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

Major Tyler J. Harder
Professor, Criminal Law Department
The Judge Advocate General's School, United States Army
Charlottesville, Virginia

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.