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Military Justice Symposium—Volume I

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Military Justice Symposium—Volume I

Foreword

Welcome to the seventh annual[1] Military Justice Symposium. This month's issue of *The Army Lawyer* contains Volume I of the symposium. Jurisdiction, pretrial procedure, evidence, substantive crimes and defenses, and urinalysis articles comprise this issue. The May 2002 issue of *The Army Lawyer* will contain Volume II of the symposium and will include articles on unlawful command influence, the Fourth Amendment, discovery, sentencing, post-trial procedure, and professional responsibility.

Volume II will also include a cumulative index of military justice related articles published from 1971-present. The index will assist trial practitioners in locating articles that address a wide range of military justice issues. Additionally, we will make the index accessible through the The Judge Advocate General's School Web site.[2]

In the two-volume symposium, the nine members of the Criminal Law Department provide their assessment of significant developments in military justice during the past year. The purpose is to provide the field, including both trial and appellate practitioners, with perspectives on significant criminal law opinions as well as noteworthy service courts cases. The following charts provide a quick look at the work of the Court of Appeals Armed Forces (CAAF) during last year's term.[3]

As always, the purpose of the symposium is to provide thoughtful and relevant support to trial practitioners at the point of the spear. We welcome all comments, suggestions, and questions. We hope you find the articles timely and helpful.

Opinion Statistics for 2001 Term of Court
(1 October 2000 – 30 September 2001)

	SJC	ERS	HFG	ASE	JEB	WTC	ROE	PC	**TOTAL**
TOTAL OPINIONS	**33**	**46**	**22**	**23**	**18** .	**2**	**1**	**3**	**148**
Majority Opinions	18	14	17	11	8	2	0	3	73
Separate Opinions	15	32	5	12	10	0	1		75

1. The idea for the military justice symposium originated with Lieutenant Colonel Lawrence J. Morris, Professor and Chair of the Criminal Law Department from 1995-1998. The idea, based on the "COMA Watch" instruction given by previous department members, came to fruition with the publication of the first symposium in the March 1996 issue of *The Army Lawyer.* Lieutenant Colonel Morris hesitated to attach the label "annual" to the second symposium issue. *See* Lieutenant Colonel Lawrence J. Morris, *Foreword*, ARMY LAW., Apr. 1997, at 4. Thanks to the efforts of former and current members of the Criminal Law Department, the label "annual" may now safely be affixed to the symposium name.

2. The JAG School Web site is http://www.jagcnet.army.mil/TJAGSA.

3. This past year was the first full term for the newest member of the CAAF, Judge James E. Baker. Judge Baker joined the CAAF as the court's eighteenth member on 1 December 2000. The investiture proceedings may be found at 54 M.J. LXIX-LXXVIII (2000).

Breakdown of Separate Opinions

	SJC	ERS	HFG	ASE	JEB	WTC	ROE	PC	**TOTAL**
Concur	1	10		1	4				16
Concur in Result	2	9	2	1	5				19
Concur in Part & in the Result	1	3		1			1		6
Concur in Part & in the Result & Dissent in Part		1							1
Concur in Part & Dissent in Part	4	1		3	1				9
Dissent	7	8	3	6					24

Key:

SJC = Chief Judge Crawford
ERS = Associate Judge Sullivan
HFG = Associate Judge Gierke
ASE = Associate Judge Effron
JEB = Associate Judge Baker
WTC = Senior Judge Cox
ROE = Senior Judge Everett
PC = Per Curiam

Note: An opinion that is "**joined by**" one or more judges or authored by one or more judges ("**and**") is counted only for the judge listed first.

Provided by the Clerk of the Court, Court of Appeals for the Armed Forces.

All Quiet on the Jurisdictional Front . . . Except for the Tremors from the Service Courts

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Introduction

Prognostics do not always prove prophecies - at least the wisest prophets make sure of the event first.[1]

As the title of this article implies, things were relatively quiet in the area of military jurisdiction this past year. In 2000, several significant jurisdictional cases were decided,[2] and the Military Extraterritorial Jurisdiction Act of 2000 (MEJA)[3] was signed into law. While these developments promised exciting things to come, the anticipated follow-on developments have been slow to unfold, leaving the prophetic anticipation of 2001 as the Year of Jurisdiction unfulfilled.[4] But as the professional baseball player Yogi Berra once said, "It's tough to make predictions, especially about the future."[5] The implementing regulations for the MEJA still remain to be written and the Court of Appeals for the Armed Forces (CAAF) did not decide the tough jurisdictional issues this year. However, a closer look at two service court opinions, one published and the other unpublished, reveals a potential jurisdictional issue of great scope looming at the CAAF's doorstep.[6]

This article discusses those opinions and offers some analysis of the potential future of military jurisdiction. Additionally, this article discusses the CAAF opinions and other service court opinions of the past year that touch on issues of jurisdictional concern. The article is divided into two parts: court-martial jurisdiction in general and appellate jurisdictional issues involving post-trial relief.

Court-Martial Jurisdiction

The five requisites of court-martial jurisdiction are found in Rule for Courts-Martial (RCM) 201(b): (1) the court-martial must be convened by the proper official, (2) the military judge and members must be of the proper number and have the proper qualifications, (3) the charges must be referred to the court-martial by competent authority, (4) there must be jurisdiction over the accused, and (5) there must be jurisdiction over the offense.[7] During the 2001 term of court, the CAAF decided only one case that addressed any of these elements; however, as already mentioned, the various service courts issued a number of opinions of jurisdictional concern, several of which addressed these elements.

The first part of this article is divided into four sections. The first section discusses a Navy-Marine Corps Court of Criminal Appeals (NMCCA) decision involving the second element listed above, proper court-martial composition. The second section discusses the sole CAAF opinion decided this term, which addresses the third element listed above, properly referred charges. The third section discusses an NMCCA opinion touching upon personal jurisdiction, and the final section discusses those service court opinions addressing subject-matter jurisdiction.

A Properly Composed Court-Martial

The second element needed to perfect court-martial jurisdiction is a properly composed court. Rule for Courts-Martial 201(b)(2) requires that the court-martial be composed in accordance with the rules addressing the requisite number and qualifications of the members and the military judge.[8] One such

1. Horace Walpole, Letter to Thomas Walpole, Feb. 19, 1785, *reprinted in* JOHN BARTLETT, FAMILIAR QUOTATIONS 324:2 (1992).

2. See Major Tyler J. Harder, *Recent Developments in Jurisdiction: Is This the Dawn of the Year of Jurisdiction?* ARMY LAW., Apr. 2001, at 2, for a discussion of the prior year's jurisdiction cases.

3. 18 U.S.C. §§ 3261-3267 (2000).

4. *See* Harder, *supra* note 2.

5. High School Baseball Web, Yogi Berra Quotes (revised Dec. 29, 2001), *at* http://www.hsbaseballweb.com/yogi-isms (listing a variety of humorous quotes attributed to Yogi Berra).

6. *See infra* notes 63-85 and accompanying text.

7. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 201(b)(1)-(5) (2000) [hereinafter MCM].

8. *Id.* R.C.M. 201(b)(2). Rule for Courts-Martial 201(b) reads: "The court-martial must be composed in accordance with these rules with respect to number and qualifications of its personnel. As used here 'personnel' includes only the military judge, the members, and the summary court-martial." *Id.*

rule addressing court-martial composition is found in Article 16, UCMJ, which allows for a court-martial without any members, or in other words, trial by military judge alone.[9] The right of an accused to elect a trial by a military judge alone is limited in capital cases (in which the death penalty is an authorized sentence). Article 18, UCMJ, specifically withholds jurisdiction from military judge alone courts-martial in cases in which the death penalty is a possible sentence.[10]

In 2000, the CAAF addressed the application of Articles 16 and 18 in *United States v. Fricke*.[11] Lieutenant Commander Fricke initially pled not guilty to premeditated murder at a general court-martial that had been referred capital.[12] Following the conclusion of the government's case, the accused entered into a pretrial agreement with the convening authority whereby the convening authority would withdraw the capital referral if the accused successfully pled guilty to premeditated murder.[13] The withdrawal of the capital referral and the subsequent noncapital referral were done orally on the record.[14]

On appeal, Fricke claimed that the court lacked jurisdiction under Article 18 to accept his guilty plea because there was no paperwork in the record to show that the convening authority withdrew the capital referral and re-referred it as a noncapital case.[15] The CAAF disagreed, holding that paperwork was not required. The court noted that the military judge had acknowledged the noncapital referral on the record, and that the failure to reduce the re-referral to writing did not mean the case had not been re-referred.[16]

This past year, the NMCCA addressed a similar situation in *United States v. Thomas*.[17] In *Thomas*, the accused was charged with the premeditated murder of his son.[18] The convening authority originally referred the case to a general court-martial as a capital case. Following the psychological evaluation of the accused by a defense-employed civilian forensic psychiatrist, the accused entered into a pretrial agreement with the convening authority. In return for the accused's agreement to plead guilty to the charges, the convening authority agreed to refer the case noncapital.[19] The charge sheet was amended to reflect the noncapital referral and the accused entered pleas of guilty to the charges and specifications, to include the premeditated murder charge.[20]

On appeal, the accused argued that his trial by military judge alone lacked jurisdiction to try him for premeditated murder because the case had been initially referred as a capital case. He argued that the language in Article 18 required that the case be *previously* referred to trial as a noncapital case.[21] The NMCCA disagreed, holding that the trial by military judge alone had jurisdiction. The court stated that even though the case was initially referred as a capital case, the convening authority modified the referral to a noncapital referral as part of the pretrial agreement, and once referred noncapital, a trial by military judge alone had jurisdiction to hear the case.[22]

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9. UCMJ art. 16(1)(B) (2000). Article 16 states that a courts-martial may consist of "only a military judge, if before the court is assembled the accused, knowing the identity of the military judge and after consultation with defense counsel, *requests orally on the record or in writing* a court composed only of a military judge and the military judge approves." *Id*. (emphasis added).

10. *Id*. art. 18. Article 18 states that "a general court-martial of the kind specified in . . . article16(1)(B) . . . shall not have jurisdiction to try any person for any offense for which the death penalty may be adjudged unless the case has been previously referred to trial as a noncapital case." *Id*.

11. 53 M.J. 149 (2000).

12. *Id*. In 1988, the accused, a thirty-eight year old naval officer with seventeen years of service, hired a hit man to kill his wife in exchange for $25,000. The hit man shot the accused's wife twice and stole her purse as she entered her vehicle at a Virginia Beach supermarket. The accused was not arrested for the murder until October 1993. *Id*. at 150.

13. *Id*. at 151.

14. *Id*. Before the acused entered his guilty plea, the military judge asked the trial counsel to make an announcement regarding the pretrial agreement and the capital referral. The trial counsel stated: "Sir, I've been authorized by the convening authority that this General Court-Martial's now been referred noncapital. That referral decision is conditioned upon your acceptance of a plea of guilty from the accused." *Id*. The military judge then informed the accused that "because the Government has withdrawn the capital referral at this time, that gives you a different option regarding forum election." *Id*.

15. *Id*. at 153.

16. *Id*. at 154.

17. 56 M.J. 523 (N-M. Ct. Crim. App. 2001).

18. *Id*. at 525. The accused pled guilty to attempted unpremeditated murder of his son, premeditated murder of his son, two specifications of assault on his wife, and kidnapping of his wife. He was sentenced to confinement for life, total forfeitures, reduction to E-1, and a dishonorable discharge. *Id*. at 524.

19. *Id*. at 525-26.

20. *Id*. at 526.

21. *Id*. at 530; *see supra* note 10.

Properly Referred Charges

The third element found in RCM 201(b) necessary for court-martial jurisdiction is that each charge before the court-martial be referred to trial by competent authority.[23] The question of whether a charge has been properly referred to trial is often one of procedure. The procedural requirements for a proper referral are found in Chapter VI of the Rules for Courts-Martial.[24] Military appellate courts, however, have seemed to look past procedural and administrative deficiencies when determining if a case has a jurisdictional defect.[25] The CAAF appeared to continue that trend in *United States v. Williams*.[26]

In *Williams*, the only court-martial jurisdictional case decided by the CAAF during the 2001 term of court, the accused was charged with numerous offenses, including murder.[27] On 10 October 1995, the commanding officer of Fort Ritchie, Maryland, Brigadier General (BG) Essig, referred the case to a general court-martial convened by General Court-Martial Convening Order (GCMCO) Number 1. The accused was arraigned on 19 October, but did not enter his pleas. On 26 October BG Essig sent the case to Major General (MG) Foley, his immediate superior, with a note stating that the case had been previously referred to trial by general court-martial.

On 31 October BG Essig retired, and Lieutenant Colonel (LTC) Lefluer became the acting commander and the general court-martial convening authority for Fort Ritchie; however, MG Foley, the commander of the Military District of Washington, immediately withdrew LTC Lefluer's general court-martial convening authority and reserved it to his level. Based upon the recommendation of his staff judge advocate, MG Foley referred the case to a general court-martial convened by GCMCO Number 2, Headquarters, Military District of Washington.[28] At the time of the second referral, the court had already held several Article 39(a) sessions in the case under GCMCO Number 1. The second referral did not expressly withdraw the charges referred to court-martial by GCMCO Number 1.[29]

At trial and on appeal, the defense argued that the court-martial lacked jurisdiction because MG Foley did not properly withdraw the initially referred charges and re-refer the charges as required by law. No document indicated an express intent to withdraw the initial charges, and the trial counsel stated early in the proceedings that MG Foley "let stand" the initial referral and that an "amending order to GCMCO 1" was forthcoming.[30] The accused argued that the act of re-referral "cannot be read to imply an intent to withdraw" because withdrawal of charges and referral of charges are separate and distinct acts under RCM 601 and 604.[31]

The CAAF agreed that withdrawal of charges and referral of charges are separate acts; however, it stated these functions "are closely related, and it is reasonable to presume that re-referral of a charge by a proper convening authority implies a decision to withdraw that charge from a prior referral."[32] The CAAF also added, "Although it is preferable for a convening authority to indicate this intent expressly, RCM 604 does not require that the convening authority memorialize this decision in any particular form."[33] The court looked at all the circumstances of this case and held that MG Foley's intent to withdraw the initial charges was implicit in his re-referral of those charges.[34] The

22. *Thomas*, 56 M.J. at 530.

23. MCM, *supra* note 7, R.C.M. 201(b)(3).

24. *Id.* R.C.M. 601-604.

25. *See, e.g.*, United States v. Townes, 52 M.J. 275 (2000) (error was not jurisdictional when military judge failed to obtain on the record the accused's personal request for enlisted members); United States v. Turner, 47 M.J. 348 (1997) (procedural error but not jurisdictional error where the accused failed to personally make the request orally or in writing for a military judge alone); United States v. Pate, 54 M.J. 501 (Army Ct. Crim. App. 2000), *petition for grant of review denied*, 2001 CAAF LEXIS 216 (Mar. 5, 2001) (finding jurisdiction existed when pretrial agreement changing the charged offense was unsigned by convening authority). For a more thorough discussion of these cases, see Harder, *supra* note 2, at 3.

26. 55 M.J. 302 (2001).

27. *Id.* at 303.

28. *Id.* at 304. Major General Foley was provided with the same Article 34 pretrial advice that had been provided to BG Essig prior to the first referral. The charges were identical to the first referral, except for some minor pen-and-ink changes. The Staff Judge Advocate's recommendation described the action as a "re-referr[al]" of the charges. *Id.*

29. *Id.*

30. *Id.*

31. *Id.* Rule for Courts-Martial 601 provides the rules governing referral of charges, while RCM 604 provides the rules governing withdrawal and re-referral of charges. *See* MCM, *supra* note 7, R.C.M. 601, 604.

32. *Williams*, 55 M.J. at 304.

33. *Id*. at 305.

court concluded by stating that any "administrative deficiency in memorializing this process was insubstantial and did not deprive the court-martial of jurisdiction."[35]

Williams may appear to be of minor significance; however, the conclusion reached by the court is a continuation of what appears to be a "substance over form" analysis when it comes to satisfying the jurisdictional requirements of RCM 201. Several cases decided by the military appellate courts in recent years have emphasized the importance of placing the practical effect and substance of the rule above the technical adherence to the rule.[36] *Williams* is one more case that emphasizes the substance of the rule and minimizes the significance of administrative deficiencies. This trend has thus far been limited to issues arising out of the second and third elements of RCM 201(b)—a properly composed court and properly referred charges.[37]

Personal Jurisdiction

The fourth element of court-martial jurisdiction is that the "accused must be a person subject to court-martial jurisdiction."[38] This element of *in personam* jurisdiction requires that an accused occupy a status as a person subject to the Uniform Code of Military Justice (UCMJ) at the time of trial.[39] A list of those persons subject to the UCMJ is found in Article 2, UCMJ.[40] This past year the NMCCA decided *United States v. Morris*,[41] a case that focused on members of the Fleet Reserve and Fleet Marine Corps Reserve, one status of persons listed in Article 2(a) as being subject to military jurisdiction.[42]

On 31 January 1995, Staff Sergeant (SSG) Morris was transferred to the Fleet Marine Corps Reserve after completing twenty years of active service in the Marine Corps. Following his retirement,[43] the accused's sexual activity with his minor daughter was discovered, and an investigation was conducted. On 20 August 1997, the Commander, Marine Reserve Forces, submitted a request to the Secretary of the Navy to recall the accused for a period of active duty for trial by court-martial and service of any post-trial confinement. On 5 November 1997, the Secretary of the Navy approved that request, and the accused was ordered to report to Jacksonville, North Carolina (Camp Lejeune).[44] At a general court-martial, SSG Morris pled guilty to committing carnal knowledge, sodomy, indecent acts, and indecent liberties against his daughter.[45]

On appeal, SSG Morris argued that the court-martial lacked personal jurisdiction over him because he was discharged and retired from active duty. He argued that his DD Form 214[46] indicated no reserve obligation termination date, therefore, he could not be recalled for court-martial. He argued further that he was not on active duty at the time of his trial, and that RCM 204(b)(1) required him to be on active duty.[47]

The NMCCA quickly dismissed SSG Morris's lack of jurisdiction argument. It found the provisions of Article 2 and Arti-

34. *Id.* Some of the specific circumstances the court considered significant were that MG Foley had reserved the general court-martial convening authority to himself, the SJA specifically referred to the action as a re-referral, the SJA used the same pretrial advice used by BG Essig's SJA, and the trial counsel made it clear at trial that the government viewed the action by MG Foley as a withdrawal and re-referral (trial counsel apparently clarified his earlier comment that MG Foley "let stand" the initial referral). *Id.*

35. *Id.*

36. *See supra* note 25.

37. While it may be reassuring to know that the appellate courts draw a distinction between procedural error and jurisdictional error, it should be emphasized among practitioners that the best way to avoid these jurisdictional issues in the first place is to follow the procedural requirements of the Rules for Courts-Martial.

38. MCM, *supra* note 7, R.C.M. 201(b)(4).

39. *Id.* discussion.

40. *See* UCMJ art. 2(a) (2000).

41. 54 M.J. 898 (N-M. Ct. Crim. App. 2001).

42. UCMJ art. 2(a)(6).

43. Transfer from the Regular Marine Corps or Marine Corps Reserve to the Fleet Marine Corps Reserve is made at the member's request following twenty or more years of active service. Once transferred, the member begins receiving retainer pay. *See* 10 U.S.C. § 6330 (2000). Upon completion of thirty years service, the member is then transferred to the retired list of the Regular Marine Corps or the Marine Corps Reserve and begins receiving retired pay. *See id.* § 6331. For jurisdictional purposes, there is no distinction between retired pay and retainer pay. *See Morris*, 54 M.J. at 899.

44. *Morris*, 54 M.J. at 899.

45. *Id.* at 898.

46. U.S. Dep't of Defense, DD Form 214, Certificate of Release or Discharge From Active Duty (Nov. 1988).

47. *Morris*, 54 M.J. at 899.

cle 3 sufficiently established jurisdiction in this case.[48] Article 2(a)(6) specifically lists "[m]embers of the Fleet Reserve and Fleet Marine Corps Reserve" as persons subject to the UCMJ.[49] Article 3(a) provides that jurisdiction continues over persons who commit offenses while in a status subject to the UCMJ, even if their status later changes, so long as their new status is still one subject to the UCMJ.[50] In *Morris*, the accused was on active duty when he committed the charged acts and was a member of the Fleet Marine Corps Reserve when he was recalled to active duty for trial. Military jurisdiction existed over SSG Morris both as an active duty member and as a member of the Fleet Marine Corps Reserve.

The court could have finished its analysis of the jurisdiction issue at this point; however, it addressed the application of RCM 204(b)(1) to this case. Rule for Courts-Martial 204(b)(1) states that "[a] *member of a reserve component* must be on active duty prior to arraignment at a general or special court-martial."[51] The court concluded that RCM 204(b)(1) did not apply to retirees and members of the Fleet Reserve or the Fleet Marine Corps Reserve.[52]

First, the court questioned whether the Fleet Marine Corps Reserve is part of the *reserve component*. It reasoned that because retirees and members of the Fleet Reserve or Fleet Marine Corps Reserve are specifically listed in Article 2 apart from "members of a reserve component," that Congress must have intended to define them as separate groups.[53] As the court concluded, it would make little sense to separately list a group if that group was meant to be included in an already listed group.[54]

Second, the court looked at the Analysis of RCM 204(b)(1) and the fact that RCM 204(b)(1) was added in 1987 to implement recent amendments that had been made to Articles 2 and 3.[55] The amendments to Articles 2 and 3 addressed jurisdictional issues with regard to *reservists*. Because Congress did not amend the provisions in Article 2 concerning jurisdiction over retirees and members of the Fleet Reserve or Fleet Marine Corps Reserve, the court concluded that RCM 204 was not intended to apply to retirees and members of the Fleet Reserve or Fleet Marine Corps Reserve.[56]

As a final comment on the jurisdictional issue, the court addressed a regulatory concern that had not been raised by either party. In a footnote, the court stated "that secretarial instructions prohibit ordering a member of the Fleet Marine Corps Reserve to active duty solely for the purpose of exercising court-martial jurisdiction;"[57] however, the court found this a policy prohibition, and not related to jurisdiction.[58]

Although the court's additional analysis of personal jurisdiction in *Morris* was unnecessary, it is nonetheless of some significance. The court makes clear that the requirement of RCM 204(b)(1) to place a member of the reserve component on active duty before arraignment does not apply to retirees and members

48. *Id.* at 900.

49. UCMJ art. 2(a)(6) (2000).

50. *Id.* art. 3(a). Article 3(a) provides in part:

> [A] person who is in a status in which the person is subject to this chapter and who committed an offense against this chapter while formerly in a status in which the person was subject to this chapter is not relieved from amenability to the jurisdiction of this chapter for that offense by reason of a termination of that person's former status.

Id.

51. MCM, *supra* note 7, R.C.M. 204(b)(1) (emphasis added).

52. *Morris*, 54 M.J. at 901. The accused argued he was not on active duty at the time of his trial and, even though the service court found ample evidence to conclude to the contrary, the court still addressed the applicability of RCM 204 to retirees and members of the Fleet Reserve or Fleet Marine Corps Reserve. *Id*.

53. *Id.* Article 2(a)(4) subjects to the UCMJ "[r]etired members of a regular component of the armed forces who are entitled to pay." UCMJ art. 2(a)(4). Articles 2(a)(3) and 2(d) address jurisdiction over members of a "reserve component." *Id*. arts. 2(a)(3), (d). The court cited to *United States v. Hooper*, 26 C.M.R. 417 (C.M.A. 1958) (holding that retired members of a regular component are subject to military jurisdiction without the necessity of an order calling them to active duty), as its basis for this reasoning. *See Morris*, 59 M.J. at 901.

54. *Morris*, 59 M.J. at 901.

55. *See* MCM, *supra* note 7, app. 21, at A21-13.

56. *Morris*, 54 M.J. at 901. The court unsuccessfully looked to Title 10 of the United States Code for a clear definition of the term "reserve components." While it found a statutory provision listing the "Retired Reserve" as one of the "Elements of Reserve Components," it also found a statutory provision listing the Marine Corps Reserve, but not the Fleet Marine Corps Reserve, as a reserve component of the armed forces. *Id.* (citing 10 U.S.C. § 10154 and 10 U.S.C. § 10101, respectively).

57. *Id.* at 902 n.5 (citing to U.S. DEP'T OF NAVY, JAG INSTR. 5800.7C, MANUAL OF THE JUDGE ADVOCATE GENERAL § 0123a(1) (3 Oct. 2990) [hereinafter JAGMAN]).

58. *Id.* at 902. The court states that this prohibition "is not related to jurisdiction, as the same section states that such members may simply be ordered to appear. Apparently, the prohibition is a fiscal consideration. . . . This prohibition, however, is merely policy and was not promulgated for the benefit of an accused." *Id.*

of the Fleet Reserve or Fleet Marine Corps Reserve. This means that jurisdiction would have existed over SSG Morris even if the Commander, Marine Reserve Forces, had not requested permission from the Secretary of the Navy to "recall" the accused.[59]

This analysis implies that the involuntary recall procedures contained in Article 2(d) would also not apply to retirees and members of the Fleet Reserve or Fleet Marine Corps Reserve. If this is the case, it was unnecessary for the Commander, Reserve Marine Forces, to request Secretary of the Navy approval to recall the accused to active duty. While the secretarial instruction requires prior authorization of the Secretary of the Navy before a retiree or a member of the Fleet Marine Corps Reserve is *referred* to trial by court-martial, the instruction also specifically provides that such members may *not* be recalled to active duty solely for court-martial purposes. It states that, once referred to a court-martial, such members are "directed to appear."[60] Based upon the request submitted to the Secretary of the Navy in this case, it seems the accused was erroneously treated as a reservist. Although there may be reasons to recall a retiree to active duty, there did not appear to be any reason to do so in this case.[61] At least the NMCCA does not view recalling a retiree to active duty as a prerequisite to obtaining personal jurisdiction over the retiree.[62]

Subject-Matter Jurisdiction

The final element necessary for court-martial jurisdiction is that the offense be subject to court-martial jurisdiction.[63] This element is further enunciated in RCM 203, which provides, "To the extent permitted by the Constitution, courts-martial may try any offense under the code."[64] However, an aspect of subject-matter jurisdiction that is unique to the military is an *in personam* facet to the larger question of whether subject-matter jurisdiction exists. The Supreme Court addressed this issue in *Solorio v. United States*[65] in which it held that military jurisdiction depended on the status of the accused and not on the "service connection" of the offense charged.[66] Therefore, in determining whether subject-matter jurisdiction exists, it is necessary to look at the service member's status when the offense was committed. If the service member lacks military status at the time of the offense, then the military has no jurisdiction over that offense, regardless of whether the offense violates the UCMJ.[67]

With active duty personnel, the question of military status at the time of the offense is usually a conclusion that requires little analysis; however, with members of the reserve component, the question is much more significant. For a court-martial to have subject-matter jurisdiction over an offense committed by a reservist, the reservist must be on active duty or inactive duty training at the time the offense is committed.[68] The NMCCA discussed this well-settled rule in *United States v. Oliver*[69] this

59. In fact, the court concludes that "jurisdiction in this case was based upon the appellant's status as a member of the Fleet Marine Corps Reserve, and *not upon the fact that he had been recalled to active duty.*" *Id.* at 904 (emphasis added).

60. JAGMAN, *supra* note 57, § 0123a(1).

61. See *Morgan v. Mahoney*, 50 M.J. 633 (A.F. Ct. Crim. App. 1999) as an example of the necessity to recall a retiree to active duty to establish personal jurisdiction. In *Morgan*, the retiree was a member of the Retired Reserve, and as a member of the reserve component, had to be recalled to active duty pursuant to Article 2(d) before personal jurisdiction existed. *Id.* at 636 (construing UCMJ art. 2(d) (2000)). The distinction in *Morris* was the court determined that, as a member of the Fleet Marine Corps Reserve, SSG Morris was not a member of the Reserve Component.

62. Army regulation provides: "[I]f necessary to facilitate courts-martial action, retired soldiers may be ordered to active duty." U.S. DEP'T OF ARMY, REG. 27-10, LEGAL SERVICES: MILITARY JUSTICE para. 5-2b(3) (20 Aug. 1999). While this is not a jurisdictional requirement, there are still valid reasons why commanders will recall retired members to active duty for courts-martial. It is also worth noting that in the Army, HQDA approval must first be obtained before referring charges against a retiree; it is Army policy not to court-martial retirees unless extraordinary circumstances are present. *See id.*; *see also* United States v. Sloan, 35 M.J. 4 (C.M.A. 1992).

63. MCM, *supra* note 7, R.C.M. 201(b)(5).

64. *Id.* R.C.M. 203.

65. 483 U.S. 435 (1987).

66. *Id.* at 436. In *Solorio*, the Court expressly overruled *O'Callahan v. Parker*, 395 U.S. 258 (1969), and abandoned the requirement that the offense charged be "service-connected." *Id.*

67. The various categories of military status that are looked for at the time of the offense to establish subject-matter jurisdiction are found in Article 2, UCMJ. Because these are also the same categories used to determine personal jurisdiction (status at the time of trial), it is common to view this aspect of subject-matter jurisdiction as an issue of personal jurisdiction. *Solorio* and both the Discussion section and Analysis of RCM 203 make it clear that the question of military status at the time of the offense is one of subject-matter jurisdiction.

68. *See* UCMJ art. 2(a)(1), (3), 2(d). Active duty includes Active Duty (AD), Active Duty for Training (ADT), and Annual Training (AT). Inactive duty training (IDT) is typically the weekend drills conducted by reserve units.

69. 56 M.J. 695 (N-M. Ct. Crim. App. 2001).

past year, or at least it discussed the jurisdictional substance of the rule.

In *Oliver*, the accused, a member of the Marine Corps Reserve, reported to Camp Lejeune for a period of active duty. The period of active duty was to begin on 25 August 1997, and continue until 27 September 1997. On 25 August Oliver checked into the Bachelor Enlisted Quarters (BEQ). Oliver checked out of the BEQ on 7 September, and then checked back into the BEQ on 11 September, staying there until 29 September. On 29 September he filed a travel claim for his period of active duty and claimed $1888 for lodging expenses. Along with his claim, Oliver submitted a computer-generated hotel receipt indicating he stayed at a nearby hotel from 23 August until 11 September. The receipt contained several obvious alterations and raised the suspicions of the personnel at the disbursing office.[70] Following an investigation, Oliver was charged with and convicted of making a false claim, presenting a false claim, and using an altered lodging receipt in support of the claim.[71]

On appeal, Oliver argued lack of subject-matter jurisdiction. Oliver contended that his active duty ended on 27 September (28 September if one day of travel time is included) and it was not until 29 September that he made and submitted his travel claim and hotel receipt. He argued that he was not subject to the UCMJ at the time the alleged false claim was submitted.[72] Surprisingly, the NMCCA addressed the argument as a personal jurisdiction issue.[73] After determining that the government does not have an affirmative obligation to prove personal jurisdiction if the issue is not raised at trial, the court addressed the issue as raised on appeal.[74] The court noted that Oliver received medical treatment on 20 September, which resulted in Oliver being placed on medical hold on 28 September. Oliver was placed on light duty until December, at which time he was placed on a limited duty board status for six months. Thus, Oliver's active duty started on 25 August and continued, without interruption, through the date of arraignment and sentencing.[75]

As mentioned above, the accused must have been on active duty at the time the offense was committed for subject-matter jurisdiction to exist. In *Oliver*, the accused argued lack of subject-matter jurisdiction because he was not on active duty at the time he submitted his travel claim. The NMCCA erroneously addressed the lack of subject-matter jurisdiction as a personal jurisdiction issue. The court appears to misunderstand the personal aspect of subject-matter jurisdiction discussed previously.[76] If the accused was not on active duty at the time he violated the UCMJ, military jurisdiction over that offense would not exist. Obviously, if the accused's active duty status began on 25 August and continued past the date the accused submitted his travel claim (29 September), the question of subject-matter jurisdiction has been resolved—the accused was on active duty at the time he submitted his travel claim. So, while the NMCCA addressed the issue as one of personal jurisdiction, it correctly resolved the subject-matter jurisdiction issue raised by the accused. It is worth noting that the CAAF recently granted review in this case.[77]

Another service court case, an unpublished opinion, provides for a good comparison with *Oliver*. Factually similar, *United States v. Morse*[78] was decided by the Air Force Court of Criminal Appeals (AFCCA) in 2000.

Morse, a colonel in the Air Force Reserve, submitted various AF Forms 938[79] and DD Forms 1351-2[80] for active duty tours and inactive duty training between 15 October 1995 and 3 November 1996. On these forms, the accused swore that he traveled to and from Plano, Texas. Based upon these forms, the accused was charged with and found guilty of attempted larceny and filing false travel vouchers. At trial, the accused stipulated that he was serving on active duty or inactive duty for training when he signed the forms. On appeal, Morse argued

70. *Id*. at 698. On the receipt, the middle initial of the patron, the month of arrival, the date of departure, and the room rate had all been altered by hand. *Id.*

71. *Id.*

72. *Id*.

73. The court stated, "We view the appellant's initial reference to subject-matter jurisdiction as a confused allusion to the actual issue of personal jurisdiction that he ultimately addresses." *Id.* at 699.

74. Lack of jurisdiction may be raised for the first time on appeal. *See* MCM, *supra* note 7, R.C.M. 905(e).

75. *Oliver*, 56 M.J. at 699-700.

76. *See supra* note 67 and accompanying text.

77. United States v. Oliver, No. 02-0084/MC, 2002 CAAF LEXIS 181 (Feb. 22, 2002). The CAAF granted review on the following issue: "Whether, in a contested court-martial of a reservist, the government must prove sufficient facts to establish *subject-matter jurisdiction* over the alleged offense." *Id*. (emphasis added).

78. No. ACM 33566, 2000 CCA LEXIS 233 (A.F. Ct. Crim. App. Oct. 4, 2000), *petition for grant of review denied*, 2001 CAAF LEXIS 1021 (Aug. 24, 2001).

79. U.S. Dep't of Air Force, AF Form 938, Request and Authorization for Active Duty Training/Active Duty Tour (Oct. 1981).

80. U.S. Dep't of Defense, DD Form 1351-2, Travel Voucher and Subvoucher (Aug. 1997).

that the trial court lacked subject-matter jurisdiction because he signed the forms *after* he was released from active duty or inactive duty for training.[81] The AFCCA found ample evidence to conclude that the accused regularly signed the forms before he left the base; however, the court continued its analysis by stating, "[E]ven if we were to ignore the overwhelming evidence of subject-matter jurisdiction noted above, we would still find jurisdiction based upon the simple and undeniable fact that the appellant *signed these forms in his official capacity as a reserve officer in the United States Air Force*."[82]

Morse exhibits a substantial advance in subject-matter jurisdiction analysis. Past decisions have drawn clear lines in determining when subject-matter jurisdiction exists. If the accused is not on active duty when the offense was committed, then there is no subject-matter jurisdiction.[83] The AFCCA seems to expand these lines to potentially encompass acts that occur during time outside active duty or inactive duty training, for example, when the service member is engaged in "official duties" incident to active duty or inactive duty training, or when the service member is completing tasks assigned to him while he was subject to the UCMJ.[84]

How far these lines can be expanded remains to be seen. The AFCCA has certainly raised the question of where the lines are drawn. In *Oliver*, the NMCCA avoided the question by finding that the accused was on active duty at the time he submitted his travel voucher. On 24 August 2001, the CAAF denied a petition for grant of review in *Morse*, thereby also avoiding the question . . . for now.[85]

Post-Trial Relief Jurisdiction

The second part of this article reviews two cases that the CAAF decided during the last term of court. Both cases, decided 2 May 2001, deal with the issue of cruel and unusual punishment under Article 55, UCMJ, and the Eighth Amendment to the Constitution. Before discussing these cases, however, a short review of *United States v. Sanchez*,[86] decided by the CAAF on 30 August 2000, is necessary.

In *Sanchez*, the accused was convicted of larceny-related offenses and sentenced to one-year confinement at the Naval Consolidated Brig at Miramar, California. During her confinement, military guards and other inmates subjected Sanchez to verbal sexual harassment. Following her release from confinement, the accused claimed the harassment amounted to cruel and unusual punishment in violation of both the Eighth Amendment and Article 55.[87] The AFCCA affirmed the findings and sentence, holding that it was without jurisdiction to entertain the accused's claim for sentence relief because her claim was based upon "post-trial sexual harassment."[88]

Although the CAAF affirmed the findings and sentence, the majority opinion did not address the jurisdictional basis used by the lower appellate court in affirming the case. Instead, the majority opinion addressed the substantive issue raised by the accused.[89] Following a legal analysis of "cruel and unusual punishment" law, the CAAF held that there was no Article 55 or Eighth Amendment violation.[90]

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81. *Morse*, 2000 CCA LEXIS 233, at *2, 15. The accused also argued lack of personal jurisdiction, contending that he was not properly on active duty or involuntarily recalled to active duty pursuant to Articles 2(c) and 2(d). *Id*. at *14-15. For purposes of this discussion, however, only the subject-matter jurisdiction issue will be addressed.

82. *Id.* at *19 (emphasis added). The court further stated:

> It was part of his duty incident to these reserve tours or training to complete these forms with truthful information and that duty was not complete until the forms were signed, regardless of whether or not he completed travel pursuant to his orders. Therefore, it is immaterial if the appellant did not sign these forms until after completing his travel. He did so in a duty status.

Id.

83. *See Solorio*, 483 U.S. 435 (1987); United States v. Cline, 29 M.J. 83 (C.M.A. 1989) (finding subject-matter jurisdiction when accused was a reservist on active duty at the time of the offense); United States v. Chodara, 29 M.J. 943 (A.C.M.R. 1990) (setting aside findings where the government failed to establish that the accused used drugs while subject to the code).

84. It appears that the AFCCA is creating a sort of "service connection" test that applies to reservists. If a reservist commits an offense that is closely connected to the reservist's military service, then subject-matter jurisdiction would arguably attach even if the reservist is not on active duty or inactive duty training when committing the offense. Current law, however, does not support such a test.

85. *See* United States v. Morse, 2001 CAAF LEXIS 1021 (Aug. 24, 2001). The CAAF may have denied review because there was ample evidence to support the finding that Colonel Morse signed the forms before departing from active duty or inactive duty training. Whether the AFCCA's analysis is correct—that jurisdiction existed because the forms were signed in "his official capacity as a reserve officer"—remains to be seen.

86. 53 M.J. 393 (2000).

87. *Id.* at 394. The Eighth Amendment states, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. CONST. amend. VIII. Article 55 states in part, "Punishment by flogging, or by branding, marking, or tattooing on the body, or any other cruel or unusual punishment, may not be adjudged by a court-martial or inflicted upon any person subject to this chapter." UCMJ art. 55 (2000).

88. *Sanchez*, 53 M.J. at 397.

While the majority opinion never addressed the jurisdictional question, two judges felt the issue was important enough to warrant discussion. In a concurring opinion, Judge Gierke wrote, "By deciding the merits of the issue, this [c]ourt has *sub silentio* asserted its jurisdiction."[91] In distinguishing the case from *Clinton v. Goldsmith*,[92] he stated that *Sanchez* was in front of CAAF on *direct review* under Article 67 and did not involve the All Writs Act.[93] Similarly, Judge Sullivan viewed unlawful post-trial punishment as "a matter of law related to 'the review of specified sentences imposed by courts-martial' under Articles 66 and 67, UCMJ."[94] In his opinion, sexual harassment was not a lawful punishment under the UCMJ, was not adjudged at the accused's court-martial, and was "unquestionably a matter of codal concern."[95]

Although the majority opinion did not address the jurisdictional issue in *Sanchez*, the fact that it addressed the issue of post-trial cruel and unusual punishment was understood to imply it had jurisdiction to address such post-trial issues. At least one service court followed this implicit holding. The Army Court of Criminal Appeals (ACCA) decided a line of cases involving claims of post-trial cruel and unusual punishment in 2000. In each case, the government argued that the court lacked jurisdiction to consider the matter under Article 66, UCMJ, and *Goldsmith*; however, in each case the ACCA disagreed, holding it had jurisdiction on direct review to consider post-trial cruel and unusual punishment claims.[96]

If the implied holding in *Sanchez* was ever in question, the CAAF addressed it again this past year. In *United States v. White*,[97] the accused had been convicted by court-martial twice for cocaine use.[98] Following his first conviction, he was processed into the confinement facility at Lackland Air Force Base to begin serving his sentence to confinement. As part of the inprocessing, the accused was required to submit a urine sample for medical purposes. The urine sample tested positive for cocaine, and the accused was court-martialed a second time. In his clemency submission to the convening authority following his second conviction, the accused made numerous allegations about the conditions of his confinement.[99] After the convening authority approved the adjudged sentence, the accused asserted on appeal that the conditions of his confinement constituted cruel and unusual punishment. In an unpublished opinion, the AFCCA opined that it did not have jurisdiction to address the accused's complaints.[100]

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89. The granted issue was "[w]hether appellant was subjected to cruel and unusual punishment in violation of the Eighth Amendment and Article 55 of the UCMJ when guards at the military confinement facility repeatedly sexually harassed her." *Id.* at 394.

90. *Id*. at 395. The majority opinion states:

> While appellant endured inexcusable behavior during her confinement, it did not rise to the level of cruel and unusual punishment as contemplated by the Eighth Amendment and Article 55 of the UCMJ. We conclude that verbal sexual harassment at the level appellant suffered is insufficient to establish conduct amounting to cruel and unusual punishment. Further, the record does not establish the requisite state of mind for an Eighth Amendment violation.

Id.

91. *Id*. at 397. Apparently, the government position on appeal was that the appellate court lacked jurisdiction. Judge Gierke stated, "I write separately to address the question of jurisdiction, which the Government asserts is 'a matter of considerable debate.'" *Id.*

92. 526 U.S. 529 (1999). In *Goldsmith*, the Supreme Court found the CAAF lacked jurisdiction in an administrative matter involving the accused. The Court held that the military court did not have authority to "oversee all matters arguably related to military justice," but rather its jurisdiction was limited to the authority to act "only with respect to the findings and sentence as approved by the [court-martial's] convening authority and as affirmed or set aside as incorrect in law by the Court of Criminal Appeals." *Id.* at 534, 536.

93. 28 U.S.C. § 1651(a) (2000). The authority for appellate jurisdiction comes from one of two sources: direct review of cases pursuant to Articles 62, 66, 67, 67a, and 69, UCMJ, or collateral review of issues under authority of the All Writs Act. *See id*.; UCMJ arts. 62, 66-67, 67a, 69.

94. *Sanchez*, 53 M.J. at 397 (Sullivan, J., dissenting).

95. *Id*. at 398. Judge Sullivan cites to the following *Goldsmith* language as support: "It would presumably be an entirely different matter if a military authority attempted to alter a judgment by revising a court-martial finding and sentence to increase the punishment, contrary to specific provisions of the UCMJ . . . ." *Goldsmith*, 526 U.S. at 536.

96. *See* United States v. Faulkner, No. 9900432 (Army Ct. Crim. App. Dec. 21, 2000); United States v. Emminger, No. 9900428 (Army Ct. Crim. App. Dec. 15, 2000); United States v. Kinsch, 54 M.J. 641 (Army Ct. Crim. App. 2000) (holding that jurisdiction exists when the court-martial is not final and the accused on direct appeal requests relief for cruel and unusual punishment that was not part of the adjudged and approved sentence).

97. 54 M.J. 469 (2001).

98. *Id*. at 470. On 27 July 1998, he was convicted for using cocaine on or about 17 November 1997. On 24 November 1998, he was convicted for using cocaine between 13-28 July 1998. *Id.*

99. *Id*. The complaints by the accused included being yelled at by guards, excessively harassed and intimidated, deprived of sleep, threatened by the noncommissioned officer in charge not to talk to lawyers or chaplains, and having his personal property thrown all over the floor. *Id.*

On appeal, the CAAF stated, "We now expressly hold that we have jurisdiction under Article 67(c) to determine on direct appeal if the adjudged and approved sentence is being executed in a manner that offends the Eighth Amendment or Article 55."[101] The court limited its holding, however, by determining that it had authority on *direct appeal* to review claims of post-trial violations of Article 55 and the Eighth Amendment.[102] Once the court determined it had jurisdiction, it affirmed the case, finding that the accused's complaints did "not amount to either a constitutional or statutory violation in derogation of the Eighth Amendment or Article 55."[103]

In a second case, factually similar and decided at the same time as *White*, the CAAF reached a different outcome. In *United States v. Erby*,[104] the accused had been previously convicted at a general court-martial and sentenced to three years in confinement. After serving some of his confinement at the Naval Consolidated Brig at Miramar, California, he was transferred to the Dyess Air Force Base confinement facility in Texas, where he was court-martialed a second time. At his second court-martial, Erby was convicted of two specifications of larceny of government currency. On appeal to the AFCCA, the accused argued that the treatment he received while confined at Dyess Air Force Base amounted to cruel and unusual punishment in violation of Article 55 and the Eighth Amendment.[105] The AFCCA affirmed the case and, although it found the treatment alleged by the accused to be appalling, held that it lacked authority to review the accused's complaints because the alleged mistreatment "was not a part of the approved sentence of his court-martial, nor was it raised as a part of his clemency request to the convening authority."[106]

In *Erby*, the CAAF first looked at the jurisdictional issue and determined, as it did in *White*, that the AFCCA erred in concluding that it lacked jurisdiction. But, unlike *White*, the court set aside the AFCCA's decision and returned the case to the Judge Advocate General for remand. In finding that the court had jurisdiction on direct appeal to hear the issue, the court cited to its decision in *White*, but held that it was unable to resolve the issue of whether the accused had been subjected to cruel and unusual punishment. The CAAF, therefore, found that further fact-finding was necessary to determine (1) if the accused had exhausted his administrative remedies, (2) if the mistreatment rose to the level of cruel and unusual punishment, and (3) if any relief was appropriate.[107]

The AFCCA, without the assistance of the *Sanchez* opinion, incorrectly determined it was without jurisdiction to hear the complaints of post-trial violations in *Erby* and *White*. The ACCA, on the other hand, had the benefit of the *Sanchez* opinion when it decided *Kinsch* and its progeny, and correctly determined that it had jurisdiction. While the question still remains whether *Goldsmith* prevents the military appellate courts from reviewing a collateral attack on the conditions of confinement, it is at least clear that the courts have the authority on direct review to determine if post-trial confinement conditions violate the Eighth Amendment or Article 55.

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100. *See* United States v. White, No. ACM 33583, 1999 CCA LEXIS 220 (A.F. Ct. Crim. App. July 23, 1999).

101. *White*, 54 M.J. at 472.

102. *Id*. The court stated that because "this case is before us on direct appeal, we need not and do not determine the extent of our authority to review a collateral attack on the conditions of confinement." *Id.* The court also added, "We are not persuaded, however, by the Government's suggestion that jurisdiction is precluded by *Clinton v. Goldsmith*, 526 U.S. 529 (1999)." *Id*.

103. *Id.* at 475.

104. 54 M.J. 476 (2001).

105. *Id.* at 477. The accused alleged that he was continuously cursed at and threatened by the guards, forced to remove his clothing and stand at attention while the guards cursed at and ridiculed him, had his personal belongings thrown about, awakened at 5:00 a.m. and not allowed to sleep until 9:00 p.m., forced to perform personal services for the staff, forced to intimidate new prisoners, and put in fear that he would be raped. *Id.*

106. United States v. Erby, No. ACM 33282, 2000 CCA LEXIS 120 (A.F. Ct. Crim. App. Apr. 14, 2000). The AFFCA stated that had "the appellant raised the complaint during his clemency petition, it would be a part of the record of trial and would, therefore, be properly before us." *Id.*

107. *Erby*, 54 M.J. at 479.

Conclusion

Things appeared quiet on the jurisdictional front this past year. It will undoubtedly not be remembered as "the year of jurisdiction;" however, the jurisdictional landscape continues to change and the tremors from the service courts are an indication of the direction of that change. Although the aftershocks of *Goldsmith* are beginning to dissipate and appellate jurisdiction is again finding its legs, there remain jurisdictional questions of great importance. This year again holds the promise of exciting things to come. The implementing regulations for the MEJA are still pending and, while MEJA does not expand military jurisdiction, the regulations will nonetheless leave their mark on the way we do business overseas.

Of a more direct concern is the question of the limits of reserve jurisdiction. The CAAF denied review in *Morse*, but has granted review in *Oliver*. Unfortunately, the issue granted for review in *Oliver* will not likely allow the CAAF to address the big questions: Are we entering an era of "service connection" for offenses committed by reservists? If so, can we expand the limits of reserve jurisdiction without legislative change to support the expansion? If the CAAF is to take on this tough jurisdictional issue, it may have to wait until a more opportune case presents itself. While the CAAF successfully avoided the issue of reserve jurisdiction last year, it is an issue that must eventually be addressed. As reserve units continue to become a larger part of our total force, the reserve jurisdictional issues become more significant and deserve precise answers. These answers will undoubtedly create some noise on the jurisdictional front.

New Developments on the Urinalysis Front: A *Green* Light in Naked Urinalysis Prosecutions?[1]

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Introduction

In the world of military drug testing, the importance of last year cannot be measured by the number of urinalysis cases decided by military appellate courts. Although there were only a handful of significant urinalysis cases, the decision of the Court of Appeals for the Armed Forces (CAAF) to "give fresh attention . . . to the applicable principles governing litigation of urinalysis cases" in *United States v. Green*[2] was front-page news. With *Green*, the CAAF put to rest most of the confusion generated by the court's decision in *United States v. Campbell*.[3] Despite the considerable amount of criticism of *Campbell* and the court's apparent "about face" in *Green*, there is a silver lining.[4] In all services, the twin *Campbell* opinions caused military justice practitioners and experts in forensic toxicology to take a hard look at how they were handling drug cases.

To put the significance of *Green* in perspective, a brief look at *Campbell I* & *II* is necessary. Although several good resources are available, Judge Sullivan's concurring opinion in *Green* provides the most current and concise treatment of the twin *Campbell* opinions.[5] Accordingly, practitioners are encouraged to read his summary.

Campbell I & II (Briefly)

> *[T]his standard . . . does not establish new law.*[6]
>
> *If* Campbell *does not establish new law, I would be forced to conclude that the many trial and appellate defense counsel who practiced before me were incompetent—for none of them ever raised the issue.*[7]

Private First Class (PFC) Christopher W. Campbell, U.S. Army, was charged with wrongful use of lysergic acid diethylamide (LSD).[8] The only evidence of wrongful use of LSD was the report of his urinalysis test results.[9] At trial, the defense moved to exclude the report on grounds that the novel testing procedure used by the government "did not meet the standards of reliability required by [Military Rule of Evidence] 702, and relevant case law."[10] After experts for both sides testified, the military judge ruled against the defense. Subsequently, Campbell was convicted and sentenced, and his conviction was affirmed by the Army Court of Criminal Appeals. The CAAF granted review on Campbell's petition based on the reliability

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1. Practitioners have used "naked" in the context of urinalysis prosecutions to identify drug cases in which "the only evidence of drug use is the scientific laboratory report." Major Charlie Johnson-Wright, *Put Some Clothes on that Naked Urinalysis Case*, THE REPORTER, Sept. 2001, at 29.

2. 55 M.J. 76, 80 (2001).

3. 50 M.J. 154 (1999) (*Campbell I*), *supplemented on reconsideration*, 52 M.J. 386 (2000) (*Campbell II*). In Judge Sullivan's concurring opinion in *Green*, he began, "In Belfast, during the height of the 'troubles' (the seemingly never-ending struggle between the Protestants and the Catholics in Northern Ireland), there was a popular saying: *Anyone who isn't confused here really doesn't understand what is going on.*" *Green*, 55 M.J. at 81 (emphasis added).

4. The opinion was more than just an "about face" or a 180° turnaround. In the spirit of the XIX Olympic Winter Games, the decision was more like Kelly Clark's "McTwist 540" (an inverted aerial consisting of a forward flip with a 540° twist performed by Clark during her gold-medal run in the women's halfpipe snowboard competition on 10 February 2002). Using simple math, 540° = 360° + 180°. The full explanation of why *Green* is more than an about face is discussed below in the section on judicial notice.

5. *See Green*, 55 M.J. at 81-85; *see also* Lieutenant Commander David A. Berger & Captain John E. Deaton, Campbell *and Its Progeny: The Death of the Urinalysis Case*, 47 NAVAL L. REV. 1 (2000); Major Walter M. Hudson & Major Patricia A. Ham, United States v. Campbell*: A Major Change for Urinalysis Prosecutions?*, ARMY LAW., May 2000, at 38.

6. *Campbell I*, 50 M.J. at 161 n.2 (1999).

7. United States v. Phillips, 53 M.J. 758, 764 (A.F. Ct. Crim. App. 2000) (Young, C.J., concurring) (concluding that the counsel were not incompetent because no previous case had ever "required the prosecution to establish the reasonable likelihood that the accused experienced the physical and psychological effects of the drug").

8. *Campbell I*, 50 M.J. at 155.

9. *Id*. at 156.

of the government's novel testing procedure and related additional issues.[11]

As to legal sufficiency, the CAAF held that the government failed at trial to present any evidence that "would reasonably exclude the possibility of a false positive and would indicate a reasonable likelihood that at some point a person would have experienced the physical and psychological effects of the drug."[12] After the government successfully petitioned for reconsideration, the CAAF essentially reiterated its previous holding, but added that "[i]t is sufficient if the expert testimony reasonably supports the [permissive] inference with respect to human beings as a class [as opposed to a particular individual accused]."[13]

The overwhelming consensus in the military justice community was that *Campbell* established new law.[14] *Campbell* literally transformed the landscape upon which counsel tried urinalysis cases. The decision had predictable results: considerable confusion and uncertainty.[15] Apparently recognizing it had created a monster, the CAAF filled the first two slots of the court's docket for the 2001 term with cases potentially affected by *Campbell*.[16] Although *Campbell* may be the ugliest case ever decided by the court, so what?[17] In retrospect, the significant amount of attention and critical thinking generated by *Campbell* led to a better understanding of a very important area of military law. In its relatively short (and controversial) life, *Campbell* caused many practitioners to "search for the truth" more vigorously before trial and, more importantly, in the crucible of the courtroom.

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10. *Id*. (citations omitted). The government used a civilian laboratory to conduct the confirmatory testing on Campbell's urine sample. According to the government's expert, the civilian lab was the only one in the country using the gas chromatography tandem mass spectrometry testing methodology. *Id*.

11. *Id*. at 154-55.

12. *Id*. at 161. In full, the court said that the government cannot rely on the permissive inference of wrongfulness in naked urinalysis cases unless the government presents expert testimony showing:

> (1) that the "metabolite" is "not naturally produced by the body" or any substance other than the drug in question;
> (2) that the cutoff level and reported concentration are high enough to reasonably discount the possibility of unknowing ingestion and to indicate a reasonable likelihood that the user at some time would have "experienced the physical and psychological effects of the drug;" and,
> (3) that the testing methodology reliably detected the presence and reliably quantified the concentration of the drug or metabolite in the sample.

Id. at 160 (citations omitted).

13. *Campbell II*, 52 M.J. 386, 389 (2001). In addition, the court noted that "[i]f the test results, standing alone, do not provide a rational basis for inferring knowing use, then the prosecution must produce *other* direct or circumstantial evidence of knowing use in order to meet its burden of proof." *Id*. at 388 (emphasis added).

14. *See Campbell I*, 50 M.J. at 162-63 (Sullivan, J., dissenting) (referring to the "new rule" established by the case and the "new requirement" added by the majority); *Campbell II*, 52 M.J. at 389-90 (Sullivan, J., dissenting) (disagreeing with the "majority's creation of a new requirement in urinalysis cases" and arguing that the requirement is actually contrary to the court's decision in *United States v. Harper*, 22 M.J. 157, 163-64 (C.M.A. 1986), and subsequent cases from the court); United States v. Harris, 54 M.J. 749, 754 n.2 (N-M. Ct. Crim. App. 2001) (commenting that the "state of the law as understood by virtually all who practiced military law" before *Campbell* was different than the law as characterized by the majority in *Campbell*); United States v. Phillips, 53 M.J. 758, 764 (A.F. Ct. Crim. App. 2000) (Young, C.J., concurring) (criticizing Judge Effron's statement that *Campbell* was not new law); United States v. Barnes, 53 M.J. 624, 628 n.1 (N-M. Ct. Crim. App. 2000) (Anderson, J., *dubitante*) (referring to *Campbell* as appearing to be "a major shift in the treatment of urinalysis cases"); Berger & Deaton, *supra* note 5, at 60 (concluding that *Campbell* is new law and that the "traditional urinalysis case is dead"); Hudson & Ham, *supra* note 5, at 41 (commenting on the considerable confusion caused by *Campbell* and pointing out that Judge Effron's characterization of the decision as "well established case law" is not supported by precedent).

15. Specifically, the second prong of the *Campbell* standard caused nearly all of the uproar:

> *Campbell's* second prong requiring the Government to prove that the accused experienced the effects of the drug is absolutely irrelevant to the guilt or innocence of an accused charged with wrongful drug use. If a member of the armed forces intentionally and knowingly uses cocaine, but for whatever reason, experiences no effects, he is still guilty of the offense. Likewise, if a service member's drink is spiked with cocaine and he in fact does feel the effects of the drug, he is still not guilty of the offense. The CAAF's premise in *Campbell* that suggests a person who experiences the effects of the drug is more likely to be guilty makes no sense. Nor does it help discount unknowing ingestion. Under the CAAF's rationale, Article 112a criminalizes the "high" and not the wrongful use. Their position actually rewards the offender because he was unsuccessful in achieving his ultimate goal—enjoying the fruits of his criminal misconduct.

Berger & Deaton, *supra* note 5, at 56-57. Decisions from the Navy-Marine Corps Court of Criminal Appeals mainly evidenced this confusion and uncertainty. *See, e.g.*, United States v. Stark, No. 9901146 (N.M. Ct. Crim. App. Feb. 13, 2001) (unpublished) (Price, J., concurring) (commenting on the "logical weaknesses" of the *Campbell* opinions and that they raise "serious questions concerning the law of urinalysis in the military"); *see also* Hudson & Ham, *supra* note 5, at 38 (commenting that *Campbell* has "generated a tremendous number of questions and a fair amount of controversy").

16. *See* U.S. Court of Appeals for the Armed Forces, *Scheduled Hearings* (Oct. 2000) (listing United States v. Barnes, No. 00-5005/MC (2001), and United States v. Green, No. 00-0268/MC (2001), as the first scheduled hearings for the 2001 term of the CAAF), *at* http://www.armfor.uscourts.gov/calendar.htm.

17. Paraphrasing New York Yankees catcher Yogi Berra's famous quote, "So I'm ugly. So what? I never saw anyone hit with his face." BERT SUGAR, THE BOOK OF SPORTS QUOTES (1979), *reprinted in* JAMES B. SIMPSON'S CONTEMPORARY QUOTATIONS (1988).

United States v. Green: The Facts and Holding

Sergeant (Sgt.) Nolan P. Green, U.S. Marine Corps, was charged with a single specification of unauthorized absence and two specifications of wrongful use of cocaine.[18] Unlike PFC Campbell, Sgt. Green did not move to exclude the report of his positive urinalysis result or expert testimony explaining the report.[19] More importantly, the government used standard screening and confirmatory testing procedures to analyze Green's urine sample. The only concern of the government's case regarding the three-part test announced in *Campbell* was that Green's sample had tested at a relatively low level, 213 nanograms per millileter (ng/ml).[20] Sergeant Green was convicted of all charges and specifications and sentenced to sixty-eight days' confinement, reduction to E-1, and a bad-conduct discharge.[21]

On appeal, the Navy-Marine Corps Court of Appeals dismissed one of the findings of guilty to wrongful use of cocaine and reassessed Green's sentence.[22] The CAAF affirmed, holding that the evidence was "sufficient to support the permissive inference of knowing, wrongful use."[23] *Green* is important because it clarifies most of the confusion caused by *Campbell I* & *II*.

In *Green*, the CAAF effectively dissipated *Campbell*'s thick fog by placing the decision on the reliability and relevance of expert testimony squarely where it belongs—with the military judge as gatekeeper.[24] In addition, the court provided practitioners with a flexible standard for the admissibility of urinalysis results through expert testimony, emphasizing that this standard or approach is not exclusive or mandatory.[25] This new standard replaces the three-part test in *Campbell*. Finally, *Green* emphasizes the importance of trial defense counsel to preserve questions of reliability concerning government scientific evidence. To preserve the matter for appellate review, defense counsel must move to exclude or, at the very least, object to the admission of urinalysis test results and expert testimony which supports the results. Absent error, failure of defense counsel to object to the admissibility of the test results or expert testimony at trial will result in forfeiture of the issue on appeal.[26]

Judicial Notice: The "McTwist 540"[27]

As briefly mentioned earlier, the CAAF went well beyond just an "about face" in *Green*. The court's decision in *Campbell* effectively prevented the government from ever presenting sufficient expert testimony to draw the permissive inference of knowledge in a naked urinalysis case. In other words, the government could no longer prosecute naked urinalysis cases following *Campbell*.

In *Green*, the majority wiped out the three-prong *Campbell* requirement and then took one big step in the opposite direction by commenting that, in some cases, "it may be appropriate to take judicial notice under [Military Rule of Evidence] 201 without further litigation."[28] Unfortunately for practitioners, the

18. United States v. Green, 55 M.J. 76 (2001).

19. *Id*. at 81.

20. *Id*. at 78 (the cutoff level for cocaine metabolite during confirmatory testing is 100 ng/ml). This low level is significant because, considering the current state of forensic toxicology, no expert would be able to opine whether an average person would have felt the effects of this particular drug at 213 ng/ml absent more information regarding the circumstances of Sgt. Green's cocaine use. *See* Berger & Deaton, *supra* note 5, at 29-34, 57.

21. *Green*, 55 M.J. at 77.

22. *Id*. at 77-78. The dismissal apparently was unrelated to any *Campbell* issues. One of the three issues granted by the CAAF for review was whether the lower court erred by ignoring *Campbell*. *Id.* at 78 n.2. According to Judge Sullivan, concurring, he believed the lower court "effectively ignored the majority decision in *Campbell I* on the basis that a motion for reconsideration was pending and affirmed this conviction using the cases cited in [his] dissent in *Campbell I*." *Id*. at 82.

23. *Id*. at 81.

24. *Id*. at 80. The court stated:

> The military judge, as gatekeeper, may determine, in "appropriate circumstances" that the test results, as explained by the expert testimony, permit consideration of the permissive inference that presence of the controlled substance demonstrates knowledge and wrongful use. In making this determination, the military judge may consider factors such as whether the evidence reasonably discounts the likelihood of unknowing ingestion, or that a human being at some time would have experienced the physical and psychological effects of the drug, but these factors are not mandatory.

Id. (citations omitted).

25. *See id*. The major change is to the second prong of *Campbell*. The new standard gives the military judge "discretion to determine [admissibility] by considering whether . . . (2) the permissive inference of knowing use is appropriate in light of the cutoff level, the reported concentration, and other appropriate factors." *Id*. Compare this with the second prong in *Campbell*, *supra* note 12.

26. *Green*, 55 M.J. at 81.

27. *See supra* note 4.

court did not elaborate upon *when* it would be appropriate to take judicial notice. Trial counsel would be wise to consider the court's comment with the understanding that expert testimony remains a necessary component in all urinalysis "use" cases. For the government to get the permissive inference, trial counsel still must establish the significance of a particular metabolite concentration level in all contested urinalysis cases. Establishing the reliability and relevance of novel or proven testing procedures is not enough, with or without judicial notice.[29] At the very least, judicial notice will only satisfy the first and third prongs of the *Green* standard.[30] Because no two urinalysis cases are alike, a military judge cannot take judicial notice of case-specific facts, particularly when one of the facts is the accused's reported metabolite concentration.

Judge Gierke's Dissent

Finally, Judge Gierke, dissenting, argued that the "majority has offended the Due Process Clause of the Constitution, transformed Article 112a into an absolute-liability offense, and modified the test for admissibility of scientific evidence."[31] He made a very compelling argument that application of the permissive inference of knowledge in naked urinalysis cases violates a core principle of our justice system—the presumption of innocence. Judge Gierke contended that "[t]he majority opinion permits the trier of fact to infer drug use from the presence of the metabolite in the body, and then to use the same evidence to infer knowing use, without any other evidence from which knowing use may be inferred."[32] Supporting legal precedent provides considerable merit to Judge Gierke's argument.[33] In essence, allowing the trier of fact in *Green* to rely on the permissive inference without any other direct or circumstantial evidence of knowledge circumvents the requirement to prove every element beyond a reasonable doubt. The only fact that the government had to prove was that Sgt. Green's urine sample contained cocaine metabolite.[34]

On a side note, Judge Gierke also considered it "significant that the Government has failed to present any evidence to support its argument that this [the three-prong standard in *Campbell*] is an impossible evidentiary burden."[35] In fact, substantial evidence indicates that no forensic toxicologist could satisfy either part of the second prong of the standard, at least at low reported concentration levels.[36]

28. *Green*, 55 M.J. at 81. The court's comment is limited at least to cases that do not involve "a novel scientific procedure." *Id*.

29. In *United States v. Phillips*, Chief Judge Young advocated taking judicial notice of the reliability of testing procedures without expert testimony. 53 M.J. 758, 767 (A.F. Ct. Crim. App. 2000); *see also* Berger & Deaton, *supra* note 5, at 22-23 (discussing Chief Judge Young's concurring opinion in *Phillips* and tacitly approving of his suggestion that judicial notice can and should be used to establish the foundation for the permissive inference in urinalysis cases).

30. *Campbell*'s three-pronged test appears *supra* note 12.

31. *Green*, 55 M.J. at 85.

32. *Id.* at 86.

33. *See* EDWARD J. IMWINKELRIED, PAUL C. GIANNELLI, FRANCIS A. GILLIGAN & FREDRIC I. LEDERER, COURTROOM CRIMINAL EVIDENCE § 2920, at 1109 (3d ed. 1998). The treatise states that "[t]he foundational fact must prove the inferred fact's existence beyond a reasonable doubt only if the inference is the only possible basis in the record for a guilty finding in the case." *Id*. (citing Ulster County Court v. Allen, 442 U.S. 140, 158 (1979)). *See also* Barnes v. United States, 412 U.S. 837, 840 (1973) (holding that permissive inference instruction comported with due process in that it allowed the jury to infer possession by petitioner of stolen mail after they found predicate facts beyond a reasonable doubt).

34. A possible solution would be to add language in Article 112(a), UCMJ, that would direct the military judge to allow the permissive inference in naked urinalysis cases only after finding beyond a reasonable doubt that the particular metabolite was present in the accused's urine sample. Modifying the current permissive inference instruction would provide an additional safeguard. As modified (for the cocaine metabolite), the instruction would read, in part:

> Knowledge by the accused of the presence of the substance and knowledge of its contraband nature may be inferred from the surrounding circumstances. You may infer from the presence of the metabolite for cocaine in the accused's urine that the accused knew he used cocaine. *In order for you to infer the accused knew he used cocaine, you must find beyond a reasonable doubt that the metabolite for cocaine was present in the accused's urine.* However, the drawing of any inference is not required.

U.S. DEP'T OF THE ARMY, PAM. 27-9, LEGAL SERVICES: MILITARY JUDGES' BENCHBOOK para. 3-37-2.d. (1 Apr. 2001) (modifying language italicized). The additional language in UCMJ art. 112(a) and this instruction, as modified, would satisfy *Allen* and conform with the instruction used in *Barnes*, discussed *supra* note 33.

35. *Green*, 55 M.J. at 87.

36. *See* Berger & Deaton, *supra* note 5, at 29-34. In addition, the author participated in the Department of Defense Forensic Toxicology Drug Testing Conference in San Antonio, Texas, during the week of 11 June 2001. Judge advocates and forensic toxicologists from several services attended the conference which was, in part, held to evaluate the current state of forensic toxicology in light of the CAAF's holding in *Campbell I* & *II*. Ironically, the CAAF published *Green* on the first day of the conference, 11 June 2001 (a copy of the decision was not available until the next day). During a session with all participants in attendance, the consensus among forensic toxicologists was that, considering the current state of the science, the second prong of *Campbell* could not be satisfied, at least for low reported concentration levels (for example, less than 200 ng/ml for THC and 1000 ng/ml for BE, the metabolites for marijuana and cocaine, respectively). *See also* United States v. Barnes, 53 M.J. 624, 629 (N-M. Ct. Crim. App. 2000) (Anderson, J., *dubitante*) (concluding that the cutoff level requirement in *Campbell* cannot be satisfied and that the metabolite concentration level in all positive urine samples will have to be "very high" to satisfy the remaining portion of the second prong).

The Results (So Far): Cases Applying *Green*

Immediately after deciding *Green*, the CAAF reviewed a large number of service court cases. The CAAF set aside most of the cases from the Navy-Marine Corps Court of Criminal Appeals (NMCCA),[37] while the court affirmed a handful of cases from the Air Force Court of Criminal Appeals (AFCCA).[38] These results are significant. To illustrate, this section compares two published opinions from the AFCCA with two from the NMCCA.

In all four service court cases, the central issue was the legal sufficiency of evidence presented at trial in light of the three-prong standard in *Campbell*. In each case, the government expert did not satisfy the second prong of *Campbell*. In the two Air Force cases, *United States v. Phillips*[39] and *United States v. Tanner*,[40] the service court affirmed primarily because the government presented "other" circumstantial evidence of knowledge at trial. In the two Navy-Marine Corps cases, *United States v. Barnes*[41] and *United States v. Harris*,[42] the service court set aside the findings and sentences despite considerable "other" circumstantial and direct evidence of knowledge. Upon review, the CAAF affirmed *Phillips* and *Tanner*, but set aside *Barnes* and *Harris* and returned them to The Judge Advocate General of the Navy for remand to the NMCCA.[43] The CAAF based its summary disposition of all four cases on *Green*.

So what is the lesson to learn from these cases? In short, trial counsel need to "put some clothes on [their] naked urinalysis case[s]."[44] Although *Green* has significantly reduced the possibility that an appellate court will set aside the average naked urinalysis case, trial counsel should avoid walking into court without some "other" evidence of knowledge (besides just expert testimony and the permissive inference). The solution for trial counsel is to turn over every rock as soon as possible.[45] The same advice applies to trial defense counsel.

Finally, what have the service courts said so far about *Green*? At least from the AFCCA, the answer is that the CAAF accomplished its goal in *Green*—the *Campbell* confusion has cleared. In four recent unpublished opinions from the AFCCA, the court swiftly disposed of defense claims of factual and legal insufficiency, with relatively little ink.[46] In each case the court summarily dismissed all *Campbell*-related claims from the defense, citing *Green* as authority. At least so far, it seems that the fog has lifted.

Conclusion

The CAAF signaled a *Green* light in naked urinalysis prosecutions on 11 June 2001. Although Sgt. Green forfeited any objection to the test results or expert testimony on appeal, the CAAF used his case to clear up the confusion caused by the court's twin *Campbell* opinions. The CAAF's intent is shown by the court's disposition of the four published service court cases and the AFCCA's most recent urinalysis cases, discussed in the last section. What remains from *Campbell* is the require-

37. *See, e.g.*, United States v. Barnes, 53 M.J. 624 (N-M. Ct. Crim. App. 2000), *set aside by, remanded by* 55 M.J. 236 (2001); United States v. Harris, 54 M.J. 749 (N-M. Ct. Crim. App. 2001) *set aside by, remanded by* 55 M.J. 358 (2001).

38. *See, e.g.*, United States v. Phillips, 53 M.J. 758 (A.F. Ct. Crim. App. 2000), *aff'd*, 55 M.J. 242 (2001); United States v. Tanner, 53 M.J. 778 (A.F. Ct. Crim. App. 2000), *aff'd*, 55 M.J. 357 (2001). The CAAF also affirmed one ACCA case. *See* United States v. Pugh, No. 9600811 (Army Ct. Crim. App. Dec. 8, 1998) (unpublished), *aff'd*, 55 M.J. 357 (2001).

39. 53 M.J. at 758. The other evidence was the appellant's failure to report for his urinalysis, the appellant had to be ordered a second time to provide a sample, another instance of drug use that was charged, and rebuttal testimony from a government expert about traces of drug metabolite found in a hair sample from the appellant. *Id*. at 762-63.

40. 53 M.J. at 778. The government presented other evidence of knowledge consisting of a previous admission of the appellant that she used methamphetamine to lose weight and evidence describing the unusual behavior of the appellant at the testing location. *Id.* at 783.

41. 53 M.J. at 624. In the government's rebuttal, other evidence of knowledge consisted of the appellant being present four or five times with his neighbor while his neighbor smoked marijuana, the appellant's failure to leave during these occasions while his neighbor smoked marijuana, and the appellant's requests for marijuana from his neighbor before and after his urinalysis test. *Id*. at 627.

42. 54 M.J. at 749. The other evidence was the appellant's roommate's testimony that he smoked marijuana with the appellant, testimony from other witnesses that they smelled marijuana smoke in the appellant's room, and the presence of the appellant in the room just after the marijuana smoke was detected. *Id.* at 753.

43. *Phillips*, 55 M.J. at 242; *Tanner*, 55 M.J. at 357; *Barnes*, 55 M.J. at 236; *Harris*, 55 M.J. at 358. Following the court's decision in *Green*, appellants petitioned for writs of certiorari in a number of cases. The Supreme Court denied all of these petitions, including one from Sgt. Green. *See, e.g.*, Green v. United States, 122 S. Ct. 469 (2001).

44. Johnson-Wright, *supra* note 1. Major Johnson-Wright's article is an excellent primer on how to avoid taking naked urinalysis cases into court. A copy of her article is a must read for all trial practitioners.

45. *Id*. at 31.

46. *See* United States v. Calef, No. ACM 34163, 2002 CCA LEXIS 16 (A.F. Ct. Crim. App. Jan. 25, 2002) (unpublished); United States v. Stallens, No. ACM 34203, 2002 CCA LEXIS 27 (A.F. Ct. Crim. App. Jan. 15, 2002) (unpublished); United States v. Mahoney, No. ACM 34209, 2001 CCA LEXIS 352 (A.F. Ct. Crim. App. Dec. 13, 2001) (unpublished); United States v. Dawson, No. ACM 33757, 2001 CCA LEXIS 344 (A.F. Ct. Crim. App. Dec. 7, 2001) (unpublished).

ment to subject novel testing procedures to a higher reliability standard; however, this new standard is flexible and provides military judges with broad discretion to handle relevance and reliability questions concerning the admission of scientific evidence in urinalysis cases. In the very near future, the true effectiveness of this standard will be tested in a courtroom.

In addition to changes affecting naked urinalysis cases, counsel should heed developments in other facets of drug-use prosecutions. Beginning this year, all services will begin using new testing procedures for ecstasy and LSD.[47] Practitioners should also know that the U.S. Drug Enforcement Agency published an interim ruling in the *Federal Register* stating that "under the Controlled Substances Act (CSA) and DEA regulations, any product that contains any amount of [THC] is a schedule I controlled substance."[48] Finally, Army practitioners need to review changes to *Army Regulation 600-85*.[49] The revised regulation contains some major changes in the text and, listed in appendix E, procedural changes at the unit drug collection level. For example, one significant change in the text of the regulation is the prohibition of "the ingestion of hemp seed oil or products made with hemp seed oil."[50]

47. *See* Christopher Munsey, *More Sensitive Drug Test Planned to Screen Sailors for Ecstasy Use*, NAVY TIMES, Dec. 24, 2001, at 13; Major Margaret B. Baines, New Developments in Drug Testing (unpublished manuscript) (on file with author).

48. Interpretation and Clarification of Listing of "Tetrahydrocannobinols" in Schedule I; Exemption From Control of Certain Industrial Products and Materials Derived From the Cannabis Plant; Final Rules and Proposed Rule, 66 Fed. Reg. 51,530 (Oct. 9, 2001) (to be codified at 21 C.F.R. pt. 1308). This ruling potentially impacts the use of the hemp-product defense. As of the date this article was submitted for publication, however, there was a stay on this ruling until 18 March 2002 according to the Department of Justice Web site, http://http:www.usdoj.gov/dea.

49. U.S. DEP'T OF THE ARMY, REG. 600-85, ARMY SUBSTANCE ABUSE PROGRAM (ASAP) (1 Oct. 2001).

50. *Id*. para. 1-35d. The paragraph adds, "Failure to comply with the prohibition . . . is a violation of Article 92, UCMJ." *Id*.

New Developments in Pretrial Procedures: Evolution or Revolution?

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Introduction

This article analyzes recent developments in the law relating to court-martial personnel, pleas and pretrial agreements, and voir dire and challenges. As in past installments of this annual review, most of the cases reviewed are from the Court of Appeals for the Armed Forces (CAAF), with a lesser focus on the service courts. Where possible, the article discusses the practical implications of recent developments for military justice practitioners trying cases in the field. This article attempts to look over the horizon and ask if we are experiencing a gradual, case-law-driven evolution or the beginning of a legislative, Cox Commission-inspired revolution in military pretrial practice.

Arguably, this year's most notable developments in court-martial practice came not from the courts, but from discussion and legislation fueled by the controversial Cox Commission Report.[1] The National Institute of Military Justice (NIMJ), a private non-profit organization, sponsored the Report to commemorate the 50th anniversary of the Uniform Code of Military Justice (UCMJ).[2] Walter T. Cox III,[3] Senior Judge of the Court of Appeal for the Armed Forces, chaired the Commission. The armed services did not participate in the proceedings.[4]

The Commission recommended action in four broad areas of court-martial practice and procedure. Three of the Commission's four recommendations pertain to pretrial practice. The fourth recommendation addresses the rape and sodomy provisions of the UCMJ and will not be discussed in this article.[5] The Commission made the following three recommendations regarding pretrial practice:

> 1. Modify the pretrial role of the convening authority in both selecting court-martial members and making other pre-trial legal decisions that best rest within the purview of a sitting military judge.
>
> 2. Increase the independence, availability, and responsibilities of military judges [including the creation of standing circuits staffed by tenured judges who serve fixed terms].
>
> 3. Implement additional protections in death penalty cases [including trial by twelve member panels and supplying counsel "qualified" to try capital cases].[6]

Beyond these three broad recommendations, the commissioners raised additional concerns. With regard to pretrial processing of courts-martial, the Report specifically addresses the proper role of staff judge advocates after preferral.[7]

Judge Cox sent the completed Report to the NIMJ on 25 May 2001.[8] The NIMJ then forwarded the Report to the Secretary of Defense, the Service Secretaries, the House and Senate Committees on Armed Services, and the Code Committee. Soon after, Congress passed legislation regarding the Commis-

1. REPORT OF THE COMMISSION ON THE 50TH ANNIVERSARY OF THE UNIFORM CODE OF MILITARY JUSTICE (May 2001) [hereinafter COX COMMISSION REPORT] (sponsored by the National Institute of Military Justice and commonly referred to as the Cox Commission Report), *available at* http://www.badc.org/html/militarylaw_cox.html.

2. *Id.* at 2.

3. Judge Cox, an Army veteran, was a judge on the South Carolina Circuit Court and an Acting Associate Justice of the Supreme Court of South Carolina. Before becoming a Senior Judge, he served on the U.S. Court of Military Appeals and the U.S. Court of Appeals for the Armed Forces, including four years as Chief Judge. *Id*. at 4-5.

4. *See id* at 5-6.

5. *Id.* Specifically, the Commission recommended the "repeal [of Title] 10 U.S.C. §§ 920 & 925, and the offenses specified under the general article, 10 U.S.C. § 134, that concern criminal sexual misconduct [to be replaced] with a comprehensive Criminal Sexual Conduct Article, such as is found in the Model Penal Code or Title 18 of the United States Code." *Id.*

6. *Id.* at 5.

7. *Id.* at 12.

8. Letter from Judge Walter T. Cox to Eugene R. Fidell, President of the NIMJ (May 25, 2001) (on file with author).

sion's recommendation to increase capital panel size from five members to twelve.[9] Some might view the codification of the Commission's capital panel recommendation as merely a coincidence. Others might see the change as a signal that Congress, and perhaps the President and the appellate courts, will seek to address other recommendations and concerns raised in the Report. Against the backdrop of the commissioners' recommendations, this article identifies, organizes, and analyzes new developments in the pretrial arena.

Court-Martial Personnel

This section discusses cases that define the roles and responsibilities of convening authorities, military judges, staff judge advocates, counsel, and experts within the military justice system. By and large, over the past year the courts looked past technical form to substantive matters and continued their deference to convening authorities, government counsel, and military judges.

Convening Authority Disqualification

Commanders, by statute, play a central role in the military justice system by convening, or "calling together" courts-martial.[10] Commanders may have their discretion as a convening authority limited, however, if they do not remain impartial.[11] For example, a convening authority who is an "accuser" is disqualified from referring a case to a special or general court-martial.[12] A convening authority may become an accuser by signing and swearing to charges, directing that charges nominally be signed and sworn to by another, or by having "other than an official" interest in the prosecution of the accused.[13]

9. National Defense Authorization Act of 2002, Pub. L. No. 107-107, § 582, 115 Stat. 1012 (2001) (amending 10 U.S.C. ch. 47, §§ 816(1)(A), 829(b)).

> SEC. 582. REQUIREMENT THAT COURTS-MARTIAL CONSIST OF NOT LESS THAN 12 MEMBERS IN CAPITAL CASES.
>
> (a) CLASSIFICATION OF GENERAL COURT-MARTIAL IN CAPITAL CASES.—Section 816(1)(A) of title 10, United States Code (article 16(1)(A) of the Uniform Code of Military Justice) is amended by inserting after ''five members'' the following: ''or, in a case in which the accused may be sentenced to a penalty of death, the number of members determined under section 825a of this title (article 25a)''.
>
> (b) NUMBER OF MEMBERS REQUIRED.—(1) Chapter 47 of title 10, United States Code (the Uniform Code of Military Justice), is amended by inserting after section 825 (article 25) the following new section:
>
> ''§ 825a. Art. 25a. Number of members in capital cases
>
> ''In a case in which the accused may be sentenced to a penalty of death, the number of members shall be not less than 12, unless 12 members are not reasonably available because of physical conditions or military exigencies, in which case the convening authority shall specify a lesser number of members not less than five, and the court may be assembled and the trial held with not less than the number of members so specified. In such a case, the convening authority shall make a detailed written statement, to be appended to the record, stating why a greater number of members were not reasonably available.''
>
> (2) The table of sections at the beginning of subchapter V of such chapter is amended by inserting after the item relating to section 825 (article 25) the following new item:
>
> ''825a. 25a. Number of members in capital cases.''
>
> (c) ABSENT AND ADDITIONAL MEMBERS—Section 829(b) of such title (article 29 of the Uniform Code of Military Justice) is amended—
>
> (1) by inserting ''(1)'' after ''(b)'';
>
> (2) by striking ''five members'' both places it appears and inserting ''the applicable minimum number of members''; and
>
> (3) by adding at the end the following new paragraph:
>
> ''(2) In this section, the term 'applicable minimum number of members' means five members or, in a case in which the death penalty may be adjudged, the number of members determined under section 825a of this title (article 25a).''
>
> (d) EFFECTIVE DATE—The amendments made by this section shall apply with respect to offenses committed after December 31, 2002.

Id.

10. UCMJ arts. 22-24 (2000).

11. United States v. Nix, 40 M.J. 6 (C.M.A. 1994).

12. MANUAL FOR COURTS-MARTIAL, UNITED, STATES, R.C.M 601(c) (2000) [hereinafter MCM] (implementing UCMJ article 22(b) and 23(b) for general courts-martial and special courts-martial, respectively).

A convening authority-accuser may be disqualified in either a "statutory" sense (for example, having sworn to the charges) or in a "personal" sense by virtue of having an "other than official" interest in the case.[14] Statutorily disqualified convening authorities are not, per se, disqualified from appointing an investigating officer to conduct an Article 32 pretrial investigation.[15] On the other hand, personally disqualified convening authorities may not appoint an investigating officer to conduct an Article 32 pretrial investigation.[16] Disqualified convening authorities may not refer a case to a general or a special court-martial.[17] They may, however, take lesser action[18] or forward the case to the next higher commander, noting their disqualification.[19]

The Cox Commission Report criticizes the central role that commanders play within the military justice system. According to the Report, "[T]he far-reaching role of commanding officers in the courts-martial process remains the greatest barrier to operating a fair system of criminal justice within the armed forces."[20] The Report recommends that "decisions on pretrial matters should be removed from the purview of the convening authority and placed within the authority of a military judge."[21]

Military appellate courts have struggled for many years to determine how much involvement a convening authority may have in a case before being disqualified. In 1952, the Court of Military Appeals (CMA), the predecessor to the CAAF, set a high standard when it decided *United States v. Gordon*.[22] The court held that convening authorities must be "free from any connection to the controversy."[23] At least one scholar has noted that since *Gordon*, the courts have given greater deference to commanders by broadening the range of acceptable behavior.[24] This long-term trend holds true in two recent cases, *United States v. Tittel*[25] and *United States v. Dinges*.[26]

In *United States v. Tittel*,[27] the CAAF addressed the personal disqualification of convening authorities who issue orders that are subsequently violated. In *Tittel*, the accused was convicted of shoplifting and several other offenses and processed for separation from military service. Consequently, the special court-martial convening authority signed an order barring the accused from entering any Navy Base Exchange (NEX). The accused was then caught shoplifting a second time from the NEX. At his second court-martial, Tittle pled guilty to violating the special court-martial convening authority's order.[28]

On appeal, the defense argued that the convening authority was not and could not be neutral because he was the victim of Tittle's willful disobedience. The CAAF disagreed, finding that the special court-martial convening authority's order to stay out of the NEX was a routine administrative directive. The court found that the convening authority was not an "accuser."[29] The court also found that the accused had waived the issue because it was not raised at trial.[30] Defense practitioners should

13. UCMJ art. 1(9); *see also* MCM, *supra* note 12, R.C.M. 601(c) discussion.

14. *See generally* UCMJ arts. 22-23.

15. McKinney v. Jarvis, 46 M.J. 870 (Army Ct. Crim. App. 1997).

16. United States v. Jeter, 35 M.J. 442 (C.M.A. 1992); *see also* United States v. Thomas, 22 M.J. 388, 394 (C.M.A. 1986) (listing examples of unofficial interests that disqualified convening authorities).

17. UCMJ arts. 22(b), 23(b).

18. *See* MCM, *supra* note 12, R.C.M. 1302(b) (accuser not disqualified from convening summary court-martial, or initiating administrative measures).

19. *Id*. R.C.M. 401(c)(2)(A), 601(c); *see* UCMJ arts. 22(b), 23(b).

20. Cox Commission Report, *supra* note 1, at 6.

21. *Id*. at 8.

22. 2 C.M.R. 161 (C.M.A. 1952).

23. *Id*. at 168.

24. Lieutenant Colonel John P. Saunders, *Hunting for Snarks: Recent Developments in the Pretrial Arena*, Army Law., Apr. 2001, at 15.

25. 53 M.J. 313 (2000).

26. 55 M.J. 308 (2001).

27. 53 M.J. 313 (2000).

28. *Id*. at 314.

29. *Id*.

take heed: failure to raise convening authority disqualification at trial may result in waiver.[31]

In *United States v. Dinges*,[32] the CAAF addressed the personal disqualification of a convening authority who, through his involvement in Boy Scouts, heard an allegation of consensual homosexual sodomy between an Air Force officer and a scout. The convening authority accepted a district governor position with the Boy Scouts of America (BSA). A BSA official contacted the convening authority because he was upset that Oklahoma officials would not prosecute the consensual (homosexual) relationship. The convening authority initiated an investigation, obtained command and special court-martial convening authority over the accused, appointed an Article 32 investigating officer, nominated a slate of members, and forwarded the case with a recommendation for general court-martial. At a general court-martial, Dinges was convicted of sodomy arising out of his activities as an assistant scoutmaster.[33]

In 1998, the CAAF ordered a *DuBay* hearing[34] to determine whether the convening authority had an "other than official interest" that would disqualify him.[35] Based on the facts gathered at the *DuBay* hearing, the CAAF held that the special court-martial convening authority did not become an accuser because "he did not have such a close connection to the offense that a reasonable person would conclude he had a personal interest in the case."[36]

Judge Effron and Judge Sullivan disagreed with the majority. They felt the majority applied the wrong standard to determine whether the commander exhibited bias or prejudice. They argued that the court should have focused on potential conflict of interest or "other than official" interest in the prosecution.[37] The dissent reasoned that due to the commander's potential conflict between his personal interest in the BSA and his statutory role as a convening authority, he should have been disqualified from acting as a convening authority in the case.[38]

Taken together, *Tittel* and *Dinges* show that the CAAF is willing to allow convening authorities more latitude than a strict reading of the UCMJ and Rules for Courts-Martial might suggest. This posture gives critics of the military justice system an argument that convening authorities have too much power and discretion. Despite the holdings in *Tittel* and *Dinges*, government counsel should remain vigilant and recommend that commanders disqualify themselves if they have a potential conflict of interest. At a minimum, this approach will minimize appellate issues. At a maximum, it protects the integrity of the military justice system.

Panel Member Selection

Panel member selection has also generated debate over the years. Congress, when it enacted Article 25, UCMJ, mandated that convening authorities personally, rather than randomly, select panel members. Congress requires that convening authorities select only those members who, in their opinion, are best qualified by virtue of their age, education, training, experience, length of service, and judicial temperament.[39]

In 1998, Congress directed the Secretary of Defense to study alternate methods of panel selection.[40] This mandate required

30. *Id.*

31. *See also* United States v. Voorhees, 50 M.J. 494 (1999) (stating that the convening authority did not become an accuser by threatening to "burn" the accused if the accused did not enter into a pretrial agreement; even if the convening authority did become an accuser, accused affirmatively waived issue at trial).

32. 55 M.J. 308 (2001).

33. *Id*. at 309-10.

34. A *DuBay* hearing occurs when an appellate court sends a matter back to a convening authority to take testimony in an adversarial setting. *See* United States v. DuBay, 37 C.M.R. 411 (C.M.A. 1967).

35. 48 M.J. 232 (1998). *United States v. Haagenson*, 52 M.J. 34 (1999) is a similarly postured case. In *Haagenson*, the CAAF examined the issue of a convening authority who seemed to have decided a case in advance. In *Haagenson*, the special court-martial convening authority (SPCMCA) originally referred the accused's case to a special court-martial, but withdrew it and forwarded it with recommendation for general court-martial. Contrary to her pleas, the accused was found guilty by a panel of a single specification of fraternization. The accused alleged on appeal that the case had been withdrawn and forwarded because the SPCMCA's superior yelled at the SPCMCA, "I want [the accused] out of the Marine Corps." *Id.* at 37 (Sullivan, J., concurring). After framing the issue as whether the SPCMCA had become an accuser, the CAAF remanded the case for a fact-finding proceeding. *Id*. at 37. In 1999, the accused filed a petition for review with the CAAF, *see* 52 M.J. 466 (1999), but nothing further has been published on this case.

36. *Dinges*, 55 M.J. at 311.

37. *Id.* at 316 (citing UCMJ art. 1(9)).

38. *Id.*

39. UCMJ art. 25 (2000).

40. *See* The Strom Thurmond National Defense Authorization Act for Fiscal Year 1999, Pub. L. No. 105-261, § 1, 112 Stat. 1920 (1998).

the Secretary of Defense to develop and report on a random selection method of choosing members to serve on court-martial panels.[41] The Department of Defense General Counsel requested that the Joint Service Committee (JSC) conduct a study and prepare a report on random selection.[42] The JSC sought opinions from each service and reviewed random court-martial selection practices in Canada and the United Kingdom. After considering six alternatives, the JSC concluded that the current practice "insures fair panels of court-martial members who are best qualified" and that there is "no evidence of systematic unfairness or unlawful command influence."[43]

The Cox Commission Report is at odds with the conclusions of the JSC. The Commission stated bluntly, "There is no aspect of military criminal procedures that diverges further from civilian practice, or creates a greater impression of improper influence, than the antiquated process of panel selection."[44] The Commission concluded, "There is no reason to preserve a practice that creates such a strong impression of, and opportunity for, corruption of the trial process by commanders and staff judge advocates."[45] The Commission called on Congress to immediately strip convening authorities of their responsibility to select panel members. The Commission recommended that members of courts-martial "should be chosen at random from a list of eligible servicemembers prepared by the convening authority, taking into account operational needs as well as the limitations on rank, enlisted or officer status, and same-unit considerations currently followed in the selection of members."[46]

The CAAF wrestled with Article 25's requirement that convening authorities personally select the best-qualified members of their command for duty on courts-martial in *United States v. Benedict*.[47] In *Benedict*, an administrative division sent a list of panel member nominees to the convening authority's Chief of Staff (CoS) with a note to *select* nine members. The CoS selected the members and submitted a final list to the convening authority for signature. Pretrial testimony from the CoS and the SJA indicated that the convening authority signed the convening order without asking any questions or making any changes. Both maintained that had he wanted to, the convening authority could have made changes to the list. Noting that it is common practice for convening authorities to rely upon staff assistance to select members, the CAAF held that the convening authority met the requirement of Article 25, UCMJ, by personally selecting the nine prospective members set forth by the CoS.[48] Of note, the CAAF relied on pretrial motion transcripts that did not include any testimony from the convening authority.[49]

The opinion, however, was not unanimous. Judge Baker (concurring) and Judge Effron (dissenting) both expressed concern about the failure of the convening authority to testify.[50] Further, Judge Effron's dissent presents a well-reasoned discussion of the history of Article 25. His dissent makes a strong argument for the idea that if convening authorities do not take their responsibilities under Article 25 seriously, they risk losing their central role in selecting panels under the UCMJ to another method, such as random selection.[51]

Challenges to Composition of the Panel

In the last several years, the CAAF has allowed the government greater latitude in selecting members. In *United States v. Bertie*,[52] *United States v. Upshaw*,[53] and *United States v. Roland*,[54] the CAAF upheld the military judges' denial of challenges to panels. The net result of these cases was to increase the burden on defense counsel to show improprieties in panel

41. *See* Major Guy P. Glazier, *He Called for His Pipe and He Called for His Bowl, and He Called for His Members Three—Selection of Juries by the Sovereign: Impediment to Military Justice*, 157 MIL. L. REV. 1 (1998).

42. *See* the JOINT SERVICE COMMITTEE ON MILITARY JUSTICE, REPORT ON THE METHODS OF SELECTION OF MEMBERS OF THE ARMED FORCES TO SERVE ON COURTS-MARTIAL (Aug. 1999) [hereinafter JCS REPORT] (on file with the Office of The Judge Advocate General, U.S. Army).

43. *Id.* at 45.

44. COX COMMISSION REPORT, *supra* note 1, at 7.

45. *Id.*

46. *Id.*

47. 55 M.J. 451 (2001).

48. *Id.* at 454.

49. *See id.* at 452-55.

50. *Id.* at 455, 459.

51. *Id.* at 456-58.

52. 50 M.J. 489 (1999).

53. 49 M.J. 111 (1998).

selection. To prevail, counsel had to go beyond the black letter requirements of Article 25 and show specifically that the government acted in bad faith.

In *Bertie*,[55] the accused, a specialist (E-4), challenged the panel arrayed for his trial. The defense argued that the government improperly used rank as a selection criterion. The accused presented evidence showing that no officer below the grade of captain (O-3) and no enlisted person below the grade of sergeant first class (E-7) had been selected to serve as a panel member over the previous year. In upholding the panel selection, the CAAF held that no presumption of impropriety flowed from the composition of the panel. The CAAF noted that the "linchpin" of the accused's argument was that the composition of the panel created a presumption of court stacking.[56] The CAAF noted that the acting SJA had advised the convening authority of the Article 25 criteria and told him not to use rank or other criteria to systematically exclude qualified persons. Additionally, the convening authority stated in a memorandum that he had considered the criteria of Article 25 when making his panel selection.[57]

Upshaw,[58] like *Bertie*, was a case where the defense argued that the government improperly used rank as a selection criterion. In *Upshaw*, the SJA mistakenly believed the accused was an E-6, and as a result requested panel member nominees in the grade of E-7 and above. At trial the accused, an E-5, moved to dismiss for lack of jurisdiction based on the convening authority's exclusion of E-6s from consideration. The military judge denied this motion, holding that an innocent, good faith mistake on the part of the convening authority's subordinates did not imperil the panel selection absent a showing of prejudice.[59] The CAAF upheld this ruling, noting that the accused was not able to show prejudice.[60]

In *Roland*,[61] the SJA sent out a memorandum requesting nominees in the ranks of sergeant (E-5) to colonel (O-6). The defense challenged the panel selection based on the SJA's memorandum, arguing that the SJA deliberately failed to request nominees from otherwise-qualified groups of service members (those below the grade of E-5). The SJA claimed that she never intended to exclude groups of otherwise eligible nominees. She had simply identified other groups for consideration. In affirming, the CAAF characterized the relevant standard of proof as "[o]nce the defense comes forward and shows an improper selection, the burden is upon the Government to demonstrate that no impropriety occurred."[62] The CAAF held that the defense had not met its burden of showing "that there was command influence."[63]

In 2000, the CAAF marked the outer limit of deference the court would extend to the government. In *United States v. Kirkland*,[64] the SJA solicited nominees from subordinate commanders via a memorandum signed by the special court-martial convening authority. The memorandum asked for nominees in various grades and included a worksheet to fill in the names of nominees. The worksheet had a column for E-9, E-8, and E-7, but no place to list a nominee in a lower grade. To nominate E-6 or below, the nominating officer would have had to modify the form. No one below E-7 was nominated or selected for the panel. Although there was little difference between the facts of *Roland* and *Kirkland*, the CAAF reversed in *Kirkland*. The court stated that where there was an "unresolved appearance" of exclusion based on rank, "reversal of the sentence is appropriate to uphold the essential fairness . . . of the military justice system."[65]

If *Kirkland* signaled the CAAF's reluctance to continue to defer to the government when it appeared to use rank as a shortcut to select panel members, the Air Force Court of Criminal Appeals showed that the service courts will continue to defer to the government when non-Article 25 criteria (other than rank) are used to exclude qualified personnel from membership on courts-martial. In *United States v. Brocks*,[66] the staff judge

54. 50 M.J. 66 (1999).

55. 50 M.J. at 489.

56. *Id.* at 492.

57. *Id.* at 493.

58. 49 M.J. at 111.

59. *Id.* at 112.

60. *Id.* at 113.

61. 50 M.J. 66 (1999).

62. *Id.* at 69.

63. *Id.*

64. 53 M.J. 22 (2000).

65. *Id.* at 25.

advocate and chief of justice at the base legal office intentionally excluded all officers in the Medical Group from the nominee list because all four alleged conspirators and many of the witnesses were assigned to that unit. Citing *United States v. Upshaw*,[67] the court held that because the exclusion of Medical Group officers did not constitute unlawful command influence, there was not reversible error.[68]

The results in recent panel member selection cases reflect the CAAF's reluctance to set aside cases absent evidence of bad faith by the convening authority. It seems that a majority of the CAAF will analyze a challenge to panel selection not only under Article 25, but also under Article 37, UCMJ. It is simply not enough for the defense to show that "qualified, potential members appear to be systematically excluded." Defense counsel must also show that this occurred in an attempt to "unlawfully influence" the court. While the CAAF's approach makes some sense in the context of commanders doing their best to comply with Article 25 in a dynamic, demanding setting, it may give critics of the military justice system ammunition in their fight to implement random panel member selection.

Military Judges

One of the overarching themes of the Cox Commission Report is a shift of judicial power from convening authorities to military judges. Commenting on the efficiency of the current system, the Report states, "Under the current system, neither defense counsel nor prosecutors have a judicial authority to whom to turn until very close to the date of trial. This creates delay, inefficiency, and injustice, or at a minimum, the perception of injustice . . . ."[69] The Commission members urge changes that will make sitting judges available after preferral, rather than referral, of charges.[70] To this end, the Report advocates the creation of standing judicial circuits, made up of tenured judges who are available to counsel immediately after preferral.[71] This change would allow military judges, rather than convening authorities, to control such pretrial matters as witness availability during Article 32 investigations, detailing of investigative and expert assistance, and directing the scientific testing of evidence.[72]

United States v. Johnson[73] illustrates how involving military judges early in the pretrial process could streamline the military justice system. In *Johnson*, the accused was convicted of assaults on his eight-month-old daughter, primarily through the testimony of his wife.[74] His wife had appeared at the Article 32, UCMJ, hearing pursuant to a German subpoena, which threatened criminal penalties if she did not comply; however, civilian witnesses cannot be subpoenaed to appear at investigations held pursuant to Article 32. At trial, the military judge found that the subpoena was unlawful and issued without apparent legal authority, but he also found that the accused was not prejudiced by having a witness illegally produced at the hearing.[75]

On appeal, the CAAF agreed with the military judge that the subpoena was unlawful and that the accused suffered no prejudice to his substantial rights as a result of the improper production of the witness. The CAAF concluded that the accused did not have standing to object to the use of the Article 32 testimony at trial because the evidence presented against him was reliable.[76] Arguably, if the military judge would have had judicial oversight at the time of the Article 32 investigation, the appellate issue could have been avoided by using judicial subpoena powers that do not otherwise exist at an Article 32 investigation.[77]

The UCMJ requires that military judges be properly qualified, certified by The Judge Advocate General of their service to perform judicial duties, and properly detailed to the court-

66. 55 M.J. 614 (A.F. Ct. Crim. App. 2001).

67. 49 M.J. 111, 113 (1998). "An element of unlawful court stacking is improper motive. Thus, where the convening authority's motive is benign, systematic inclusion or exclusion may not be improper." *Id.*

68. *Brocks*, 55 M.J. at 617.

69. COX COMMISSION REPORT, *supra* note 1, at 9.

70. *Id*. at 7.

71. *Id*. at 8-9.

72. *Id*. at 7.

73. 53 M.J. 459 (2000).

74. *Id*. at 459.

75. *Id.*

76. *Id*. at 462.

77. *See* MCM, *supra* note 12, R.C.M. 703(e)(2) (civilian witnesses—subpoena).

martial.[78] Further, the Rules for Courts-Martial require military judges to disqualify themselves in "any proceeding in which [their] impartiality might reasonably be questioned."[79]

United States v. Reed,[80] an Army Court of Criminal Appeals (ACCA) case, demonstrates how trial and appellate judges should react when they discover a potentially disqualifying issue during trial. In *Reed*, the accused pled guilty to conspiracy to commit larceny and to willfully and wrongfully damaging nonmilitary property in a scheme to defraud the United States Automobile Association (USAA) insurance company.[81] During sentencing, a USAA claims handler testified about fraudulent claims and their effect on the company's policy holder members. The military judge (himself a policy holder member) immediately disclosed his affiliation with USAA and stated this would not affect his sentencing decision.[82] The military judge allowed the defense an opportunity for voir dire. The military judge also allowed the defense an opportunity to challenge him for cause. The defense declined to challenge him.[83] The Army court, after *sua sponte* disclosing all judges of the ACCA are also policy holders of USAA,[84] held nothing was improper or erroneous in the judge's failure to disclose his policy holder status until a potential ground for his disqualification unfolded.[85] Further, the court found the military judge's financial interests so remote and insubstantial as to be nonexistent.[86]

The CAAF published *United States v. Quintanilla*[87] and *United States v. Butcher*[88] on the same day. Both cases raised the issue of the impartiality of the military judge. In *Quintanilla*, the military judge became involved in verbal out-of-court confrontations with a civilian witness that included profanity and physical contact.[89] The military judge also engaged in an ex parte discussion with the trial counsel on how to question this civilian witness about the scuffle.[90] The CAAF held the military judge's failure to fully disclose the facts on the record deprived the parties of the ability to effectively evaluate the issue of judicial bias.[91] As such, the court remanded the case for a *DuBay* hearing.[92]

In *Butcher*, the military judge, while presiding over a contested trial, went to a party at the trial counsel's house and played tennis with the trial counsel.[93] The CAAF reviewed whether the military judge abused his discretion by denying a defense request that the judge recuse himself.[94] The CAAF advised that under the circumstances the military judge should have recused himself.[95] The court held there was no need to reverse the case, however, because there was no need to send a message to the field—the social interaction took place after evidence and instructions on the merits, and public confidence was not in danger (the social contact was not extensive or intimate and came late in trial).[96]

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78. *See* UCMJ art. 26 (2000).

79. MCM, *supra* note 12, R.C.M. 902(a).

80. 55 M.J. 719 (Army Ct. Crim. App. 2001).

81. *Id.* at 719.

82. *Id.* at 720.

83. Under R.C.M. 902(b)(5), financial interest is not an issue the defense may waive. MCM, *supra* note 12, R.C.M. 902(b)(5).

84. *Reed*, 55 M.J. at 721 n.3.

85. *Id.* at 722.

86. *Id.* at 723.

87. 56 M.J. 37 (2001).

88. 56 M.J. 87 (2001).

89. *Quintanilla*, 56 M.J. at 40.

90. *Id.* at 40-41.

91. *Id.* at 80.

92. *Id.* at 85.

93. *Butcher*, 56 M.J. at 89.

94. *Id.* at 91.

95. *Id.* at 92.

Both *Quintanilla* and *Butcher* raised red flags relating to professional responsibility and are must-reads for members of the trial judiciary. The professional responsibility issues raised in these cases will be discussed at length in Major David Robertson's new developments article in next month's *The Army Lawyer.*

Staff Judge Advocates

Conventional wisdom suggests that staff judge advocates (SJAs) should strive to remain "above the fray." Staff judge advocates must maintain some detachment to be able to provide independent, impartial assessment of cases to their convening authority.[97] The tension between remaining neutral and detached and becoming a partisan advocate for the government can manifest itself in many ways. For example, SJAs may feel a responsibility to act as "gatekeepers" in screening actions for their convening authority.

In this vein, the Cox commissioners took the position that "[t]he impression that staff judge advocates (SJA's) possess too much authority over the court-martial process is nearly as damaging to perceptions of military justice as the over-involvement of convening authorities at trial."[98] To combat this impression, the Commission suggested, "Staff judge advocates, who act as counsel to commanding officers and not as independent authorities, should not exert influence once charges are preferred, should work out plea bargains only upon approval of the convening authority, and deserve a clear picture of what their responsibilities are."[99] The Commission also pointed out that there is a danger of unlawful command influence flowing from staff judge advocates as well as commanders. As such, the Commission recommended that "[t]he Code and the Manual for Courts-Martial should be amended to stress the need for impartiality, fairness and transparency on the part of staff judge advocates as well as all attorneys, investigators, and other command personnel involved in the court-martial process."[100]

Last term, the CAAF reviewed *United States v. Ivey.*[101] In the case, the defense alleged that the government failed to process the accused's immunity requests for four civilian witnesses. In *Ivey*, the convening authority did not act on the defense request for immunity until after trial or forward the defense request to the Department of Justice.[102] In addition, the military judge denied the defense request to grant immunity or to abate the proceedings to wait for convening authority action.[103] The CAAF noted that trial counsel and staff judge advocates do not have *de facto* authority to deny a request for immunity by withholding it from the convening authority. All requests for immunity, from either the prosecution or the defense, must be submitted to the convening authority for a decision.[104] The court held that the convening authority did not have to forward an immunity request for a civilian witness to the Attorney General, however, if the convening authority intended to deny that request.[105]

In reviewing the military judge's refusal to grant the defense request or abate the proceeding, the CAAF pointed out that a military judge may overrule a convening authority's decision to deny a request for immunity only if all three prongs of RCM 704(e) are met. These requirements are: (1) the witness intends to invoke the right against self-incrimination to the extent permitted by law if called to testify; (2) the government has engaged in discriminatory use of immunity to obtain a tactical advantage, or the government, through its own overreaching, has forced the witness to invoke the privilege against self-incrimination; and (3) the witness's testimony is material, clearly exculpatory, not cumulative, not obtainable from any other source and does more than merely affect the credibility of other witnesses. The CAAF held in *Ivey* that the military judge did not abuse his discretion by refusing to abate the proceedings (to wait for convening authority action) when he found there had been no discriminatory use of immunity or government overreaching, and proffered testimony was not clearly exculpatory.[106]

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96. *Id.* at 93 (citing *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847 (1988), for the three-part test laid out by the Supreme Court).

97. *See, e.g.*, UCMJ art. 34 (2000).

98. Cox Commission Report, *supra* note 1, at 12.

99. *Id.* at 12–13.

100. *Id.* at 13.

101. 55 M.J. 251 (2001).

102. *Id.* at 253-54.

103. *Id.* at 254.

104. *Id.* at 256 (citing R.C.M. 704(c)(3)).

105. *Id.* at 256 (interpreting R.C.M. 704(c)(2)).

106. *Id.* at 257 (citing R.C.M. 704(e)).

While *Ivey* is a complex opinion that addresses many issues, it sheds light upon the distinct roles that the convening authority, the staff judge advocate, and the military judge play when processing immunity requests. Clearly, the authority to take action rests with the convening authority. The CAAF stated that staff judge advocates and trial counsel should not usurp this authority by abusing their gatekeeper role.[107] Further, military judges have only limited power to review a convening authority's decision, in the sense that action can be taken only after specific findings of fact are made on the record.

The troublesome part of *Ivey* is that the convening authority took action on the defense immunity request post-trial. As such, the military judge could only review the defense motion by assuming the convening authority would disapprove the defense request. Given this sequence of events, it is difficult to imagine a situation where the convening authority would choose to grant immunity after-the-fact. In *Ivey* the convening authority knew the military judge had reviewed the denial decision (that had not yet been made) and found it to pass legal muster. What incentive remained for the convening authority to grant the defense request post-trial?

Counsel

Detailed trial and defense counsel must be qualified to try cases at courts-martial.[108] When an accused elects to hire a civilian defense counsel, such counsel must also be qualified to try cases at courts-martial.[109] Recently, the CAAF decided two cases concerning the qualification of civilian counsel, *United States v. Steele*[110] and *United States v. Beckley.*[111]

In *Steele*, the court addressed the issue of a civilian defense counsel (CDC) who was carried "inactive" by all state bars of which he was member.[112] This inactive status prohibited the CDC from practicing law in the jurisdictions where he was licensed. This was problematic because the Rules for Courts-Martial require a CDC to be a member of a bar of a federal court or bar of the highest court of the state, or a lawyer authorized by a recognized licensing authority to practice law (and determined by a military judge to be qualified to represent the accused).[113] The CAAF looked to federal case law, holding that neither suspension nor disbarment creates a per se rule that continued representation is constitutionally ineffective.[114] The CAAF also noted that a Navy instruction permits military counsel to remain "in good standing" even though they are "inactive."[115] Stating that counsel are presumed competent once licensed, the CAAF found no error.[116]

In the second case, *United States v. Beckley*,[117] the CAAF addressed the accused's right to retain civilian counsel of choice. In *Beckley*, the counsel in question was the member of a small firm who represented the accused's wife in a divorce action against the accused.[118] In an ugly set of motion hearings, the military judge denied the government's request to remove the CDC, but at a later session a second judge granted the CDC's request to withdraw.[119] The CAAF, comparing a qualified Sixth Amendment right to choose one's own counsel to a service member's qualified statutory right to choose one's own counsel,[120] determined that the CDC was disqualified. As a

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107. *Id.* at 256 ("The rule [RCM 704(c)(3)] contemplates that all requests for immunity, from either the prosecution or the defense, will be submitted to the convening authority for a decision.").

108. UCMJ arts. 27(b), 42(a) (2000). In accordance with UCMJ Articles 27(b) and 42(a), counsel must be certified as competent to perform such duties, and must take an oath to perform their duties faithfully. *Id. See id.* art. 27(b) (including the requirement that counsel be "a judge advocate who is a graduate of an accredited law school or is a member of the bar of a Federal court or of the highest court of a State"); *see also* MCM, *supra* note 12, R.C.M. 502(d) (certification of counsel), 807(b) (oaths).

109. *See* MCM, *supra* note 12, R.C.M. 502 (d)(3) (counsel must be a member of the bar of a federal court or the highest court of a state, or be authorized by a recognized licensing authority to practice law and be found by the military judge to be qualified to represent the accused).

110. 53 M.J. 274 (2000).

111. 55 M.J. 15 (2001).

112. *Steele*, 53 M.J. at 275.

113. *Id.* at 276 (citing R.C.M. 502(d)(3)(A)).

114. *Id.* at 278.

115. *Id.*

116. *Id.*

117. 55 M.J. 15 (2001).

118. *Id.* at 17.

119. *Id.* at 16-22.

result, the CAAF affirmed the ACCA, holding that the civilian counsel had an actual conflict of interest and was required to withdraw.[121]

Experts

Before employing an expert at government expense, a party must submit a request to the convening authority (with notice to the opposing party) to authorize the employment and to fix the compensation.[122] A denied request may be renewed before the military judge to determine if the testimony is relevant and necessary and whether the government has provided an adequate substitute.[123]

In *United States v. Gunkle*,[124] the CAAF examined whether the military judge abused his discretion in denying the defense expert assistance. In deciding the case, the CAAF noted a three-part test for determining the necessity for expert assistance provided by the government: (1) why is the expert needed, (2) what would the expert accomplish for the defense, and (3) why is the defense counsel unable to gather and present the evidence that the expert assistance would be able to develop.[125] When the CAAF applied this test to the facts of *Gunkle*, the court found that any error in denial of the defense request for pretrial expert assistance was rendered moot because the accused received the expert assistance he sought (at his own expense). Additionally, the military judge said he would reconsider the defense's request for production of the defense expert; the defense, however, failed to renew its request.[126]

The CAAF reached the issue of defense choice of expert in *United States v. McAllister.*[127] In *McAllister,* the accused was convicted of murder based in part upon the presence of DNA material underneath the fingernails of the victim. Before trial the defense requested and received a DNA expert from the convening authority.[128] During a pretrial session,[129] the defense asked the military judge to instruct the convening authority to release their current expert because he did not have the requisite knowledge and qualifications on Polymerase Chain Reaction testing, and to appoint an alternate expert (this alternate expert was recommended to the defense by the original convening authority-appointed DNA expert).[130] The military judge denied this request, but "left the door open" for the defense to make its request to the convening authority.[131] The military judge, however, denied the defense's request for a continuance to make its request to the convening authority.[132] Concluding that the military judge's focus on "holding the defense's feet to the fire" arbitrarily deprived the accused of the tools needed to defend his case, the CAAF ruled that the military judge abused her discretion.[133] As a remedy, the court remanded the case to the ACCA, ordered The Judge Advocate General to provide $5000 to the accused to employ an expert, and gave the defense ninety days to file supplemental pleadings.[134]

Pleas and Pretrial Agreements

One unique facet of the military justice system is that the accused does not have the right to plead guilty.[135] The military accused may not plead guilty unless he honestly and reasonably believes he is guilty, and is able to explain his guilt to the satisfaction of the military judge.[136] If the accused enters the plea of

120. *Id.* at 23 (discussing UCMJ arts. 27, 38; MCM, *supra* note 12, R.C.M. 506(c)).

121. *Id.* at 25.

122. *See* MCM, *supra* note 12, R.C.M. 703(d).

123. *Id.*

124. 55 M.J. 26 (2001).

125. *Id.* at 32 (citing United States v. Ford, 51 M.J. 445, 455 (1999)).

126. *Id.*

127. 55 M.J. 270 (2001).

128. *Id.* at 273.

129. This session was held in accordance with UCMJ Article 39(a).

130. *McCallister*, 55 M.J. at 273.

131. *Id.* at 274.

132. *Id.*

133. *Id.* at 276.

134. *Id.* at 277.

guilty "improvidently or through lack of understanding of its meaning and effect, or if he fails or refuses to plead, a plea of not guilty will be entered."[137] In a capital case, the accused may never enter a plea of guilty.[138]

Providence Inquiry

In *United States v. Fitzgerald*,[139] the ACCA found the military judge erred in accepting the accused's pleas because the providence inquiry did not establish violations of the punitive articles of the Code. The accused was charged with violating a lawful general regulation[140] by wrongfully possessing and transporting an unregistered firearm on Fort Gordon, Georgia. The ACCA found the accused's failure to admit how he violated the regulation fatal because it raised "a substantial, unresolved question of law and fact as to the providence."[141] Consequently, the ACCA set aside the findings of guilt based on the pleas in question.[142]

The CAAF addressed the military judge's burden to secure a voluntary and intelligent guilty plea from the accused in *United States v. Roeseler*.[143] Under the terms of Specialist Roeseler's pretrial agreement, he pled guilty to conspiracy to murder and attempted murder of a soldier in his unit, and of two people who, in fact, did not exist.[144] On appeal, the accused argued his guilty pleas regarding the fictitious individuals were improvident because the military judge failed to instruct on the defense of impossibility and because one of the conspirators knew the targets did not exist.[145] The CAAF agreed with the accused that guilty pleas must be both voluntary and intelligent and that the military judge has the responsibility of ensuring the accused understands the nature of the offenses to which he is pleading guilty. The court, however, disagreed that the accused was "entitled to a law school lecture on the difference between bilateral and unilateral conspiracy."[146] Reasoning that the trial judge must have some leeway concerning the exercise of her judicial responsibility to explain a criminal offense to an accused, the court held that the military judge's explanations in this case were sufficient.[147]

In *United States v. James*,[148] the accused attacked the constitutionality of his conviction for possessing and transporting child pornography. After pleading guilty, and enjoying the protection of the sentence limitation of his pretrial agreement, the accused argued that the statutory language in 18 U.S.C. § 2252A, which codifies the Child Pornography Prevention Act of 1996, was unconstitutionally overbroad.[149] The CAAF rejected this argument, holding that the factual circumstances on the record objectively supported the accused's guilty plea. Specifically, the court found that the accused pled guilty to a violation of the statute. The accused admitted that actual minors were portrayed in the charged pictures. He admitted he visited Web sites looking for pictures of pre-teens, and that he participated in chat rooms where pictures of minors were regularly requested. In addition, the photographic exhibits supported the accused's admissions, and the military judge explained the statutory requirement that the pictures were of minors.[150]

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135. *See* UCMJ art. 45 (2000); MCM, *supra* note 12, R.C.M. 910(d).

136. *See* United States v. Care, 18 C.M.A. 535 (1969).

137. UCMJ art. 45(a); *see also Care*, 18 C.M.A. at 535.

138. UCMJ art. 45(b).

139. No. 9801677 (Army Ct. Crim. App. Sept. 28, 2001) (unpublished).

140. U.S. Army Signal Center & Fort Gordon, Reg. 210-13, Control of Firearms, Ammunition, and Other Dangerous Weapons (1993).

141. *Fitzgerald*, No. 9801677, at 3.

142. *Id.*

143. 55 M.J. 286 (2001).

144. *Id.* at 286-87.

145. *Id.* at 288.

146. *Id.* at 289.

147. *Id.* at 290.

148. 55 M.J. 297 (2001).

149. *Id.* at 298.

150. *Id.* at 301.

The importance of *James* to government counsel prosecuting child pornography cases cannot be overstated. Appellate courts will look beyond the entry of pleas when evaluating a constitutional challenge. Trial counsel should put together a comprehensive stipulation of facts, including photographic evidence, to insulate the case from constitutional attack on appeal.

Pretrial Agreements

Military plea-bargaining differs significantly from its civilian counterpart.[151] One notable distinction is that military pretrial agreements are between the accused and the convening authority,[152] whereas civilian plea-bargaining is between the prosecution's office and the defendant. While the military accused has virtually an unfettered ability to withdraw from a pretrial agreement,[153] the convening authority may withdraw only before the accused begins performance of the agreement.[154]

In *United States v. Villareal*,[155] the CAAF examined a homicide case in which the convening authority withdrew from a pretrial agreement that limited confinement to five years. The convening authority withdrew after consulting with his superior general court-martial convening authority about how to console the victim's family, who felt the agreement was too lenient. The case was then transferred to a new general court-martial convening authority, without the pretrial agreement in force. Further entrenching its deference to convening authority discretion in the area of pretrial negotiations, the CAAF held that although the accused, who was sentenced to ten years' confinement, "certainly was placed in a different position by the convening authority's decision to withdraw from the agreement, this is not the type of legal prejudice that would entitle appellant to relief."[156]

The *Villareal* dissenters were troubled by the taint of unlawful command influence. They noted that convening authority discretion is not absolute and should give way to concerns about due process of law.[157] According to Judge Effron, military due process dictated that the accused's case should have been transferred to a new general court-martial convening authority with the pretrial agreement intact.[158]

Permissible Terms in Pretrial Agreements

The *Manual for Courts-Martial* recognizes the right of an accused to make certain promises or waive procedural rights as bargaining chips in negotiating a pretrial agreement.[159] There are, however, provisions that may not be waived.[160] For example, the *Manual* prohibits provisions that violate public policy.[161] In addition, the CAAF has sanctioned several pretrial agreement provisions that are not specified in the *MCM*.[162]

In *United States v. Clark*,[163] the accused submitted a false claim. He denied his guilt and submitted to a polygraph examination. When confronted with the results, Airman Clark admitted to lying and submitting a false claim.[164] He was charged and elected to plead guilty. The accused and the convening authority entered into a pretrial agreement that included a promise by the accused to enter into "reasonable stipulations concerning the facts and circumstances" of his case.[165] At trial, the military judge noticed the polygraph information in the stipulation, noted that the appellant had agreed to take a polygraph test, and that the "test results revealed deception."[166] There was

151. For a comprehensive discussion of the development of military plea-bargaining, see Major Mary M. Foreman, *Let's Make a Deal! The Development of Pretrial Agreements in Military Criminal Justice Practice*, 170 MIL. L. REV. 53 (2001).

152. MCM, *supra* note 12, R.C.M. 705(a).

153. *Id.* R.C.M. 705(c)(4)(A) (noting that the accused may withdraw from a pretrial agreement "at any time").

154. *Id.* R.C.M. 705(d)(5)(B).

155. 52 M.J. 27 (1999).

156. *Id.* at 30.

157. *Id.* at 32-33.

158. *Id.* at 33 (Effron, J., dissenting).

159. MCM, *supra* note 12, R.C.M. 705(c)(2).

160. *Id.* R.C.M. 705(c)(1).

161. *Id.* R.C.M. 705(d)(1) (providing that "the defense and government may propose any term or condition not prohibited by law or public policy").

162. *See, e.g.*, United States v. Gansemer, 38 M.J. 340 (1993) (holding that the accused may waive the right to a post-trial administrative separation board).

163. 53 M.J. 280 (2000).

164. *Id.* at 281.

no objection to the stipulation, and the trial judge admitted the stipulation into evidence. Applying MRE 707 and *United States v. Glazier*,[167] the CAAF held that it was plainly erroneous for the military judge to admit the evidence of the polygraph, even via a stipulation;[168] however, the facts of the case indicated that the accused suffered no prejudice because the military judge did not rely upon the stipulation to accept appellant's pleas as provident.[169]

Permissible Use of Pleas and Providence Inquiry

Once the military judge finds an accused's plea provident, the government may want to use the accused's plea and sworn statement made during the providence inquiry to prove greater or additional offenses, or as aggravation evidence during sentencing. Judges may not tell the members about guilty pleas until after findings are announced on any contested offenses unless the guilty plea was to a lesser-included offense and the government intends to prove the greater offense. As an exception to this rule, the accused may request that the members be informed of the accused's guilty plea.[170] The rules regarding the use of statements made by the accused during providency are even more restrictive than the rules regarding use of pleas. The government may not use the accused's statements made during the providence inquiry to prove additional charges. The accused's statements may, however, be used during the sentencing phase of trial.[171]

The use of the accused's statements made during the providence inquiry was at issue in *United States v. Grijalva*.[172] In *Grijalva*, the accused shot his wife in the back while she was sleeping.[173] At trial, the military judge rejected the accused's plea of guilty to attempted premeditated murder, but accepted his plea to the lesser-included offense of aggravated assault by intentional infliction of grievous bodily harm. On the merits of the greater offense, the military judge used the accused's guilty plea to the lesser offense and his admissions during the providence (or *Care*)[174] inquiry. The military judge then convicted the accused of attempted premeditated murder. Following precedent, the CAAF held that the military judge properly used the accused's plea to the lesser-included offense, but erred by considering statements made by the accused during the plea inquiry. Finding the judge's error harmless beyond a reasonable doubt, the CAAF affirmed.[175]

Unforeseen Consequences

Before 1999, when the CAAF decided *United States v. Mitchell*,[176] appellate courts that wrestled with the problem of regulations or statutes which limited the terms of a pretrial agreement generally found these issues to be collateral.[177] In *Mitchell*, the CAAF departed from settled case law. The accused, approaching the end of a six-year enlistment, agreed to extend his enlistment for nineteen months. Before he entered the extension period, he committed misconduct and faced trial. The accused and the convening authority signed a

165. *Id.*

166. *Id.*

167. 26 M.J. 268, 270 (C.M.A. 1988).

168. *Clark*, 53 M.J. at 282.

169. *Id.* at 283.

170. MCM, *supra* note 12, R.C.M. 913(a), 910(g) discussion.

171. United States v. Ramelb, 44 M.J. 625 (Army Ct. Crim. App. 1996). In *Ramelb*, the accused pled guilty to the lesser offense of wrongful appropriation, and the government went forward on the greater charge of larceny. *Id.* at 626. The military judge erred by permitting a witness to testify, on the merits of greater charges, about the accused's admissions during providency. *Id.* at 629.

172. 55 M.J. 223 (2001).

173. *Id.* at 224.

174. United States v. Care, 18 C.M.A. 535 (1969).

175. *Grijalva*, 55 M.J. at 226.

176. 50 M.J. 79 (1999).

177. *See, e.g.*, United States v. McElroy, 40 M.J. 368 (C.M.A. 1994) (holding that generally judges should not instruct on collateral, administrative consequences of sentences); United States v. Pajak, 29 C.M.R. 502 (C.M.A. 1968) (holding that a plea of guilty was not improvident when the appellant was unaware that legislation would have the effect of denying him retirement earned after twenty-five years of active service); United States v. Paske, 29 C.M.R. 505 (C.M.A. 1960) (ruling that an SJA did not err in failing to advise a convening authority of the adverse financial impact on sentence as a result of decision of comptroller general); United States v. Lee, 43 M.J. 518 (A.F. Ct. Crim. App. 1995) (holding that the general rule has been that collateral consequences of a sentence are not properly part of sentencing consideration).

pretrial agreement whereby the convening authority agreed to suspend any adjudged forfeiture of pay and allowances to the extent that such forfeiture would result in the accused receiving less than $700 per month.[178] The accused was tried five days before the beginning of the extension to his enlistment. Under Air Force personnel regulations, he lost his eligibility to extend and his entitlement to pay because he was confined. The defense argued that the unanticipated termination of this pay status reflected substantial misunderstanding of the effects of his pretrial agreement.[179]

The CAAF, in remanding the case for a *DuBay* hearing, focused on ensuring that the accused received the "benefit of his bargain." The court also signaled that when personal and financial regulations obviate the terms of a pretrial agreement, such impact will no longer be considered collateral. On rehearing, the Air Force Court of Criminal Appeals found that the approval of the accused's retirement was taken without regard to his pretrial agreement, but that, for a number of reasons, no further relief was required.[180] Despite the fact that Mitchell's retirement mooted the issue in his case, precedent was set. If the accused did not receive the benefit of his bargain, the CAAF would find the pleas improvident and set the findings aside.

The CAAF followed the precedent set in *Mitchell* when it decided *United States v. Williams* (*Williams I*)[181] and *United States v. Hardcastle*.[182] In *Williams I*, the accused was on legal hold after his term of service expired.[183] Neither the government nor the defense was aware of the Department of Defense (DOD) regulation that required a service member on legal hold and subsequently convicted of an offense to forfeit all pay and allowances. On appeal, the government conceded that the pretrial agreement, which required the convening authority to disapprove forfeitures, when none would exist after trial, invalidated the providence inquiry.[184] In *Hardcastle*, the accused's pretrial agreement required the convening authority to defer and waive forfeitures in excess of $400 per month. After his court-martial, the accused's enlistment expired, placing him in a no-pay status.[185] In both cases, the CAAF found that the accused had not received the benefit of his bargain and that the faulty provision had induced his pleas. The court set aside the guilty pleas, reversed the cases, and authorized rehearings.[186]

Last term, however, there was a shining example of how attention to detail can save the government from stepping on the unintended-consequences land mine. In *United States v. Williams* (*Williams II*),[187] the accused contended he was denied the benefit of his pretrial agreement because his pay and allowances ended with the expiration of his term of service (ETS).[188] Relying on *Williams I* and *Hardcastle*, he argued that this mutual misunderstanding rendered his guilty plea improvident.[189] The CAAF affirmed the Army court's decision that the pleas remained provident. The court distinguished *Williams I* and *Hardcastle*: in *Williams II*, there was no representation to entitlement of pay beyond the accused's ETS by the convening authority in the pretrial agreement, or by the trial counsel or military judge during trial. Further, in *Williams II* the military judge asked the defense counsel about the potential impact of the accused's pending ETS. The defense counsel assured the military judge that he had discussed the impact of the pending ETS with his client.[190]

The *Williams II* case offers some hope that attention to detail at trial can save what could become a fatal provision in the quantum portion of the pretrial agreement. Following *Williams II*, however, the CAAF was "once again faced with the unfortunate, if not inexcusable, situation where an accused was beyond

178. *Id.* at 80.

179. *Id*. at 81-82.

180. United States v. Mitchell, No. 31421, 2000 CCA LEXIS 150 (A.F. Ct. Crim. App. May 26, 2000) (unpublished).

181. 53 M.J. 293 (2000) (*Williams I*).

182. 53 M.J. 299 (2000).

183. *Id*. at 294-95; *see* MCM, *supra* note 12, R.C.M. 202(c) ("[T]he servicemember may be held on active duty over objection pending disposition of any offense for which held and shall remain subject to the code during the entire period.").

184. *Hardcastle*, 53 M.J.. at 295.

185. *Id*. at 299.

186. *Williams I*, 53 M.J. at 296; *Hardcastle*, 53 M.J. at 303.

187. 55 M.J. 302 (2001).

188. *Id.* at 303.

189. *Id.* at 306.

190. *Id.* at 307.

his ETS date at trial and, apparently, none of the participants recognized the significance of this important fact."[191]

In *United States v. Smith*,[192] the accused submitted RCM 1105 matters to the convening authority. In these matters, he pointed out that the convening authority had not ensured that pay and allowances went to the accused's dependents. In lieu of the bargained-for financial support, the accused requested early release from confinement so he could support his family. Although the convening authority only approved thirty-six of the accused's forty months' confinement, neither the convening authority nor his staff judge advocate commented upon the government's inability to defer and waive automatic forfeitures once the accused, who was on legal hold, was convicted. In reversing and remanding the case, the CAAF stated that the remedy "is either specific performance of the agreement or an opportunity for the accused to withdraw from the plea."[193] Citing to *Mitchell*, the CAAF also pointed out that the government "may provide alternative relief if it will achieve the objective of the agreement."[194]

Voir Dire and Challenges

Over the last several years, the area of voir dire and challenges has been marked by the CAAF's continuing deference to the role of the military judge in the trial process.[195] This trend flows in the same direction as the recommendations made in the Cox Commission Report.[196] No two cases more clearly illuminate this trend than *United States v. Dewrell*[197] and *United States v. Lambert*.[198] Both cases address the military judge's authority to reserve voir dire to the bench.

In *Dewrell*, an Air Force master sergeant with over nineteen-years' service was convicted by an officer panel for committing an indecent act upon a female less than sixteen-years old. The convening authority approved a sentence of dishonorable discharge, seven-years' confinement, and reduction to the grade of E-1. On appeal, the accused alleged that the military judge abused his discretion by refusing to allow any defense voir dire questions concerning the members' prior involvement in child abuse cases, or their notions regarding preteen-age girls' fabrications about sexual misconduct. The CAAF noted that the "military judge's questions properly tested for a fair and impartial panel and allowed counsel to intelligently exercise challenges."[199] The court upheld the trial judge's practice of having counsel submit written questions seven days before trial, not allowing either side to conduct group voir dire, and rejecting the defense counsel's request for case-specific questions.[200]

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191. United States v. Smith, 56 M.J. 271, 280 (2002) (Crawford, C.J., concurring in part and in the result).

192. *Id*. at 271.

193. *Id*. at 273.

194. *Id*. (citing United States v. Mitchell, 50 M.J. 79 (1999)).

195. *See* Major Gregory Coe, *On Freedom's Frontier: Significant Developments in Pretrial and Trial Procedure*, ARMY LAW., May 1999, at 1 n.8 (discussing the CAAF's "reaffirmation of power and respect" for the military judge).

196. COX COMMISSION REPORT, *supra* note 1, at 8-9.

197. 55 M.J. 131 (2001).

198. 55 M.J. 293 (2001).

199. *Dewrell*, 55 M.J. at 137.

200. *Id.*

In *Lambert*, the CAAF addressed judicial control of voir dire after the members were impaneled.[201] Immediately after the members returned a verdict of guilty to one specification of indecent assault, the accused's civilian defense counsel asked the military judge to allow voir dire of the members because one member took a book titled *Guilty as Sin* into the deliberation room. The military judge conducted voir dire of the member, but did not allow the defense an opportunity to conduct individual or group voir dire. Analyzing the issue under an abuse of discretion standard, the CAAF held that the military judge did not err by declining to allow the defense to voir dire the members. The court cited to its earlier opinion in *Dewrell*, in finding that "[n]either the UCMJ nor the *Manual* gives the defense the right to individually question the members."[202]

Taken together, *Dewrell* and *Lambert* demonstrate that the military judge has almost unlimited control of voir dire throughout the trial. Using an abuse of discretion standard and deferring to the trial judge, the CAAF clearly bolsters the authority and autonomy of military judges. Practitioners should recognize and heed the harsh message contained in *Dewrell* and *Lambert*. Counsel that do not take the time and energy to plan and prepare effective voir dire will not only miss an advocacy opportunity, but also invite the bench to foreclose participation in this critical stage of litigation.

Causal Challenges

After questioning has been completed and the military judge has sequestered the members, counsel are asked to exercise causal challenges.[203] If counsel show proper grounds for challenge, the military judge must grant the challenge.[204] If counsel argue that a member "[s]hould not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality,"[205] the military judge may decide to grant or deny the challenge based on whether the member has an actual or implied bias. Actual bias is a credibility test viewed through the subjective eyes of the trial judge, whereas implied bias is an appearance test viewed through the objective eyes of the public.[206]

In *United States v. Armstrong*,[207] the CAAF addressed whether counsel have to articulate if causal challenges are based on actual or implied bias. In *Armstrong*, a panel member, Lieutenant Commander T, stated during voir dire that he worked with Special Agent Cannon, the lead investigator in the accused's case. Special Agent Cannon sat at counsel's table as a member of the prosecution team during trial and testified on the merits. Lieutenant Commander T stated that he was in the intelligence field, not law enforcement, and that he had no personal involvement in the accused's case, but had heard it discussed in meetings.[208] Lieutenant Commander T said he could put all of the above aside when deciding the case. Finding no actual bias, the military judge denied the defense's challenge for cause.[209] On appeal, the defense alleged error because of implied bias. The Coast Guard Court of Criminal Appeals, exercising its *de novo* power of review, set aside the findings and sentence based upon the theory of implied bias.[210] The CAAF, noting a challenge for cause under RCM 912(f)(1)(N) encompasses both actual and implied bias, held that the Coast Guard Court of Criminal Appeals did not err in granting relief.[211]

Last term, the CAAF decided *United States v. New*.[212] Known as the "blue beret" case, *New* is most noted for resolving the issue of who decides the "legality" of an order; however, the case also addresses the military judge's denial of a defense challenge for cause. On appeal, the defense argued that the military judge erroneously denied a causal challenge of a member who previously ordered a subordinate to deploy to Macedonia.[213] The CAAF held that the trial judge did not err in denying this causal challenge.[214] First, the court deferred to the judge on the issue of actual bias.[215] Then, on the issue of

201. *Lambert*, 55 M.J. at 294.

202. *Id.* at 296 (citing *Dewrell*, 55 M.J. at 136).

203. *See* UCMJ art. 46 (2000); MCM, *supra* note 12, R.C.M. 912(f)(2).

204. MCM, *supra* note 12, R.C.M. 912(f)(1)(A)–(M).

205. *Id.* R.C.M. 912(f)(1)(N).

206. United States v. Minyard, 46 M.J. 229 (1997).

207. 54 M.J. 51 (2000).

208. *Id.* at 52.

209. *Id.* at 53.

210. *Id.* (citing United States v. Armstrong, 51 M.J. 612, 615 (1999)).

211. *Id.* at 55.

212. 55 M.J. 95 (2001).

implied bias, the CAAF reasoned that "[i]t is unlikely that the public would view all . . . who have ever given an order as being disqualified from cases involving disobedience of orders that are similar to any they may have given in the past."[216]

In *New*, the CAAF did not discuss the causal challenge "liberal grant" mandate, but the issue caused the court to reverse the case of *United States v. Wiessen*.[217] An enlisted panel convicted Sergeant Wiessen of two specifications of attempted forcible sodomy with a child, indecent acts with a child, and obstruction of justice by an enlisted panel. He was sentenced to a dishonorable discharge, confinement for twenty years, total forfeitures, and reduction to the lowest enlisted grade.[218] During voir dire, Colonel (COL) Williams, a brigade commander and the senior panel member, identified six of the ten members as his subordinates. The defense, arguing implied bias, challenged COL Williams. The military judge denied this causal challenge. The defense then used their peremptory challenge to remove COL Williams, but preserved the issue for appeal by stating that "but for the military judge's denial of [our] challenge for cause against COL Williams, [we] would have peremptorily challenged [another member]."[219]

Judge Baker, writing for the majority, concluded, "Where a panel member has a supervisory position over six of the other members, and the resulting seven members make up the two-thirds majority sufficient to convict, we are placing an intolerable strain on public perception of the military justice system."[220] The CAAF held that "the military judge abused his discretion when he denied the challenge for cause against COL Williams."[221] Finding prejudice, the court reversed the ACCA, and set the findings and sentence aside.[222]

Although *Wiessen* did not change the substantive law in the area of peremptory challenges and implied bias, it is a landmark case. At a minimum, the bench and bar must give heightened scrutiny to whether two-thirds of the members work within the same chain of command. Savvy trial counsel should join defense challenges for cause of senior members who could be perceived (objectively by the public) of "controlling" enough members to convict.

Practitioners should remember that rehabilitation of members applies to actual bias, not necessarily to implied bias.[223] A recent illustration of this is *United States v. Napolitano*.[224] In *Napolitano*, a member filled out a written questionnaire, noting his disapproval of civilian defense counsel behavior. He stated that "they are freelance guns for hire, like Johnny Cochran."[225] The CAAF found that the military judge did not abuse his discretion in denying a defense challenge for cause.[226] The court reasoned that during voir dire the member, answering rehabilitative questions from the bench, retracted his opinion and stated he was not biased against the civilian defense counsel representing the accused in the current case.[227]

United States v. Rolle[228] provides another recent example of successful rehabilitation. The accused, a staff sergeant, pled guilty to the use of cocaine.[229] Much of voir dire focused on

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213. *Id.* at 97.

214. *Id.* at 100.

215. *Id.* at 99.

216. *Id.* at 100.

217. 56 M.J. 172 (2001).

218. *Id.* at 173.

219. *Id.* at 174.

220. *Id.* at 175.

221. *Id.* at 172.

222. *Id.* at 177.

223. This is because a challenge for cause based on actual bias is one of credibility as subjectively viewed by the military judge, whereas a challenge for cause based on implied bias is one of plausibility as objectively viewed by the public. *See generally* United States v. Minyard, 46 M.J. 229 (1997).

224. 53 M.J. 162 (2000).

225. *Id.* at 164.

226. *Id.* at 167.

227. *Id.* at 163-66.

228. 53 M.J. 187 (2000).

whether the panel members could seriously consider the option of no punishment, or whether they felt a particular punishment, such as a punitive discharge, was appropriate for the accused. One member, a command sergeant major, expressing his opinion that he would not let the accused stay in the military, said, "I am inclined to believe that probably there is some punishment in order there . . . . I very seriously doubt that he will go without punishment."[230] The command sergeant major did note, however, that there was a difference between a discharge and an administrative elimination from the Army.[231] Another member, a sergeant first class, stated: "I can't [give a sentence of no punishment] . . . because basically it seems like facts have been presented to me because he evidentially [sic] said that he was guilty."[232] The military judge denied the challenges for cause against both noncommissioned officers.[233] In affirming the trial judge's decision, the CAAF noted that the "[p]redisposition to impose some punishment is not automatically disqualifying.[234] 'The test is whether the member's attitude is of such a nature that he will not yield to the evidence presented and the judge's instructions.'"[235]

Peremptory Challenges and Batson

Once the military judge has ruled on all government and defense causal challenges, each party may then exercise one peremptory challenge.[236] Under *Batson v. Kentucky*,[237] the Supreme Court eliminated racial discriminatory use of peremptory challenges by the government. The Supreme Court has never specifically applied *Batson* to the military; but, in *United States v. Santiago-Davila*,[238] the military's highest court applied *Batson* to the military through the Fifth Amendment.[239] The military courts have even gone beyond *Batson* and its progeny; military courts have been more protective of a member's right to serve on a panel than civilian courts have been of a civilian's right to serve on a jury. For example, in *United States v. Moore*,[240] the CAAF eliminated the need for the defense to make a prima facie showing of discrimination before requiring the government to provide a race-neutral reason for exercising a peremptory challenge.[241] Further, in *United States v. Tulloch*,[242] the CAAF went beyond Supreme Court case law established in *Purkett v. Elem*,[243] requiring the challenged party to provide a reasonable, race- and gender-neutral reason for exercising a peremptory challenge.[244] Against this backdrop, the CAAF continues to develop military case law relating to peremptory challenges.

In two cases decided in 2000, the CAAF seemed to back away from *Tulloch* and move toward the less-restrictive standard set by the Supreme Court in *Purkett*. In *United States v. Norfleet*,[245] the trial counsel challenged the sole female member of the court. In response to the defense counsel's request for a gender-neutral explanation, the trial counsel stated the member "had far greater court-martial experience than any other member" and would dominate the panel, and she had potential "animosity" toward the SJA office.[246] The CAAF ruled that the

229. *Id.*

230. *Id.* at 189.

231. *Id.* at 188.

232. *Id.* at 190.

233. *Id.*

234. *Id.* at 191 (citing United States v. Jefferson, 44 M.J. 312, 319 (1996); United States v. Tippit, 9 M.J. 106, 107 (C.M.A. 1980)).

235. *Id.* (quoting United States v. McGowan, 7 M.J. 205, 206 (C.M.A. 1979)).

236. UCMJ art. 41(b)(1) (2000); MCM, *supra* note 12, R.C.M. 912(g).

237. 476 U.S. 79 (1986).

238. 26 M.J. 380 (C.M.A. 1988).

239. U.S. CONST. amend. V.

240. 28 M.J. 366 (1989).

241. *Id.* at 368-69.

242. 47 M.J. 283 (1997).

243. 514 U.S. 765 (1995).

244. *Tulloch*, 47 M.J. at 288; *see also id.* at 289 (Crawford, J., dissenting) (noting that under *Purkett*, civilian counsel only need provide a genuine race- or gender-neutral reason for exercising a challenge).

245. 53 M.J. 262 (2000).

military judge's failure to ask the trial counsel to explain the "disputes" between the member and the SJA office was not an abuse of discretion.[247] Finding that the government responded to the *Batson* objection with a valid reason and a separate reason that was not inherently discriminatory and on which opposing party could not demonstrate pretext, the court upheld the denial of the defense's *Batson* challenge.[248]

The CAAF further limited *Tulloch* when it decided *United States v. Chaney*.[249] The trial counsel in *Chaney*, as in *Norfleet*, used a peremptory challenge against the sole female member. After a defense objection, trial counsel explained the reason for the challenge was "her profession, not her gender."[250] The member in question was a nurse. The military judge interjected that in his experience, trial counsel rightly or wrongly felt members of the medical profession were overly sympathetic, but that this was not a gender issue. The defense did not object to the judge's comment or request further explanation from the trial counsel.[251] The CAAF, noting that the military judge's determination is given great deference,[252] upheld the military judge's ruling which permitted the peremptory challenge.[253] The CAAF stated that it would have been better for the military judge to require a more detailed clarification by the trial counsel, but the defense failed to show that the trial counsel's occupation-based peremptory challenge was "unreasonable, implausible or made no sense."[254]

In *United States v. Hurn*,[255] the CAAF bucked the trend that the court appeared to set in *Chaney* and *Norfleet*. *Hurn* seems to favor the more restrictive, objective standard of reasonableness set when the court decided *Chaney* in 1997. In *Hurn*, the CAAF was confronted with the issue of whether playing the "numbers" game could survive a *Batson* challenge.[256] In *Hurn*, the defense objected after the trial counsel exercised the government's peremptory challenge against the panel's only non-Caucasian officer.[257] The trial counsel said his basis "was to protect the panel for quorum."[258] This answer made sense because causal challenges had reduced the panel to eight members—five officer and three enlisted. If the government did not remove an officer member, the defense could have delayed the proceeding by reducing the panel below the required one-third enlisted membership. The CAAF held that the reason proffered did not satisfy the underlying purpose of *Batson*, *Moore*, and *Tulloch*, which is to protect the participants in judicial proceedings from racial discrimination.[259] This was because the trial counsel did not explain why he removed the non-Caucasian officer as opposed to the four Caucasian officers. The CAAF returned the case to The Judge Advocate General for a *DuBay* hearing to take evidence regarding post-trial affidavits provided by the trial counsel.[260]

Conclusion

This article has reviewed significant new developments in the areas of court-martial personnel, pleas and pretrial agreements, and voir dire and challenges. It seems fair to say that the CAAF defers to convening authorities, staff judge advocates, and military judges by continuing to elevate substance over form. With regard to pleas and pretrial agreements, the CAAF seems to be fine-tuning the burden military judges shoulder during the providence inquiry and holding the government's feet to the fire with regard to unintended consequences in pretrial agreements. Finally, in the area of voir dire and challenges,

246. *Id.* at 271.

247. *Id.* at 272.

248. *Id.*

249. 53 M.J. 383 (2000).

250. *Id.* at 384.

251. *Id.*

252. *Id.* at 385.

253. *Id.* at 386.

254. *Id.*

255. 55 M.J. 446 (2001).

256. *Id.* at 448.

257. *Id.* at 447-48.

258. *Id.* at 448.

259. *Id.* at 449.

260. *Id.* at 450. These affidavits detail additional reasons the government exercised its peremptory challenge against the lone minority member. *Id.*

the court has ruled conclusively on trial judges' ability to control the questioning of members and continues to hold the military to a higher standard than the civilian bar with regard to answering *Batson* challenges.

Whether we have witnessed a quiet evolution or the beginning of a noisy revolution remains to be seen. The Cox Commission Report certainly fueled critical discussion at many levels and may have spurred Congress to require twelve-member capital panels. Will Congress legislate random selection of panel members? In the future, will military judges be detailed once charges are preferred, rather than after referral? Only time will tell. The center of gravity of this debate is, and will remain, the requirement of the military justice system to promote justice without adversely affecting the efficiency and effectiveness of the military establishment.[261]

261. MCM, *supra* note 12, at I-1, para. 3. In evaluating the current push to "civilianize" the military justice system, special attention should be paid to the balancing test expressed in Article 36, UCMJ. The President is charged with prescribing rules that "shall, so far as he considers *practicable* . . . apply the principles of law . . . generally recognized in the trial of criminal cases in the United States district courts." UCMJ art. 36 (2000) (emphasis added). Given an explicit goal of mirroring civilian practice to the extent practicable, it is no wonder that military panel selection draws harsh criticism; however, the military lines of cases interpreting *Batson* illustrate how the UCMJ manages to deliver due process to service members in a unique, but effective, manner. *See, e.g.*, UCMJ arts. 31 (the rough military equivalent of *Miranda* rights that preceded *Miranda* by a decade and offer the accused superior protections), 32 (the rough military equivalent to a grand jury that offers superior protections to the accused), 34 (the SJA's pretrial advice to the convening authority, which has no civilian equivalent and offers substantial protections to the accused). These subtle strengths of the Code may escape readers of the Cox Commission Report who are not intimately familiar with the military justice system. Those who take into consideration the strengths of the military justice system, as well as its weaknesses, may hesitate before jumping on the bandwagon to recast the military justice system in a more "civilian" mold.

Recent Developments in Substantive Criminal Law: Broadening Crimes and Limiting Convictions

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Introduction

Lost is our old simplicity of times,
the world abounds with laws, and teems with crimes.[1]

The decisions of the Court of Appeals for the Armed Forces (CAAF) during the 2001 term[2] reflect two intriguing trends. First, the CAAF indicated a willingness to expand the government's ability to characterize conduct as criminal by broadening the reach of many offenses and by narrowing a number of defenses. In a competing trend, the CAAF signaled its growing dislike for overcharging. While supporting the use of the criminal justice system to proscribe misconduct, the court showed a distinct reluctance to allow the government to pile on convictions. The CAAF appears ready to combat criminality by expanding the reach of criminal statutes, while striving for simplicity and reasonableness by strictly limiting the government to one conviction for each act of misconduct.

This article analyzes both trends in detail. The analysis of the first trend starts with a discussion of two cases[3] involving the CAAF's interpretation of federal statutes regarding threats against the President[4] and child pornography.[5] In both cases the court affirmed convictions by interpreting the statutes in a manner broad enough to include the accused's misconduct. Then the article discusses three cases in which the CAAF affirmed convictions by narrowing or limiting the scope of possible defenses. In these cases, the court narrowed the scope of the parental discipline defense,[6] expanded limits on the defense of impossibility,[7] and narrowly defined what constitutes reasonable force when ejecting a trespasser.[8] The article completes the analysis of the first trend by examining how the CAAF solidified commanders' ability to maintain discipline by affirming a conviction against a soldier for disobeying an order to wear United Nations insignia on his uniform.[9] In the case, the court held that military judges should properly decide issues regarding the lawfulness of orders as interlocutory questions of law.[10] The majority then reaffirmed the principle that "an order requiring the performance of a military duty or act may be inferred to be lawful and it is disobeyed at the peril of the subordinate."[11]

The analysis of the second trend, toward limiting the number of convictions the government may secure against an accused, begins with a case of first impression for the CAAF.[12] The court held that the robbery of property belonging to one entity from multiple persons constitutes only one offense chargeable under Article 122, Uniform Code of Military Justice (UCMJ).[13] In another case, the CAAF provided a clear message to the field

1. Anonymous, *On the Proceedings Against America*, The Pennsylvania Gazette, Feb. 8, 1775, *reprinted in* John Bartlett, Familiar Quotations 779:4 (1968).

2. The 2001 term began 1 October 2000 and ended 30 September 2001.

3. United States v. Ogren, 54 M.J. 481 (2001); United States v. James, 55 M.J. 297 (2001).

4. 18 U.S.C.A. § 871 (West 2002).

5. *Id.* § 2252A.

6. United States v. Rivera, 54 M.J. 489 (2001).

7. United States v. Roeseler, 55 M.J. 286 (2001).

8. United States v. Marbury, 56 M.J. 12 (2001).

9. United States v. New, 55 M.J. 95 (2001).

10. *Id*. at 100.

11. Manual for Courts-Martial, United States, pt. IV, ¶ 14c(2)(a)(i) (2000) [hereinafter MCM].

12. United States v. Szentmiklosi, 55 M.J. 487, 489 (2001).

13. UCMJ art. 122 (2000).

by restricting the government from obtaining multiplicious convictions under Article 133, UCMJ,[14] and another substantive offense for the same underlying misconduct.[15] Finally, the article discusses the CAAF's opinion that multiplicity and unreasonable multiplication of charges represent two separate and distinct legal concepts.[16] By affirming the distinction between legal theories, the court unmistakably signaled its preference for reasonableness and restraint in the charging process.

Broadening the Scope of Criminal Offenses: Crimes and Offenses Not Capital

United States v. Ogren: *The CAAF Adopts an Objective Test for Willfulness When Considering Threats Against the President Under 18 U.S.C. § 871(a)*

Seaman Recruit Ogren was in pretrial confinement when he made threats against the President of the United States on two separate occasions. On the first occasion, he told a guard, "Hell, **** the President too . . . . [As] a matter of fact, if I could get out of here right now, I would get a gun and kill that bastard."[17] Later in the day, Ogren told a second guard, "I can't wait to get out of here, Man . . . . Because I'm going to find the President, and I'm going to shove a gun up his ***, and I'm going to blow his ******* brains out . . . . Clinton, Man. I'm going to find Clinton and blow his ******* brains out."[18] The guards took the statements seriously and telephoned the Secret Service.[19]

The next day, Special Agent Cohen of the Secret Service interviewed Seaman Recruit Ogren. Ogren admitted to making the threats but did not reaffirm that he would carry them out. He responded to questioning about whether he owned guns with the statement, "No, but I can get them."[20] He also told Special Agent Cohen "that he was just blowing off steam and was expressing displeasure at his incarceration."[21] At the prompting of the Secret Service Agent, Seaman Recruit Ogren wrote a sworn apology to the President.[22] Among other findings at trial, a military judge sitting alone convicted the accused of two specifications of communicating a threat under Article 134, UCMJ. One specification involved a violation of 18 U.S.C. § 871, Threats Against the President.[23]

As interpreted by the Supreme Court and other federal courts, 18 U.S.C. § 871(a)[24] requires the government to prove two elements beyond a reasonable doubt. The threat must be: (1) "true" and (2) made knowingly and willfully.[25] In *United States v. Watts*,[26] the Supreme Court emphasized the importance of carefully interpreting § 871(a) consistent with the limitations of the First Amendment.[27] The Court expressed a three-part test

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14. *Id.* art. 133.

15. United States v. Frelix-Vann, 55 M.J. 329 (2001).

16. United States v. Quiroz, 55 M.J. 334 (2001).

17. United States v. Ogren, 54 M.J. 481, 482 (2001).

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.* Article 134, UCMJ, proscribes noncapital offenses that violate federal law, including law made applicable through the Federal Assimilative Crimes Act. MCM, *supra* note 11, pt. IV, ¶ 60c(1).

24. 18 U.S.C. § 871(a) provides:

> Whoever knowingly and willfully deposits for conveyance in the mail or for a delivery from any post office or by any letter carrier any letter, paper, writing, print, missive, or document containing any threat to take the life of, to kidnap, or to inflict bodily harm upon the President of the United States, the President-elect, the Vice President or other officer next in the order of succession to the office of the President of the United States, or the Vice President-elect, or knowing and willfully otherwise makes any such threat against the President, President-elect, Vice President, or Vice President-elect, shall be fined under this title or imprisoned not more than five years, or both.

Id.

25. *Ogren*, 54 M.J. at 484.

26. United States v. Watts, 394 U.S. 705 (1969).

27. U.S. CONST. amend. I. The First Amendment provides, in part: "Congress shall make no law . . . abridging the freedom of speech." *Id.*

to distinguish "true threats" from protected speech. To determine whether a true threat exists, the court must examine: "(1) the 'context;' (2) 'the expressly conditional nature of the statement;' and (3) 'the reaction of the listeners.'"[28] In *Ogren*, the CAAF held that the statements were "true threats" because they were not conditioned on a future event. Also, in judging the context of the words and the reaction of listeners, the guards took the threats seriously enough to contact the Secret Service.[29]

The issue that required more in-depth analysis by the CAAF concerned the willfulness element. As discussed in the opinion, a majority of the federal circuits apply an objective test to measure the willfulness of threatening statements.[30]

> The objective test requires "only that the defendant intentionally make a statement, written or oral, in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily harm upon or to take the life of the President."[31]

A minority of federal circuits use a subjective test that requires an actual intention to do injury to the President.[32] Also, the Supreme Court in *Watts* "expressed 'grave doubts about' an objective test of willfulness based on 'an apparent determination to carry . . . [a threat] into execution.'"[33] The Court emphasized the importance of protecting "debate on public issues" that is "uninhibited, robust, and wide-open;"[34] however, the Supreme Court did not reach the second element of the offense in deciding the case and elected not to resolve the split between the circuits.[35]

In *Ogren*, the CAAF followed the majority view. By adopting the objective test, the court decided to follow a more expansive reading of § 871(a). The CAAF interpreted congressional intent "based on the plain language of the statute, its legislative history, and [a] review of federal case law."[36] The objective test proscribes a greater scope of conduct because it not only reaches statements reflecting an actual intent to threaten, but also statements reflecting an apparent intent to threaten. The court found that Congress intended the statute to protect against "harms associated with the threat itself," as well as the President's life.[37] The CAAF also supported its decision to adopt the objective test by stating that it is "consistent with the maintenance of good order and discipline in the armed forces and serves to promote the proper relationship between the military force and its commander in chief."[38]

In applying the objective test and affirming the legal and factual sufficiency of Ogren's conviction under § 871(a), the CAAF again focused on the reactions of the guards. The court also relied on the statements made to Special Agent Cohen after Ogren had the benefit of an evening to reflect on his threatening words.[39] The court held that although the statements may have resulted from frustration at being incarcerated, Ogren "should have reasonably foreseen that his threats would be understood to be more than a crude method of responding to confinement."[40]

In evaluating whether to charge threatening statements involving the President or Vice President of the United States, trial counsel should focus not only on the actual intent of the offender, but also on the foreseeable results. Both may form the

28. *Ogren*, 54 M.J. at 484 (quoting *Watts*, 394 U.S. at 707-08).

29. *Id*. at 487.

30. *Id*. at 485 (citing Rodgers v. United States, 422 U.S. 35, (1975); United States v. Fulmer, 108 F.3d 1486 (1st Cir. 1997); United States v. Johnson, 14 F.3d 766 (2d Cir. 1994); United States v. Miller, 115 F.3d 361 (6th Cir. 1997); Roy v. United States 416 F.2d 874 (9th Cir. 1969)).

31. *Id*. (quoting *Roy*, 416 F.2d at 877).

32. *Id*. at 486 (citing United States v. Frederickson, 601 F.2d 1358, 1363 (8th Cir. 1979); United States v. Patillo, 431 F.2d 293, 297-98 (4th Cir. 1970)).

33. *Id*. (quoting *Watts*, 394 U.S. at 707-08).

34. *Id*. at 487 (quoting *Watts*, 394 U.S. at 708).

35. *Id*. at 486.

36. *Ogren*, 54 M.J. at 486.

37. *Id*.

38. *Id*. at 487.

39. *Id*. at 487-88.

40. *Id*. at 487.

basis for a charge under § 871(a). Defense counsel should remain aware that the Supreme Court has expressed grave doubts about application of an objective standard under the statute. Although the Supreme Court denied *certiorari* in Seaman Recruit Ogren's case in December 2001,[41] the split in the circuits remains unresolved. Defense counsel should challenge any attempt to apply the objective standard on First Amendment grounds. Doing so will not only preserve the issue for appeal, but also focus the military judge's attention on the tests and limits to § 871(a) expressed by the Supreme Court. Forcing the military judge and trial counsel to distinguish between "true and willful" threats and protected speech at the trial level may pay dividends for clients even under the CAAF's broadly defined interpretation of the statute.

United States v. James: *Constitutionality of Child Pornography Statute*

From February 1998 through April 1998, Machinist's Mate First Class James used his roommate's computer to download, view, and save pornographic images of minors. Then in April 1998, he entered a chat room to discuss "Dad and daughter sex." While in the chat room, he engaged in a conversation with a U.S. Customs Service agent who was using the name "Fast Girl." James uploaded and sent pornographic images of minors to Fast Girl.[42]

At trial, James pled guilty to "one specification of possessing child pornography and two specifications of transporting child pornography in interstate commerce, in violation of 18 U.S.C. § 2252A as assimilated by Article 134, UCMJ."[43] On appeal, he asked the CAAF to set aside his convictions under 18 U.S.C. § 2252A because the Child Pornography Prevention Act of 1996 (CPPA) violated the First Amendment.[44] In particular, James argued that the statute was unconstitutionally overbroad because it proscribed both sexually explicit pictures of actual minors and similar depictions of virtual or apparent children.[45] The CAAF rejected the appellant's arguments in *James* and affirmed the convictions.[46]

The CAAF joined a majority of federal circuits in holding that the CPPA was constitutional.[47] The court showed its willingness to expand definitions of proscribed conduct when it specifically adopted the First Circuit's rationale in *United States v. Hilton*.[48] The First Circuit held that "suppressing the 'virtual' or apparent child-pornography trade constituted a compelling government interest that justified the expanded definition of 'child pornography' found in the federal statute."[49] The First Circuit also held that Congress narrowly tailored the CPPA in such a way that it was not unconstitutional.[50]

In justifying its opinion that the statute was animated by a compelling state interest and narrowly tailored to fulfill that concern, the circuit court looked primarily to the legislative history surrounding the adoption of the CPPA. In *Hilton*, the court recounted Congress's reasons for broadening the statute. First, child molesters use virtual child pornography to stimulate their sexual appetites.[51] Second, "Congress sought to ban computer-generated images that are 'virtually indistinguishable' from those of real children."[52] Thus, the narrowly tailored aim of the statute was computer-generated images. Third, Congress desired to protect the privacy of actual children whose images could be altered to create sexually explicit pictures.[53] Fourth, Congress wanted "to deprive child abusers of a 'criminal tool' frequently used to facilitate the sexual abuse of children."[54]

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41. United States v. Ogren, 122 S. Ct. 644 (2001).

42. United States v. James, 55 M.J. 297, 298 (2001).

43. *Id*. at 297.

44. *Id*.

45. *Id*. at 298. In 1996, Congress passed the Child Pornography Prevention Act, Pub. L. No. 104-208, div. A, tit. I, § 101(a), 110 Stat. 3009 (1996) (codified as amended at 18 U.S.C. §§ 2251-2252A, 2256 (2000)). The Act broadened existing federal legislation prohibiting the sexual exploitation of children by including the phrases "appears to be" and "conveys the impression" that the depiction portrays a minor. *Id*. (codified as amended at 18 U.S.C. 2256(8)(B), (D)).

46. *James*, 55 M.J. at 298.

47. *Id*. at 299-300 (citing United States v. Fox, 248 F.3d 394 (5th Cir. 2001); United States v. Mento, 231 F.3d 912 (4th Cir. 2000); United States v. Acheson, 195 F.3d 645 (11th Cir. 1999); United States v. Hilton, 167 F.3d 61 (1st Cir. 1999)).

48. *Id*. at 300.

49. *Id*. (quoting *Hilton*, 167 F.3d at 69).

50. *Hilton*, 167 F.3d at 66.

51. *Id*. (citing S. REP. 104-358, pt. IV(B) (1996)).

52. *Id*. (quoting S. REP. 104-358, pt. IV(B)).

53. *Id*. at 66-67 (citing S. REP. 104-358, § 2(7)).

In *Free Speech Coalition v. Reno*,[55] the Court of Appeals for the Ninth Circuit expressed a minority viewpoint that the CPPA constituted "censorship through the enactment of criminal laws intended to control an evil idea."[56] The Ninth Circuit found no compelling state interest in regulating virtual child pornography. The court struck the phrases "appears to be" and "conveys the impression" from the statute.[57] The circuit court focused its analysis around the theme that the original federal statutes prohibiting sexual exploitation of children "always acted to prevent harm to real children."[58] The court opined that by regulating virtual child pornography, the CPPA attempted "to criminalize disavowed impulses of the mind."[59]

Although the CAAF adopted the First Circuit's rationale when upholding the constitutionality of the CPPA's virtual image language, the court expressly found that James's convictions would stand even under the Ninth Circuit's narrow construction of the statute.[60] The CAAF pointed out that James admitted during his guilty plea inquiry that the pictures he possessed and transported were depictions of actual minors. Also, the pictures attached as exhibits to the record objectively supported the accused's admissions.[61]

On 16 April 2002, the Supreme Court affirmed the Ninth Circuit.[62] The Court specifically held that the virtual image prohibitions in §§ 2256(8)(B) and 2256(8)(D) of the CPPA were overbroad and unconstitutional.[63] Therefore, military practitioners should disregard the CAAF's pronouncements in *James* regarding the constitutionality of prohibiting virtual child pornography. Because Congress included a severability clause in the CPPA,[64] the Supreme Court's actions should not discourage trial counsel from continuing to use § 2252A to charge crimes involving depictions of *actual* children. Section 2256(8)(A) prohibits conduct involving pornographic images made using minors.[65] Additionally, Congress included in §§ 2256(8)(C) and 2256(9) of the CPPA a freestanding prohibition against use of "identifiable minors" in visual depictions of sexually explicit conduct.[66] Therefore, charging service members for crimes involving images of real children that are "morphed"

54. *Id*. at 67 (quoting S. REP. 104-358, § 2(3)).

55. 198 F.3d 1083 (9th Cir. 1999), *cert. granted sub nom.*, Holder v. Free Speech Coalition, 531 U.S. 1124 (2001).

56. *Id*. at 1086

57. *Id*.

58. *Id*. at 1089.

59. *Id*. at 1094.

60. *James*, 55 M.J. at 300.

61. *Id*. at 301.

62. Ashcroft v. Free Speech Coalition, 2002 U.S. LEXIS 2789, at *45 (Apr. 16, 2002).

63. *Id.* 18 U.S.C. § 2256 states, in pertinent part:

> (8) "child pornography" means any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where—
> (A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;
> (B) such visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct;
> (C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct; or
> (D) such visual depiction is advertised, promoted, presented, described, or distributed in such manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct;
> (9) "identifiable minor"—
> (A) means a person—
> (i)
> (I) who was a minor at the time the visual depiction was created, adapted, or modified; or
> (II) whose image as a minor was used in creating, adapting, or modifying the visual depiction; and
> (ii) who is recognizable as an actual person by the person's face, likeness, or other distinguishing characteristic, such as a unique birthmark or other recognizable feature.

18 U.S.C. § 2256 (2000).

64. S. REP. 104-358, § 8 (1996).

65. 18 U.S.C. § 2256(8)(A).

66. *Id*. § 2256(8)(C).

or collaged to make them appear sexually explicit remains a viable alternative for trial counsel.

Narrowing the Scope of Defenses

United States v. Rivera:
One Closed-Fist Punch Sufficient to Overcome Parental Discipline Defense

Sergeant Rivera's thirteen-year-old stepson, Edward, brought home a report card with several Ds and Fs. Sergeant Rivera became angry, screamed at his son, and punched him once in the stomach. Edward fell down. He stayed on the ground until his stepfather stopped talking and left. At trial, Sergeant Rivera argued that he had a proper purpose and used reasonable force to discipline his stepson. As evidence, he pointed to the fact that his punch did not cause substantial risk of bodily injury.[67]

> Edward did not receive any welts, bruises, or other marks, and he did not go to a doctor or to the hospital. The record does not reflect any mental distress. Edward did not visit a mental health professional, advise his friends of mental trauma, or convey to the trier of fact mental distress at the time he testified that he was punched in the stomach and fell down.[68]

The military judge found Sergeant Rivera guilty of assault consummated by a battery in violation of Article 128, UCMJ.[69] On appeal, Sergeant Rivera argued "no reasonable factfinder could find beyond a reasonable doubt that the purpose and degree of force used . . . moved on a continuum from reasonable parental discipline to criminal conduct."[70] The CAAF held that even in the absence of actual physical harm, one closed-fist punch could overcome the parental discipline defense.[71]

The CAAF explicitly recognized that the case "tests anew the scope of the parental discipline defense."[72] Previous cases decided by the CAAF relied on evidence of numerous blows and physical harm to overcome the affirmative defense.[73] The court also referred to its consideration of the "inherent tension between the privacy and sanctity of the family, including freedom to raise children as parents see fit, and the interest of the state in the safety and well being of children."[74] Because of its recognition of the inherent tension, the court elected to reject a per se rule regarding closed fists as followed by some states.[75] However, the court discussed the fact that using a closed fist bears certain burdens. Using a closed fist allows the factfinder to more readily infer ill motive, and it undermines an accused's claim of proper intent. Also, "a fist amplifies force magnifying the likelihood that a punch will be found to create a substantial risk of serious bodily injury."[76]

While the CAAF's ruling in *Rivera* clearly narrowed the scope of the parental discipline defense, it also reaffirmed the court's reliance upon the standards expressed in the Model Penal Code.[77] The court used the two-pronged test expressed in the code to conduct its analysis. First, the court evaluated whether or not Sergeant Rivera possessed a proper parental purpose. Using this subjective test, the CAAF found that a bad report card was an appropriate reason for parental intervention. Second, the court examined whether Sergeant Rivera acted with reasonable force—not intended to cause or known to cause serious bodily injury. Under this objective test, the court determined that the force he used was unreasonable. Judge Baker listed three critical facts that led to the court's determination that a reasonable factfinder could conclude beyond a reasonable doubt that Sergeant Rivera was guilty of assault consummated by battery. First, Sergeant Rivera punched his son with

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67. United States v. Rivera, 54 M.J. 489, 490 (2001).

68. *Id*. at 491.

69. *Id*. at 489. The elements for assault consummated by battery under Article 128, UCMJ, are

> [1] That the accused did bodily harm to a certain person; and
> [2] That the bodily harm was done with unlawful force or violence.

MCM, *supra* note 11, pt. IV, ¶ 54b(2).

70. *Rivera*, 54 M.J. at 490.

71. *Id*.

72. *Id*. at 491.

73. *Id*; *see* United States v. Robertson, 36 M.J. 190 (1992); United States v. Brown, 26 M.J. 148 (1988).

74. *Rivera*, 54 M.J. at 491.

75. *Id*.

76. *Id*. at 492.

a closed fist. Second, he hit him in the stomach. Third, the blow was hard enough that Edward fell down, indicating that the punch possessed sufficient force to cause a substantial risk of serious bodily injury.[78]

The *Rivera* opinion provides a good review of the standards applied in military practice when the affirmative defense of parental discipline arises in a case. Both trial and defense counsel must be familiar with the scope of the defense. Although the closed fist in *Rivera* makes the case a little easier, the tension described by the CAAF between protecting the safety of children and respecting family privacy can be troublesome. Although trial counsel should not read *Rivera* as providing a license to prosecute questionable child abuse cases, the court's opinion shows a willingness to proscribe a wider range of misconduct than in previous cases.[79]

United States v. Roeseler:
Impossibility Not a Defense to Attempted Conspiracy

Specialist (SPC) David Roeseler and Private First Class (PFC) Toni Bell were members of the same platoon in Germany. Private First Class Bell had two children by different fathers. The children lived with PFC Bell's parents in Iowa. Private First Class Bell was never married; however, she told SPC Roeseler that one of the fathers was her deceased husband. Then she lied again to SPC Roeseler, telling him that her in-laws (Joyce and Jerry Bell) were attempting to take custody of her children. Joyce and Jerry Bell did not actually exist.[80] Private First Class Bell also told SPC Roeseler that "she 'wished [the Bells] were dead' and would pay somebody to 'take care of them.'"[81]

Specialist Roeseler introduced PFC Bell to Private (PVT) Armann, also a member of their platoon. Private Armann bragged on numerous occasions that he was an assassin. Specialist Roeseler, PVT Armann, and PFC Bell discussed how they could kill the fictitious Bells. Eventually, SPC Roeseler and PVT Armann agreed to kill the Bells in exchange for $55,000 ($5000 of which was a deposit). The "would-be-assassins" drew up a contract containing a "reversion clause." If PFC Bell refused to comply with the contract, the assassins would kill her. Private First Class Bell signed the contract.[82] Specialist Roeseler and PVT Armann began making preparations to carry out the killing, including submitting leave papers to travel from Germany to Iowa. As the two assassins began making preparations, they demanded the $5000 deposit from PFC Bell. She made excuses for not providing the money, and when she realized that her lie had gone far enough, she told PVT Armann that she no longer needed the Bells killed.[83]

Because they were frustrated with PFC Bell for backing out of the contract, SPC Roeseler and PVT Armann elected to make good on the reversion clause. Specialist Roeseler persuaded PFC Bell to name him as guardian for her children and beneficiary of $200,000 under her Servicemembers' Group Life Insurance (SGLI) plan. The assassins then attempted numerous methods of killing her. Their last attempt involved enlisting an accomplice who designed and built a sniper rifle for PVT Armann to use. While PFC Bell was standing guard duty, PVT Armann shot her. The shot pierced her neck, 0.5 cm from her spine. She recovered after surgery.[84]

Among many other offenses, the government charged SPC Roeseler with attempting to conspire with PFC Bell and PVT Armann to commit murder.[85] Specialist Roeseler pled guilty to the charged offense under Article 80, UCMJ.[86] On appeal, he argued that his plea was not provident because the military

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77. *Id.* at 491 (citing MODEL PENAL CODE § 3.08(1) (ALI 1985), *reprinted in* ALI MODEL PENAL CODE AND COMMENTARIES 136 (1985)). The Model Penal Code states, in pertinent part:

> (a) the force is used for the purpose of safeguarding or promoting the welfare of the minor, including the prevention or punishment of his misconduct; and
> (b) the force used is not designed to cause or known to create a substantial risk of causing death, serious bodily injury, disfigurement, extreme pain or mental distress or gross degradation . . . .

MODEL PENAL CODE § 3.08(1)(a)-(b).

78. *Rivera*, 54 M.J. at 492.

79. *See, e.g.*, United States v. Robertson, 36 M.J. 190 (1992); United States v. Brown, 26 M.J. 148 (1988).

80. United States v. Roeseler, 55 M.J. 286, 287 (2001).

81. *Id.* (quoting Respondent's Brief at 36, 39).

82. *Id.*

83. *Id.* at 288.

84. *Id*.

85. *Id.* at 286.

judge did not explain to him the difference between conspiracy and attempted conspiracy. Specifically, he alleged that the judge should have informed him that "because PFC Bell knew Joyce and Jerry Bell were fictitious persons, she did not legally share his intent to kill them as required for a conspiracy conviction."[87] Specialist Roeseler also challenged the providency of his plea based on the military judge's failure to explain the defense of impossibility to him.[88]

The CAAF dismissed the first issue in fairly short order by showing that the military judge properly explained the offense of attempted conspiracy to SPC Roeseler. The judge correctly explained that it was SPC Roeseler's state of mind, not a co-conspirator's belief, that was critical to establish guilt for an attempt offense.[89] The court also pointed out that the judge did explain the difference between conspiracy and attempted conspiracy at an earlier stage of the inquiry.[90]

The CAAF then made equally short work of SPC Roeseler's second issue regarding the impossibility defense. The court looked to its decision in *United States v. Riddle*[91] to conclude that Article 80 "provides for no defense that the crime attempted could not factually or legally be committed . . . . [The] general rule is that an accused should be treated in accordance with the facts as he or she supposed them to be."[92] Additionally, the CAAF cited a case from last year, *United States v. Valigura*,[93] in which the court reiterated its view that "impossibility—whether in law or fact—is no defense in a prosecution for conspiracy or attempt."[94] Because impossibility was not a cognizable defense to either an attempt or conspiracy charge, the CAAF simply extended the limitation to the double-inchoate offense of attempted conspiracy.[95] Again, the court continued this year's trend of broadening the scope of proscribed conduct. Here, as in *Rivera*, the vehicle for expansion was the limiting or narrowing of a possible defense.

Perhaps the most valuable trend for practitioners to note in *Roeseler* is the court's affirmation of the crime of attempted conspiracy. In *Valigura*, the CAAF specifically rejected the "unilateral theory" of conspiracy in favor of the traditional "bilateral theory" of conspiracy.[96] The bilateral theory requires an agreement between at least two criminally culpable minds.[97]

The unilateral theory, adopted by the Model Penal Code and a number of states, requires only one culpable mind. The culpability of other parties to the agreement is immaterial.[98] Although the CAAF did not discuss which theory it preferred from a policy perspective, the Army Court of Criminal Appeals did express its policy-based opinion that it was unnecessary to adopt a unilateral theory of conspiracy.[99] The lower court reasoned that "[w]ith a 'solo conspirator' there is no 'group' criminal activity, so there is no increased danger in a feigned conspiracy. Also, other inchoate offenses, such as attempted conspiracy and solicitation, will usually cover such misconduct."[100] Although unnecessary to reach its holding in *Roeseler*, the CAAF explicitly defended its decision in *Riddle*, finding that attempted conspiracy could constitute a crime under the UCMJ.[101] Before *Riddle*, in *United States v. Anzalone*,[102] the

86. *Id.* Article 80, UCMJ, states, in pertinent part: "An act, done with specific intent to commit an offense under this chapter, amounting to more than mere preparation and tending, even though failing, to effect its commission, is an attempt to commit that offense." UCMJ art. 80 (2000).

87. *Roeseler*, 55 M.J. at 289.

88. *Id*. at 288.

89. *Id.* at 289.

90. *Id*. at 290.

91. 44 M.J. 282 (1996).

92. *Roeseler*, 55 M.J. at 291 (quoting *Riddle*, 44 M.J. at 286).

93. 54 M.J. 187 (2000).

94. *Roeseler*, 55 M.J. at 291 (quoting *Valigura*, 54 M.J. at 189).

95. *Id.*

96. *Valigura*, 54 M.J. at 188. *See generally* Major Timothy Grammel, *Justice and Discipline: Recent Developments in Substantive Criminal Law*, ARMY LAW., Apr. 2001, at 79-84, (discussing the bilateral theory of conspiracy).

97. 2 WAYNE R. LAFAVE & AUSTIN W. SCOTT, SUBSTANTIVE CRIMINAL LAW § 6.5 (1986); ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 694 (3d ed. 1982).

98. LAFAVE & SCOTT, *supra* note 97, § 6.5 (1986); PERKINS & BOYCE, *supra* note 97, 694.

99. United States v. Valigura, 50 M.J. 844, 848 (Army Ct. Crim. App. 1999); *see also* Grammel, *supra* note 96, at 81.

100. Grammel, *supra* note 96, at 81 (citing *Valigura*, 50 M.J. at 847).

101. United States v. Roeseler, 55 M.J. 286, 291 (2001).

CAAF found that an agreement with an undercover agent to commit espionage also constituted attempted conspiracy.[103]

In citing to *Riddle*, the CAAF applied traditional tools of statutory interpretation.[104] However, the court also expressed the policy-based argument that "conviction of an attempt under Article 80 is particularly appropriate where there is no general solicitation statute in the jurisdiction or a conspiracy statute embodying the unilateral theory of conspiracy."[105] The CAAF restrained itself last year from entering the "the policy-making prerogative that belongs to Congress"[106] with regard to adopting the bilateral theory of conspiracy. Then in *Roeseler*, the court entered the arena of policy-based reasoning by using that very theory of conspiracy to reaffirm its commitment to the double-inchoate offense of attempted conspiracy.

Perhaps Judge Gierke's concurring opinion in *Roeseler* provided the impetus for the majority's "dicta-defense" of attempted conspiracy. As in *Anzalone*, Judge Gierke expressed his opinion that there is no crime of attempted conspiracy.[107] He would affirm the attempted conspiracy conviction in *Roeseler* "as a mislabeled solicitation to commit premeditated murder."[108] He points to the fact that SPC Roeseler clearly solicited PVT Armann to murder the fictitious in-laws. His argument points out a minor fallacy in the majority's policy-based defense of attempted conspiracy. Although the UCMJ does not statutorily proscribe solicitation except in limited circumstances under Article 82, UCMJ,[109] the President has in fact enumerated an offense under Article 134 to address solicitation.[110] However, Judge Gierke's reliance on solicitation will not fill all possible gaps left in a system adopting the bilateral theory of conspiracy. For instance, any time a person with a "non-culpable" state of mind approaches a service member and an agreement is struck to commit a crime, the government is left without a charging option in the absence of attempted conspiracy. Solicitation is only sufficient when the service member approaches the non-culpable individual.

Given the court's commitment to the double-inchoate offense of attempted conspiracy, practitioners should remain aware of its existence. Although trial counsel should certainly never overuse offenses that are difficult to explain to panel members, attempted conspiracy may often be the only way to adequately address particular acts of misconduct. Defense counsel need to familiarize themselves with Judge Gierke's well-reasoned arguments to continue the battle over the controversial double-inchoate offense.

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102. 43 M.J. 322 (1995).

103. *Id.* at 323.

104. *Roeseler*, 55 M.J. at 288-89 (citing *Riddle*, 44 M.J. at 285). The CAAF relied specifically on the text of Article 80, UCMJ, and the fact that no other statute or case law precludes application of Article 80 to a conspiracy offense under Article 81, UCMJ. *See id.*

105. *Id.* (citing *Riddle*, 44 M.J. at 285 (citing Robbins, *Double Inchoate Crimes*, 26 HARV. J. ON LEGIS. 1, 91 (1989))).

106. Grammel, *supra* note 96, at 81.

107. *Anzalone*, 43 M.J. at 326 (Gierke, J., concurring).

108. *Roeseler*, 55 M.J. at 292 (Gierke, J., concurring in the result).

109. UCMJ art. 82 (2000). Article 82 states:

> (a) Any person subject to this chapter who solicits or advises another or other to desert in violation of section 885 of this title (Article 85) or mutiny in violation of section 894 of this title (Article 94) shall, if the offense solicited or advised is attempted or committed, be punished with the punishment provided for the commission of the offense, but, if the offense solicited or advised is not committed or attempted, he shall be punished as a court-martial may direct.
> (b) Any person subject to this chapter who solicits or advises another or others to commit an act of misbehavior before the enemy in violation of section 899 of this title (Article 99) or sedition in violation of section 894 of this title (Article 94) shall, if the offense solicited or advised is committed, be punished with the punishment provided for the commission of the offense, but, if the offense solicited or advised is not committed, he shall be punished as a court-martial may direct.

Id.

110. *Id.* art. 134. The elements of "[s]oliciting another to commit an offense" under Article 134 are as follows:

> [a] That the accused solicited or advised a certain person or persons to commit a certain offense under the code other than the four offenses named in Article 82;
> [b] That the accused did so with the intent that the offense actually be committed; and
> [c] That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

Id.

United States v. Marbury:
Brandishing a Knife Not Reasonably Necessary to Eject a Trespasser

Staff Sergeant (SSG) Marbury lived in a "hooch" on Camp Kyle, Korea. Her hooch contained four private rooms and a common area. One evening, a group of about twelve senior noncommissioned officers gathered at the hooch for a farewell party. During the party, SSG Marbury left the common area and entered her own room to get ready to go to a club for the rest of the evening. Sergeant First Class (SFC) Pitts followed her into the room and attempted to persuade her that she should remain at the party because she was too drunk to leave the barracks. An argument ensued, and eventually SFC Pitts, a martial arts expert, hit SSG Marbury in the mouth. Staff Sergeant Marbury left the room and asked one of the guests, SFC Beanum, to help her remove SFC Pitts. Sergeant First Class Beanum laughed at her. [111]

Staff Sergeant Marbury then retrieved a steak knife from the kitchen and went back into her room. She "walked past SFC Pitts to the back corner of the room, stood 'four or five feet away,' held the knife 'nonchalantly' in front of her, and told SFC Pitts to 'get out of my room now.'"[112] Instead of leaving the room, SFC Pitts attacked SSG Marbury in order to take the knife away from her. They struggled and fell backward onto the bed. Sergeant First Class Pitts pinned SSG Marbury on her back and held her hands over her head. During the altercation, SFC Pitts suffered a "glancing, relatively superficial" two-centimeter wound over the rib.[113] Some other NCOs then separated the two soldiers, and SFC Pitts kicked SSG Marbury in the chest, "lifting her off the ground and sending her flying across the room."[114] At trial, "SFC Pitts testified that he was drinking on the night in question and did not know how he was cut but believed it was an accident, stating, 'I didn't see her come at me with no knife.'"[115]

An officer and enlisted panel convicted SSG Marbury of intentional infliction of grievous bodily harm under Article 128, UCMJ.[116] The court sentenced SSG Marbury to a bad-conduct discharge and reduction to the lowest enlisted grade. The Army Court of Criminal Appeals rejected SSG Marbury's accident and self-defense claims, but made a factual finding that she did not possess the requisite specific intent to inflict grievous bodily harm. The court affirmed the lesser-included offense of aggravated assault with a dangerous weapon and authorized a sentence rehearing. The convening authority determined that a sentence rehearing was impracticable, and after approving the finding of guilty to the assault with a dangerous weapon, approved a sentence of no punishment.[117] The Army court characterized SSG Marbury's offense as an offer-type assault with a dangerous weapon based on a culpably negligent act. The court found negligence in her "brandishing a large knife in front of an intoxicated martial arts expert in close quarters."[118]

Staff Sergeant Marbury argued to the CAAF that the Army court erred by finding that her threatening conduct was unlawful. She contended that she could lawfully use reasonable force to eject a trespasser and protect her property.[119] While the CAAF specifically acknowledged that service members possess the right to eject trespassers from their military bedrooms and protect their personal property, the court emphasized that the individuals must act reasonably.[120] The majority found SSG Marbury's actions unreasonable.[121]

The CAAF's decision focused on SSG Marbury's failure to call the military police to have SFC Pitts removed from her room. The court characterized SSG Marbury's return to her

111. United States v. Marbury, 56 M.J. 12, 13 (2001) (citing United States v. Marbury, 50 M.J. 526, 527-28 (Army Ct. Crim. App. 1999)).

112. *Id.* at 18 (Gierke, J., dissenting).

113. *Id.* at 14 (citing *Marbury*, 50 M.J. at 527-28).

114. *Id.* at 18 (Gierke, J., dissenting).

115. *Id.*

116. *Id*. Article 128, UCMJ, states:

> (a) Any person subject to this chapter *who attempts or offers with unlawful force or violence to do bodily harm to another person*, whether or not the attempt or offer is consummated, *is guilty of assault* and shall be punished as a court-martial may direct.
> (b) Any person subject to this chapter who—
> (1) *commits an assault with a dangerous weapon or other means or force likely to produce death or grievous bodily harm*; or
> (2) commits an assault and *intentionally inflicts grievous bodily harm* with or without a weapon;
> *is guilty of aggravated assault* and shall be punished as a court-martial may direct.

UCMJ art. 128 (2000) (emphasis added).

117. *Marbury*, 56 M.J. at 13.

118. *Id*. at 15.

119. *Id.*

room with a knife as unreasonable and excessive.[122] The CAAF's ruling seemingly establishes a clear limit in military jurisprudence on one's ability to act with reasonable force to defend personal property or to eject a trespasser. No actions apparently constitute reasonable force if contacting law enforcement personnel for help is also available to the service member. The court cited to Lafave and Scott's *Substantive Criminal Law*[123] as support for its contention that the unreasonable force ruling is in "general accord with civilian law."[124] By expressing the limitation, the CAAF essentially broadens the scope of proscribed conduct chargeable under Article 128, UCMJ. Although the expanded reach will arguably only apply in a limited number of circumstances, the court remained consistent with its tendency this year to extend the scope of criminal statutes.

Judge Gierke took particular exception with the majority opinion in *Marbury*, characterizing SSG Marbury's conviction as a "gross injustice."[125] First, his dissent focused on the reasonableness of SSG Marbury's conduct given the circumstances. Judge Gierke argued that "[w]hile summoning the military police might have been a 'reasonable' course of action, it was not the only reasonable course of action."[126] He specifically contended that SSG Marbury "was entitled to display a knife in an effort to persuade SFC Pitts to leave."[127] He pointed to the reasonableness of taking the precautionary step of protecting herself before approaching SFC Pitts a second time. He also emphasized that SSG Marbury did not endanger SFC Pitts upon reentry, and she gave him a clear path to leave.[128] Judge Gierke's dissent offers some well-reasoned arguments against establishing a bright-line rule requiring a first resort to law enforcement assistance as the only reasonable way to eject trespassers or protect property.

After dealing with the lawfulness of the force used by SSG Marbury, Judge Gierke focused on the most basic element necessary in an offer-type assault—reasonable apprehension of harm. An assault by offer requires "an act or omission, which creates in the mind of another a reasonable apprehension of receiving immediate bodily harm."[129] The focus in an assault by offer is on the alleged victim's state of mind. Judge Gierke critiqued the majority opinion by showing how SFC Pitts's actions were completely inconsistent with someone possessing a reasonable apprehension of receiving immediate bodily harm. Sergeant First Class Pitts responded to SSG Marbury's request to vacate the room by attacking her instead of leaving. He testified that he did not know exactly how the injury happened. He also testified that he "didn't see Sergeant Marbury come at me with no knife."[130] Additionally, Judge Gierke pointed to "SFC Pitts' confidence that his physical strength and martial arts prowess would protect him from bodily harm."[131] Other witnesses who observed SSG Marbury also testified that they did not take her actions seriously because she was not carrying the knife in an aggressive manner.[132] Not only does Judge Gierke attack the majority for its limitation on reasonable force, but he also presented a good case that affirming the offer-type offense itself was faulty.

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120. *Id; see* United States v. Richey, 20 M.J. 251 (C.M.A. 1985); United States v. Regalado, 33 C.M.R. 12 (C.M.A. 1963). The current instruction provided in the *Military Judges' Benchbook* regarding the right to eject trespassers states, in pertinent part:

> Note 3: "*Ejecting someone from the premises.*" A person, who is lawfully in possession or in charge of premises, and who requests another to leave whom he or she has a right to request to leave, may lawfully use as much force as is reasonably necessary to remove the person, after allowing a reasonable time for the person to leave. The person who refuses to leave after being asked to do so, becomes a trespasser and the trespasser may not resist if only reasonable force is employed in ejecting him or her. *United States v. Regalado*, 33 C.M.R. 12 (C.M.A. 1963).

U.S. DEP'T OF ARMY, PAM. 27-9, LEGAL SERVICES: MILITARY JUDGES' BENCHBOOK, ¶ 5-7 n.3 (1 Apr. 2001) [hereinafter BENCHBOOK].

121. *Marbury*, 56 M.J. at 16.

122. *Id.*

123. *Id. See generally* 1 WAYNE R. LAFAVE & AUSTIN SCOTT, SUBSTANTIVE CRIMINAL LAW § 5.9(a) (1986).

124. *Marbury*, 56 M.J. at 16.

125. *Id.* at 19 (Gierke, J., dissenting).

126. *Id.*

127. *Id.*

128. *Id.*

129. MCM, *supra* note 11, pt. IV, ¶ 54c(1)(b)(ii).

130. *Marbury*, 56 M.J. at 18 (Gierke, J., dissenting).

131. *Id.* at 19.

132. *Id.*

The value for practitioners in examining *Marbury* lies in understanding the CAAF's apparent standard for evaluating when reasonable force may be used to defend property or eject a trespasser. Although the court reemphasized the right of service members to use force in both scenarios, the majority indicated that it will require them to resort to law enforcement personnel first or risk running afoul of the UCMJ. The CAAF may not have intended to draw such a bright line. The court's only objective may have been to find a way to affirm SSG Marbury's conviction because the particular fact pattern indicated that she should have called the military police. If the court intended the latter, then the opinion fell short of making that intention clear. The majority's message to the field is that whenever possible, service members must first resort to law enforcement when attempting to eject a trespasser from their barracks room or protecting their personal property.

Failure to Obey Lawful Orders

United States v. New:
Order to Wear United Nations Accouterments Lawful

Specialist Michael New's commander ordered him to wear United Nations (UN) accouterments (including a blue beret) as part of his uniform in preparation for and while on deployment to the Former Yugoslavian Republic of Macedonia. During August 1995, SPC New's battalion received orders to deploy as part of the United Nations Preventive Deployment Force in Macedonia. Specialist New expressed concerns about the legality of the UN mission and wearing UN insignia to his chain of command. His father spread these concerns worldwide via the Internet and enlisted support from members of Congress. Before deploying to Macedonia, the unit granted leave to each of the soldiers. Specialist New spent his leave in Washington, D.C. meeting with his father, lawyer, and members of Congress.[133]

On 2 October SPC New's battalion received a briefing by the brigade trial counsel laying out the legal basis for the mission. After the briefing, his battalion commander issued an order to everyone in the battalion to attend a formation at 0900 on 10 October wearing a modified uniform with UN insignia. Specialist New's company commander then issued an order that all soldiers in the company attend a formation at 0845 on 10 October wearing the modified uniform. Specialist New showed up on 10 October in his standard Army Battle Dress Uniform without the proper UN accouterments. His battalion commander called him to his office and offered him a second chance to comply with the order to wear the insignia. Specialist New refused.[134]

At trial, a special court-martial consisting of officer and enlisted members convicted SPC New of failure to obey an order in violation of Article 92(2), UCMJ.[135] The court-martial sentenced him to a bad-conduct discharge.[136] During the trial, SPC New challenged the legality of his commander's order.[137] He first argued that the order violated the Army uniform regulation[138] by transferring his allegiance to the UN.[139] He then challenged the legality of the deployment itself. Specialist New claimed that "President Clinton misrepresented the nature of the deployment to Congress and failed to comply with the United Nations Participation Act."[140] Over SPC New's objection, the military judge elected to rule on the issue of lawfulness himself. The judge decided that the question of the deployment's legality was a nonjusticiable political question. The judge further held that the order to wear the modified uniform with UN insignia was lawful. He later instructed the panel that the order was lawful.[141]

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133. United States v. New, 55 M.J. 95, 98 (2001).

134. *Id.*

135. *Id*. at 97. The elements of UCMJ Article 92(2) are

> [1] That a member of the armed forces issued a certain lawful order;
> [2] That the accused had knowledge of the order;
> [3] That the accused had a duty to obey the order; and
> [4] That the accused failed to obey the order.

UCMJ art. 92(2) (2000).

136. *New*, 55 M.J. at 97.

137. *Id.* at 100.

138. U.S. Dep't of Army, Reg. 670-1, Wear and Appearance of Army Uniforms and Insignia (1 Sept. 1992).

139. *New*, 55 M.J. at 107.

140. *Id.* (citing United States v. New, 50 M.J. 729, 736 (Army Ct. Crim. App. 1999)).

141. *Id*. at 97.

On appeal, SPC New questioned the military judge's authority to rule on the lawfulness of the order. He claimed that the judge denied him the right to have the members determine whether the government proved every element of the crime beyond a reasonable doubt. Specialist New further argued that the military judge erred when he decided that he could not rule on the legality of the deployment itself because it was a nonjusticiable political question. Finally, SPC New challenged the actual ruling that the order was lawful.[142]

The CAAF held that "lawfulness of an order, although an important issue, is not a discrete element of an offense under Article 92."[143] Therefore, the military judge properly considered the issue as a question of law.[144] The CAAF further held that the military judge properly refrained from ruling on the nonjusticiable political question regarding the deployment's legality. Additionally, the court affirmed the decision that the order itself was lawful. The CAAF reviewed the standard for a commander to make uniform modifications under the Army's uniform regulation and ruled that the changes complied with the regulation.[145] The order did not overcome the presumption of lawfulness given to orders that relate to military duty. "If uniform requirements relate to military duty, then an order to comply with a uniform requirement meets the 'military duty' test."[146]

All five CAAF judges either concurred or concurred in the result in *New*; however, Judge Sullivan and Senior Judge Everett's opinions read far more like dissents than concurrences. In fact, both judges rely on the harmless-error doctrine to affirm the case. Judge Effron joins Chief Judge Crawford and Judge Gierke in declining to recognize lawfulness as a distinct element of an offense under Article 92(2), but his concurring opinion indicates some discomfort with the current status of how orders cases are handled in military practice. Sifting through the fairly lengthy and complicated opinions for definitive signals to the field may prove difficult for practitioners. Yet, one new development appears unmistakable. The CAAF has set a bright-line standard for who determines lawfulness in obedience cases.

As discussed by Judge Sullivan[147] and Judge Effron,[148] guidance was not completely clear on whether factual issues regarding the legality of orders belonged to the military judge or to the panel. In fact, the *Military Judge's Benchbook* stood (and stands) in direct contrast to the discussion in Rule for Courts-Martial (RCM) 801(e).[149] The *Manual for Courts-Martial*, in the discussion to RCM 801(e), states that "the legality of an act is normally a question of law."[150] In contrast, the *Benchbook* model instruction specifically contemplates a role for panel members by stating, "If there is a factual dispute as to whether or not the order was lawful, that dispute must be resolved by the members in connection with their determination of guilt or innocence . . . ."[151] Under *New*, lawfulness is not a discrete element and military judges should rule on all questions regarding the legality of orders.[152]

142. *Id.*

143. *Id.* at 100.

144. *Id.*

145. *Id.* at 107.

146. *Id.* The "military duty" test as found in the *MCM* states, in pertinent part:

> (iii) *Relationship to military duty.* The order must relate to military duty, which includes all activities reasonably necessary to accomplish a military mission, or safeguard or promote the morale, discipline, and usefulness of members of a command and directly connected with the maintenance of good order in the service. The order may not, without such a valid military purpose, interfere with private rights or personal affairs. However, the dictates of a person's conscience, religion, or personal philosophy cannot justify or excuse the disobedience of an otherwise lawful order.

MCM, *supra* note 11, pt. IV, ¶ 14c(2)(a)(iii).

147. *New*, 55 M.J. at 115 (Sullivan, J., dissenting).

148. *Id.* at 111-14 (Effron, J., concurring).

149. MCM, *supra* note 11, R.C.M. 801(e).

150. *Id.* The conflicting guidance can be seen in the discussion to RCM 801(e) itself. The discussion states, in pertinent part:

> Questions of the applicability of a rule of law to an undisputed set of facts are normally question of law. Similarly, the legality of an act is normally a question of law. For example, the legality of an order when disobedience of an order is charged, the legality of restraint when there is a prosecution for breach of arrest, or the sufficiency of warnings before interrogation are normally questions of law. It is possible, however, for such questions to be decided solely upon some factual issue, in which case they would be questions of fact. For example, the question of what warnings, if any were given by an interrogator to a suspect would be a factual question.

Id. discussion.

Judge Sullivan and Senior Judge Everett concurred in the result because they opined that lawfulness was indeed an element of the offense under Article 92. Thus, the military judge should have allowed the panel to decide the issue of lawfulness. They agreed with the majority, however, that the legality of the deployment issue was a political question.[153] Therefore, the only real factual issue for the panel was whether the commander was in compliance with *Army Regulation 670-1* when ordering the uniform modifications. Judge Sullivan wrote that "[t]here was overwhelming evidence presented in this case, uncontroverted by the defense, that the order to wear the UN patches and cap was lawful, that is, it was properly authorized, related to a military duty, and violated no applicable service uniform regulations."[154] Senior Judge Everett claimed that any question regarding whether the uniform regulation promoted safety was "insubstantial."[155] Therefore, both judges found any error by the military judge to be harmless in not submitting the factual issue regarding compliance with *Army Regulation 670-1* to the panel.[156]

Specialist New based his challenge that the panel should have decided lawfulness on the reasoning provided by the Supreme Court in *United States v. Gaudin*.[157] *Gaudin* involves the question of whether a federal district court judge properly ruled on an issue of materiality himself instead of submitting it to the jurors for a decision. Specialist New equated lawfulness to materiality. In *Gaudin*, the charge concerned making material false statements in a matter within the jurisdiction of a federal agency, in violation of 18 U.S.C. § 1001. The defendant allegedly made a number of false statements on loan documents submitted to an agency within the Department of Housing and Urban Development.[158] The Supreme Court noted that materiality was an element of the offense and required findings involving mixed questions of law and fact. The Court held that jurors should decide such mixed questions.[159] Further, "[t]he Constitution gives a criminal defendant a right to have a jury determine, beyond a reasonable doubt, his guilt of every element of the crime with which he is charged. The trial judge's refusal to allow the jury to pass on the 'materiality' of Gaudin's false statements infringed that right."[160]

The majority in *New* referred to the *Gaudin* principles as not applying to all statutes.[161] Judge Sullivan and Judge Everett relied heavily on the reasoning in *Gaudin* to opine that lawfulness *is* an element of an offense under Article 92(2).[162] Yet, despite their differences on the applicability of *Gaudin* to issues of lawfulness, both camps appear to have drawn from a concurring opinion in the case to help *New* pass muster if reviewed by the high court. In the opinion, Chief Justice Rehnquist, joined by Justices O'Connor and Breyer, pointed out that *Gaudin* became an "easy" case because the government conceded that materiality was an element of the offense.[163] Of course, much of the argument in *New* centered on the element issue, with the majority concluding that lawfulness was not an element. Thus, *New* was not going to present an "easy" case for the Supreme Court. Chief Justice Rehnquist also suggested that had the government argued "harmless error," the Court might have decided differently in *Gaudin*.[164] Interestingly, while Judges Sullivan

151. BENCHBOOK, *supra* note 115, ¶ 3-16-3 n.3. According to note 3, the military judge should give the following instruction if the lawfulness of the order presents an issue of fact for the members:

> An order, to be lawful, must relate to specific military duty and be one that the member of the armed forces is authorized to give. An order is lawful if it is reasonably necessary to safeguard and protect the morale, discipline and usefulness of the members of a command and is directly connected with the maintenance of good order in the services . . . . You may find the accused guilty of failing to obey a lawful order only if you are satisfied beyond a reasonable doubt that the order was lawful.

Id.

152. *New*, 55 M.J. at 100.

153. *Id.* at 116 (Sullivan, J., concurring in the result).

154. *Id.* at 128.

155. *Id.* at 130 (Everett, J., concurring in part and in the result).

156. *Id.* at 128, 130.

157. 515 U.S. 506 (1995).

158. *Id.* at 507.

159. *Id.* at 512.

160. *Id.* at 522-23.

161. *New*, 55 M.J. at 104.

162. *Id.* at 115 (Sullivan, J., concurring in the result), 129 (Everett, J., concurring in part and in the result).

163. *Gaudin*, 515 U.S. at 524.

and Everett relied on *Gaudin* to conclude that lawfulness was an element that should have gone to the panel, they held that the error was harmless.[165] Thus, even the opinions that concurred in the result contributed to protecting *New* from review by the Supreme Court by using Chief Justice Rehnquist's reasoning. The Supreme Court denied *certiorari* on 9 October 2001.[166]

An important reason cited by Judge Effron for allowing judges to rule on lawfulness is a concern for consistency and reviewability. "Rather than producing the unity and cohesion that is critical to military operations, appellant's approach could produce a patchwork quilt of decisions, with some courts-martial determining that orders were legal and others determining that the same orders were illegal, without the opportunity for centralized legal review that is available for all other issues of law."[167] The unanimous consent of the five judges on the political question doctrine appears to work in harmony with the majority's concern for consistency and reviewability. The court expressed its unwillingness to allow service members to substitute their personal judgment for that of their superiors or the federal government regarding the legality of an order.[168] An order requiring the performance of a military duty is *inferred* lawful and disobeyed at the peril of the subordinate.[169] By affirming SPC New's conviction, the CAAF indicated a clear desire to support commanders' ability to maintain discipline, particularly with regard to highly publicized and politically questionable deployments. Military justice practitioners should recognize that in reaffirming the principle that all orders are presumed lawful unless they are palpably illegal on their face, the CAAF showed its willingness to support broadly the criminality of military specific offenses to help promote discipline in the ranks.

Limiting the Number of Possible Convictions: Robbery

United States v. Szentmiklosi:
Forcible Taking of Property Belonging to One Entity From Multiple Persons Constitutes One Robbery

Specialist Szentmiklosi conspired to rob the post exchange (PX) money courier. As a military policeman (MP), SPC Szentmiklosi had previously escorted the courier from the bank to the PX. On the morning of 15 March 1997, SPC Szentmiklosi and an accomplice waited behind the PX for the courier and MP escort. The two assailants wore ski masks and gloves. Specialist Szentmiklosi carried a loaded pistol. The accomplice carried a loaded shotgun.[170] When the courier arrived, SPC Szentmiklosi pointed the pistol at him and told him to put down the bag of money. The bag contained $36,724.88. Specialist Szentmiklosi ordered the courier to get down, sprayed his face with mace, and grabbed the bag of money. While SPC Szentmiklosi was dealing with the courier, his accomplice pointed his shotgun at the MP and ordered him to the ground. As the MP was kneeling, the accomplice hit the MP in the back of the head with the shotgun, causing a serious wound. The MP fell to the ground and sustained another injury above his right eye. The accomplice took the MP's pistol, handcuffs, and radio. Specialist Szentmiklosi and his accomplice fled in the MP vehicle.[171]

The government charged SPC Szentmiklosi with two specifications of robbery under Article 122, UCMJ.[172] One specification alleged that he robbed $36,724.88 from the courier. The second specification alleged that he robbed $36,724.88 from the MP escort. The military judge found SPC Szentmiklosi guilty, pursuant to his pleas, of both specifications of robbery. On appeal, the Army Court of Criminal Appeals affirmed the convictions. In doing so, the Army court found that "robbery is

164. *Id.* at 526.

165. *New*, 55 M.J. at 128, 130.

166. New v. United States, 112 S. Ct. 256 (2001).

167. *New*, 55 M.J. at 110 (Effron, J., concurring).

168. *Id.* at 107-08.

169. MCM, *supra* note 11, pt. IV, ¶ 14c(2)(a)(i).

170. United States v. Szentmiklosi, 55 M.J. 487, 488 (2001).

171. *Id.* at 489.

172. *Id.* at 488. Article 122, UCMJ, states:

> Any person subject to this chapter who with intent to steal takes anything of value from the person or in the presence of another, against his will, by means of force or violence or fear of immediate or future injury to his person or property or to the person or property of a relative or member of his family or of anyone in his company at the time of the robbery, is guilty of robbery and shall be punished as a court-martial may direct.

UCMJ art. 122 (2000).

preeminently a crime of violence against a person, and in crimes of violence the permissible unit of prosecution is the number of victims (persons) assaulted, rather than the number of larcenies committed."[173]

A robbery of multiple persons possessing one entity's property presented a case of first impression for the CAAF.[174] The court concluded that because both the MP escort and PX courier were jointly or constructively in possession of the money on behalf of one entity, only one robbery occurred. The CAAF reversed the conviction for robbing the MP escort, but affirmed the lesser offense of aggravated assault.[175] Although the opinion refrains from expressing any particular hierarchy, the court appropriately used various canons of interpretation in reaching its conclusion.

The CAAF analyzed the plain text of Article 122 to decipher congressional intent. The court concluded that the phrase "anyone in his company at the time of the robbery"[176] contemplated the presence of multiple victims during a single robbery. The CAAF also examined external sources such as legislative history regarding the punitive articles. The court concluded that because Congress left Article 122 unchanged since enacting the UCMJ in 1950, the legislature intended to permit only one conviction as indicated by the plain text.[177]

Additionally, the CAAF surveyed both state and federal law and found a split of authority;[178] however, the court focused on the federal court decisions, particularly those dealing with the Federal Bank Robbery Act.[179] The court specifically cited *United States v. Canty*,[180] in concluding that Congress never indicated intent to permit more than one conviction for one bank robbery.[181] Next, the court distinguished its own precedent in *United States v. Parker*.[182] In *Parker*, the CAAF upheld two robberies when the assailants took distinct property from each of the victims.[183] Finally, the CAAF applied a principle expressed in its own case law that "[u]nless a statutory intent to permit multiple punishments is stated 'clearly and without ambiguity, doubt will be resolved against turning a single transaction into multiple offenses[.]'"[184]

One development, one trend, and one practice tip surface in *Szentmiklosi*. The CAAF resolved for the first time that in a forcible taking of one entity's property from multiple victims, only one robbery conviction will stand.[185] The case also illustrates the CAAF's growing dislike for overcharging. By strictly applying the principle that doubt will be resolved in favor of allowing only one conviction per transaction, the court signaled its apparent intent to limit the number of possible convictions for each act of misconduct committed by an accused. This trend toward limiting charges will become more apparent in the next two sections of this article dealing directly with multiplicity and unreasonable multiplication of charges.

The practice tip involves how to charge robbery in light of the CAAF's decision. In a footnote, the court pointed out the "curious decision on the part of the Government to charge appellant for the wrongful appropriation of the military policeman's pistol, handcuffs, and radio, as opposed to a separate robbery of those items."[186] Although the court's comment offers practitioners an excellent opportunity to contemplate the issue, a simple reading of the Stipulation of Fact reveals that the government's decision was not "curious" in the least. After driving away from the scene of the crime in the MP vehicle, Szentmiklosi and his accomplice left the vehicle behind a chapel on post. They also left the MP's pistol belt, radio, and weapon near the

173. *Szentmiklosi*, 55 M.J. at 488.

174. *Id.* at 489.

175. *Id.* at 491.

176. UCMJ art. 122.

177. *Szentmiklosi*, 55 M.J. at 490.

178. *Id.* at 489.

179. *Id.* at 490 (citing to 18 U.S.C. § 2113).

180. 469 F.2d 114 (D.C. Cir. 1972) (no congressional intent to permit multiple punishments because only one bank robbed; court could only sustain one conviction for back robbery).

181. *Szentmiklosi*, 55 M.J. at 490.

182. 38 C.M.R. 343 (A.C.M.R. 1968).

183. *Szentmiklosi*, 55 M.J. at 490 (construing *Parker*, 38 C.M.R. at 343).

184. *Id.* at 491 (quoting Bell v. United States, 349 U.S. 81, 84 (1955) (brackets in original)). *See* United States v. Miller, 47 M.J. 352, 357 (1997).

185. *Szentmiklosi*, 55 M.J. at 491.

186. *Id.* at 492 n.9.

vehicle.[187] Robbery under the UCMJ requires both an assault and a larceny. Thus, a specific intent to permanently deprive the victim of the property must accompany the taking.[188] Perhaps a zealous trial counsel might have attempted the tenuous argument that specific intent is measured at the time of the taking and tried to get the military judge to divine a permanent intent to deprive on the part of SPC Szentmiklosi. However, the evidence indicated a temporary intent, more in line with wrongful appropriation.[189] Because the items were left on post with the MP vehicle, the government made the appropriate decision not to charge an offense that counsel could not prove. Government counsel should learn from *Szentmiklosi* that they may charge multiple robberies if distinct property (not belonging to one entity) is taken from multiple victims. Wise counsel should also learn to only go forward with charges supported by the evidence.

Multiplicity

United States v. Frelix-Vann:
Conduct Unbecoming and Larceny Multiplicious If Both Refer to the Same Misconduct

Before discussing the *Frelix-Vann* case, a brief survey of the legal landscape surrounding multiplicity and Article 133, UCMJ,[190] is appropriate. In 1984, the Court of Military Appeals (COMA)[191] decided *United States v. Timberlake*.[192] The case dealt with a conviction under Article 133 in which the government also charged the underlying misconduct as forgery under Article 123(2), UCMJ.[193] In the case, the COMA applied the statutory elements test expressed by the Supreme Court in *United States v. Blockburger.*[194] To determine whether Congress intended for an accused to be convicted of two offenses for the same underlying misconduct, the *Blockburger* test asks whether each offense requires proof of a unique fact.[195] The prohibition against convicting an accused of two offenses for the same underlying misconduct, unless Congress allows it, finds its roots in the Double Jeopardy Clause of the Constitution.[196] In *Timberlake*, the COMA found that the only substan-

187. United States v. Szentmiklosi, No. 9701049 (Headquarters, Fort Riley, Kansas, July 1997) (Record of Trial, Prosecution Exhibit #1, Stipulation of Fact).

188. UCMJ art. 122 (2000). The elements of robbery under Article 122, UCMJ, are as follows:

> [1] That the accused wrongfully took certain property from the person or from the possession and in the presence of a person named or described;
> [2] That the taking was against the will of that person;
> [3] That the taking was by means of force, violence, or force and violence, or putting the person in fear of immediate or future injury to that person, a relative, a member of the person's family, anyone accompanying the person at the time of the robbery, the person's property, or the property of a relative, family member, or anyone accompanying the person at the time of the robbery;
> [4] That the property belonged to a person named or described;
> [5] That the property was of a certain or of some value; and
> [6] *That the taking of the property by the accused was with the intent permanently to deprive the person robbed of the use and benefit of the property.*

MCM, *supra* note 11, pt. IV, ¶ 47b (emphasis added).

189. *See* UCMJ art. 121. The elements of wrongful appropriation under Article 121 are

> [1] That the accused wrongfully took, obtained, or withheld certain property from the possession of the owner or of any other person;
> [2] That the property belonged to a certain person;
> [3] That the property was of a certain value, or of some value; and
> [4] That the taking, obtaining, or withholding by the accused was with the *intent to temporarily deprive or defraud another person of the use and benefit of the property or temporarily to appropriate the property for the use of the accused or for any person other than the owner.*

MCM, *supra* note 11, pt. IV, ¶ 46b(2) (emphasis added).

190. UCMJ art. 133 (2000). Article 133 states: Any commissioned officer, cadet, or midshipman who is convicted of conduct unbecoming an officer and a gentleman shall be punished as a court-martial may direct. *Id*.

191. The Court of Military Appeals (COMA) is now referred to as the Court of Appeals for the Armed Forces (CAAF).

192. 18 M.J. 371 (C.M.A. 1984) (when forgery constitutes the underlying conduct required for conduct unbecoming an officer, Congress intended forgery become a lesser included offense of the conduct unbecoming offense); *see also* United States v. Waits, 32 M.J. 274 (C.M.A. 1991); United States v. Taylor 23 M.J. 314 (C.M.A. 1987).

193. UCMJ art. 123(2).

194. 284 U.S. 299 (1932).

195. United States v. Timberlake, 18 M.J. 371, 374 (1984) (quoting *Blockburger*, 284 U.S. at 304).

tial difference between the two offenses was that the charge under Article 133 required a showing of unbecoming conduct. Therefore, only one offense required proof of a unique fact. The court held that in the absence of clearly expressed congressional intent, it must dismiss the lesser offense.[197] The court also specifically held that no per se rule exists "that the same conduct charged as a particular violation of the Code and as a violation under Article 133 constitutes separate offenses for purposes of findings."[198]

In 1993 and 1995, the CAAF decided *United States v. Teters*[199] and *United States v. Weymouth*.[200] The cases and multiplicity law in general have led commentators to liken the "multiplicity conundrum"[201] to "the Gordian Knot, the Sargasso Sea, and being damned to the inner circle of the Inferno to endlessly debate it."[202] In a nutshell, *Teters* and *Weymouth* adopt the *Blockburger*-elements test. When distinguishing lesser-included offenses *Weymouth* adds the requirement that the comparison must be done by examining the elements as factually pled in the specifications.[203] When the government bases an Article 133 charge solely on the misconduct required to prove another substantive offense, only the Article 133 offense requires proof of a unique fact. Article 133 requires an additional showing of unbecoming conduct. Thus, the *Timberlake* holding and reasoning remain good law in the post-*Teters* era. Yet, in practice, counsel continue to charge and courts continue to convict service members of both substantive offenses and offenses under Article 133 for the same underlying misconduct.

As explained by Chief Judge Everett in his concurring opinion in *Timberlake*, duplication of charges against officers began under the Articles of War. Article 133, UCMJ, finds its roots in Article of War 95. Article of War 95 provided for a mandatory dismissal if a court-martial convicted an officer of conduct unbecoming. Thus, the government would often allege that misconduct violated Article of War 95 in addition to other articles to ensure a dismissal from the Army.[204] The UCMJ eliminated the need to charge both offenses. Article 133 allows for a broad range of punishment "as a court-martial may direct."[205] Additionally, other substantive offenses provide adequate opportunity for dismissing officers under the current maximum punishment scheme.

Why then, in situations where charging in the alternative appears unnecessary, have counsel continued to charge both offenses? Perhaps the *Manual for Courts-Martial* itself has caused much of the confusion. In the explanation section for Article 133, the *Manual* states, "This article includes acts made punishable by any other article, provided these acts amount to conduct unbecoming an officer and a gentleman. Thus, a commissioned officer who steals property violates both this article and Article 121."[206] The non-binding explanation, provided by the executive branch, appears to contradict established case law directly. Thus, as written, the explanation continues to foster confusion regarding the appropriateness of charging officers under Article 133 and other substantive offenses for the same underlying misconduct.

Last year, the CAAF renewed its effort to delineate clearly its position on how multiplicity standards apply to Article 133. In *United States v. Cherukuri*,[207] the CAAF held that four specifications of indecent assault under Article 134 were multiplicious with an Article 133 specification addressing the same underlying misconduct.[208] The facts in *Cherukuri* and the Article 133 specification's reference to the accused's abuse of the trust placed in him as a medical doctor left some question as to whether the charges, as drafted, actually referred to the same underlying misconduct. Given the CAAF's interpretation that

196. U.S. CONST. amend. V; *see also* UCMJ art. 44.

197. *Timberlake*, 18 M.J. at 375.

198. *Id.* at 377.

199. 37 M.J. 370 (1993).

200. 43 M.J. 329 (1995).

201. United States v. Quiroz, 55 M.J. 334, 339 (2001) (Crawford, J., dissenting).

202. United States v. Quiroz, 53 M.J. 600, 603 (N-M. Ct. Crim. App. 2000) (citing Albernaz v. United States, 450 U.S. 333, 343 (1981); United States v. Baker, 14 M.J. 361, 373 (C.M.A. 1983) (Cook, J., dissenting); United States v. Barnard, 32 M.J. 530, 537 (A.F.C.M.R. 1990); Major William T. Barto, *Alexander the Great, The Gordian Knot, and the Problem of Multiplicity in the Military Justice System*, 152 MIL. L. REV. 1 (1996)).

203. *Weymouth*, 43 M.J. at 333.

204. United States v. Timberlake, 18 M.J. 371, 377 (C.M.A. 1984).

205. UCMJ art. 133 (2000).

206. MCM, *supra* note 11, pt. IV, ¶ 59c(2).

207. 53 M.J. 68 (2000).

208. *Id.* at 71-72.

both charges only focused on the sexual assaults, however, the court's ruling appears consistent with *Timberlake* and the *Teters/Weymouth* pleadings-elements test.

Chief Judge Crawford dissented in *Cherukuri*. Her opinion suggests that the government should be able to convict officers of both Article 133 and other offenses for the same underlying misconduct.[209] She specifically called upon the majority to send a clear signal to the field, if the court intended to treat charging under Articles 133 and 134 differently than charging under Article 133 and other substantive offenses.[210] In the 2001 term, the CAAF heeded Chief Judge Crawford's advice and sent a clear signal regarding multiplicious charging under Article 133 and other substantive offenses; however, the signal in *United States v. Frelix-Vann*[211] did not reflect Chief Judge Crawford's desired message.

Captain Frelix-Vann shoplifted a package of dog bones, four videocassette tapes, and two compact discs from the PX annex in Kaiserslautern, Germany. She pled guilty and was convicted of one specification of larceny under Article 121 and one specification of conduct unbecoming under Article 133 for the same exact misconduct.[212] Although the defense counsel did not challenge the charges as multiplicious for findings because the case involved a guilty plea, counsel did move to have the offenses considered multiplicious for sentencing.[213] The military judge granted the motion.[214]

On appeal, the CAAF ruled that the issue of multiplicity was not waived at trial because of the facial duplicativeness of the charges. Further, the court held that the offenses were in fact multiplicious for findings. Consistent with *Cherukuri*, the CAAF remanded the case to the Army Court of Criminal Appeals to select which conviction to retain. The CAAF found no further sentence relief was warranted because the military judge had ruled at trial that the offenses were multiplicious for sentencing.[215]

By ruling that larceny under Article 121 is a lesser-included offense of conduct unbecoming under Article 133,[216] the CAAF once again exhibited its clear dislike for overcharging. The court continued the effort begun last term in *Cherukuri* to make its position on duplicative convictions crystal clear. Trial counsel must remain vigilant when charging officers. The government cannot expect to gain convictions under Article 133 and another substantive offense for the same underlying misconduct. Trial counsel must establish a separate factual basis for a charge under Article 133 and draft the specification so as to clearly indicate that basis to the court. If the government desires a conviction under Article 133 for conduct proscribed by another article, then practitioners should draft the charge under Article 133 using language from the other substantive offense. The other offense will then become a lesser-included offense to the Article 133 charge. If the government considers a conviction for the other offense is more important (for instance, the indecent assault convictions in Dr. Cherukuri's case), then trial counsel should refrain from charging Article 133 for the same underlying misconduct.

Although *Frelix-Vann* does not stand for the proposition that trial counsel cannot charge in the alternative, practitioners should remain aware that only one conviction for the same underlying misconduct will withstand scrutiny at the CAAF. Also, the CAAF's holding clearly signals a preference against overcharging in the first place. The CAAF's clear pronouncements on multiplicity and Article 133 should signal defense counsel that multiplicious charging does not increase the government's bargaining power during plea negotiations. Also, defense counsel need to object to any efforts by the government to charge the same misconduct twice using Article 133 and any other substantive offense. *Frelix-Vann* clearly indicates that the CAAF will intensely scrutinize efforts by the government to tack on an extra charge under Article 133 just because the offender is an officer.

Unreasonable Multiplication of Charges

United States v. Quiroz:
Multiplicity and Unreasonable Multiplication of Charges Constitute Two Distinct Legal Theories

The CAAF's signal to discontinue overcharging resonated even more clearly when the court released *United States v. Quiroz*[217] on the same day it released its decision in *United States v. Frelix-Vann*. *Quiroz* involves a Navy-Marine Corps Court of Criminal Appeals (NMCCA) decision that the concept of unreasonable multiplication of charges in military jurispru-

209. *Id*. at 74-75 (Crawford, J., dissenting).

210. *Id.* at 75.

211. 55 M.J. 329 (2001).

212. *Id*. at 330.

213. *See id*. Rule for Courts-Martial 906(b)(12) addresses multiplicity of offenses for sentencing. MCM, *supra* note 11, R.C.M. 906(b)(12).

214. *Frelix-Vann*, 55 M.J. at 330.

215. *Id.* at 333.

216. *Id.*

dence was founded on separate and distinct legal principles from the doctrine of multiplicity. The NMCCA held that a specification under Article 108, UCMJ, for selling C-4 explosive and a specification under Title 18 for "possessing, storing, transporting, and/or selling" the same C-4 explosive,[218] constituted an unreasonable multiplication of charges.[219] The NMCCA heard the challenge based on unreasonable multiplication of charges despite the fact that defense counsel never raised the claim at trial.[220] In making its decision, the NMCCA listed five non-exclusive factors it used in analyzing the unreasonable multiplication of charges issue.

> (1) Did the accused object at trial that there was an unreasonable multiplication of charges and/or specifications?
> (2) Is each charge and specification aimed at distinctly separate criminal acts?
> (3) Does the number of charges and specifications misrepresent or exaggerate the appellant's criminality?
> (4) Does the number of charges and specifications *unfairly* increase the appellant's punitive exposure?
> (5) Is there any evidence of prosecutorial overreaching or abuse in the drafting of the charges?[221]

A 3-2 majority at the CAAF affirmed the NMCCA's decision that multiplicity and unreasonable multiplication of charges constitute separate and distinct legal theories.[222] The court also affirmed the NMCCA's decision to hear the unreasonable multiplication of charges claim for the first time on appeal.[223] The CAAF did, however, remand the case for further consideration because of its concern that the word *unfairly* in the fourth factor listed by the NMCCA referred to an equitable rather than a legal standard. The CAAF requested clarification that the lower court applied a classic legal test of reasonableness.[224] The CAAF generally affirmed that the approach was well within the discretion provided to the NMCCA by Article 66(c), UCMJ.[225] "Reasonableness, like sentence appropriateness, is a concept that the Courts of Criminal Appeals are fully capable of applying under the broad authority granted them by Congress under Article 66."[226]

The majority opined that the concept of multiplicity is founded on the Double Jeopardy Clause of the Constitution. Multiplicity focuses on the elements of criminal statutes themselves and congressional intent.[227] The concept of unreasonable multiplication of charges only comes into play when charges do not already violate constitutional prohibitions against multiplicity. "[T]he prohibition against unreasonable multiplication of charges addresses those features of military law that increase the potential for overreaching in the exercise of prosecutorial discretion."[228] The CAAF pointed specifically to the discussion accompanying Rule for Courts-Martial 307(c)(4) to support the proposition that unreasonable multiplication of charges exists in military practice separate and apart from the concept of multiplicity. The discussion states, "What is substantially one

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217. 55 M.J. 334 (2001).

218. 18 U.S.C. § 842(h) (2000).

219. United States v. Quiroz, 52 M.J. 510, 513 (N-M. Ct. Crim. App. 1999).

220. *Id.*

221. *Id.* (emphasis added).

222. *Quiroz*, 55 M.J. at 337.

223. *Id.* at 338.

224. *Id.* at 339.

225. *See id*. Article 66(c), UCMJ, states:

> In a case referred to it, the Court of Criminal Appeals may act only with respect to the findings and sentence as approved by the convening authority. It may affirm only such findings of guilty and the sentence or 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. In considering the record, it may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.

UCMJ art. 66(c) (2000).

226. *Quiroz*, 55 M.J. at 339.

227. *Id.* at 337.

228. *Id.* Two features specifically mentioned by the CAAF are (1) the preference in military practice for trying all known offenses at a single trial, and (2) the existence of broadly worded offenses such as disrespect, disobedience, and dereliction (Articles 89-92), conduct unbecoming (Article 133), and the general article (Article 134). *Id*.

transaction should not be made the basis for an unreasonable multiplication of charges against one person."[229] The court traces similar language back to the 1928 *Manual for Courts-Martial*. The majority also points to William Winthrop's classic treatise on 19th century military law, *Military Law and Precedents*, in which he stated that "[a]n unnecessary multiplication of forms of charges for the same offense is always to be avoided."[230]

Perhaps one of the most controversial sections of the CAAF opinion involves its support of the NMCCA's decision to hear the unreasonable multiplication of charges claim for the first time on appeal. As evidenced by the fact that The Judge Advocate General of the Navy certified the issue to the CAAF, government appellate counsel were concerned that the NMCCA's decision would open "Pandora's box."[231] Appellants could raise unreasonable multiplication of charges in almost every case whether or not a military judge ever considered the issue at trial. Because multiplicity claims are generally waived if not raised at trial, the opportunity to raise unreasonable multiplication of charges for the first time on appeal seemed inconsistent.

The CAAF addressed the government's concerns in *United States v. Butcher*.[232] In *Butcher*, the CAAF affirmed the service courts' authority to consider claims of unreasonable multiplication of charges waived if not raised at trial. The Air Force Court of Criminal Appeals (AFCCA) had held that the appellant forfeited an unreasonable multiplication of charges claim by waiting to raise it for the first time on appeal.[233] The CAAF clearly considers issues regarding unreasonable multiplication of charges to fall within the Article 66(c) authority of the service courts. Practitioners in each of the services need to watch their own appellate courts vigilantly for standards and guidance in the area.

In *Quiroz*, the NMCCA stated that part of its unreasonable multiplication of charges analysis would include whether counsel raised the issue at trial;[234] however, the court indicated that it would not automatically treat failure to raise the issue at trial as waiver. In a post-*Quiroz* decision, *United States v. Deloso*,[235] the AFCCA reiterated its position that failure to raise unreasonable multiplication of charges at trial will normally result in waiver or forfeiture on appeal.[236] The Army Court of Criminal Appeals (ACCA) has not yet published a post-*Quiroz* opinion that directly addresses the issue of waiver.[237] In a pre-*Quiroz* memorandum opinion, the ACCA indicated that failure to raise unreasonable multiplication of charges at trial would constitute waiver.[238] Although the service courts differ on exactly how to apply the doctrine of waiver to unreasonable multiplication of charges, all military defense counsel should remain wary of not raising cognizable claims at the trial level. Failure to raise the issue will likely result in an unsuccessful challenge on appeal. Also, the service courts should recognize their obligation to provide clear guidance to the field on applicable standards.

Chief Judge Crawford and Judge Sullivan wrote stinging dissents in *Quiroz*. Both dissents express dissatisfaction with the majority's sanctioning of a principle grounded in equity. Judge Sullivan claimed that the majority's judicial activism created a "new legal right for a military accused."[239] Chief Judge Crawford claimed, "Today our Court perpetuates the turmoil in the military justice system by sanctioning yet another subjective test, one that smacks of equity, as a way to solve the multiplicity conundrum."[240] Although the majority opinion appears in line with long-standing tradition in military practice and the

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229. MCM, *supra* note 11, R.C.M. 307(c)(4) discussion.

230. *Quiroz*, 55 M.J. at 337 (quoting WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 143 (2d ed. 1920 reprint)).

231. Pandora's box refers to "a source of extensive but unforeseen troubles or problems." WEBSTER'S UNABRIDGED DICTIONARY 1401 (Random House 2d ed. 1998).

232. 56 M.J. 87 (2001).

233. *Id*. at 93.

234. United States v. Quiroz, 52 M.J. 510, 513 (N-M. Ct. Crim. App. 1999).

235. 55 M.J. 712 (A.F. Ct. Crim. App. 2001).

236. *Id.* at 715.

237. In *United States v. Carson*, 55 M.J. 656 (Army Ct. Crim. App. 2001), the ACCA declined an opportunity to provide explicit guidance on the issue of waiver and unreasonable multiplication of charges. In the case, defense counsel did not urge the military judge to dismiss any specifications for multiplicity or unreasonable multiplication of charges. The only issue raised at trial was that a maltreatment charge and an indecent exposure charge should be treated as one offense for sentencing purposes (arguably raising unreasonable multiplication). The court declined to accept the government's concession on appeal that the charges constituted an unreasonable multiplication of charges and affirmed the convictions. While mentioning that counsel did not specifically raise unreasonable multiplication at trial, the court did not address waiver in its ruling. *Id*. at 659-60.

238. United States v. McLaurin, No. 9901115 (Army Ct. Crim. App. Apr. 18, 2001) (unpublished).

239. United States v. Quiroz, 55 M.J. 334, 345 (2001) (Sullivan, J., dissenting).

240. *Id.* at 339 (Crawford, J., dissenting).

CAAF's own warnings in *United States v. Foster*[241] to avoid unreasonable "piling on" of charges,[242] the dissenting opinions raise a good point. The theory of unreasonable multiplication of charges clearly finds its roots in equitable principles. When attempting to understand the difference between multiplicity and unreasonable multiplication of charges, practitioners should view one as grounded in the legal protections of the Constitution and the other as grounded in common sense and fairness. By understanding the purposes behind each legal theory, practitioners should not experience any additional turmoil as a result of *Quiroz*.

One practical benefit of *Quiroz* for trial practitioners is the framework for analysis provided by the NMCCA. Certainly, *Quiroz* may have opened the possibility for additional claims. The case may also have officially created a legal right where one did not previously exist.[243] Additionally, as Judge Sullivan's dissenting opinion eloquently articulates, the court did not pick a very deserving case to create a new equitable power.[244] However, down at the level where trial and defense counsel live on a daily basis—the courtroom—military judges have been exercising the power now officially recognized in *Quiroz* for many years. Sometimes judges dismissed charges as multiplicious for sentencing,[245] other times they called it an "unreasonable piling on," and occasionally they actually referred to the government's charging practices as an unreasonable multiplication of charges. Yet, counsel remained without practical guidance for analyzing charges in these situations. *Quiroz* provides a good framework for both trial and defense counsel to structure their arguments. Now that the CAAF has officially sanctioned the distinction between multiplicity and unreasonable multiplication of charges, counsel must learn to articulate arguments in an understandable fashion. The *Quiroz* factors provide an excellent starting point.

Conclusion

During the last term, the CAAF expanded the scope of criminality in a number of areas by broadening the reach of UCMJ articles and by narrowing or limiting possible defenses. The court affirmed convictions under federal statutes regarding threats against the President and child pornography. The court also narrowed the parental discipline defense, the defense of impossibility, and a service member's ability to eject a trespasser. Additionally, the court affirmed the principle that an order is presumed lawful unless palpably illegal on its face.

In a competing trend, the CAAF significantly reduced the ability of the government to pile on convictions. The court limited the number of robbery convictions possible under Article 122, prevented duplicitous convictions under Article 133, and legitimized the doctrine of unreasonable multiplication of charges. Although practitioners may not agree with all the court's decisions this year, the CAAF once again demonstrated its commitment to the integrity of the military justice system. The court appropriately attempted to balance the need to refine substantive crimes and defenses with the necessity of protecting service members against undue prosecutorial overreaching.

241. 40 M.J. 140 (C.M.A. 1994).

242. *Id.* at 144 n.4.

243. *Quiroz*, 55 M.J. at 349 (Sullivan, J., dissenting).

244. *Id.* at 350.

245. MCM, *supra* note 11, R.C.M. 906(b)(12). Practitioners should note that the CAAF specifically decided that the doctrine of "multiplicious for sentencing" remains a valid basis for relief under the *MCM*. *Quiroz*, 55 M.J. at 339.

New Developments in Evidence: Counsel, Half-Right Face, Front Leaning Rest Position-Move!

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Introduction

Mist rises off the warm, red Georgia clay in the early morning hours. The hammering of woodpeckers resounds through the pine trees on Sand Hill.[1] Drill sergeants sip coffee as they wait for a busload of new recruits bound for the home of the Infantry, Queen of Battle.[2] The bus pulls up, and young men fall out onto the pavement, eager, committed, and terrified of the unknown experience that awaits them. The voices of the drill sergeants drown out the morning's stillness, beginning the indoctrination and training process that creates a soldier. It isn't long before the drill sergeants initiate the new recruits with one of the educational and motivational tools of which every soldier has intimate knowledge—the push up. Used by drill sergeants from time immemorial to impress upon new soldiers their duties and responsibilities, the requirement to "assume the position" quickly reinforces what young soldiers should or should not do in a particular situation. As muscles fail and arms burn, young recruits resolve not to make that mistake again.

Over the last year, in its rulings concerning the Military Rules of Evidence (MRE), the Court of Appeals for the Armed Forces (CAAF) reinforced the need for counsel at the trial level to assume the correct position in evidentiary matters. Counsel who fail to take into account the court's clear instructions will not prevail at the trial or appellate level. The decisions of the court have particular value for focusing counsel on the potential impact of their trial strategy decisions. Successful counsel will heed the call of the court and "assume the position." Unsuccessful counsel will experience the pain and remedial training suffered by new soldiers learning the requirements of service. This article reviews recent developments in evidentiary law to assist trial counsel and defense counsel with identifying correct evidentiary positions and then using those positions at trial.

The CAAF addressed several substantive issues affecting the use of the rules of evidence during courts-martial over the last year. It was a year of definitive instruction on how things are supposed to be done, with counsel, and ultimately the accused, bearing the impact for failing to understand and use fully the rules of evidence during trial. This article addresses each development of evidentiary law sequentially as they appear in the MRE. Subjects include: (1) the admissibility of prior bad acts evidence and post-offense misconduct under MRE 404(b),[3] (2) the proper use of reputation and opinion testimony under MRE 405,[4] (3) the proper use of military records for aggravation purposes under MRE 410,[5] (4) proper impeachment under MRE 613,[6] (5) requests for expert assistance and expert witnesses under MRE 702,[7] (6) the marriage of character evidence and expert testimony, and (7) the adoption of the silent witness theory for VHS tapes under MRE 901(b)(9).[8]

Recent Developments in Evidence

The Admissibility of Prior Bad Acts and Post-Offense Uncharged Misconduct

Over the last two years, the CAAF has begun to address the admissibility of post-offense uncharged misconduct in a variety of settings. To a great extent, these have been cases of first impression for the CAAF. While other federal jurisdictions have addressed this issue with varying results,[9] the Supreme Court has never ruled directly on the admissibility of post-

1. Fort Benning Infantry Training Brigade, Commander's Welcome Letter (initial Web-based welcome letter to all new infantry recruits), *at* http://www-benning.army.mil/itb/cdrwelcome-newsol.htm (last visited Feb. 20, 2002).

2. Fort Benning MWR Web Site, National Infantry Museum (describing the history of the Infantry), *at* http://www.benningmwr.com/museum.cfm (last visited Feb. 20, 2002).

3. MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 404(b) (2000) [hereinafter MCM].

4. *Id.* MIL. R. EVID. 405(a).

5. *Id.* MIL. R. EVID. 410.

6. *Id.* MIL. R. EVID. 613.

7. *Id.* MIL. R. EVID. 702.

8. *Id.* MIL. R. EVID. 901(b)(9).

offense uncharged misconduct.[10] The CAAF has addressed the potential admissibility of post-offense uncharged misconduct under MRE 404(b) with what appear to be, at least on their face, diametrically opposed opinions. A careful reading of the decisions, however, provides some guidance through the thicket of legal brambles that have grown around the post-offense misconduct decisions of the court over the last two years.

The cases have created two differing views on the potential admissibility of post-offense misconduct, while further blurring the lines regarding the general admissibility of evidence under MRE 404(b). In cases involving post-offense positive urinalysis results, the CAAF has clearly limited the ability of the government to admit such evidence.[11] Other types of post-offense misconduct may be admissible,[12] depending upon the charged offense, the uncharged post-offense misconduct, the way the government attempts to admit evidence of the post-offense misconduct at trial, and its potential impact under the MRE 403 balancing test.[13] The resulting confusion makes it difficult for counsel to determine when such evidence may come in. Given that this type of evidence is usually quite prejudicial and may have a tremendous impact on the potential outcome at trial, it behooves counsel to wade carefully through these CAAF opinions and form a template suggesting when the trial court may admit such evidence. This section looks at a case from last year, *United States v. Matthews*,[14] and juxtaposes it with two cases the CAAF decided this year, *United States v. Tyndale*[15] and *United States v. Young*.[16] It then suggests ways for counsel to reconcile these opinions when attempting to admit post-offense misconduct. The goal is to provide counsel with a means for admitting or suppressing evidence of prior bad acts or post-offense misconduct at trial.

In *United States v. Matthews*,[17] the CAAF addressed the use of post-offense uncharged misconduct in the context of multiple urinalysis tests. In *Matthews*, the CAAF held that evidence of an unlawful substance in the accused's urine after the date of the charged offense, and not connected to the charged offense, may not be used to prove knowing use on the date of the charged offense.[18] The CAAF ruled that the military judge abused his discretion when he allowed the government to introduce extrinsic evidence of a post-offense positive urinalysis under MRE 404(b)[19] after the trial counsel raised the issue through cross-examination of the accused under MRE 405(a).[20]

In *Matthews*, the CAAF agreed with renowned scholars of military evidentiary law,[21] holding that extrinsic evidence of post-offense misconduct that might otherwise be admissible

9. *See generally* I STEPHEN A. SALTZBURG ET AL., FEDERAL RULES OF EVIDENCE MANUAL 387 (7th ed. 1998). Professor Saltzburg provides an overview of this issue delineating various federal courts of appeals cases in which such evidence has either been admitted or denied. He specifically pointed out that the language within the rule of "prior bad act" is a misnomer because it indicates that the acts in question must have proceeded the trial. *Id*. Case law supports the general contention that the admissibility of bad acts committed after the offense in question should be decided on a case-by-case basis. *Id*. Factors that should be considered are the intervening time period, similarities to the charged offense, and whether the bad acts in question are relevant to prove something other than the accused's character, which is clearly not admissible under Federal Rule of Evidence (FRE) 404(b) or MRE 404(b).

10. In *Huddleston v. United States*, 485 U.S. 681 (1988), the Supreme Court had an opportunity to directly address the admissibility of post-offense misconduct and chose not to do so. Instead, the Court focused on whether FRE 404(b) required a preliminary finding by the trial court under FRE 104(a). *See id* at 687-89. The Court held that it did not. *Id*. at 689. The Court's opinion goes on to narrowly decide the admissibility of the post-offense misconduct in question by focusing on the ability of this evidence to establish the knowledge requirement under FRE 404(b) and the relationship between certain facts of the charged offenses and the post-charged offense misconduct. *See id*. at 690-91. The Court's choice not to adopt a per se rule regarding the admissibility of post-offense bad acts in and of itself should be a lesson to both trial and appellate counsel. The subsequent jurisprudence of the circuit courts on this issue has followed a general standard of narrowly tailored decisions tied to the language in FRE 404(b), with some tinkering around the edges concerning how the proffered evidence should relate to the charged offense.

11. *See* United States v. Matthews, 53 M.J. 465 (2000). In *Matthews*, an Air Force sergeant assigned to the information management section of an Office of Special Investigations (OSI) detachment tested positive for marijuana. At her trial for violating Article 112a, she presented a good soldier defense and denied knowing ingestion of marijuana between 1 and 29 April of that year. At trial, the government cross-examined the accused on her subsequent positive urinalysis that experts testified was not related to the earlier presence of THC in her urine. The military judge then allowed the government to admit extrinsic evidence of the post-offense urinalysis upon which the trial counsel based his cross-examination. *Id*. at 467-68.

12. *See* United States v. Young, 55 M.J. 193 (2001). This case involved a corporal in the Marine Corps who conspired to distribute marijuana and then distributed marijuana. After the charged offenses, an undercover source discussed making additional purchases of marijuana from the accused. During these discussions, the accused admitted to the previous sale and made arrangements for subsequent sales, thereby entering into an additional conspiracy to distribute marijuana. At trial, the military judge allowed the trial counsel to admit evidence of the accused's admission and evidence of the subsequent post-offense misconduct—the additional conspiracy to distribute. *Id*. at 194-95.

13. *See* United States v. Reynolds, 29 M.J. 105 (C.M.A. 1989). The CAAF has referenced its seminal holding regarding the MRE 403 balancing test in *Reynolds* on multiple occasions during the last two years. *See, e.g*., United States v. Tyndale, 56 M.J. 209, 213 (2001); United States v. Young, 55 M.J. 193, 196 (2001).

14. 53 M.J. 465 (2000).

15. 56 M.J. 209 (2001).

16. 55 M.J. 193 (2001).

17. 53 M.J. at 465.

18. *Id*. at 470.

under the MRE is not admissible as extrinsic evidence tied to the cross-examination of the accused under MRE 405(a).[22] The fact that the evidence may have been admissible for another purpose does not cure the trial court's decision to admit the evidence under the rubric of MREs 405(a) and 404(b). This is especially true given that the evidentiary balancing concerns found in MRE 403[23] and the seminal case of *Reynolds*[24] were not met in *Matthews*. The basis of admissibility cannot rest upon impeaching cross-examination evidence of specific acts not admissible under MRE 405(a). Some scholars question the position of the CAAF, pointing out that reliance upon a learned treatise does not, in and of itself, mean that the court's opinion is based upon anything other than a circular argument.[25]

Commentators have also speculated on the degree of applicability of *Matthews* in light of the CAAF's jaundiced view toward urinalysis testing and procedures.[26] Cases from both 2000 and 2001 support the contention that *Matthews* should be viewed through the cloudy waters of the urinalysis program, including the CAAF's recent murky treatment of urinalysis testing in *United States v. Campbell*[27] and *United States v. Green*.[28] While the court frowned upon the admissibility of a post-offense urinalysis under MRE 404(b), the CAAF reached a different result in *United States v. Tyndale*,[29] in which the urinalysis occurred before the charged offense,[30] and *United States v. Young*,[31] in which the post-offense misconduct was conspiracy to distribute and distribution of marijuana.[32]

Tyndale addresses the circumstances under which the trial courts will admit evidence of a prior positive urinalysis at a court-martial for a subsequent positive urinalysis. While the CAAF's analysis in *Tyndale* is not directly on point concerning post-offense misconduct, it does address the admissibility of urinalysis testing under a MRE 404(b) analysis, paying particular attention to the application of the *Reynolds* test under MRE 403 in urinalysis cases. While the court mentioned *Reynolds* only briefly in *Matthews*, its use of *Reynolds* as a template for addressing uncharged misconduct in *Tyndale* lead to an entirely different result. The thought process of the court is enlightening. Considering the facts of *Tyndale*, the CAAF may apply this same type of reasoning in the next urinalysis case dealing with post-offense misconduct.

In *Tyndale*, the appellant was a staff sergeant in the Marine Corps. In January 1994 the appellant's urine tested positive for methamphetamine. He was tried by a special court-martial consisting of officer members. The appellant did not contest the presence of the metabolite in his urine; instead, he presented an innocent ingestion defense. At trial, he stated that "someone had, without his knowledge, placed the drug in the coffee he was served while playing guitar with his brother and other indi-

19. Military Rule of Evidence 404(b) provides in part: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . . ." MCM, *supra* note 3, MIL. R. EVID. 404(b).

20. *Matthews*, 53 M.J. at 470. Military Rule of Evidence 405(a) provides: "In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct." MCM, *supra* note 3, MIL. R. EVID. 405(a).

21. *See, e.g.*, STEPHEN A. SALTZBURG ET AL., MILITARY RULES OF EVIDENCE MANUAL 572 (4th ed. 1997).

22. *Matthews*, 53 M.J. at 470.

23. Military Rule of Evidence 403 states: "Although relevant, evidence may be excluded if its probative value is *substantially outweighed* by the danger of *unfair* prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." MCM, *supra* note 3, MIL. R. EVID. 403 (emphasis added).

24. 29 M.J. 105 (C.M.A. 1989). The Court of Military Appeals adopted the following three-pronged test for the admissibility of "other crimes, wrongs, or acts" when viewed through the lenses of potential admissibility under MRE 403: (1) the evidence must reasonably support a finding that the appellant committed the crime, wrong, or act; (2) it must make a fact of consequence more or less probable; and (3) its probative value must not be substantially outweighed by the danger of unfair prejudice. *Id.* at 109.

25. *See* Major Victor M. Hansen, *New Developments in Evidence 2000*, ARMY LAW., Apr. 2001, at 44.

26. *Id.* at 45.

27. 52 M.J. 386 (2000).

28. 55 M.J. 76 (2001).

29. 56 M.J. 209 (2001).

30. *Id*. at 211.

31. 55 M.J. 193 (2001).

32. *Id*. at 194-95.

viduals at a residence near Ocean Beach in San Diego."[33] At his trial in 1994, the appellant was unable to identify the persons living in the apartment because they had moved out, and he could not give an address for the apartment where he had been playing guitar. He was acquitted at his first court-martial.[34]

In October of 1996, the appellant's urine sample again tested positive for methamphetamine. At his subsequent court-martial, he testified about his activities leading up to the second urinalysis. He told the court that he played guitar at various local venues. On the Saturday night before the urinalysis, he agreed to play a private party in Dana Point, California, for seventy-five dollars. Appellant and his brother showed up at the party, which had a crowd of about forty-five to sixty "fairly radical people."[35] He played halfway through the night, and was paid by a person whose name he never got. At some point during the evening, his brother told him that drug use was going on in another part of the party. The appellant chose to remain at the party, and consumed about a case of beer over the course of the evening.[36]

At the beginning of the second court-martial, the trial counsel requested a preliminary ruling from the military judge to admit evidence of the appellant's 1994 urinalysis, as well as the appellant's explanation about the innocent ingestion surrounding the 1994 urinalysis. The government intended to present evidence through the testimony of the prosecuting attorney for the first court-martial. The defense objected, categorizing the government's attempt to admit the evidence as an attempt to place propensity evidence before the panel; pointing out the danger of unfair prejudice if the evidence was admitted; and claiming that from a logical relevance perspective, admission of the first urinalysis provided no proof that the appellant had committed the charged act.[37] The military judge ruled that the evidence of the 1994 urinalysis could only be admitted in rebuttal to a defense of innocent ingestion.[38] This forced the defense to make a Hobson's choice.[39] They could present a defense of innocent ingestion and risk admission of the prior positive urinalysis, or limit their defense and risk a conviction in the face of a valid urinalysis result from the January 1996 test. The CAAF's opinion does not address the conundrum the defense faced.

Eventually the appellant testified, and at the close of the defense case the trial counsel again moved to admit into evidence the appellant's 1994 positive urinalysis result and attendant explanation of innocent ingestion. The trial counsel focused on the element of knowing use, relating the requirement of knowledge to the MRE 404(b) exception allowing for admissibility of evidence related to knowledge. This time the military judge agreed with the government and allowed them to call the trial counsel from the first case. The former trial counsel testified concerning the previous positive urinalysis and the innocent ingestion defense offered by the appellant during his first trial.[40] Thus, the *Tyndale* decision provides a possible framework for admitting former positive urinalyses in future cases.

The CAAF began their analysis in *Tyndale* by stating that evidence of a previous drug use is not per se inadmissible at a court-martial.[41] This required a small degree of mental gymnastics given the CAAF's recent history in *United States v. Graham*[42] and *Matthews*. The court stated that for such evidence to be admissible, counsel must tie the reason for admissibility to some purpose other than to show the accused's predisposition to commit the charged offense.[43] The CAAF noted that MRE 404(b) is designed to function as a rule of inclusion. The court went on to draw specific attention to the standard for applying MRE 403 as delineated by the court in *Reynolds*:

> Evidence offered under [MRE] 404(b) must meet three criteria for admissibility. First, the evidence must reasonably support a finding by the court members that appellant committed the prior crimes, wrongs, or acts. Second, the evidence must make a fact of

33. *Tyndale*, 56 M.J. at 211.

34. *Id*.

35. *Id*.

36. *Id*.

37. *Id*. The opinion notes that the government had no burden to provide a verbatim record of trial because the first court-martial resulted in an acquittal. *Id*. at 211 n.1.

38. *Id*.

39. Random House Webster's Unabridged Dictionary (2d ed. 1987) defines Hobson's choice as "the choice of taking either that which is offered or nothing; the absence of a real alternative." *Id*. at 909.

40. *Tyndale*, 56 M.J. at 212.

41. *Id*.

42. 50 M.J. 56 (1999).

43. *Tyndale*, 56 M.J. at 212 (quoting United States v. Taylor, 53 M.J. 195, 199 (2000)).

> consequence more or less probable. Third, the probative value of the evidence must not be substantially outweighed by the danger of unfair prejudice.[44]

The CAAF then applied the facts in *Tyndale* to the *Reynolds* standard. While informed minds may differ as to the final result of such an analysis, even the dissent in this case agreed with the overall framework of the application of *Reynolds* to a case dealing with the results of urine testing.[45] This is a landmark case because the CAAF departed from a history of extreme skepticism regarding the admissibility of urinalysis tests in general and the admissibility of prior urinalysis tests in particular at courts-martial. This application of a regular MRE 404(b) analysis to a urinalysis case is important for trial practitioners.

Counsel should take care at the trial level to couch the potential admissibility of prior positive tests in light of the stated exceptions to MRE 404(b). They should then apply the *Reynolds* 403 balancing test analysis to the specific facts of their cases. In *Tyndale*, the question of knowledge was particularly important. Knowledge is often an extremely important factor in urinalysis cases in which the government bears some burden, however unclear in light of *Campbell* and *Green*, to establish knowing use of the controlled substance by the accused. Because the case often turns on this issue of knowledge, counsel should be able to rely upon the court's analysis in *Tyndale* when making the argument that prior positive urinalyses may be admissible to establish the knowing use requirement for an Article 112a violation.[46] Both *Matthews* and *Tyndale* must be viewed with some skepticism as a general guideline for applying 404(b) to admissibility requirements, however, because both of these cases deal with urinalysis results.

The CAAF had an opportunity to clarify or support its holding in *Matthews* when the court decided *United States v. Young*.[47] It did neither. Instead, *Young* calls into question any application of *Matthews* that goes beyond the specific urinalysis-based offenses charged in a particular case. To understand why the CAAF addressed the admissibility of post-offense charged misconduct so differently in *Young*, one must first understand the facts of the case and the issues directly before the CAAF.

The command charged Marine Corps Corporal (Cpl) Anthony Young with conspiracy to distribute marijuana and distribution of marijuana. The charged offenses resulted from a controlled sale of marijuana from Young to a Naval Investigative Service (NIS) informant on 27 December 1995.[48] On 26 December 1995, Marine Private Frank Smith approached Cpl Young and asked him to store some marijuana at Cpl Young's home. On 27 December the informant approached both Smith and Young in the barracks and asked Smith if Smith could get him some marijuana. Smith agreed. Young and Smith went to Young's apartment where they retrieved the marijuana and agreed to split the proceeds of the sale. They then returned to base and sold the marijuana to the informant.[49]

The informant went back to Smith on 3 January 1996 and complained that he did not get all of the marijuana for which he had paid two days after Christmas. Smith blamed any problems on Cpl Young. He told the informant that Young had weighed and bagged the marijuana, and suggested that Young had probably smoked some of it while it was kept in Young's apartment. The informant relayed this information to NIS. On 17 January 1996, the informant approached Young directly and asked Young to sell him some more marijuana. During that conversation, the informant wore a recording device. While Young and the informant discussed the possibility of another sale of marijuana, they also discussed Young's involvement in the prior sale of marijuana on 27 December 1995.[50]

At trial, the government sought to introduce the tape of the conversation between the informant and the appellant on 17 January 1996. The defense agreed that the portions of the tape containing alleged admissions about the drug deal on 27 December 1995 were admissible; however, the defense counsel objected to the other portions of the tape as uncharged misconduct under MRE 404(b), arguing that the government sought to introduce this evidence for the purpose of showing that the accused was a bad man—as propensity evidence. The trial counsel argued that the tape would not be understandable if the panel did not hear the portions the defense sought to suppress. The trial counsel further argued for completeness, stating that the panel would not be able to understand the terms used on the tape and the references made without access to the statements admitting to the uncharged misconduct. The military judge agreed with the trial counsel and admitted the entire taped con-

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44. *Id*. (citing United States v. Reynolds, 29 M.J. 105, 109 (C.M.A. 1989); MCM, *supra* note 3, MIL. R. EVID. 401, 403 (2000)).

45. *Id*. at 219-20.

46. *See* MCM, *supra* note 3, pt. IV, ¶ 37(a)-(c).

47. 55 M.J. 193 (2001).

48. *Id*. at 194. While the CAAF opinion initially addresses the date of the controlled sale as 26 December 1997, the additional dates provided in the opinion lead one to believe that the first reference to 26 December 1997 is a clerical error. *See id*. at 194-97.

49. *Id*. at 194.

50. *Id*.

versation.[51] Immediately after the introduction of the tape, the military judge gave a limiting instruction to the panel.[52] The panel convicted the appellant, sentencing him to a bad-conduct discharge, reduction to the lowest enlisted grade, and thirty-six months' confinement.[53]

The CAAF began by identifying the issue as the admissibility of MRE 404(b) evidence. The court focused upon the reasons that the government proffered this evidence, carefully pointing out that the purpose behind admitting the evidence must be based in one of the 404(b) exceptions. The CAAF then turned to the *Reynolds* case as a framework for deciding the correctness of the military judge's decision to admit the evidence in *Young*. Before engaging in the *Reynolds* analysis, the court first addressed the applicability of *Reynolds* to post-offense misconduct as opposed to misconduct that occurred prior to the charged offense.[54] The CAAF noted that most cases, including *Reynolds*, had addressed misconduct that had occurred before the charged offense. The court then stated that it had previously applied the *Reynolds* test to post-offense misconduct.[55] The CAAF specifically noted that applying a 403-balancing test to the admissibility of post-offense misconduct was consistent with prevailing federal practice. After pointing out the applicability of *Reynolds* to post-offense misconduct, the CAAF held that it did not need to apply the *Reynolds* test to *Young* because the evidence "was admissible for a separate limited purpose, to show the subject matter and context of conversation in which appellant admitted the conspiracy."[56] Under that analysis, the CAAF held that the military judge did not abuse his discretion in admitting the evidence.[57]

When read together, *Matthews*, *Tyndale*, and *Young* clearly indicate the willingness of the CAAF to grapple with the potential admissibility of post-offense misconduct. This is a relatively new issue from a military justice standpoint. While *Matthews* and *Tyndale* must be viewed in a limited manner given their focus on the particular difficulties experienced by the CAAF with urinalysis-based prosecutions, counsel should pay particular attention to the language of the court in *Young* when facing this issue at trial. That case does not involve the potential complicating factor of a urinalysis test.

When approaching the admissibility of post-offense misconduct under MRE 404(b), counsel should begin by following the notice requirements of 404(b). Counsel should carefully analyze the reason under the exceptions to 404(b) that allows admission of the evidence. This requires an in-depth factual analysis of the case. These are not the types of motions that counsel should attempt to argue "off the top of their heads." The reason for admissibility must be tied to the facts and fall within one of the exceptions allowed under 404(b). Once counsel have done that, they should focus the military judge on the requirements of *Reynolds*. At a minimum, *Young* stands for the concept that military judges can and should use a *Reynolds* test when weighing the potential admissibility of post-offense misconduct under MRE 403. Counsel that follow this template will ensure appropriate rulings by the military judge that will withstand appellate review.

The Proper Use of Reputation and Opinion Testimony Under MRE 405

In *United States v. Goldwire*,[58] the CAAF identified a potential area for the admissibility of reputation and opinion evidence concerning the accused's character. The majority

51. *Id*. at 195.

52. *Id.*

> Now, members of the court, before we proceed, there's a matter I want to bring to your attention. Based on a reading of Prosecution Exhibit 6 for Identification that we just retrieved [the transcript], and listening to Prosecution Exhibit 5 [the tape], this evidence may suggest to you that Berrian was attempting to set up another drug transaction with the accused, and that the accused may have tentatively agreed to do so. Now this evidence may be considered by you for its limited purpose of its tendency to show that the accused intended to join in a conspiracy, and that is the conspiracy that he is charged with . . . . Secondly, this information or this evidence has been provided to you to show the context in which the statements were made about the transaction that Berrian testified took place on 27 December 1995. Now the accused has not been charged with participating in or attempting to participate in a second drug transaction. It will be unfair in the extreme to punish him for that. We're only here to concern ourselves with the charged offenses. You may not consider this evidence *for any other purpose*, other than whatever his *original intent* may have been on the alleged conspiracy or *for the context of conversation* and you may not conclude from this evidence that the accused is a bad person or his criminal tendency and he, therefore, committed the charged offenses.

Id. (emphasis added).

53. *Id*. at 194.

54. *Id*. at 196.

55. *Id*. (citing United States v. Dorsey, 38 M.J. 244 (C.M.A. 1993)).

56. *Id*.

57. *Id*. at 197.

58. 55 M.J. 139 (2001).

opinion is somewhat convoluted, but taken in conjunction with the concurring opinion, the holding of the court clearly identifies fertile opportunities for trial counsel, while raising a large red flag for defense counsel who attempt to try their case through the cross-examination of government witnesses. To understand how the door to character evidence of the accused has been further propped open by the CAAF, one must first consider the facts in *Goldwire*.

In *Goldwire*, the appellant and two of his friends invited the victim to attend a party at an off-post residence on 6 July 1996. The next morning, the victim met the appellant and his two friends for a day of drinking, music, cards, and dominos. The appellant drank to excess, eventually becoming physically ill. The other three members of the party, to include the victim, found the appellant lying on the bathroom floor. They took him to the bedroom, and then they played a drinking game with shots of vodka and orange juice. Eventually, they all fell asleep while the appellant was still in the bedroom.[59]

The next thing that the victim remembered about that evening was waking up on the bed in the bedroom with the appellant on top of her. Someone else was holding her arms, and she was naked from the waist down. The appellant had sexual intercourse with the victim for about one minute, and then he jumped off the bed. The victim got dressed and fled the apartment. She returned to her dorm room, told her roommate what happened, and went to the base hospital. The appellant gave an oral statement to an Office of Special Investigations (OSI) agent five months after the incident. Portions of that statement were inculpatory, and other parts were exculpatory.[60]

The appellant chose not to testify at his court-martial. The OSI agent who had interviewed the appellant testified during the government's case-in-chief. The trial counsel asked the OSI agent questions about the portions of the appellant's oral statement that admitted to acts supporting the charged rape. The trial counsel did not ask, and the OSI agent did not volunteer, any of the exculpatory information contained in the appellant's oral statement. On cross-examination, the defense counsel elicited the exculpatory information from the OSI agent. Later in the court-martial, the trial counsel called the appellant's first sergeant as a witness to testify concerning the appellant's character for truthfulness. The military judge allowed the testimony over defense objection.[61]

The CAAF addressed the facts in *Goldwire* in an interesting manner. The majority and concurring opinions both agree that the defense counsel's questioning of the OSI agent was an attempt by the defense counsel to get the appellant's version of events before the finder of fact without the appellant taking the witness stand.[62] The defense counsel wished to use the out of court statements of his client to prove that the sexual contact between the victim and the appellant was consensual. The decision to do so placed the truthfulness of the appellant at issue, even though he had never taken the stand to testify.[63] Where the majority and concurring opinions differ, however, is the path of legal reasoning that the court should take to arrive at the conclusion that the accused opened the door to his character for truthfulness.

The majority opinion begins by analyzing MRE 106[64] and the common law rule of completeness.[65] Military Rule of Evidence 106 allows an opposing party to introduce the remainder of a written or recorded statement once the other side has introduced a portion of it into evidence.[66] The CAAF noted that while MRE 106 applies only to recorded or written statements, the military judge has the discretion under MRE 611(a) to apply the common law rule of completeness that allows completion of oral statements.[67] The CAAF then concluded that either method would still place the character of the accused that made the oral statement at issue under MRE 806.[68] The court analogized the hearsay exception of admission by a party opponent to MRE 806 and determined that "when the defense affirmatively introduces the accused's statement in response to the prosecution's direct examination, the prosecution is not prohibited from impeaching the declarant under MRE 806."[69] The majority walked all the way to the edge of the precipice of adopting the common law rule of completeness and then stepped back, relying instead upon MRE 304(h)(2).[70]

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59. *Id.* at 140.

60. *Id.* at 141.

61. *Id*.

62. *Id.* at 142, 147-48.

63. *Id.* at 142.

64. Military Rule of Evidence 106 states: "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require that party at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it." MCM, *supra* note 3, MIL. R. EVID. 106 (2000).

65. *Goldwire*, 55 M.J. at 142. Unlike both the federal and military rule, the common law rule of completeness allows for completing oral as well as written or recorded statements. *Id*. (citing Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 172 (1988)).

66. *See* MCM, *supra* note 3, MIL. R. EVID. 106.

Military Rule of Evidence 304(h)(2) allows the defense counsel, after the trial counsel has admitted part of an accused's admission or confession into evidence, to admit all or part of the remaining portions.[71] The court then applied the same reasoning to statements admitted under MRE 304(h)(2), concluding that admission of such statements by the defense in response to the prosecution's direct examination opened the door to evidence concerning the accused's truthfulness.[72] The concurring opinion notes this analysis, disagreeing with the use of the common law and MRE 106 doctrine of completeness, but agreeing with the MRE 304(h)(2) analysis and subsequent opening of the door to character evidence for truthfulness under MRE 806 and MRE 405.[73]

Counsel at the trial level should take note of this opinion. Trial counsel may, to a certain extent, limit examinations of witnesses concerning the substance of statements made by the accused and force the defense to make a difficult choice: attempt to complete the statements made and place the character of the accused for truthfulness at issue, or forgo the opportunity to present the evidence, thereby potentially weakening the defense case, perhaps fatally. The potential exists for trial counsel to manipulate this factor and deny pertinent evidence to the finder of fact. Defense counsel must be cognizant of the danger that they now run if they attempt to try their case through cross-examination of the government's witnesses. Whenever defense counsel attempt to get out their client's "version" or "story" through cross-examination designed to show exculpatory statements by the accused, they are opening the door to reputation and opinion evidence concerning the accused's character for truthfulness. Defense counsel must proceed warily as a result of *Goldwire*.

Admissibility of Administrative Separation Actions Under MRE 410

In *United States v. Vasquez*[74] the CAAF gave definitive guidance on whether administrative separation actions in lieu of courts-martial could be construed as personnel records for purposes of Rule for Courts-Martial (RCM) 1001(b)(2).[75] Rule for Courts-Martial 1001(b)(2) allows trial counsel to admit personnel records of the accused during sentencing.[76] At issue before the court last year was whether requests for discharge in lieu of court-martial were the type of personnel records that could be admitted under the rubric of RCM 1001(b)(2), or would their admission violate the restrictions of MRE 410.[77] Military Rule of Evidence 410 allows for full and open negotiations concerning pleas and pre-trial agreements by guaranteeing that documents prepared in furtherance of those activities will not be admissible for any other purpose.[78] The *Vasquez* court held that

67. *Goldwire*, 55 M.J. at 142. Military Rule of Evidence 611(a) states:

> *Control by the military judge.* The military judge shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

MCM, *supra* note 3, MIL. R. EVID. 611(a).

68. *Goldwire*, 55 M.J. at 143-44. Military Rule of Evidence 806 provides in part:

> When a hearsay statement, or a statement defined in MRE 801(d)(2)(C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if [the] declarant had testified as a witness.

MCM, *supra* note 3, MIL. R. EVID. 806.

69. *Goldwire*, 55 M.J. at 144.

70. Military Rule of Evidence 304(h)(2) provides: "If only part of an alleged admission or confession is introduced against the accused, the defense, by cross-examination or otherwise, may introduce the remaining portions of the statement." MCM, *supra* note 3, MIL. R. EVID. 304(h)(2).

71. *See id*.

72. *Goldwire*, 55 M.J. at 144.

73. *Id*. at 146 (Sullivan, J., concurring in the result). Military Rule of Evidence 405(a) provides:

> *Reputation or opinion.* In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

MCM, *supra* note 3, MIL. R. EVID. 405(a).

74. 54 M.J. 303 (2001).

75. *See id.* at 305-06.

trial counsel cannot use the language in RCM 1001(b)(2) to circumvent the clear purpose of MRE 410.[79]

Seaman Vasquez absented himself without leave from his unit for 212 days. When Vasquez returned to his unit, the command initiated court-martial proceedings for the unauthorized absence. The appellant, with the advice of counsel, submitted a request for an other than honorable discharge in lieu of court-martial. While waiting for the command to take action on his request, the appellant engaged in additional misconduct by acting as a lookout for a fellow seaman attempting to steal merchandise from the Navy Exchange. They were caught.[80]

The appellant pled guilty at his court-martial for the misconduct surrounding the thefts at the Navy Exchange. After the military judge accepted the appellant's guilty plea, the trial counsel attempted to offer into evidence copies of the appellant's request for discharge in lieu of court-martial for the 212-day absence. The trial counsel argued that the discharge request constituted a personnel record of the accused that was admissible under RCM 1001(b)(2). Over defense objection, the military judge accepted into evidence copies of the request for discharge in lieu of court-martial.[81] The trial counsel subsequently referred to the 212-day absence as an aggravating factor during his sentencing argument. The Navy and Marine Corps Court of Criminal Appeals (NMCCA) affirmed the appellant's conviction, holding that MRE 410 was not applicable because it only applies to pending charges. The NMCCA reasoned that after the convening authority approved the appellant's request for discharge in lieu of court-martial for the unauthorized absence, the administrative action was no longer pending for purposes of MRE 410.[82] The CAAF, however, did not agree with the NMCCA's analysis.

The CAAF began their analysis in *Vasquez* by noting the language of MRE 410 that specifically identifies statements made by the accused solely for the purpose of receiving an administrative discharge in lieu of court-martial.[83] While the CAAF could have decided the case solely on the language contained in MRE 410, the court went on to provide an overall view of how it interpreted the language of the rule. The CAAF noted that in previous cases it had chosen not to adopt an "excessively formalistic or technical" application of MRE 410 in favor of a broad application of the rule.[84]

Specifically, the *Vasquez* court addressed whether the administrative action was "pending" as defined by MRE 410.[85] The CAAF noted that requests for discharge in lieu of court-martial are pending until the discharge has been executed.[86] Under the CAAF's definition, requests for separation will

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76. *See* MCM, *supra* note 3, R.C.M. 1001(b)(2). Rule for Courts-Martial 1001(b)(2) states:

> *Personal data and character of prior service of the accused.* Under regulations of the Secretary concerned, trial counsel may obtain and introduce from the personnel records of the accused evidence of the accused's marital status; number of dependents, if any; and character of prior service. Such evidence includes copies of reports reflecting the past military efficiency, conduct, performance, and history of the accused and evidence of any disciplinary actions including punishments under Article 15. "Personnel 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. If the accused objects to a particular document as inaccurate or incomplete in a specified respect, or as containing matter that is not admissible under the Military Rules of Evidence, the matter shall be determined by the military judge. Objections not asserted are waived.

Id.

77. Military Rule of Evidence 410 provides:

> "[S]tatement[s] made in the course of plea discussions" includes a statement made by the accused solely for the purpose of requesting disposition under an authorized procedure for administrative action in lieu of trial by court-martial; "on the record" includes the written statement submitted by the accused in furtherance of such request.

Id. MIL. R. EVID. 410.

78. *See id*.

79. *Vasquez*, 54 M.J. at 305.

80. *Id*. at 304.

81. *Id*.

82. *Id*. at 305.

83. *Id*.

84. *Id.* (citing United States v. Barunas, 23 M.J. 71, 75-76 (C.M.A. 1986)).

85. *Id*. at 306.

86. *Id*.

always be pending as to potential admissibility under RCM 1001(b)(2) because once they have been executed, the court no longer has jurisdiction over the former service member. The message from CAAF is clear: trial counsel should not attempt to circumvent the spirit of MRE 410 through the use of RCM 1001(b)(2), and defense counsel should ensure that they preserve this issue by objecting on the record to any attempts by the government to admit otherwise inadmissible documents under cover of the personnel records theory.

Applying the Wright *Factors to MRE 413 and 414*

The CAAF continued to develop and refine the appropriate MRE 403[87] balancing test for cases involving either MRE 413[88] or MRE 414[89] over the last year. Previous CAAF cases addressing MRE 413 and MRE 414 established the constitutionality of these new rules[90] and the balancing test that ensures their fairness and continued viability. The seminal case in this area is *United States v. Wright*.[91] In *Wright*, the court established factors the military judge must consider when conducting a balancing test in cases involving the admissibility of this evidence. Those factors include: (1) strength of proof of the prior act—conviction versus gossip, (2) probative weight of the evidence, (3) potential for less prejudicial evidence, (4) distraction of the factfinder, (5) temporal proximity, (6) frequency of the acts, (7) presence or lack of presence of intervening circumstances, and (8) relationships between the parties. [92] The CAAF further refined the proper procedures for addressing the *Wright* factors in *United States v. Bailey*[93] and *United States v. Dewrell*.[94]

In *Bailey*, the appellant was convicted of rape, forcible sodomy, aggravated assault and battery, making false official statements, kidnapping, communicating threats, obstructing justice, disorderly conduct, and unlawful entry.[95] At trial, the government presented propensity evidence under MRE 413 that included forcible anal sodomy with two other individuals. Neither of these instances were charged offenses. One involved anal sodomy with a former spouse, and the other sodomy occurred between the appellant and a former girlfriend. The government proffered this evidence under the theory that it assisted in proving that the appellant had committed the charged forcible sodomy offenses.[96]

The CAAF began their analysis by reiterating the court's decision in *Wright*, carefully stating that the factors delineated in *Wright* were nonexclusive. The court noted that *Wright* had not been decided when the *Bailey* court-martial took place.[97] The court then looked to the balancing test performed by the military judge and held that it met the standards set by the court in *Wright*. Interestingly, the military judge's ruling in *Bailey* substantively addressed many of the *Wright* factors. The CAAF applied the *Wright* factors and two additional factors concerning similarities to the event charged and time needed for proof of the prior act.[98] The court noted that the military judge used an appropriate limiting instruction, and that instruction, taken in conjunction with the balancing factors he considered, resulted in the CAAF affirming the decision of the Air Force Court of Criminal Appeals (AFCCA).[99]

In *Dewrell*,[100] the CAAF looked at the factors applied by the military judge during his MRE 403 balancing test of MRE 413

87. Military Rule of Evidence 403 states: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." MCM, *supra* note 3, MIL. R. EVID. 403.

88. Military Rule of Evidence 413(a) states: "In a court-martial in which the accused is charged with an offense of sexual assault, evidence of the accused's commission of one or more offenses of sexual assault is admissible and may be considered for its bearing on any matter to which it is relevant." *Id*. MIL. R. EVID. 413(a).

89. Military Rule of Evidence 414(a) states: "In a court-martial in which the accused is charged with an offense of child molestation, evidence of the accused's commission of one or more offenses of child molestation is admissible and may be considered for its bearing on any matter to which it is relevant." *Id*. MIL. R. EVID. 414(a).

90. Hansen, *supra* note 25, at 49.

91. 53 M.J. 476 (2000).

92. *Id*. at 482.

93. 55 M.J. 38 (2001).

94. 55 M.J. 131 (2001).

95. *Bailey*, 55 M.J. at 38.

96. *Id.* at 39.

97. *Id*. at 40.

98. *Id*. at 41.

99. *See id*.

evidence at trial. The CAAF described the balancing test applied by the military judge as one of "careful and reasoned analysis on the record."[101] The court relied upon the balancing test performed by the military judge and the limiting instruction he provided to the panel in affirming the decision of the AFCCA.[102]

Trial counsel, defense counsel, and military judges can use the court's decisions in *Wright, Bailey,* and *Dewrell* to navigate carefully and successfully potential admissibility issues surrounding propensity evidence under MRE 413 and MRE 414. Future battles over the admissibility of this evidence will turn on the ability of counsel to provide the military judge with an interpretation of the facts surrounding the propensity evidence that "dovetails" with the *Wright* factors. Unsettled now is the significance of the CAAF's determination in *Bailey* that the *Wright* factors are not exclusive. This room for maneuvering benefits creative trial counsel and military judges faced with situations and facts that do not clearly fall within the *Wright* factors, but are nonetheless probative as to the propensity evidence's viability. The task for defense counsel in cases involving these types of offenses is much more difficult. The potential for eliminating MRE 413 evidence under a constitutional theory is moribund at this point.[103] The CAAF's guidance on the MRE 403 balancing test that the trial court must apply is sufficiently general to admit most evidence of this type. Given that the CAAF's position follows closely the jurisprudence of most federal jurisdictions, it is doubtful that this standard will shift to one more onerous for the government.

One area that the courts have not yet addressed is whether MRE 413 and MRE 414, when applied in conjunction with MRE 412, violate the constitutional rights of the accused. This area is one of potential litigation as the courts continue to expand on their interpretation and understanding of these powerful and far-reaching rules of evidence.

What Is Proper Impeachment Under MRE 613

In *United States v. Palmer*,[104] the CAAF reiterated that the appellate court will not peer past the veil of the trial to interpret evidentiary objections and decisions when counsel do not clearly inform the trial court of the basis for their objection. *Palmer* reminds counsel that the CAAF will not reward counsel on appeal for their failure to properly object and make the record, or to give the military judge at least some understanding of the legal issues upon which they base their objections. The issue in *Palmer* involves trial decisions made by the defense counsel in which the defense counsel failed to properly state an objection to the military judge's ruling.[105]

Palmer was on trial in 1998 for unlawful possession, distribution, and use of marijuana. He was first identified as a potential drug user when a civilian police officer stopped to assist him after his vehicle became stuck in a ditch around 3:00 a.m. on 26 January 1998. Palmer failed several field sobriety tests, and the police seized marijuana they found while conducting an inventory of his car subsequent to his arrest. During the court-martial, the trial counsel called three different witnesses to provide evidence of Palmer's possession, distribution, and use of marijuana. One of those witnesses, Private First Class (PFC) Sean Boggs, testified that he had purchased marijuana from Palmer seven or eight times and that after each purchase he had smoked marijuana with Palmer. The defense counsel cross-examined PFC Boggs, but did not address any inconsistent out of court statements. The military judge then permanently excused PFC Boggs as a witness without objection by the defense counsel.[106]

During his case in chief, the defense counsel asked Specialist (SPC) Timothy Sauls to relate a conversation Sauls had overheard between PFC Boggs and the appellant. The trial counsel made a hearsay objection to Sauls's testimony. The defense counsel then made an offer of proof that he was offering the hearsay statement to show the state of mind of Boggs, not for the truth of the matter asserted.[107] The military judge sustained the government's objection. He specifically ruled that the statement offered by the defense counsel did not fall within the gambit of MRE 803(3).[108] The military judge informed the defense counsel that the defense was clearly attempting to admit the hearsay statement for some other reason. The defense counsel did not offer an alternate basis for admissibility, and the evidence was excluded.[109]

On appeal, counsel for the appellant argued that the statement in question was clearly admissible under MRE 613.[110] This rule allows for cross-examination of a witness with a prior inconsistent statement. A fair reading of the case supports the appellate defense counsel's position.[111] While the CAAF

100. 55 M.J. 131 (2001).

101. *Id.* at 138.

102. *Id.*

103. Hansen, *supra* note 25, at 50.

104. 55 M.J. 205 (2001).

105. *See id.* at 208.

106. *Id.* at 206.

acknowledged the potential admissibility of the evidence through MRE 613, the court determined that the trial defense counsel had failed to place the military judge on notice of the grounds for admissibility at trial.[112]

The CAAF looked at the specificity of the offer of proof by the trial defense counsel to determine whether the military judge had been placed on notice. The court relied upon the language of MRE 103(a)(2) to make that decision.[113] This rule provides in pertinent part:

> Error may not be predicated upon a ruling which admits or excludes evidence unless the ruling materially prejudices a substantial right of a party, and in case the ruling is one excluding evidence, the substance of the evidence was made known to the military judge by offer or was apparent from the context within which questions were asked.[114]

The CAAF held that the military judge had not been placed on notice by the defense counsel's offer of proof. The court reiterated the usual practice of confronting a witness directly with a prior inconsistent statement while on the stand, but acknowledged that for tactical reasons counsel might choose to delay any mention of inconsistent statements until other witnesses are called. Regardless, the CAAF held that none of these possibilities allowed appellate counsel to raise an evidentiary issue on appeal that was not properly placed before the trial court.[115]

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107. *Id*. The following exchange occurred:

> DC: Well, Your Honor, PFC Boggs—this soldier is privy to a conversation that Boggs had with Specialist Palmer when Boggs told Palmer that Palmer didn't do anything with regards to what he is being charged with. And that statement was made by Boggs and *it goes to his state of mind at the time the statement was made, and it's not going—it's not hearsay.*
>
> M J: So, what you want to do is have this witness testify that on some occasion after the accused was charged, Boggs said to the accused, you didn't do what you are charged with?
>
> DC: Something to that effect, Your Honor. Boggs made a statement after Boggs made his 24 February statement with regards to what's true and what's not true in his statement, and I believe this witness has some information that goes to the actual credibility of Boggs' statements.
>
> MJ: Yes, Captain King? You are standing?
>
> ATC: Yes, thank you, Your Honor. First of all, Your Honor, if the defense wants to attack Boggs' credibility, he certainly could have asked this question of Boggs while he was on the stand. To *offer hearsay under this—under this premise that it goes to some mental state or emotional condition of Boggs* while having Sauls testify about it, the—the government submits it's not authorized, and that is clearly a hearsay case.

Id. (emphasis added).

108. *Id*. Military Rule of Evidence 803(3) defines then existing mental state as follows:

> Then existing mental, emotional or physical condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification or terms of declarant's will.

MCM, *supra* note 3, MIL. R. EVID. 803(3).

109. *Palmer*, 55 M.J. at 207.

110. *Id.*

111. MCM, *supra* note 3, MIL. R. EVID. 613. Military Rule of Evidence 613 addresses prior statements of a witness. It states that when

> examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to him at that time, but on request the same shall be shown or disclosed to opposing counsel . . . . Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require.

Id.

112. *Palmer*, 55 M.J. at 207.

113. *Id.*

114. MCM, *supra* note 3, MIL. R. EVID. 103(a)(2).

115. *Palmer*, 55 M.J. at 207 (citing United States v. Callara, 21 M.J. 259, 264-65 (C.M.A. 1986) (holding that defense counsel can wait until their case in chief to present a prior inconsistent statement)).

In making that determination, the CAAF held the defense counsel's feet to the fire. *Palmer* reiterates current case law on the preservation of an issue for appeal.[116] When evidence is excluded at trial because it is inadmissible for the purpose cited by the proponent, the proponent cannot challenge the ruling on appeal based upon the fact that the evidence could have been admitted for another purpose.[117] When counsel attempt to raise a valid purpose for proposed evidence for the first time on appeal, they will not get the benefit of their newfound knowledge or earlier mistake. Trial practitioners should pay heed to this decision and make sure that they articulate all relevant and possible grounds for the admissibility of evidence, particularly when the evidence has the potential to be dispositive. The standard on review is abuse of discretion.[118] Given the case law in this area, there is little chance of victory on appeal.

Requesting Expert Assistance and Expert Witnesses

In *United States v. McAllister*,[119] The CAAF addressed the difficulties inherent in expert witness requests and expert assistance requests. The court paid particular attention to how counsel should request expert assistance, and reiterated the standard for requesting and receiving expert witnesses. While the lead opinion determines that the necessity for expert assistance was not at issue in *McAllister*,[120] the dissent disagrees, providing a cogent and applicable template for counsel facing the need to justify expert assistance at trial.[121] Both the dissent and the majority opinions give excellent examples that counsel should apply in future cases when the issue of expert assistance and expert testimony arises. A quick review of the facts and motions hearings in *McAllister* will assist with understanding how to address these problems.

Private First Class Carla Shanklin was choked to death by an unknown assailant on or around 8 July 1995.[122] Two weeks before her murder, McAllister's commander ordered him to stay away from PFC Shanklin's quarters because of a domestic dispute. Before the order, McAllister was living with PFC Shanklin at her quarters at Helemano Military Reservation, Hawaii. Nonetheless, he went to PFC Shanklin's quarters on 7 July 1995. He waited for her, and upon her return they talked for about two hours.[123] Private First Class Shanklin then went out on a date that evening. McAllister called her quarters while she was out and asked to speak with her. Private First Class Shanklin returned from the date around midnight, and her sister, who lived with her, heard a short, cut-off scream around three or four o'clock in the morning. Shanklin's sister later discovered PFC Shanklin's corpse. Other members of the apartment complex heard the scream, and one individual observed a car matching the general description of McAllister's car in the apartment complex area about the time of the murder.[124]

A Criminal Investigation Division (CID) agent interviewed McAllister. During the interview, the CID agent noticed scratches on McAllister's arm and a gouge on his index finger. McAllister volunteered that his current girlfriend, Staff Sergeant (SSG) Rogers, with whom he was living, scratched him. She denied it.[125]

In the course of their investigation, CID took material from underneath PFC Shanklin's fingernails. The DNA of that material and its testing became the turning point in McAllister's trial. The government called an expert to explain the DNA testing process and the results of that testing. The expert testified that the tests conducted by her laboratory excluded everyone from whom DNA samples had been taken as a possible source of the DNA except for McAllister and PFC Shanklin. On cross-examination, the expert admitted that her laboratory had started testing for two additional genetic systems after testing McAllister's sample. The panel members were particularly interested in the DNA evidence; six of the eight members asked questions about the possibility of contaminated samples, the possibility of multiple contributors, the limited readings from PFC Shanklin's right fingernail, the possibility of mistakes in the chain of custody, and the possibility of retesting.[126] McAllister was con-

116. *Id.*

117. *Id.* at 208.

118. *Id.* (citing United States v. Sullivan, 42 M.J. 360, 363 (1995)).

119. 55 M.J. 270 (2001).

120. *Id.* at 275-76.

121. *Id.* at 270.

122. *Id.* at 272.

123. *Id.* at 271.

124. *Id.* at 272.

125. *Id.*

126. *Id.* at 273.

victed and sentenced to a dishonorable discharge, reduction to the lowest enlisted grade, and confinement for life.[127]

On appeal, the CAAF focused on the attempts by the defense counsel to get expert assistance, and subsequently, an expert witness. The court noted that the convening authority granted the first defense request for expert assistance. The case involved a new type of DNA testing, and no testing facilities were available in Hawaii.[128] Dr. Conneally, a scientist on the island with an in-depth knowledge of DNA and genetics, was appointed as a defense consultant on DNA evidence under MRE 502, and he consulted with the defense in that capacity on multiple occasions.[129] Afterwards, the defense asked the convening authority on 4 April 1996, to produce Dr. Conneally as a defense expert witness at government expense. The convening authority granted the request. During an Article 39(a) session on 23 April 1996, the defense proffered to the military judge that Dr. Conneally had recommended employing someone else to discuss Polymerase Chain Reaction (PCR) testing at trial. The defense filed a motion asking that the evidence be preserved and that the convening authority provide three to four thousand dollars to pay for independent DNA testing. The military judge issued an order to preserve the evidence for possible retesting, but denied the defense request for additional funds.[130]

During an Article 39(a) session on 15 May 1996, the defense asked the military judge to order the government to make funds available so that the defense could hire Dr. Blake, an expert in PCR testing, as a defense consultant and to conduct another DNA test. During the 39(a) session, the defense eventually asked the military judge to substitute Dr. Blake for Dr. Conneally. The military judge refused, but left the option open to the defense to request such a substitution from the convening authority. The defense made that request, and it was denied. The defense counsel informed the military judge that Dr. Conneally did not have the appropriate knowledge to assist the defense, and that Dr. Blake had the knowledge and a requisite "expertise in forensic and criminology where Dr. Conneally does not."[131] Therefore, during the trial on the merits, the defense did not present any expert testimony.[132]

The CAAF began its analysis in *McAllister* by reminding counsel that the defense is entitled to expert assistance when they demonstrate the necessity for it.[133] The court next pointed out that establishing the necessity for an expert does not guarantee the production of any specific expert.[134] The CAAF noted that the necessity for expert assistance was not at issue in this case, and focused instead on whether the appellant had received competent assistance.[135] The court determined that he had not, and remanded the case back to the Army Court of Criminal Appeals (ACCA) for the appointment of an expert to test the preserved DNA evidence.[136]

The dissent in *McAllister* disagreed with the majority opinion on whether the defense had established the necessity for expert assistance.[137] The dissent points out that the CAAF had adopted a three-prong test in *United States v. Gonzalez*,[138] laying out the requirements for a showing that expert assistance is necessary in a particular case.[139] Under *Gonzalez*, the defense must first show (1) why the expert is needed, (2) what such expert assistance would accomplish for the defendant, and (3) why the defense counsel is unable to gather and present the evidence that the expert assistance would be able to develop.[140] The convening authority must provide expert assistance under *United States v. Garries*[141] only after the defense has met this initial burden.[142]

127. *Id.* at 270.

128. *Id*. at 273.

129. *Id*. Under MRE 502, any communications between the appellant and Dr. Conneally would be protected by privilege and would not be disclosed to the government counsel. *See* MCM, *supra* note 3, MIL. R. EVID. 502 (2000).

130. *McAllister*, 55 M.J. at 273.

131. *Id*. at 274.

132. *Id*.

133. *Id.* at 275. The court drew counsels' attention to *United States v. Garries*, 22 M.J. 288 (C.M.A. 1986), *cert. denied*, 479 U.S. 985 (1986), in which the Court of Military Appeals addressed the requirement for a showing of necessity before any requirement to provide expert assistance accrued to the convening authority. *Id*. at 291.

134. *McAllister*, 55 M.J. at 275. *See generally* United States v. Burnette, 29 M.J. 473 (C.M.A. 1990).

135. *McAllister*, 55 M.J. at 275.

136. *Id.* at 276.

137. *Id.* at 277 (Crawford, C.J., dissenting).

138. 39 M.J. 459 (C.M.A. 1994).

139. *McCallister*, 55 M.J. at 277.

Counsel should note that an expert who assists the defense is a member of the defense team, and that the attorney-client privilege includes communications between the expert assistant and the client.[143] The government can only pierce that privilege and interview the expert assistant after the defense requests that the assistant be provided as an expert witness.[144] Defense counsel should consider this when making requests for expert assistance and expert witnesses, taking care to articulate the difference between the two for the convening authority. Such care will assist in preventing the disclosure of privileged information through the metamorphosis of expert assistance into expert testimony.

Defense counsel facing the need for expert assistance and expert witnesses should fashion their requests to the military judge or convening authority in a manner that reflects the requirements of *Gonzalez*. They should identify the reason for the expert, explain why they cannot gather and present that type of evidence without expert assistance, and explain how the expert assistance would assist the defendant. Failure to initially address these issues allows the convening authority or military judge to appropriately deny defense requests for expert witnesses which might otherwise be valid.

Counsel should always begin their requests in a way that satisfies the requirements in *Gonzalez* before they make a request for assistance under *Garries*. Defense counsel should also consider the decision of the CAAF in *United States v. Houser*[145] when developing the reasons that expert assistance or testimony is a necessity. Trial counsel responding to defense requests should either hold the defense's feet to the fire and force them to properly articulate the necessity for such assistance under *Gonzalez*, or in instances where justice would best be served, present the convening authority with the information required under *Garries* and *Gonzalez* sua sponte. The convening authority should then consider that information before acting on a defense request for expert assistance.

The Marriage of Expert Testimony and Character Evidence

In *United States v. Dimberio*[146] the CAAF attempted to address the difficulty created when the defense attempts to proffer evidence at trial under two separate theories of admissibility.[147] The situation in *Dimberio* was exacerbated because one of the theories of admissibility was clearly valid while the other was not.[148] The CAAF, focusing on the inability of the defense to discern accurately between the two theories, affirmed the lower court's decision. The court used the case as a teaching example of how to address requests for experts and the requirements for establishing admissibility of expert testimony under *Houser*, and suggested ways to deal with the particular difficulties encountered when scientific evidence becomes entwined with character evidence.[149] To understand how the CAAF arrived at its decision, one must first review the facts in *Dimberio*.

On 3 February 1997, the wife of Senior Airman Dimberio took their four-week-old son to the emergency room of a nearby civilian hospital. The boy was suffering from injuries consistent with having been violently shaken. The previous evening, the appellant and his wife entertained friends for the first time since the birth of their child. The mother placed the baby on the bed around 10:00 p.m., and checked on him around 12:30 a.m.

140. *Id.* at 277-78 (citing *Gonzalez*, 39 M.J. at 461).

141. 22 M.J. 288 (C.M.A. 1986).

142. *See McCallister*, 55 M.J. at 278.

143. *See* MCM, *supra* note 3, MIL. R. EVID. 502(a).

144. *See id*. MIL. R. EVID. 502(b)(4).

145. 36 M.J. 392 (C.M.A. 1993). The Court of Military Appeals discussed the following factors in *Houser* that counsel should rely upon when making requests for experts: (1) Qualified Expert. To give expert testimony, a witness must qualify as an expert by virtue of his or her "knowledge, skill, experience, training, or education." *Id*. at 398 (quoting MCM, *supra* note 3, MIL. R. EVID. 702). (2) Proper Subject Matter. Expert testimony is appropriate if it would be helpful to the trier of fact. It is essential if the trier of fact could not otherwise be expected to understand the issues and rationally resolve them. *Id.* (construing MCM, *supra* note 3, MIL. R. EVID. 702). (3) Proper Basis. The expert's opinion may be based on admissible evidence "perceived by or made known to the expert at or before the hearing" or inadmissible hearsay if it is "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." MCM, *supra* note 3, MIL. R. EVID. 703. The expert's opinion must have an adequate factual basis and cannot be simply a bare opinion. *See Houser*, 36 M.J. at 398 (construing MCM, *supra* note 3, MIL. R. EVID. 703). (4) Relevant. Expert testimony must be relevant. *Id.* (citing MCM, *supra* note 3, MIL. R. EVID. 402). (5) Reliable. The expert's methodology and conclusions must be reliable. *See id.* (construing MCM, *supra* note 3, MIL. R. EVID. 401). (6) Probative Value. The probative value of the expert's opinion, and the information comprising the basis of the opinion must not be substantially outweighed by any unfair prejudice that could result from the expert's testimony. *Id*. (citing MCM, *supra* note 3, MIL. R. EVID. 403).

146. 56 M.J. 20 (2001).

147. *See id*. at 25-26.

148. *Id.* at 25.

149. *Id*. at 22.

when she brought him a bottle. She left the bottle propped up against a pillow so she could return to the party.[150] The appellant went to bed sometime after his wife gave the baby the bottle. The appellant had not been drinking during the evening, but the mother did consume alcohol that night. The appellant had been in the field and was quite tired. Sometime around 5:30 or 6:00 the next morning, the baby cried so loudly and painfully over the monitor system that his mother began to lactate involuntarily, even though she had been given drugs to stop lactation. The mother went upstairs and found dried blood and abrasions on the baby's face. Dimberio told his wife that he had rolled over on the baby. She called the hospital and then took her son to the emergency room. Dimberio later joined her.[151]

In preparation for trial, the defense counsel learned that Mrs. Dimberio had a history of treatment for various mental health issues. The defense counsel requested and received an expert to assist in reviewing Mrs. Dimberio's medical records.[152] The expert concluded that Mrs. Dimberio suffered from an unspecified personality disorder with narcissistic, histrionic, and borderline traits. He also found that she suffered from stress and occasionally would act without thinking. He did not conclude that she had a history of violent behavior or was likely to act violently.[153]

At trial, the defense counsel attempted to link the expert's opinion of Mrs. Dimberio's mental health condition to the baby's injuries under the theory that Mrs. Dimberio shook the baby during a momentary loss of control. Her tendency to act without thinking under stressful situations was evidence of a character trait that made it more likely that Mrs. Dimberio shook her baby. Such evidence was potentially admissible under MRE 404(a) through expert testimony.[154] The military judge decided that the link between the proffered testimony and the accused was that the defense intended to introduce evidence that the appellant was calm in stressful situations and a peaceful person. Counsel also intended to admit the psychological history of Mrs. Dimberio under MRE 404(b) to show that she acted in accordance with her psychological history when she shook the baby.[155] This theory was clearly not appropriate. Just as the government could not admit propensity evidence that violated MRE 404(b) to say that the accused acted in conformity therewith, the accused could not admit propensity evidence to show that an alternate perpetrator acted in conformity therewith.[156]

The CAAF assumed for purposes of their analysis in *Dimberio* that character evidence could potentially include psychiatric diagnoses or evidence of personality disorders. The court held, however, that such evidence would not be admissible under MRE 404(a). The CAAF noted that the evidence was still potentially admissible under a constitutional right to present a defense, if the appellant could establish legal and logical relevance and make an adequate proffer or presentation of the evidence.[157] The court went on to hold, however, that the defense failed to make an adequate proffer. The CAAF laid out the procedure whereby the defense could have adequately informed the military judge as to the substance of their evidence, citing MRE 103(a)(2), which allows the defense to accomplish this through a stipulation, direct testimony, or an appropriate proffer.[158] The court noted that the burden was on the defense to make an adequate proffer.[159]

The *Dimberio* court determined that the defense failed due to a lack of proper foundation for the evidence under MRE 405, and a failure to establish accurately the necessity for expert testimony under the *Houser*[160] factors that incorporate the Supreme Court's *Daubert*[161] analysis regarding expert testimony. The CAAF viewed the defense's failure to offer supporting *Houser* factors at trial fatally defective. The court finally noted that, even if the defense had made an appropriately substantive proffer, the evidence should have been excluded under the MRE 403 balancing test.[162]

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150. *Id.* at 21.

151. *Id.* at 22.

152. *Id.*

153. *Id.* at 23.

154. *Id.* at 25.

155. *Id.* at 23.

156. *Id.* at 30 (Sullivan, J., concurring in the result).

157. *Id.* at 25.

158. *Id.* at 25-26.

159. *Id.* at 25.

160. United States v. Houser, 36 M.J. 392 (C.M.A. 1993).

161. Daubert v. Merrell Dow Pharm., 509 U.S. 579 (1993).

Defense counsel that wish to admit psychiatric evidence of an alternate perpetrator under a character evidence theory should take special note of the court's holding in *Dimberio*. While difficult to accomplish, it is possible. Counsel should begin by appropriately requesting and receiving an expert in accordance with the procedures discussed above. Once the expert has been assigned, counsel must view the evidence with an eye toward potential admissibility under a character evidence theory. To do this, counsel must initially qualify scientific evidence for potential admissibility under *Houser.* Then, counsel should integrate the now potentially admissible expert testimony with an admissible theory of character evidence. That could include character traits that indicate an alternate perpetrator of the crime.

Counsel must be prepared to address a trial judge's ruling that the expert testimony is not admissible under an MRE 404(a) character theory because a direct reading of that rule could support such a ruling. If that happens, counsel should use *Dimberio* to argue that such evidence, if legally and logically relevant as indicated by the *Houser* factors, is admissible. Remember, counsel must tie the evidence to a constitutional right to present a defense. In other words, it needs to be the only arrow in the defense's quiver. Such decisions at trial are difficult, but a careful reading of *Dimberio* may indicate an area of fertile evidentiary production for savvy defense counsel.

Adoption of the Silent-Witness Theory for VHS Tapes Under MRE 901(b)(9)

In *United States v. Harris,*[163] the CAAF adopted the "silent-witness" theory of authentication for videotapes.[164] Yeoman Seaman Harris stole checks from the coffee mess checking account of Fighter Air Station 101, Naval Air Station Oceana, Virginia Beach, Virginia.[165] He then cashed those checks using a stolen driver's license. During Harris's court-martial, the trial counsel offered into evidence still photographs digitally extracted from the videotape taken from the drive-in window where Yeoman Seaman Harris cashed the stolen checks. The trial counsel called the bank security manager and a teller as witnesses to lay the foundation for the photographs.[166] They testified about their handling of the videotapes from the security cameras, to include discussing how the logs controlling the videotapes were "prepared in the course of the business of the banking center."[167] The witnesses also discussed the procedures for changing tapes and ensuring that the system was working properly after installing each tape. The trial counsel then offered the videotapes under the silent-witness theory of admissibility. The military judge accepted them into evidence, and the appellant was convicted.[168]

The appellant argued on appeal that the photographs derived from the videotape were not properly authenticated and admitted into evidence at trial.[169] The appellant did not contest the use of the silent-witness theory, but instead chose to focus on the validity, or lack thereof, of the authentication process. On appeal he attacked the quantum of evidence about the recording process and recording system. He argued that the testimony offered by the government at trial resulted in the military judge misapplying the silent-witness theory.[170] The CAAF disagreed.

The CAAF held in *Harris* that the silent-witness theory allows the proponent of videotape evidence to satisfy the authentication requirement by allowing the videotape to "speak for itself after the proponent has offered evidence supporting the reliability of the process or system that produced the videotape."[171] The CAAF noted that its adoption of the silent-witness theory came twenty-five years after its initial inception, and well after the ACCA and NMCCA had adopted the theory. The court went on to say that its decision generally reflected decisions in the federal circuits that have examined and adopted the use of the silent-witness theory for the authentication of videotapes.[172] The CAAF then considered whether the quantum of evidence about the recording process and system was sufficient to support a finding that the automated camera footage was authentic under MRE 901(b)(9).[173] The court held that it was and affirmed the case.[174]

162. *Dimberio*, 56 M.J. at 27.

163. 55 M.J. 433 (2001).

164. *Id.* at 438.

165. *Id.* at 435.

166. *Id*.

167. *Id.* at 436.

168. *Id*.

169. *Id.* at 434-35.

170. *Id.* at 436-37.

171. *Id.* at 435.

172. *Id*.

Based upon the court's holding in *Harris*, counsel wishing to proffer videotape evidence must first establish the validity of the process or system in accordance with MRE 901(b)(9). Counsel can establish the validity of the system or process by calling a witness or witnesses to show "the manner in which the film was installed in the camera, how the camera was activated," when the film was removed from the camera, the chain of possession of the film once it was removed from the camera, the fact the film was properly developed or processed, and that any prints produced from the videotape were also properly processed.[175]

Counsel that follow these simple foundational requirements can rely upon the silent-witness theory to overcome any other foundational requirements. This obviates the need to call a witness to testify about the actual filming or any extraction or development process used to create images from the videotape, streamlining the admission of such evidence without sacrificing authenticity or reliability.

Conclusion

Counsel should carefully consider the MRE decisions of the CAAF over the last year. There is a remarkable amount of definitive instruction on how things should be done. Trial practitioners who learn from the court's clear guidance can positively impact their chances of success at trial. Evidentiary decisions made at trial have a phenomenal impact on who succeeds. It is also quite certain that counsel who fail to heed the court and "assume the correct evidentiary position" at the trial level will not receive relief on appeal. The CAAF is clearly acting under the assumption that counsel at the trial level are competent, intelligent, and knowledgeable about the rules of evidence. That assumption, and the CAAF's approach to interpreting the rules of evidence, may very well make the court's belief concerning counsel a self-fulfilling prophecy.

173. *Id*. at 438-39. Military Rule of Evidence 901(b)(9) is an illustration of one of the means by which the requirement of authentication or identification can be met. It states: "Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result." MCM, *supra* note 3, MIL. R. EVID. 901(b)(9).

174. *Harris*, 55 M.J. at 439-40.

175. *Id.* at 438 (quoting the threshold case for automated evidence, *United States v. Taylor*, 530 F.2d 639, 641-42 (5th Cir. 1976)). Subsequent cases in federal jurisdictions have followed the thought process laid out in *Taylor*. *See, e.g.*, United States v. Rembert, 863 F.2d 1023, 1027 (D.C. Cir. 1988); United States v. Bynum, 567 F.2d 1167, 1171 (1976).

CLE News

1. Resident Course Quotas

Attendance at resident continuing legal education (CLE) courses at The Judge Advocate General's School, United States Army (TJAGSA), is restricted to students who have confirmed reservations. Reservations for TJAGSA CLE courses are managed by the Army Training Requirements and Resources System (ATRRS), the Army-wide automated training system. If you do not have a confirmed reservation in ATRRS, you do not have a reservation for a TJAGSA CLE course.

Active duty service members and civilian employees must obtain reservations through their directorates of training or through equivalent agencies. Reservists must obtain reservations through their unit training offices or, if they are nonunit reservists, through the United States Army Personnel Center (ARPERCEN), ATTN: ARPC-OPB, 1 Reserve Way, St. Louis, MO 63132-5200. Army National Guard personnel must request reservations through their unit training offices.

When requesting a reservation, you should know the following:

TJAGSA School Code—181

Course Name—133d Contract Attorneys Course 5F-F10

Course Number—133d Contract Attorney's Course 5F-F10

Class Number—133d Contract Attorney's Course 5F-F10

To verify a confirmed reservation, ask your training office to provide a screen print of the ATRRS R1 screen, showing by-name reservations.

The Judge Advocate General's School is an approved sponsor of CLE courses in all states that require mandatory continuing legal education. These states include: AL, AR, AZ, CA, CO, CT, DE, FL, GA, ID, IN, IA, KS, LA, MN, MS, MO, MT, NV, NC, ND, NH, OH, OK, OR, PA, RH, SC, TN, TX, UT, VT, VA, WA, WV, WI, and WY.

2. TJAGSA CLE Course Schedule

2002

April 2002

2-5 April	6th Comptroller Accreditation Program (5F-F14).
15-19 April	4th Basics for Ethics Counselors Workshop (5F-F202).
15-19 April	13th Law for Paralegal NCO Course (512-27D/20/30).
22-26 April	2002 Combined WWCLE (5F-2002).
29 April-10 May	148th Contract Attorneys Course (5F-F10).
29 April-17 May	45th Military Judge Course (5F-F33).

May 2002

6-10 May	3rd Closed Mask Training (512-27DC3).
13-17 May	5th Intelligence Law Workshop (5F-F41).
13-17 May	50th Legal Assistance Course (5F-F23).
29-31 May	Professional Recruiting Training Seminar.

June 2002

3-5 June	5th Procurement Fraud Course (5F-F101).
3-7 June	171st Senior Officers Legal Orientation Course (5F-F1).
3-14 June	5th Voice Recognition Training (512-27DC4).
3 June-28 June	9th JA Warrant Officer Basic Course (7A-550A0).
4-28 June	158th Officer Basic Course (Phase I, Fort Lee) (5-27-C20).
10-12 June	5th Team Leadership Seminar (5F-F52S).
10-14 June	32d Staff Judge Advocate Course (5F-F52).
17-21 June	13th Senior Paralegal NCO Management Course (512-27D/40/50).
17-21 June	6th Chief Paralegal NCO Course 512-27D-CLNCO).
24-26 June	Career Services Directors

	Conference.
24-28 June	13th Legal Administrators Course (7A-550A1).
28 June-6 September	158th Officer Basic Course (Phase II, TJAGSA) (5-27-C20).

July 2002

8-12 July	33d Methods of Instruction Course (5F-F70).
8-26 July	3d JA Warrant Officer Advanced Course (7A-550A0).
15-19 July	78th Law of War Workshop (5F-F42).
15 July-2 August	MCSE Boot Camp.
15 July-13 September	8th Court Reporter Course (512-27DC5).
29 July-9 August	149th Contract Attorneys Course (5F-F10).

August 2002

5-9 August	20th Federal Litigation Course (5F-F29).
12 August-22 May 03	51st Graduate Course (5-27-C22).
12-23 August	38th Operational Law Seminar (5F-F47).
26-30 August	8th Military Justice Managers Course (5F-F31).

September 2002

9-13 September	2002 USAREUR Administrative Law CLE (5F-F24E).
23-27 September	3rd Court Reporting Symposium (512-27DC6).
16-20 September	51st Legal Assistance Course (5F-F23).
16-27 September	18th Criminal Law Advocacy Course (5F-F34).

3. Civilian-Sponsored CLE Courses

12 April ICLE	Art of Effective Speaking for Lawyers Swissotel Atlanta, Georgia
19 April ICLE	Criminal Law Clayton State College & University Atlanta, Georgia
19 April ICLE	Motion Practice Sheraton Hotel-Buckhead Atlanta, Georgia
31 May ICLE	Jury Trial Marriott Gwinnett Place Hotel Atlanta, Georgia

For further information on civilian courses in your area, please contact one of the institutions listed below:

4. Mandatory Continuing Legal Education Jurisdiction and Reporting Dates

Jurisdiction	**Reporting Month**
Alabama**	31 December annually
Arizona	15 September annually
Arkansas	30 June annually
California*	1 February annually
Colorado	Anytime within three-year period
Delaware	31 July biennially
Florida**	Assigned month triennially
Georgia	31 January annually
Idaho	31 December, Admission date triennially
Indiana	31 December annually
Iowa	1 March annually
Kansas	30 days after program
Kentucky	30 June annually
Louisiana**	31 January annually
Maine**	31 July annually

Minnesota	30 August
Mississippi**	1 August annually
Missouri	31 July annually
Montana	1 March annually
Nevada	1 March annually
New Hampshire**	1 August annually
New Mexico	prior to 30 April annually
New York*	Every two years within thirty days after the attorney's birthday
North Carolina**	28 February annually
North Dakota	31 July annually
Ohio*	31 January biennially
Oklahoma**	15 February annually
Oregon	Anniversary of date of birth—new admittees and reinstated members report after an initial one-year period; thereafter triennially
Pennsylvania**	Group 1: 30 April Group 2: 31 August Group 3: 31 December
Rhode Island	30 June annually
South Carolina**	15 January annually
Tennessee*	1 March annually
Texas	Minimum credits must be completed by last day of birth month each year
Utah	31 January
Vermont	2 July annually
Virginia	30 June annually
Washington	31 January triennially
West Virginia	30 July biennially
Wisconsin*	1 February biennially
Wyoming	30 January annually

* Military Exempt

** Military Must Declare Exemption

For addresses and detailed information, see the March 2002 issue of *The Army Lawyer.*

5. Phase I (Correspondence Phase), RC-JAOAC Deadline

The suspense for submission of all RC-JAOAC Phase I (Correspondence Phase) materials is ***NLT 2400, 1 November 2002***, for those judge advocates who desire to attend Phase II (Resident Phase) at The Judge Advocate General's School (TJAGSA) in the year 2003 ("2003 JAOAC"). This requirement includes submission of all JA 151, Fundamentals of Military Writing, exercises.

This requirement is particularly critical for some officers. The 2003 JAOAC will be held in January 2003, and is a prerequisite for most JA captains to be promoted to major.

Any judge advocate who is required to retake any subcourse examinations or "re-do" any writing exercises must submit the examination or writing exercise to the Non-Resident Instruction Branch, TJAGSA, for grading by the same deadline (1 November 2002). If the student receives notice of the need to re-do any examination or exercise after 1 Ocotber 2002, the notice will contain a suspense date for completion of the work.

Judge advocates who fail to complete Phase I correspondence courses and writing exercises by these suspenses will not be cleared to attend the 2003 JAOAC. Put simply, if you have not received written notification of completion of Phase I of JAOAC, you are not eligible to attend the resident phase.

If you have any further questions, contact Lieutenant Colonel Dan Culver, telephone (800) 552-3978, ext. 357, or e-mail Daniel.Culver@hqda.army.mil.

Current Materials of Interest

1. The Judge Advocate General's On-Site Continuing Legal Education Training and Workshop Schedule (2000-2001 Academic Year)

DATE	TRNG SITE/HOST UNIT	COURSE NUMBER*	CLASS NUMBER	SUBJECT	ACTION OFFICER
12-14 Apr 02	Kansas City, MO 8th LSO/89th RSC	JA0-21 JA0-11	936 922	Administrative/Civil Law; Contract Law	MAJ Joseph DeWoskin (816) 363-5466 jdewoskin@cwbbh.com SGM Mary Hayes (816) 836-0005, ext. 267 mary.hayes@usarc-emh2.army.mil
22-26 Apr 02	Charlottesville, VA OTJAG	5F-2002	002	Spring Worldwide CLE	
19-21 Apr 02	Austin, TX 1st LSO	JA0-31 JA0-21	929 937	Criminal Law; Administrative Law	MAJ Randall Fluke (903) 868-9454 Randall.Fluke@usdoj.gov
27-28 Apr 02	Newport, RI 94th RSC	JA0-31 JA0-11	930 923	Military Justice; Contract/Fiscal Law	MAJ Jerry Hunter (978) 796-2140 Jerry.Hunter@usarc-emh2.army.mil

***** Prospective students may enroll for the on-sites through the Army Training Requirements and Resources System (ATRRS) using the designated Course and Class Number.

2. TJAGSA Materials Available through the Defense Technical Information Center (DTIC)

For a complete listing of TJAGSA Materials Available Through the DTIC, see the March 2002 issue of *The Army Lawyer.*

3. Regulations and Pamphlets

For detailed information, see the March 2002 issue of *The Army Lawyer.*

4. The Legal Automation Army-Wide Systems XXI—JAGCNet

a. The Legal Automation Army-Wide Systems XXI (LAAWS XXI) operates a knowledge management and information service called JAGCNet primarily dedicated to servicing the Army legal community, but also provides for Department of Defense (DOD) access in some case. Whether you have Army access or DOD-wide access, all users will be able to download the TJAGSA publications that are available through the JAGCNet.

b. Access to the JAGCNet:

(1) Access to JAGCNet is restricted to registered users, who have been approved by the LAAWS XXI Office and senior OTJAG staff.

(a) Active U.S. Army JAG Corps personnel;

(b) Reserve and National Guard U.S. Army JAG Corps personnel;

(c) Civilian employees (U.S. Army) JAG Corps personnel;

(d) FLEP students;

(e) Affiliated (that is, U.S. Navy, U.S. Marine Corps, U.S. Air Force, U.S. Coast Guard) DOD personnel assigned to a branch of the JAG Corps; and, other personnel within the DOD legal community.

(2) Requests for exceptions to the access policy should be e-mailed:

LAAWSXXI@jagc-smtp.army.mil

c. How to logon to JAGCNet:

(1) Using a web browser (Internet Explorer 4.0 or higher recommended) go to the following site: http://jagcnet.army.mil.

(a) Follow the link that reads "Enter JAGCNet."

(b) If you already have a JAGCNet account, and know your user name and password, select "Enter" from the next menu, then enter your "User Name" and "password" in the ap-

propriate fields.

(c) If you have a JAGCNet account, *but do not know your user name and/or Internet password*, contact your legal administrator or e-mail the LAAWS XXI HelpDesk at LAAWSXXI@jagc-smtp.army.mil.

(d) If you do not have a JAGCNet account, select "Register" from the JAGCNet Intranet menu.

(e) Follow the link "Request a New Account" at the bottom of the page, and fill out the registration form completely. Allow seventy-two hours for your request to process.' Once your request is processed, you will receive an e-mail telling you that your request has been approved or denied.

(f) Once granted access to JAGCNet, follow step (b), above.

5. TJAGSA Publications Available Through the LAAWS XXI JAGCNet

For detailed information, see the March 2002 issue of *The Army Lawyer.*

6. TJAGSA Legal Technology Management Office (LTMO)

The Judge Advocate General's School, United States Army (TJAGSA), continues to improve capabilities for faculty and staff. We have installed new computers throughout the School. We are in the process of migrating to Microsoft Windows 2000 Professional and Microsoft Office 2000 Professional throughout the School.

The TJAGSA faculty and staff are available through the MILNET and the Internet. Addresses for TJAGSA personnel are available by e-mail at jagsch@hqda.army.mil or by calling the LTMO at (804) 972-6314. Phone numbers and e-mail addresses for TJAGSA personnel are available on the School's Web page at http://www.jagcnet.army.mil/tjagsa. Click on directory for the listings.

For students that wish to access their office e-mail while attending TJAGSA classes, please ensure that your office e-mail is web browser accessible prior to departing your office. Please bring the address with you when attending classes at TJAGSA. If your office does not have web accessible e-mail, you may establish an account at the Army Portal, http://ako.us.army.mil, and then forward your office e-mail to this new account during your stay at the School. The School classrooms and the Computer Learning Center do not support modem usage.

Personnel desiring to call TJAGSA can dial via DSN 934-7115 or, provided the telephone call is for official business only, use our toll free number, (800) 552-3978; the receptionist will connect you with the appropriate department or directorate. For additional information, please contact our Legal Technology Management Office at (804) 972-6264. CW3 Tommy Worthey.

7. The Army Law Library Service

Per *Army Regulation 27-1*, paragraph 12-11, the Army Law Library Service (ALLS) Administrator, Ms. Nelda Lull, must be notified prior to any redistribution of ALLS-purchased law library materials. Posting such a notification in the ALLS FORUM of JAGCNet satisfies this regulatory requirement as well as alerting other librarians that excess materials are available.

Ms. Lull can be contacted at The Judge Advocate General's School, United States Army, ATTN: JAGS-CDD-ALLS, 600 Massie Road, Charlottesville, Virginia 22903-1781. Telephone DSN: 934-7115, extension 394, commercial: (804) 972-6394, facsimile: (804) 972-6386, or e-mail: lullnc@hqda.army.mil.

8. Kansas Army National Guard Annual JAG Officer's Conference

The Kansas Army National Guard is hosting their Annual JAG Officer's Conference at Washburn Law School, Topeka, Kansas, on 20-21 October 2001. The point of contact is Major Jeffry L. Washburn, P.O. Box 19122, Pauline, Kansas 66619-0122, telephone (785) 862-0348.

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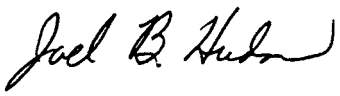

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