The Journey Is the Gift: Recent Developments in the Post-Trial Process

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

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).