you may establish an account at the Army Portal http://ako.us.army.mil and then forward your office e-mail to this new account during your stay at the School. The School classrooms and the Computer Learning Center do not support modem usage.

Personnel desiring to call TJAGSA can dial via DSN 934-7115 or provided the telephone call is for official business only, use our toll free number, (800) 552-3978; the receptionist will connect you with the appropriate department or directorate. For additional information, please contact our Legal Technology Management Office at (804) 972-6264. CW3 Tommy Worthey.

7. The Army Law Library Service

Per *Army Regulation 27-1*, paragraph 12-11, the Army Law Library Service (ALLS) Administrator, Ms. Nelda Lull, must be notified prior to any redistribution of ALLS-purchased law library materials. Posting such a notification in the ALLS FORUM of JAGCNet satisfies this regulatory requirement as well as alerting other librarians that excess materials are available.

Ms. Lull can be contacted at The Judge Advocate General's School, United States Army, ATTN: JAGS-CDD-ALLS, 600 Massie Road, Charlottesville, Virginia 22903-1781. Telephone DSN: 934-7115, extension 394, commercial: (804) 972-6394, facsimile: (804) 972-6386, or e-mail: lullnc@hqda.army.mil.

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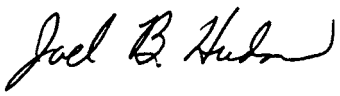

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