Annual Review of Developments in Instructions—2001[1]

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This article is the annual installment of developments on instructions, and covers cases decided during the Court of Appeals for the Armed Forces' (CAAF) 2001 term.[2] Those involved in military justice may find this article helpful, but the primary resource for instructions issues remains the *Military Judges' Benchbook*.[3] As with earlier reviews on instructions, this article addresses new cases from the perspective of substantive criminal law, evidence, and sentencing.

Substantive Criminal Law

Child Pornography: United States v. James[4]

Seaman James was assigned to a U.S. Navy ship based in Guam. With access to the Internet provided by his roommate's computer, James downloaded and uploaded child pornography on multiple occasions, believing his electronic communications were with someone called "Fast Girl."[5] At trial, James pled guilty to violations of 18 U.S.C. § 2252A, part of the Child Pornography Prevention Act (CPPA) of 1996,[6] through Article 134, Uniform Code of Military Justice (UCMJ).[7] On appeal, he challenged the constitutionality of § 2252A, arguing that to the extent it prohibited "virtual" child pornography, it was overbroad because the government had no compelling interest in restricting the transfer and possession of such virtual images.[8]

Agreeing with the majority of federal cases addressing this issue, the CAAF found the statute constitutional.[9] The CAAF held that the government had a compelling interest in preventing trafficking in even virtual pornography, given that child abusers can use such images to "whet their . . . appetites," "facilitate [their] sexual abuse of children," and that computers can alter images of actual children in "innocuous images" into child pornography.[10]

On 16 April 2002, in *Ashcroft v. Free Speech Coalition*,[11] the Supreme Court found the CPPA's provisions dealing with "virtual" child pornography[12] unconstitutionally overbroad.[13] Writing for the majority, Justice Kennedy disagreed with the Court of Appeals for the First Circuit's reasoning in *United States v. Hilton*,[14] upon which the CAAF relied in *James*.[15] The petitioners did not challenge, and the Court thus did not specifically

1. For fiscal year 2001 (1 October 2000 through 30 September 2001).

2. This article does not purport to review all of the cases from the CAAF or the service courts; it only includes those that the authors consider the most important. Although this article mainly focuses on discussing cases from an instructional perspective, it also includes other cases that may benefit practitioners—on or off the bench.

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

4. 55 M.J. 297 (2001).

5. *Id.* at 298. In reality, "Fast Girl" was a male U.S. Customs Service agent in the continental United States. *Id.*

6. 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)).

7. UCMJ art. 134 (2000).

8. *James*, 55 M.J. at 297-98. Although the accused admitted to trafficking in child pornography involving actual children, he challenged the constitutionality of the statute as it related to "virtual" or computer-generated depictions of children. *Id.* at 298.

9. *Id.* at 300-01 (citing United States v. Hilton, 167 F.3d 61 (1st Cir. 1999); United States v. Acheson, 195 F.3d 645 (11th Cir. 1999); United States v. Mento, 231 F.3d 912 (4th Cir. 2000); United States v. Fox, 248 F.3d 394 (5th Cir. 2001)).

10. *Id.* at 300 n.4 (quoting *Hilton*, 167 F.3d at 66-67 (quoting S. REP. NO. 104-358, pt. IV(B) (1996))).

11. 122 S. Ct. 1389 (2002).

address, the constitutionality of the CPPA provisions concerning child pornography involving real children.[16]

Instructing on child pornography cases under the noted federal statutes has never been easy. Although sample instructions exist, practitioners must now carefully excise those portions relating to virtual child pornography.[17]

Threats Against the President: United States v. Ogren[18]

Seaman Recruit Robert Ogren was unhappy with the conditions of his pretrial confinement. While in pretrial, he was loud, uncooperative, and made several threats against the life of President Clinton.[19] These threats resulted in his ultimate conviction for a violation of 18 U.S.C. § 871[20] under Article 134, UCMJ.[21]

Upon reviewing the legislative history of § 871(a), which indicates Congress balanced the prohibited speech against the First Amendment, the CAAF determined that the offense has two elements:

(1) The accused made a "true" threat; and
(2) The threat was knowing and willful.[22]

The First Amendment does not protect all speech. Requiring the threat to be a "true" threat is intended to separate the protected First Amendment "wheat" from the unprotected "chaff." "True threats" do not include "political hyperbole, . . . jests or innocuous remarks, . . . [or] 'very crude offensive methods[s] of stating a political opposition to the President.'"[23] Adopting *Watts v. United States*,[24] the CAAF listed three factors to be considered when determining whether the accused's threat was a "true threat":

12. 18 U.S.C. §§ 2256(8)(B), (D) (2000) (prohibiting visual depictions that "appear[] to be" or "convey[] the impression of" minors engaging in sexually explicit conduct, respectively).

13. *Free Speech Coalition*, 122 S. Ct. at 1405-06.

14. 167 F.3d 61 (1st Cir. 1999).

15. *See James*, 55 M.J. at 300 (adopting explicitly the rationale of *Hilton*).

16. 18 U.S.C. §§ 2256(8)(A), (C).

17. Before retiring, Colonel Gary Holland, with assistance from Captain John Rolph, U.S. Navy, produced some excellent sample instructions on child pornography. Although these instructions do address virtual child pornography, the authors anticipated the current debate, and these instructions can be tailored to remove any references to now-unconstitutional provisions.

18. 54 M.J. 481 (2001), *cert. denied*, 122 S. Ct. 644 (2001).

19. *Id*. at 483. The opinion reflects Ogren's salty language as follows:

> On two separate occasions on July 21, appellant made statements involving the President. Appellant first told Petty Officer Lyell: "**** off. And **** the rest of the staff. **** Admiral Green. 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." Petty Officer Lyell understood that this latter reference was to the President of the United States. Appellant did not indicate that he had a plan or scheme to get a gun and kill the President. However, Petty officer Lyell took the statement seriously.
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> Appellant's second statement was to Operations Specialist Second Class Marnati, recounted by Marnati at trial as follows:
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> OSI Marnati: [I asked appellant] why he was beating on his cell and what's he yelling for. . . . He told me, "I can't wait to get out of here, Man." I said, "Why?" He said, "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.". . . I asked him which President he was talking about. . . . He said, "Clinton, Man. I'm going to find Clinton and blow his ******* brains out" or similar to that.

Id. at 482-83 (citations omitted).

20. Section 871(a) provides that

> [w]hoever knowingly and willfully deposits for conveyance in the mail or for a delivery from any post office of 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 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.

18 U.S.C. § 871(a) (2000).

21. *Ogren*, 54 M.J. at 482.

22. *Id*. at 483-84.

(1) The context of the threat;
(2) Whether the statement was expressly conditional; and
(3) The reaction of the listeners.[25]

In Ogren's case, his threats were not conditioned on any certain event.[26] Ogren made them frequently and, although Ogren was confined when he made these threats, Ogren's jailers took him seriously enough to report his threats to the Secret Service. The day after making the threats, Ogren admitted to a Secret Service agent that he had made them and made two additional comments implying an interest in obtaining guns. Although Ogren told the agent that he was just "blowing off steam," Ogren did not express any religious, political, or moral motives for his remarks.[27] Based on the *Watts* factors, the CAAF found that Ogren's statements were "true threats."[28]

Addressing the second "knowing and willful" element of the offense, the CAAF wrestled with whether to adopt a subjective or an objective standard, ultimately adopting the latter: If, considering the language used and all the surrounding circumstances, "a reasonable person would foresee that the statement [made by the accused] would be interpreted by those [who heard it] as a serious expression of an intention to . . . take the life of the President[, this element is satisfied]."[29] Under this objective test, the accused need not have actually intended to carry out the threat, but he must have intended to make the threat.[30]

In addition to providing specific guidance on instructions for the offense of communicating a threat, *Ogren* gives practitioners a general outline for the elements and proposed instructions when faced with an offense charged under clause three of Article 134, UCMJ. Military judges and counsel are often faced with deciphering the U.S. Code to determine the elements for such cases.[31]

The Parental Discipline Offense: United States v. Rivera[32]

When charged with an assault upon one of their children, parents have an affirmative "parental discipline" defense.[33] In *United States v. Rivera*, the CAAF narrowed the breadth of this defense available to a military accused.

Sergeant (SGT) Jose M. Rivera had a thirteen year-old stepson, Edward. In response to a report card with multiple Ds and Fs, SGT Rivera punched Edward a single time in the stomach with a closed fist. At trial, Edward testified that he fell down and stayed down until Rivera stopped talking and left. Edward showed no evidence of any mental harm or any manifested physical harm, such as welts or bruises. Apparently, Edward did not need or seek medical treatment after SGT Rivera struck him.[34]

Previously, the CAAF had adopted a two-part test for the affirmative defense of parental discipline.[35] This test states that to overcome this defense, the government must prove beyond a reasonable doubt that the following do not apply:

[1] the force used by the accused was for the purpose of safeguarding or promoting the welfare of the minor, including the prevention or punishment of his misconduct; and

23. *Ogren*, 54 M.J. at 484 (quoting Watts v. United States, 394 U.S. 705, 707-08 (1969)).

24. 394 U.S. 705 (1969).

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

26. *Id.* at 487. Ogren made some of his threats in response to a question of why he wanted to get out of pretrial confinement, significantly weakening any argument that his threats were merely the idle banter of one who was in no position to carry them out. Regardless, courts interpreting this section have not found that release from confinement makes the threats conditional. *Id*. at 487 n.16 (citing United States v. Howell, 719 F.2d 1258 (5th Cir. 1983); United States v. Miller 115 F.3d 361 (6th Cir. 1997)).

27. *Id*. at 482-83. Apparently, the CAAF believed these motives might have provided Ogren some protection under the First Amendment. *See id*. at 488 n.17.

28. *Id*. at 487.

29. *Id*. at 485 (quoting Roy v. United States, 416 F.2d 874, 877 (9th Cir. 1969)).

30. *See id*. As the CAAF indicated, the Supreme Court has questioned the objective standard. *Id.* at 486 (citing *Watts*, 394 U.S. at 707-08). Until that Court states differently, based on *United States v. Ogren*, the military will apply the objective standard.

31. *See* BENCHBOOK, *supra* note 3, para. 3-60-2B n.3 (advising the bench and bar to consult each other on the elements and instructions for the charged offense).

32. 54 M.J. 489 (2001).

33. *See id*. at 491 (citing MODEL PENAL CODE § 3.08(1) (ALI 1985)).

34. *Id*. at 490-91.

35. *Id*. at 491 (citing United States v. Brown, 26 M.J. 148, 150-51 (1988); United States v. Robertson, 36 M.J. 190, 191-92 (1992)).

> [2] the force used was 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.[36]

The question in *Rivera* was whether a single blow which did not cause any mental distress or manifest any physical harm could satisfy the second element.[37] The CAAF found it could. "[T]he burden of establishing substantial risk [of serious bodily harm] can be met without physical manifestation of actual harm."[38] Thus, under the appropriate facts, trial counsel might request the following addition to the parental discipline instruction:[39] force does not have to leave a mark or cause mental distress to be excessive or unreasonable.

While the CAAF quickly indicated it was *not* creating a rule of strict liability for closed fist punches, it said that the use of a closed fist does carry with it certain implications, such as the motive of the assailant or the likelihood of injury, when compared to a slap with an open hand.[40] In other words, the use of a closed fist is a factor the members can consider when deciding the two parts of the parental discipline test.

Finally, the CAAF appears to have shut the door on the use of expert witnesses in these types of cases. According to the CAAF, whether the facts are such to create a substantial risk of the harms contemplated "does not rest on specialized medical knowledge, but rather on the everyday 'common sense and knowledge of human nature and the ways of the world' expected of triers of fact."[41] Given this language, trial counsel may have a difficult time convincing a military judge that expert testimony on risk of harm from certain conduct "will assist the trier of fact to understand the evidence or to determine a fact in issue."[42]

Larceny and Electronic Fund Transfers (EFTs): United States v. Sanchez[43]

Specialist (SPC) Alfredo Sanchez used improperly obtained American Express cards to obtain cash from several automatic teller machines (ATMs). With each money transfer, SPC Sanchez obtained the amount he keyed into the ATM, and American Express received an additional administrative fee directly from the cardholder's account via EFT. The government charged SPC Sanchez with larceny under Article 121 for all funds transferred from the cardholders' accounts; that is, both the "keyed in" amounts and the administrative fees. At trial, SPC Sanchez entered pleas of guilty.[44]

The Army Court of Criminal Appeals (ACCA) found SPC Sanchez's guilty plea to larceny of the administrative fees improvident. With regard to these fees, the ACCA determined that Sanchez did not satisfy any of the the three theories of liability for larceny—taking, withholding, and obtaining.[45] Finding that SPC Sanchez moved and had possession of the money taken from the ATM machine, the ACCA affirmed the conviction for that amount. Specialist Sanchez was not guilty of larceny of the administrative fees, however, because those fees went directly from the victims' accounts to American Express.[46]

Sanchez is important for counsel to consider when charging an accused or when reviewing charges against a client in cases involving the transfer of funds electronically. The ACCA has given practitioners on both sides (as well as judges) some guid-

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36. *Id.* (quoting MODEL PENAL CODE § 3.08(1)).

37. *Id.* at 490. The CAAF clearly stated that SGT Rivera's motive fit the first element of the parental discipline defense. *Id.* at 492.

38. *Id.* at 492. The CAAF's position was that "[a] rule that requires physical evidence of injury invites one blow too many." *Id.* The Army Court of Criminal Appeals has already referred to *Rivera*'s holding that no actual harm need be demonstrated to overcome the parental discipline defense. *See* United States v. Arab, 55 M.J. 508, 517 (Army Ct. Crim. App. 2001) (citing *Rivera*, 54 M.J. at 492).

39. BENCHBOOK, *supra* note 3, para. 5-16.

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

41. *Id.* at 491 (quoting United States v. Oakley, 29 C.M.R. 3, 7 (C.M.A. 1960)).

42. MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 702 (2000) [hereinafter MCM].

43. 54 M.J. 874 (Army Ct. Crim. App. 2001).

44. *Id.* at 876-77.

45. *Id.* at 877-78. "The [*MCM*] requires that the thief possess the property for larceny: 'There must be a taking, obtaining, or withholding . . . of specific property.'" *Id.* at 877 (quoting MCM, *supra* note 42, pt. IV, ¶ 46c(1)(b) (1998) [hereinafter 1998 MCM]). Sanchez did not "take" the administrative fees because "there was no movement of the property, or any exercise of dominion over [them]." *Id.* at 878 (citing 1998 MCM, *supra*, pt. IV, ¶ 46c(1)(b)). Likewise, no obtaining or withholding occurred because the accused "never received or possessed these fees." *Id.*

46. *Id.* at 878-79. The ACCA stated that the accused would have been provident to obtaining services under false pretenses, however, under Article 134. *Id.* at 878.

ance on determining the limits of larceny in today's world of EFTs.[47]

Mistake of Fact: United States v. Binegar[48]

Senior Airman Binegar was charged with larceny of contact lenses. At trial, Airman Binegar claimed that he thought he was allowed to order contact lenses for certain personnel. Accordingly, his defense counsel asked the military judge to give the mistake of fact instruction for the specific intent crime of larceny; that is, the mistake must only be honestly held.[49] Disagreeing, the military judge said that Binegar's mistake, if any, related "generally to the offense [of larceny,] and is not related to that element which requires specific intent[; that is, the intent to permanently deprive the Air Force of the contact lenses]."[50] The military judge therefore instructed the panel that Binegar's mistake had to be both honest and reasonable. The Air Force Court of Criminal Appeals agreed with the military judge that Binegar's mistake related to the wrongfulness of the taking—a general intent element.[51]

On appeal to the CAAF, the government argued that the military judge was correct. After all, the *Military Judges' Benchbook* specifically cautions military judges to evaluate carefully the element of the offense to which mistake applies. The *Benchbook* notes that even in specific intent crimes, if the mistake is to a general intent element, the mistake need be honest and reasonable, not just honest.[52] The defense persisted that Binegar's mistake was to the specific intent element of larceny.[53]

In a split opinion, Judge Sullivan, joined by Judges Effron and Baker, agreed with the defense. In Judge Sullivan's view, Binegar's mistake related to his specific intent to permanently defraud the Air Force of the contact lenses; therefore, his mistake need only have been honest.[54]

Judge Gierke, concurring in the result, said that Binegar's mistake went to both the wrongfulness of the taking (if the accused thought he had permission to give out the contacts then his taking would not have been wrongful) and to the intent to permanently defraud (if the accused thought he had permission, he could not have had the specific intent to permanently defraud). Because Binegar's mistake related to both general and specific intent elements, the specific intent instruction was appropriate; with the specific intent instruction "subsuming" the general intent instruction, giving both instructions was unnecessary.[55]

In a lengthy dissent, Judge Crawford said that Binegar was only mistaken about the wrongfulness of the taking, not about the intent to permanently deprive. Binegar's mistake, therefore, needed to be both honest and reasonable.[56]

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47. The ACCA is not the only court to recognize the difficulties engendered by EFTs and "plastic" (credit cards, debit cards and ATM cards). In *United States v. Hegel*, 52 M.J. 778 (C.G. Ct. Crim. App.), the Coast Guard Court of Criminal Appeals found identifying the "victim" in a larceny case difficult: "[We have not found] any cases that stand for the proposition that larceny of money from the issuer of a credit card is a proper offense under Article 121, UCMJ, when a credit card is used improperly to make purchases [of goods from merchants]." *Id.* at 780. *See also* United States v. Franchino, 48 M.J. 875 (C.G. Ct. Crim. App. 1998) (affirming convictions of larceny of goods from merchants, rather than accepting the pleas of guilty to larceny of money from the cardholder (the U.S. Government)).

The 2002 amendments to the *MCM* also addressed this issue, as follows:

> h. Paragraph 46c(1)(h) is amended by adding at the end the following new clause:
>
> (vi) *Credit, Debit, and Electronic Transactions*. Wrongfully engaging in a credit, debit, or electronic transaction to obtain goods or money is an obtaining-type larceny by false pretense. Such use to obtain goods is usually a larceny of those goods from the merchant offering them. Such use to obtain money or a negotiable instrument (e.g., withdrawing cash from an automated teller or a cash advance from a bank) is usually a larceny of money from the entity presenting the money or a negotiable instrument. For the purpose of this section, the term "credit, debit, or electronic transaction" includes the use of an instrument or device, whether known as a credit card, debit card, automated teller machine (ATM) card or by any other name, including access devices such as code, account number, electronic serial number or personal identification number, issued for the use in obtaining money, goods, or anything else of value.

Exec. Order No. 13,262, 2002 Amendments to the Manual for Courts-Martial, United States, 67 Fed. Reg. 18,773, 18,777 (Apr. 17, 2002).

48. 55 M.J. 1 (2001).

49. *Id.* at 1-3.

50. *Id.* at 4.

51. *Id.*

52. BENCHBOOK, *supra* note 3, para. 5-11.

53. *Binegar*, 55 M.J. at 4-6.

54. *Id.* at 4-6.

55. *Id.* at 6-8 (Gierke, J., concurring in the result).

In applying the mistake of fact defense, Judge Gierke succinctly set out the questions counsel and the bench must answer to determine which instruction to give:

> (1) What is the specific fact about which the [accused] claims to have been mistaken?
> (2) To what element or elements does that specific fact relate?[57]

Although reaching different results, all three opinions agree that even a specific intent crime can have a general intent element to which the mistake may apply, and that such a mistake must only be honest. Accordingly, the guidance from paragraph 5-11 of the *Benchbook* remains sound. The opinions also agree that judges and counsel must carefully evaluate the alleged mistake and the elements of the offense, as the *Benchbook* states, before deciding which instruction is appropriate.

Lawfulness of the Order: United States v. New[58]

In 1995, SPC Michael New was assigned to an infantry unit ordered to the Former Yugoslav Republic of Macedonia in support of United Nations (UN) peacekeeping operations. As part of that deployment, SPC New and his unit were ordered to make certain modifications to their uniforms, to include wearing UN shoulder patches and UN berets. Specialist New refused, challenging the legality of the order. After several opportunities to comply, New was charged with failure to obey a lawful order under Article 92(2), UCMJ.[59]

At trial, the military judge considered the lawfulness of the order as a question of law for his decision. Subsequently, he advised the members that he found the order lawful. Specialist New complained that lawfulness of the order is an element of the offense, and as such, the judge had to submit this decision to the members.[60]

In a lengthy decision in which four of the five judges wrote opinions, the CAAF determined that the military judge was correct; lawfulness of the order is not a separate element of the offense of violation of a lawful order under Article 92(2). Instead, lawfulness of the order is a question of law for the military judge.[61]

The CAAF's decision does not, however, mean that the panel no longer has a role in determining the lawfulness of an order. The opinion does not give the military judge fact-finding powers, even on the issue of lawfulness, in a members case.[62] The CAAF referred to the role of the members as follows:

> Questions of the applicability of a rule of law to an *undisputed* set of facts are normally questions of law.[63]
>
> . . . .
>
> [Prior case law does not require the issue of lawfulness to go to the members, as those opinions only address] circumstances in which *predicate* factual issues were submitted to the members.[64]

New's impact on violation of lawful orders' cases under other UCMJ Articles is still undetermined.[65] This opinion certainly provides ammunition to those arguing that lawfulness of the order is a matter for the military judge, however, even if the

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56. *Id.* at 8 (Crawford, C.J., dissenting). Judge Crawford also stated that even if the judge erred by giving the honest and reasonable instruction, the error was harmless. *Id.* In Judge Crawford's view, the evidence (ordering contact lenses for friends under "coded" names, rather than their real names) refuted an honestly held mistake on Binegar's part. *Id.* at 14.

57. *Id.* at 7. Judges Sullivan and Crawford make what are essentially similar observations. *Compare id.* at 5 (Sullivan, J.) ("The pertinent inquiry is whether the purported mistake concerns a fact which would preclude the existence of the required specific intent."), *with id.* at 10 (Crawford, C.J., dissenting) ("(1) Does the mistake show that the specific intent was not in fact entertained by the defendant? If it does, then the normal specific intent rule applies, and an honest mistake is a defense. (2) If the mistake does not show that the specific intent is lacking, then the normal *general intent* rule applies, and only an honest and reasonable mistake is a defense.").

58. 55 M.J. 95 (2001), *cert. denied*, 122 S. Ct. 356 (2001).

59. *Id.* at 97-98.

60. *Id.* at 100.

61. *Id.*

62. *New* does not convert Article 92 into a "strict liability" offense. If the lawfulness of the order turns on factual issues, those issues are for the members to decide. The military judge is tasked with drafting appropriate instructions to the members, such as "if you find the order was given to maintain good order and discipline within the unit, the order is lawful as a matter of law. If you find the order was given for the personal gain of the officer giving it, the order is not lawful as a matter of law."

63. *New*, 55 M.J. at 101 (citing MCM, *supra* note 42, R.C.M. 801(e)(5) discussion).

64. *Id.* at 102.

factual determination underlying the issue remains with the members.

Involuntary Manslaughter: United States v. Oxendine[66]

On the night of 20 December 1997, Private First Class (PFC) Philip Oxendine, his best friend Lance Corporal (LCpl) Epley, and other Marines were involved in a test of trust: with their buddies holding their ankles as the only means of support, participants were suspended head first from a third story barracks window. When it was LCpl Epley's turn, LCpl Epley fell to his death when Oxendine and another Marine lost their grip on him. At his subsequent trial for LCpl Epley's death, Oxendine was found guilty of involuntary manslaughter.[67]

To be guilty of involuntary manslaughter, an accused's actions that result in death must constitute culpable negligence. Culpable negligence is a negligent act "accompanied by a gross, reckless, wanton or deliberate disregard for the foreseeable results to others."[68] Foreseeability, an objective test, is viewed from the position of the "reasonable person, in view of all the circumstances."[69]

On appeal, PFC Oxendine argued that LCpl Epley's death was not "foreseeable from the standpoint of 'a reasonable eighteen to twenty year-old' Marine."[70] The CAAF disagreed, holding that to graft the "status or attributes of a particular person" onto the reasonable person standard would convert that test from an objective to a subjective one.[71] Accordingly, it was appropriate for the members to consider PFC Oxendine's actions and all the surrounding circumstances when evaluating the foreseeability of LCpl Epley's death, but only from the perspective of a reasonable person, not a reasonable eighteen to twenty year-old Marine.[72]

For trial practitioners, *Oxendine* is a clear statement that the accused's subjective belief about the foreseeability of the harm is not the appropriate standard. Counsel need to present evidence of the circumstances as they were at the time of the offense, and then argue whether those circumstances would have made the harm foreseeable to a reasonable person, not to someone in the accused's shoes.

Multiplicity and Unreasonable Multiplication:
United States v. Frelix-Vann[73] *and* United States v. Quiroz[74]

Captain (CPT) Francis Frelix-Vann was convicted of larceny of certain items from the Post Exchange (PX). Based on the same larceny from the PX, she was also convicted of conduct unbecoming an officer.[75] While she argued that these offenses were multiplicious for sentencing at trial, she did not raise the issue of multiplicity for findings. At trial, the judge only considered the offenses as multiplicious for sentencing.[76]

On appeal, CPT Frelix-Vann argued that the two charges were multiplicious for findings, and that the larceny charge should be dismissed. Filling in a hole left by last year's case of *United States v. Cherukuri*,[77] the CAAF held that the same conduct cannot be the basis for two convictions, one for an enumerated offense and one under Article 133.[78]

The CAAF recited that it will, in this area, look to the elements and the pleadings in applying the *United States v. Teters*[79] analysis.[80] To resolve *Felix-Vrann*, however, the CAAF needed

65. *New* has significant implications for other violations of orders' cases, such as Articles 89, 90, and 91, from cases involving anthrax refusals to those involving tattoos.

66. 55 M.J. 323 (2001).

67. *Id*. at 324-25.

68. BENCHBOOK, *supra* note 3, para. 3-44-2.

69. *Oxendine*, 55 M.J. at 325 (quoting United States v. Henderson, 23 M.J. 77, 80 (C.M.A. 1986)).

70. *Id.* (quoting appellant's brief at 3).

71. *Id*. at 326.

72. *Id.*

73. 55 M.J. 329 (2001).

74. 55 M.J. 334 (2001).

75. *Felix-Vrann*, 55 M.J. at 330.

76. *Id.* at 330 n.1, 333.

77. 53 M.J. 68 (2000) (improper to have two convictions under Articles 134 and 133 for the same conduct).

78. *Felix-Vrann*, 55 M.J. at 331.

to look no further than the *Manual for Courts-Martial* (MCM), part IV, paragraph 59c(2). That provision states that when a specific offense is charged under the *MCM*, and an Article 133 offense is also charged based on the same conduct, the elements of the Article 133 offense are the same as the elements of the specific offense, "with the additional requirement that the act or omission constitutes conduct unbecoming an officer and gentleman."[81] Finding the elements of the specific offense (here, larceny) subsumed under the Article 133 offense, the CAAF found the Article 133 offense to be the greater offense, but allowed the government to choose which offense to dismiss.[82]

Merely applying the *Teters* analysis does not ensure the charge sheet is "bulletproof." Charges surviving the *Teters* analysis may nevertheless be found unreasonably multiplied.[83] In *United States v. Quiroz*,[84] the CAAF approved the Navy-Marine Court of Criminal Appeal's (NMCCA) framework for analysis of a separate concept, unreasonable multiplication of charges.[85]

In the NMCCA's *Quiroz* opinion in 1999,[86] the court discussed multiplicity and unreasonable multiplication of charges as separate concepts; the former growing from Double Jeopardy, the latter from fairness and reasonableness considerations. The NMCCA set forth a five-part framework for analyzing whether charges are unreasonably multiplied.[87] The CAAF adopted this framework with only a minor modification, putting to rest arguments that multiplicity subsumed any considerations of unreasonable multiplication of charges.[88] The *Quiroz* factors give the military judge significant discretion in the area of unreasonable multiplication of charges, from whether to find it to how to respond to it. As a result, counsel on both sides bear a heavy burden to inform and persuade the military judge that their position is correct.

Vagaries of proof aside, trial practitioners should only charge the offense that best encompasses an accused's misconduct. Charging additional offenses under Articles 133 or 134 for the same conduct needlessly creates appellate issues and consumes trial time with motions that counsel can avoid through judicious charging. Likewise, counsel should take a close look at the *Quiroz* factors before preferring charges in anticipation of a defense motion.

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79. 37 M.J. 370 (C.M.A. 1993).

80. *Felix-Vrann*, 55 M.J. at 331 (citing United States v. Weymouth, 43 M.J. 329, 340 (1995) (holding that the CAAF will look not only at the elements of the offenses charged, but also the elements of the offenses as pled on the charge sheet in applying the *Teters* elements test). In *United States v. Teters*, the Court of Military Appeals formulated a test for determining whether separate offenses arising from a single criminal act could be separately charged and punished. The essence of the test is congressional intent. If Congress's intent is clear, it is to be followed. If congressional intent is unclear, practitioners should look to the elements of the proposed offenses. If each offense contains an element that the other does not, the presumption is that Congress intended that the offenses could be charged and punished separately, even if arising from the same criminal act. *Id.* at 376. Later cases, such as *United States v. Weymouth*, 43 M.J. 329 (1995), and *United States v. Foster*, 40 M.J. 140 (C.M.A. 1994), have "softened" that approach by adding consideration of the pleadings when determining the elements to compare.

81. MCM, *supra* note 42, pt. IV, ¶ 59c(2).

82. *Felix-Vrann*, 55 M.J. at 333.

83. United States v. Quiroz, 55 M.J. 334, 338 (2001).

84. 55 M.J. at 334.

85. *Id.* at 337.

86. United States v. Quiroz, 53 M.J. 600 (N-M. Ct. Crim. App. 1999) (reconsideration en banc).

87. *Id.* at 607. The NMCCA laid out the five-part framework as follows:

> [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 [accused's] criminality?
> [4] Does the number of charges and specifications [unreasonably] increase the [accused's] punitive exposure? and
> [5] Is there any evidence of prosecutorial overreaching or abuse in the drafting of the charges?"

Id. The NMCCA used the term "unfairly" in factor four. *Id.* On appeal, the CAAF changed "unfairly" to "unreasonably." *Quiroz*, 55 M.J. at 339.

88. *Quiroz*, 55 M.J. at 339. Some have argued that *Teters* and its progeny overruled the discussion to Rule for Courts-Martial 307(c)(4) mentioning unreasonable multiplication. By citing this discussion in support for what the CAAF believes is a separate concept of unreasonable multiplication, *see id.* at 337, the CAAF effectively put an end to this argument.

Theories of Liability: United States v. Brown[89]

Captain (Capt) Michael Brown was a married Air Force nurse with ten years of military service. Over the course of a year, Capt Brown engaged in a course of conduct with three female nurses—Capt TT, Capt LK, and First Lieutenant (1Lt) VC—that included questions ranging from whether they worked out, whether they had boyfriends, and what kind of men they liked, to comments about clothing size, extra-marital affairs, and sexual practices. Captain Brown also repeatedly touched these women, to include placing his hand on an officer's thigh, brushing an officer's cheek with the back of his hand, and brushing his hand and forearm against an officer's breast.[90]

The Air Force charged Capt Brown with violations of Article 133, alleging that his actions were conduct unbecoming an officer and a gentleman.[91] Each specification contained specific conduct relating to a single alleged victim. For example, Capt Brown was charged with making comments to Capt TT including: "Have you ever had an affair?," "You look like a size 4," "You have a very good shape and look very good for your age," "Do you wear a one piece or two piece swim suit?," "Do you get along with your husband?," and "Do women masturbate?"[92]

At the conclusion of trial, the defense requested an instruction that included the following language:

> At least two-thirds of the members . . . must agree with each other . . . that the same means or method alleged . . . was . . . engaged in or employed by the Accused in allegedly committing the offense alleged. . . . Unless the Government has proven the same means or method to at least two-thirds of the members, beyond a reasonable doubt, you must acquit the Accused. . . .[93]

The military judge refused to give the requested instruction, giving the variance instruction in the *Benchbook*, paragraph 7-15, instead.[94]

On appeal, the majority found the alleged error regarding the instruction moot; however, Judge Crawford addressed it in a partial concurrence and dissent. As a starting point, she restated the test for determining whether denying a requested instruction is an abuse of discretion. She then stated the correct test for evaluating non-standard *Benchbook* instructions:

> (1) Is the proposed instruction a correct statement of the law?;
> (2) Is the proposed instruction "not substantially covered" by the other instructions given?; and
> (3) Is the proposed instruction "on such a vital point that in the case that failure to give it deprived the accused of a defense or seriously impaired its effective presentation."[95]

Judge Crawford found the proposed instruction lacking on the first point of the test—it was not a correct statement of the law. Citing a litany of cases, Judge Crawford reiterated that when the facts show that an accused may have committed an offense by several different methods, the members are not required to agree on the *same* method to convict an accused. The members only need to agree that the accused committed the offense by *some* method.[96] Counsel submitting proposed instructions to the military judge should be prepared to justify them using the standard quoted by Judge Crawford.[97]

Robbery: United States v. Szentmiklosi[98]

Specialist Andrew Szentmiklosi was a military policeman (MP) at Fort Riley, Kansas. After conspiring with three others to pull off a robbery, SPC Szentmiklosi and one accomplice

89. 55 M.J. 375 (2001).

90. *Id.* at 378-82.

91. *Id.*

92. *Id.* at 381 n.13.

93. *Id.* at 389 (Crawford, C.J., concurring in part and dissenting in part).

94. *See id.* The judge gave the following instruction:

> If you have doubt about the time or specific manner alleged but you are satisfied beyond a reasonable doubt that the offense was committed at a time or in a particular manner that differs slightly from the exact time or manner in the Specification, you may make minor modifications in reaching your findings by changing the time or manner described in the Specification, provided you do not change the nature or identity of the offense. If you discuss doing that, you can come and ask me for more suggestions on how to go about doing that.

Id.

95. *Id.* (citing United States v. Damatta-Olivera, 37 M.J. 474 (C.M.A. 1993)).

96. *Id.* at 390.

robbed the PX money courier of his daily money drop. During the robbery, Szentmiklosi maced the courier and took the moneybag containing $36,724, while his accomplice struck the courier's MP escort with a shotgun and took items from the MP.[99] Szentmiklosi was charged with two robberies of the same money (and the money only); one specification charging "from the person of [the courier]," the other "from the presence of [the MP escort]."[100]

On appeal, Szentmiklosi argued that because the property belonged to a single entity, only one robbery occurred. The ACCA, however, agreed with the government's position that the assault element was the paramount aspect of robbery, therefore, Szentmiklosi committed two separate robberies, even though multiple victims were in possession of the same property belonging to a single entity.[101]

Noting the divergence among state and federal courts addressing this issue, the CAAF looked for clues as to which theory Congress intended to adopt. Finding an indication that Congress intended the single-robbery theory in the text of Article 122,[102] the CAAF decided against multiple convictions. The CAAF held that the "forcible taking of property belonging to one entity from the person . . . of multiple individuals . . . possessing the property on behalf of [that] entity" constitutes only one robbery.[103] If different items belonging to different individuals are taken from more than one person, however, there are multiple robberies.[104]

In *Szentmiklosi*, the accused was charged with taking the same property belonging to the same entity (the money) in both robbery specifications. Had the government charged Szentmiklosi in the specification relating to the MP escort with taking the items his accomplice took from the MP escort, two robbery convictions would likely have been upheld. This case provides the bench and bar authority when dealing with motions to dismiss or consolidate robbery specifications under similar circumstances.

Defense of Property and Accident: United States v. Marbury[105]

Staff Sergeant (SSG) Chrissandra Marbury was assigned to Korea. One evening, SSG Marbury and a group of other noncommissioned officers (NCOs) were partying in the common area of SSG Marbury's "hooch,"[106] apparently "drinking significant amounts of alcohol."[107] At some point during the party, SSG Marbury went to her bedroom to prepare to go out for the evening. An intoxicated party member, Sergeant First Class (SFC) Pitts, followed SSG Marbury into her bedroom, telling her that she could not go out because she had had too much to drink. When SSG Marbury disagreed with SFC Pitts, SFC Pitts, a martial arts expert, hit her in the mouth.[108]

After being struck, SSG Marbury left her bedroom to get other party members to help her get SFC Pitts out of her room. Rather than assisting SSG Marbury, the other participants laughed at her. Staff Sergeant Marbury then said she would handle the situation herself, grabbed a kitchen knife with a six-inch blade, and returned to her bedroom.[109]

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97. *See also* United States v. Briggs, 42 M.J. 367 (1995) (citing like standard). Counsel should be prepared to support any request they make of the military judge. For example, counsel submitting voir dire questions should be prepared to explain to the military judge how each question assists them in the intelligent exercise of challenges. *See* United States v. Smith, 24 M.J. 859 (A.C.M.R. 1987); United States v. Parker, 19 C.M.R. 400 (C.M.A. 1955).

98. 55 M.J. 487 (2001).

99. *Id*. at 488-89.

100. *Id.* at 488 n.2.

101. *Id.* at 488.

102. The CAAF stated that the language "of anyone in [the victim's] company at the time of the robbery" in Article 122 indicates Congress's intent that multiple persons having items belonging to one person taken from them constitutes a single robbery. *Id.* at 490.

103. *Id.* at 491.

104. *Id*.; *see* United States v. Parker, 38 C.M.R. 343 (C.M.A. 1968) (finding two robberies when the accused held up two individuals, took $20 from one victim, and took $20 and a watch from the other). Referring to *Parker*, the CAAF in *Szentmiklosi* stated that when an accused holds up several persons and "property [belonging to different people] is removed from each person," there are separate robberies. *Szentmiklosi*, 55 M.J. at 490.

105. 56 M.J. 12 (2001).

106. The "hooch" included four separate bedrooms adjoining and sharing a common area. *Id.* at 13.

107. *Id.*

108. *Id.*

109. *Id.* at 13.

According to SSG Marbury, she placed herself in the back of the room so that SFC Pitts was between her and the door. She held the knife outward at mid-torso pointed at SFC Pitts, and ordered him to leave. Rather than leave, SFC Pitts advanced on SSG Marbury, pinning her to the bed. Marbury then yelled for other NCOs to get SFC Pitts off her, which they did. After SFC Pitts had been pulled off SSG Marbury, he kicked SSG Marbury hard enough in the chest to knock her off her feet, and then left. Once outside the hooch, SFC Pitts collapsed from a "sucking chest wound."[110]

At trial, the members found the accused guilty of intentional infliction of grievous bodily harm upon SFC Pitts. On appeal, the ACCA found the evidence sufficient to support only a conviction for aggravated assault with a dangerous weapon.[111]

In a four to one opinion, the CAAF discussed the application of several infrequently used instructions. First, the majority discussed protection of property. Referencing *Benchbook* paragraph 5-7, Defense of Property, Judge Sullivan recited that the force used by one in defense of property (and in removing a trespasser)[112] must be reasonable. The CAAF found that SSG Marbury's actions of returning to her room with a knife in the face of an intoxicated and demonstrably violent trespasser once she had already extricated herself from that situation were negligent, and therefore the force she used was unreasonable.[113]

Second, the CAAF discussed the defense of accident. Staff Sergeant Marbury contended that she was entitled to brandish the knife to eject SFC Pitts, and therefore the injury to SFC Pitts was an accident.[114] Rule for Courts-Martial (RCM) 916(f) defines "accident" as the "unintentional and unexpected result of doing a lawful action in a lawful manner."[115] To be accidental, the result in question must not be the result of a negligent act.[116] Having found SSG Marbury's actions of returning to her room and brandishing the knife were negligent, the CAAF found that by definition there could not be any accident.[117]

Obtaining Services by False Pretenses: United States v. Perkins[118]

Sergeant Melvin Perkins moved into family quarters at Fort Stewart, Georgia, around May or June of 1994. At the time, SGT Perkins was married and thus entitled to live in family quarters. Sergeant Perkins remained in family quarters until 14 January 1998, well after his divorce became final (and his entitlement to family quarters ended) on 3 November 1994. Although SGT Perkins apparently made no affirmative misrepresentations of his marital status regarding his entitlement to family quarters, he never reported his lack of entitlement, either. As a result, he was charged with and pled guilty to obtaining services under false pretenses from November 1994 to 14 January 1998.[119]

On appeal, SGT Perkins argued that he was not guilty of obtaining services under false pretenses because he did not make a misrepresentation to obtain family quarters; he was married when he originally was assigned to quarters. Furthermore, he argued he was not guilty because he did not make any affirmative misrepresentations of his marital status to the housing office after his divorce.[120] Given the definition of "false pretense" in Article 121, UCMJ, as a "false representation of a past or existing fact . . . by means of any act, word, symbol or token,"[121] SGT Perkins's position seemed logical.

The ACCA found differently, agreeing with the Navy-Marine and Air Force service courts on this issue. Citing decisions from both courts, the ACCA said that a false pretense "may exist by one's silence or by a failure to correct a known misrepresentation."[122] The ACCA found that SGT Perkins had

110. *Id.* at 13-14.

111. *Id.* at 14-15.

112. *See* BENCHBOOK, *supra* note 3, para. 5-7 n.3.

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

114. *Id.* at 17.

115. MCM, *supra* note 42, R.C.M. 916(f).

116. *Id.* R.C.M. 916(f) discussion.

117. *Marbury*, 56 M.J. at 17.

118. 56 M.J. 825 (Army Ct. Crim. App. 2001).

119. *Id.* at 828.

120. *Id.*

121. MCM, *supra* note 42, pt. IV, ¶ 46c(1)(e).

122. *Perkins*, 56 M.J. at 828 (citing United States v. Johnson, 39 M.J. 707, 710 (N-M.C.M.R. 1993); United States v. Dean, 33 M.J. 505, 510 (A.F.C.M.R. 1991)).

an obligation to report his change in marital status and to correct a known misrepresentation about his entitlement to family quarters. The court found this inaction by SGT Perkins as false pretenses sufficient to support a conviction, even absent an affirmative misrepresentation by Perkins.[123]

Army counsel should be aware that although the CAAF has yet to address this issue, the Army is now in line with two of the three other service courts. An accused's silence can be a sufficient theory of liability to support a conviction for obtaining services by false pretenses.

False Official Statement: United States v. Newson[124]

Specialist Leslie Newson was convicted of making a false official statement. The evidence at trial showed that, without speaking, she had handed a forged pregnancy profile to one of her supervisors; that action formed the basis of the charge.[125] The military judge gave the standard instructions for a false official statement,[126] but did not define the term "statement" for the members. The defense did not request any such instruction or object to the standard instructions on a false official statement.[127]

On appeal, SPC Newson asserted that the physical action of handing her supervisor the forged profile, unaccompanied by any verbal statement, could not be a "statement." Finding no definition in the *Benchbook* or any other location for a false official statement, the ACCA looked to analogous sources. Drawing from the areas of confessions and hearsay, the ACCA held that "a physical act or nonverbal conduct intended by [an accused] as an assertion is a 'statement' [for the purposes of] Article 107, UCMJ."[128] Therefore, in response to requests from counsel[129] or the inevitable question from a panel, *Newson* provides military judges with a definition of the term "statement" when nonverbal or physical acts are involved.[130]

Indecent Exposure: United States v. Graham[131]

Corporal (CPL) Quinton Graham was convicted of, among other charges, indecent exposure for dropping his towel, in his own bedroom, in the presence of his fifteen year-old babysitter. Graham challenged the sufficiency of his conviction, arguing that the exposure was not in "public view" because it was in his private residence in a manner unlikely viewed by the general public.[132]

Benchbook paragraph 3-88-1 does not define the term "public view."[133] Undeterred after finding no military case directly on point, the NMCCA looked to state law decisions to hold that "'public view' occurs when the exposure is done in a place and in a manner that is reasonably expected to be viewed by another."[134] According to the NMCCA, because CPL Graham invited a member of the public into what would otherwise be a private area—his bedroom—Graham should reasonably have expected that such member of the public would see that "certain part of [Graham's] body"[135] when his towel dropped.[136] By so defining the term "public view," the NMCCA expanded the circumstances under which an otherwise non-public exposure

123. *Id.* at 828-29.

124. 54 M.J. 823 (Army Ct. Crim. App. 2001).

125. *Id.* at 824.

126. BENCHBOOK, *supra* note 3, para. 3-31-1.

127. *Newson*, 54 M.J. at 824.

128. *Id.* at 825.

129. Counsel must remember that if they submit an instruction, they must convince the military judge that it states the law correctly. *See* United States v. Brown, 55 M.J. 375 (2001).

130. The ACCA suggested that military judges follow Military Rule of Evidence 801(a)(2) when crafting a definition of "statement" under Article 107. *Newsom*, 54 M.J. 825 at n.2.

131. 54 M.J. 605 (N-M. Ct. Crim. App. 2000), *aff'd*, 56 M.J. 266 (2002).

132. *Id.* at 610.

133. *See* BENCHBOOK, *supra* note 3, para. 3-88-1.

134. *Graham*, 54 M.J. at 610 (citing State v. Whitaker, 793 P.2d 116 (Ariz. Ct. App. 1990)). "Such an analysis is based on a case-by-case approach, and must look to both the location of the event and all the surrounding circumstances." *Id.*

135. MCM, *supra* note 42, pt. IV, ¶ 88.

136. *Graham*, 54 M.J. at 610.

may be termed "public" and prosecuted under Article 134 as indecent exposure.

On 30 January 2002, the CAAF upheld the NMCCA's decision in *Graham* on similar rationale:

> In our opinion, consistent with a focus on the victims and not the location of public indecency crimes, "public view" means "in the view of the public," and in that context, "public" is a noun referring to any member of the public who views the indecent exposure. It is this definition of "public view" that governs the offense of indecent exposure in the military.[137]

Graham therefore provides the bench and bar guidance in defining "public view," whether required in responding to members' questions, or in drafting or evaluating non-standard instruction requests.

Maltreatment and Sexual Harassment: United States v. Carson[138]

Sergeant Claude Carson was the supervising desk sergeant in an MP station. While supervising female subordinates, SGT Carson exposed himself to them repeatedly, without their consent. As a result, he was charged with and convicted of maltreatment under Article 93, UCMJ. On appeal, SGT Carson contended that "as a matter of law, [the offense of] maltreatment . . . requires proof of 'physical or mental pain or suffering' by the alleged victim."[139] At trial, the victims testified that they did not ask the accused to expose himself, were bothered and shocked by the exposure, and considered themselves victims.[140]

After reviewing CAAF precedent which recognized, but did not resolve, disagreement among the service courts over whether the offense of maltreatment requires proof of physical or mental pain or suffering,[141] the ACCA reversed its precedent that required such a showing.[142] The ACCA stated that "[a]fter reevaluating this issue, we now conclude that because the UCMJ and [*MCM*] do not require physical pain or suffering, a nonconsensual sexual act or gesture may constitute sexual harassment and maltreatment without this negative victim impact."[143] Accordingly, the ACCA recommended modification of *Benchbook* paragraph 3-17-1, which currently contains a requirement for such pain or suffering,[144]

The CAAF granted review of this issue last year.[145] Therefore, an opinion resolving the split in the service courts over the requirements of maltreatment may be forthcoming.

Housebreaking: United States v. Davis[146]

Senior Airman Davis worked in a position that required him to have access to a warehouse where equipment was stored. To have access to the equipment twenty-four hours a day, Airman Davis was given a key to the entire warehouse.[147] Davis was not given any instructions on the limitations of his use of the key. One evening, Airman Davis used the key to enter the warehouse and remove household furnishings, also stored in the warehouse, for later sale at a swap meet. As a result, Davis was charged with and pled guilty to housebreaking.[148]

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137. United States v. Graham, 56 M.J. 266, 269-70 (2002).

138. 55 M.J. 656 (Army Ct. Crim. App. 2001), *rev. granted*, 56 M.J. 205 (2001).

139. *Id.* at 657 (quoting BENCHBOOK, *supra* note 3, para. 3-17-1).

140. *Id.*

141. United States v. Knight, 52 M.J. 47, 49 (1999) (construing United States v. Hanson, 30 M.J. 1198, 1208 (A.F.C.M.R. 1990), *aff'd*, 32 M.J. 309 (C.M.A. 1991) (physical or mental pain or suffering required); United States v. Goddard, 47 M.J. 581, 584-85 (N-M. Ct. Crim. App. 1997) (physical or mental pain or suffering not required)).

142. *Carson*, 55 M.J. at 659. The ACCA's precedent, *United States v. Rutko*, 36 M.J. 798 (A.C.M.R. 1993), required physical or mental pain or suffering. *Id.* at 801-02.

143. *Carson*, 55 M.J. at 659.

144. *Id.* at 659 n.4.

145. 56 M.J. 205 (2001).

146. 54 M.J. 622 (A.F. Ct. Crim. App. 2000), *aff'd*, 56 M.J. 299 (2002).

147. *Id.* at 623-24. The equipment for which Davis needed to enter the warehouse, however, was stored in only a portion of that warehouse. *See id.* at 625.

148. *Id.* at 624.

On appeal, Davis challenged the sufficiency of his plea, arguing that under the above facts, his entry of the warehouse was not "unlawful."[149] Following the principles set out by the Court of Military Appeals in *United States v. Williams*,[150] the AFCCA found Davis's entry unlawful.[151]

Based on Air Force precedent, the AFCCA also stated in *Davis* that an intent to commit a criminal offense in the building is not proof that the entry itself was unlawful.[152] The CAAF affirmed the AFCCA's decision earlier this year;[153] however, it clarified that criminal intent at the time of entry *is* a consideration in determining the lawfulness of the entry.[154]

Conspiracy, Attempt, and Impossibility: United States v. Roeseler[155]

In late December 1997 or early January 1998, PFC Toni Bell told SPC David Roeseler and other members of her platoon that she had a problem. She said that her husband had died, and that her in-laws, Joyce and Jerry Bell, were now trying to gain custody of her children. Bell told Roeseler that she wished her in-laws were dead and that she wanted someone to "take care of them."[156] Specialist Roeseler and a friend, PVT Armann, agreed to kill PFC Bell's in-laws for her. Unknown to Roeseler, Bell's "in-laws" were fictitious. Among other charges, Roeseler subsequently pled guilty to attempted conspiracy to commit murder.[157]

On appeal, SPC Roeseler argued that his conviction for this charge was improper because the military judge failed to advise him that PFC Bell did not share his criminal intent as a conspiracy conviction would require.[158] Likewise, the accused argued the military judge should have explained impossibility as a defense.[159] The CAAF disagreed on both counts.

First, the CAAF restated its position that attempted conspiracy is a recognized offense under the UCMJ.[160] Second, the CAAF did not require the military judge to explain why the accused was guilty of only attempted conspiracy and not guilty of conspiracy; the military judge did not need to explain the unilateral versus bilateral theories of conspiracy.[161] Finally, the CAAF reiterated what it said in *United States v. Valigura*:[162] impossibility is not a defense to either conspiracy or attempt;[163] therefore, impossibility is not a defense to attempted conspiracy.[164]

149. *Id.*

150. 15 C.M.R. 241 (C.M.A. 1954). The factors laid out in *Williams* are:

> (1) [T]he nature and the function of the building involved;
> (2) [T]he character, status, and duties of the entrant, and even at times his identity;
> (3) [T]he conditions of the entry, including time, method, ostensible purpose, and numerous other factors of frequent relevance but generally insusceptible of advance articulation;
> (4) [T]he presence or absence of a directive of whatever nature seeking to limit or regulate free ingress;
> (5) [T]he presence or absence of an explicit invitation to the visitor;
> (6) [T]he invitational authority of any purported host;
> (7) [T]he presence or absence of a prior course of dealing, if any, by the entrant with the structure or its inmates, and its nature—and so on.

Davis, 54 M.J. at 624-25 (quoting *Williams*, 15 C.M.R. at 247).

151. *Id.* at 625.

152. *Id.* at 624 (citing United States v. Doskocil, 2 C.M.R. 802, 804 (A.F.B.R. 1952)).

153. 56 M.J. 299 (2002).

154. *Id.* at 303.

155. 55 M.J. 286 (2001).

156. *Id.* at 287.

157. *Id.* at 286-87.

158. *Id.* at 288.

159. *Id*. at 290.

160. *Id.* at 288 (citing United States v. Riddle, 44 M.J. 282 (1996)).

161. *Id*. at 289. For a thorough and at times impassioned review of these theories, see *United States v. Valigura*, 54 M.J. 187 (2000). Under the bilateral theory, a conspiracy requires the meeting of the minds of two parties to commit an offense. Thus, if one party feigns agreement, such as an undercover police officer, there is no conspiracy; only an attempted conspiracy exists. *Id*. at 188. Under the unilateral theory, as under the Model Penal Code, *id*. at 189, and as supported by Judge Crawford, *id*. at 192 (Crawford, C.J., dissenting), such agreements with undercover police officers would be conspiracies, even though only one person actually agreed to commit the offense. *See id*. at 189.

Innocent Possession: United States v. Angone[165]

While being escorted from pretrial confinement to his arraignment on unrelated charges, SSG James Angone was taken to his quarters to recover some personal items. While getting something from his medicine cabinet, Angone noticed a marijuana cigarette. Believing it belonged to his roommate, but convinced that if his escorts saw the marijuana they would think it was his, Angone took it. Unfortunately for Angone, the escorts saw Angone with the marijuana and immediately seized it from him. As a result, SSG Angone was charged with and pled guilty to possession of a controlled substance.[166]

On appeal, SSG Angone challenged the sufficiency of his plea, arguing that his intent to immediately destroy the marijuana made his possession innocent and not "wrongful."[167] "Military courts have long recognized that possession of drugs is not wrongful if the appellant's intent is to properly dispose of the drugs."[168] Angone argued that finding his possession wrongful would prevent him from protecting himself from false accusations that the drugs belonged to him. He also argued that his own destruction of the drugs would serve the public policy of keeping the drugs off the streets equally as well as surrendering the marijuana to the police.[169]

Rejecting Angone's arguments, the ACCA held that "[t]he defense of innocent possession does not apply in those cases where an appellant exercises control over an item for the purpose of preventing its imminent seizure by law enforcement or other authorities, even if he intends to thereafter expeditiously destroy the item."[170] The CAAF affirmed the ACCA's decision on 17 July 2002.[171]

Evidentiary Instructions

The Urinalysis Case: United States v. Green[172]

In *Green*, the CAAF clarified the law regarding the application of the permissive inference in drug use cases.[173] In many urinalysis cases, the prosecution does not have direct evidence of the accused's use of the controlled substance. In these cases, the only evidence that may show drug use is a drug test that identifies the presence of a controlled substance in the accused's urine. Proof of drug use requires some proof of knowledge.[174] Recognizing established military case law, the President, in the *Manual for Courts-Martial*, stated that "knowledge of the presence of the controlled substance may be inferred from the presence of the controlled substance in the accused's body or from other circumstantial evidence" and that "[t]his permissive inference may be legally sufficient to satisfy the government's burden of proof as to knowledge."[175]

Following the CAAF's decision in *United States v. Campbell*,[176] there was much confusion and uncertainty in the military justice community about urinalysis cases—specifically,

162. 54 M.J. 187 (2000).

163. *Roeseler*, 55 M.J. at 291 (citing *Valigura*, 54 M.J. at 189).

164. *Id.*

165. 54 M.J. 945 (Army Ct. Crim. App. 2001), *aff'd*, No. 01-0530, 2002 CAAF LEXIS 712 (July 17, 2002).

166. *Id.* at 945-46.

167. *Id.* at 946.

168. *Id.* at 947 (citations omitted).

169. *Id.* at 947-48.

170. *Id.* at 948. The Army court also cited with approval a California jury instruction which said possession of drug was not lawful when "'[c]ontrol is . . . exercised over the [drugs] for the purpose of preventing its imminent seizure by law enforcement." *Id.* at 948 n.6.

171. United States v. Angone, No. 01-0530, 2002 CAAF LEXIS 712, at *2 (July 17, 2002).

172. 55 M.J. 76 (2001).

173. Drug use cases, also commonly referred to as urinalysis cases, are those cases in which the offense referred to a court-martial is a violation of Article 112a, UCMJ—wrongful use of a controlled substance. *See* UCMJ art. 112a (2000).

174. MCM, *supra* note 42, pt. IV, ¶ 37c(10).

175. *Id.*

176. 50 M.J. 154 (1999) (*Campbell I*), *supplemented on reconsideration*, 52 M.J. 386 (2000) (*Campbell II*). *See also* Lieutenant Colonel Michael R. Stahlman, *New Developments on the Urinalysis Front: A* Green *Light in Naked Urinalysis Prosecutions?*, ARMY LAW., Apr. 2002, at 14 (providing a scholarly discussion about the significance of *Green*); Major Walter M. Hudson & Major Patricia A. Ham, United States v. Campbell: *A Major Change for Urinalysis Prosecutions?*, ARMY LAW., May 2000, at 38 (presenting an in-depth analysis of *Campbell I* and *II* and the impact of those decisions on urinalysis case prosecution).

regarding the application of the permissive inference for knowing use of a controlled substance.[177] Many interpreted *Campbell* to require the prosecution to establish a three-part test before relying on the permissive inference.[178] If the prosecution failed to establish any of the factors, then some believed that the prosecution failed to present sufficient evidence and the case would not survive a motion for a finding of not guilty.[179] In *Green*, the CAAF emphasized that the *Campbell* three-part analysis was not established as a threshold test.[180]

Sergeant Green was convicted at a special court-martial of wrongfully using cocaine.[181] The only evidence introduced by the prosecution to prove the wrongful use was scientific evidence. The drug laboratory expert was the typical forensic chemist from a military drug laboratory who testifies about the standard tests conducted on urine samples that screen positive for a controlled substance.[182]

The CAAF started its discussion in *Green* by emphasizing that in cases "where scientific evidence provides the sole basis to prove the wrongful use of a controlled substance, '[e]xpert testimony interpreting the tests or some other lawful substitute in the record is required to provide a rational basis upon which the fact-finder may draw an inference that [the controlled substance] was [wrongfully] used.'"[183] The court then recognized the military judge's role as the "gatekeeper" of scientific evidence, which in the urinalysis case context also equates to a role as the gatekeeper of the permissive inference. *Green* identifies several factors the trial judge *may* consider when performing this gatekeeping role.[184]

What the CAAF made abundantly clear in *Green* is that the military judge must exercise his gatekeeping role effectively. If the prosecution intends to offer a novel scientific testing procedure to show that the accused's urine contained a controlled substance, and it is challenged by the defense, then the scientific method must satisfy the reliability and relevance standards established by applicable rules and case law.[185] In doing so, the CAAF encourages the trial judge to apply the guidance provided in *Green*, as well as in *Campbell I* and *II*.

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177. United States v. Green, 55 M.J. 76, 81-85 (2001) (Sullivan, J., concurring); *see also* Stahlman, *supra* note 176, at 15 n.14.

178. *Campbell I*, 50 M.J. at 160. Specifically, the court stated:

> The prosecution's expert testimony must show: (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. The most contentious of the three factors was the second one. *See* Stahlman, *supra* note 176, at 15.

179. MCM, *supra* note 42, R.C.M. 917. The argument to support a defense motion raised under RCM 917 was that all three *Campbell* factors must be established before the prosecution can rely on the permissive inference for knowing and wrongful use, and if the prosecution failed to present evidence indicating that an accused, at some time, would have experienced the effects of the drug, then the prosecution could not rely on the permissive inference. Without the permissive inference, there would be insufficient evidence to establish every essential element of the offense charged.

180. *Green*, 55 M.J. at 79.

181. *Id.* at 77.

182. *Id.* at 78. The Navy Drug Screening Laboratory in Jacksonville, Florida, tested the accused's urine. The first two tests the laboratory conducted on the accused's urine were immunoassay-screening tests. The third test was a confirmation test using gas chromatography/mass spectrometry technology. The defense did not challenge the scientific testing procedures or the expert testimony. *Id.*

183. *Id*. at 80 (quoting United States v. Murphy, 23 M.J. 310, 312 (C.M.A. 1987)).

184. *Id.* The three factors identified by the CAAF that the military judge may consider are whether:

> (1) the metabolite is naturally produced by the body or any substance other than the drug in question; (2) the permissive inference of knowing use is appropriate in light of the cutoff level, the reported concentration, and other appropriate factors; and (3) the testing methodology is reliable in terms of detecting the presence and quantifying the concentration of the drug or metabolite in the sample.

Id. The court emphasized that this "three-part approach is not exclusive, and the military judge as gatekeeper may consider other factors, so long as they meet applicable standards for determining the admissibility of scientific evidence." *Id.*

185. *Id.*; *see also* MCM, *supra* note 42, MIL. R. EVID. 702, 703; Kumho Tire v. Carmichael, 526 U.S. 137 (1999) (concluding that the trial judge's gatekeeping responsibilities apply to all types of expert testimony and that the *Daubert* analysis can be used to evaluate nonscientific expert testimony); Joiner v. General Elec. Co., 522 U.S. 136 (1997) (determining that the trial court may evaluate the reliability of both an expert's methodology and the expert's conclusions and opinions); Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993) (ruling that the *Frye* test is no longer the single controlling factor courts should use to evaluate the reliability of scientific expert evidence; rather, the Court established factors a trial judge should consider when determining if the scientific evidence in question is both reliable and relevant).

Silence:
United States v. Whitney[186] *and* United States v. Oliver[187]

In *Whitney* and *Oliver*, military appellate courts addressed a frequently occurring issue that involves both evidence and instructions. It is an issue that usually arises with the following scenario: a prosecution witness testifies that the accused, when questioned about alleged misconduct, invoked his right to silence. This scenario may transpire in a number of different ways at trial—from questioning by the prosecutor, in which she solicits the testimony from the witness, to a situation where the witness volunteers the information. Regardless of the scenario, the CAAF has consistently held that testimony revealing the accused's invocation of silence results in error, which may be cured with a proper limiting instruction.[188]

In *Whitney*, the accused, an Air Force Tech Sergeant, was convicted of raping and forcibly sodomizing an Airman First Class. As part of the investigation, the accused, with the advice of counsel, agreed to a polygraph with the understanding that the accused would not participate in a post-polygraph interview. As arranged, the accused participated in the polygraph. When the polygraph was completed, the polygrapher told the accused that he believed that the accused was untruthful. The accused did not respond to the polygrapher's comment.[189] At trial, the prosecution's direct examination of the polygrapher went as follows:

> TC: And at the conclusion of the interview, did you confront Sergeant Whitney?
> WIT: Yes, I did.
> TC: What did you tell him?
> WIT: I told him I didn't—did not feel he'd been truthful in his answers.
> TC: What did Sergeant Whitney tell you?
> WIT: He did not say anything.
> TC: Did he make—after this, did the interview continue?
> WIT: I escorted him to the door to exit; on the way out, he extended his hand and thanked me for doing a good job.[190]

The defense counsel did not object to this testimony. When given the opportunity to ask questions of the witness, two of the members posed a similar question—"Why [did] you feel [the accused] was not truthful during the interview?"[191]

The military judge did not ask the members' questions. He instructed the members to disregard the testimony of the witness about the accused's silence, and to disregard the witness's opinion about his belief that the accused was not telling the truth.[192]

In addition to holding that the human lie detector testimony was inadmissible, the CAAF addressed the comment about the accused's silence in response to the polygrapher's question. The court held that Military Rule of Evidence (MRE) 301(f)(3) had been violated and that the error was of constitutional proportion; however, the court determined that the military judge's instruction was adequate to correct the error.[193] In reaching this decision, the court emphasized that "in the absence of contrary evidence, court members are presumed to understand and follow the military judge's instructions."[194]

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186. 55 M.J. 413 (2001).

187. 56 M.J. 695 (N-M. Ct. Crim. App. 2001).

188. *See* United States v. Gray, 51 M.J. 38 (1999) (concluding that the military judge's curative instruction corrected any harm that may have existed from the prosecutor's comment on the accused's election not to testify); United States v. Sidwell, 51 M.J. 262 (1999) (finding error when a prosecution witness testified about the accused's invocation of silence during an interrogation, but ruled that any error was cured by the military judge's instruction to disregard the testimony); United States v. Riley, 47 M.J. 276 (1997) (holding that the admission of testimony regarding the accused's invocation of the privilege against self-incrimination during a pretrial interrogation constituted plain error when the military judge failed to give the members a curative instruction).

189. *Whitney*, 55 M.J. at 414.

190. *Id.* at 415.

191. *Id.*

192. *Id.*

193. *Id.* at 416; *see also* MCM, *supra* note 42, MIL. R. EVID. 301(f)(3) (making an accused's exercise of his right to remain silent inadmissible against him). In an attempt to cure the inadmissible testimony, the military judge gave the members the following instruction:

> You're to disregard his testimony about the fact that Sergeant Whitney didn't respond to that. That is not admissible evidence and I probably should have struck it earlier. So, please do disregard that. In regards to the questions by Captain Hansen and Colonel Walgamott, which is the same question, "Why did you feel that Tech Sergeant Whitney was not truthful during the interview," that's not a permissible question. The reason being is determination of truth is your realm, and nobody can come in here and tell you whether or not someone is being truthful. That's purely up to you to decide.

Whitney, 55 M.J. at 415.

United States v. Oliver is an NMCCA case in which the court upheld a conviction despite the failure of the military judge to give a curative instruction to the members to disregard any comment about the accused's election to remain silent. Regardless, the court identified that the testimony about the accused's election of silence was improper and that the military judge should have addressed the error with a curative instruction.[195]

An important principle from the *Whitney* and *Oliver* cases is that when evidence is presented that indicates an accused exercised his privilege against self-incrimination, the military judge should instruct the members to disregard the evidence.[196]

Uncharged Misconduct: United States v. Tyndale[197]

In *Tyndale*, the CAAF affirmed the military judge's decision to permit the prosecution, in rebuttal, to offer a prior positive urinalysis test of the accused, which was the basis of an earlier court-martial that resulted in an acquittal. The accused, a Marine Corps Staff Sergeant, was a guitar player who often played his guitar at private parties for pay. In 1994, he tested positive for methamphetamine. Charges were referred to a court-martial, and he was acquitted. His defense was innocent ingestion—someone drugged his coffee while he played a "gig."[198]

Two years later, the accused tested positive again for methamphetamine. At his second trial, the accused asserted the same defense; that is, he was at a private party playing his guitar, and someone spiked his drink with a drug. The prosecution moved to admit the prior positive urinalysis. The military judge initially denied the prosecution's motion; however, after the defense case in chief, the judge permitted the prosecution to introduce the prior positive urinalysis, along with the defense asserted by the accused at his first trial.[199]

In affirming the military judge's decision, the court identified the three-step analysis that applies when determining the admissibility of uncharged misconduct (MRE 404(b) evidence).[200] The three-steps are: (1) "the evidence must reasonably support a finding that [the accused] committed the prior crimes, wrongs, or acts;" (2) "the evidence must make a fact of consequence more or less probable;" and (3) "the probative value of the evidence must not be substantially outweighed by the danger of unfair prejudice."[201]

In its decision, the CAAF recognized that evidence of prior drug use is not inadmissible *per se*. Under the facts in *Tyndale*, the prosecution offered the evidence to show that it was unlikely that the accused would have found himself twice in this type of situation. Applying the doctrine of chances, a theory of logical relevance that supports the argument that it is "unlikely an accused would be repeatedly, innocently involved in similar, suspicious, circumstances," the CAAF agreed with the prosecution.[202]

Tyndale provides an excellent discussion and application of the test for the admissibility of 404(b) evidence. The case also recognizes the efforts of the military judge in instructing the members on the limited scope in which they could consider the evidence of a prior drug use.[203]

194. *Id*. at 416.

195. 56 M.J. 695, 700 (N-M. Ct. Crim. App. 2001).

196. In April 2001, the Army adopted the instruction given by the military judge in *United States v. Sidwell*, 51 M.J. 262 (1999). *See* BENCHBOOK, *supra* note 3, para. 2-7.

197. 56 M.J. 209 (2001).

198. *Id.* at 212. A "gig" is defined as "an entertainer's engagement for a specified time." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 517 (1985).

199. *Tyndale*, 56 M.J. at 212.

200. *Id.*; *see also* MCM, *supra* note 42, MIL. R. EVID. 304(b).

201. *Tyndale*, 56 M.J. at 212-13 (citing United States v. Reynolds, 29 M.J. 105, 109 (C.M.A. 1989)).

202. *Id.* at 213.

203. *Id.* at 215. Specifically, the court recognized that "the military judge gave a clear and narrowly crafted instruction cautioning the members that they could only consider the evidence of the [prior] urinalysis on the issues of knowledge and intent, and to rebut the issue of innocent ingestion." *Id.*

Attacking the Veracity of a Non-Testifying Accused:
United States v. Goldwire[204] *and* United States v. Hart[205]

Goldwire and *Hart* address when it is permissible for the prosecution to attack the veracity of a non-testifying accused. In these cases, the CAAF not only identified when it is permissible to do so, but the court also gives guidance on what limiting instruction may be appropriate.

The accused in *Goldwire* was convicted of rape. The evidence indicated that the accused had intercourse with the victim when she was passed-out drunk.[206] As part of the investigation, the accused made a statement to investigators in which he provided information that was both inculpatory and exculpatory. At trial, the prosecution only introduced those portions of the accused's statements that were admissions.[207] During the defense's cross-examination of the agent who questioned the accused, the defense solicited the accused's exculpatory statements—statements indicating that the victim may have consented to the sexual intercourse. Later in the trial, despite an objection from the defense, the military judge permitted the prosecution to call a witness (MSG Green) to testify that, in the witness's opinion, the accused was not a truthful person.[208]

After admitting the opinion testimony, the military judge gave the following limiting instruction to the members:

> Members of the court, with regard to the testimony you heard yesterday from Sergeant Green, Master Sergeant Green was permitted to express his opinion of the accused's character for truthfulness for your evaluation in considering the weight you'll accord the accused's out of court statements as related in the testimony of other witnesses . . . . [Y]ou may not infer from his opinion or its basis that the accused is a bad person and must therefore have committed the offenses here charged.[209]

The facts in *Goldwire* implicate several rules: MRE 106,[210] the common law rule of completeness,[211] MRE 304(h)(2),[212] and MRE 806.[213] In applying the first three rules, the CAAF found that the accused's entire statement was admissible—specifically, the exculpatory portion of the accused's statement offered by the defense.[214] The court went on to hold that when the defense exercises these rules, under MRE 806, the prosecution may attack the accused's veracity.[215] The court did not comment on the appropriateness of the military judge's limiting instruction. One can infer that since the court took the time to include the instruction in its opinion, and did not criticize it, the court endorsed the instruction.

Hart presents a similar set of circumstances. The accused in *Hart* was convicted of larceny. At his court-martial, the accused claimed that he did not steal the property; rather, he was given the property. During cross-examination of several of the prosecution's witnesses, the defense solicited testimony in which the accused told the witnesses that he believed that the property was his. The effect of this testimony was that it raised

204. 55 M.J. 139 (2001).

205. 55 M.J. 395 (2001).

206. *Goldwire*, 55 M.J. at 140.

207. *Id.* at 141. For purposes of this article, the word "confession" includes both a confession and an admission. A confession is defined as "an acknowledgment of guilt." MCM, *supra* note 42, MIL. R. EVID. 304(c)(1). An admission is defined as "a self-incriminating statement falling short of an acknowledgment of guilt, even if it was intended by its maker to be exculpatory." *Id.* MIL. R. EVID. 304(c)(2).

208. *Goldwire*, 55 M.J. at 141.

209. *Id.*

210. MCM, *supra* note 42, MIL. R. EVID. 106. This rule "permits the defense to interrupt the prosecution's presentation of the case as to written and recorded statements." *Goldwire*, 55 M.J. at 143.

211. Professor Wigmore defined the common law rule of completeness as follows: "[T]he opponent, against whom a part of an utterance has been put in, may in his turn complement it by putting in the remainder, in order to secure for the tribunal a complete understanding of the total tenor and effect of the utterance." 7 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2113, at 653 (J. Chadbourn rev. 1978).

212. MCM, *supra* note 42, MIL. R. EVID. 304(h)(2). This is a rule specific to confessions and admissions that "allows the defense to complete an incomplete statement regardless of whether the statement is oral or in writing." *Id.* MIL. R. EVID. 304(h)(2) analysis, app. 22, at A22-13.

213. *Id.* MIL. R. EVID. 806. This rule states "that a hearsay declarant or statement may always be contradicted or impeached." *Id.* MIL. R. EVID. 806 analysis, app. 22, at A22-57.

214. *Goldwire*, 55 M.J. at 143.

215. *Id.* at 144. The attack on credibility should be limited to the declarant's out of court statement, and should only be offered for the purpose of attacking the weight of the out of court statement.

the mistake of fact defense even though the accused did not testify. In response to this defense tactic, the prosecution introduced opinion and reputation testimony that the accused was untruthful.[216] The military judge permitted the prosecution to impeach the accused in this manner. Unlike the trial judge in *Goldwire*, however, the trial judge in *Hart* did not give a limiting instruction to the members.[217]

The CAAF affirmed the trial judge's actions. The court found that the accused's statements offered by the defense were "state-of-mind" statements—that is, hearsay statements. As such, the prosecution could impeach the accused under MRE 806.[218] Again, the CAAF remained silent about the requirement for a limiting instruction.

The clear rule litigants can derive from *Goldwire* and *Hart* is that "[w]hen 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 Mil. R. Evid. 806."[219] A subtler tenet of these cases is that if this scenario presents itself at trial, the military judge should consider giving a limiting instruction similar to the one used in *Goldwire*.[220]

Sentencing Instructions

In the recent case of *United States v. Hopkins*,[221] the CAAF upheld the military judge's decision to not instruct the members about the accused's expression of remorse made during his unsworn statement.[222] Instead, the trial judge provided the standard sentencing instruction that tells the members they "must consider all matters in extenuation and mitigation, as well as those in aggravation."[223]

In writing for the majority, Judge Effron identified two key concepts regarding sentencing instructions. First, the military judge has a duty to tailor his sentencing instructions to comport to the law and the state of the evidence; and second, on appeal, sentencing instructions are reviewed using the abuse of discretion standard.[224] These two concepts give a military judge considerable discretion in tailoring sentencing instructions. Last year's cases identify several sentencing scenarios, however, in which this discretion is limited.

Loss of Retirement Benefits: United States v. Luster[225] *and* United States v. Boyd[226]

The issue of when evidence or instructions relating to the impact of a punitive discharge on future retirement benefits should be admitted or presented to the trier of fact is not a new topic for the CAAF.[227] In the past, the resolution of this matter has depended on the situation. Although the conclusions the CAAF reached in *Luster* and *Boyd* are fact dependent, with its analysis, the court provided definitive guidance on when this type of sentencing evidence is relevant.

In *Luster*, the accused, a Staff Sergeant in the Air Force, was convicted of a single specification of marijuana use.[228] She pled

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216. United States v. Hart, 55 M.J. 395, 396 (2001).

217. *See id*. at 396-97.

218. *Id.* at 396.

219. *Goldwire*, 55 M.J. at 144. Similar to character evidence, in circumstances such as those presented in *Goldwire*, the defense holds the key to the door of MRE 806. *See* MCM, *supra* note 42, MIL. R. EVID. 404(a). Significantly, as of 1 June 2002, the recent amendment to MRE 404(a)(1) took effect in the military. With the change, MRE 404(a)(1) reads as follows:

> Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except: (1) Character of accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, *or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution.*

Id. MIL. R. EVID. 404(a)(1) (emphasis added).

220. *See Goldwire*, 55 M.J. at 141.

221. 56 M.J. 393 (2002).

222. *Id*. at 394. The case discusses the application of *Wheeler* factors—aggravating, extenuating, and mitigating factors that the military judge should inform the members about to assist them in deciding an appropriate sentence. *See* United States v. Wheeler, 38 C.M.R. 72, 75 (C.M.A. 1967).

223. *Hopkins*, 56 M.J. at 394; *see also* BENCHBOOK, *supra* note 3, para. 2-5-23.

224. *Hopkins*, 56 M.J. at 395.

225. 55 M.J. 67 (2001).

226. 55 M.J. 217 (2001).

guilty to the offense and elected enlisted members for sentencing. At the time of trial, she had eighteen years, three months in service. If she successfully completed her current enlistment, she would be eligible for retirement.[229]

During the sentencing case, the defense offered evidence about retirement pay. The purpose of this evidence was to show the members what retirement pay the accused would lose if they sentenced her to a punitive discharge. The prosecutor objected, arguing that the evidence would create confusion.[230] The military judge sustained the trial counsel's objection, but permitted voir dire and argument about the issue.[231] The AFCCA affirmed the case, but the CAAF reversed and set aside the sentence. The CAAF found that the military judge abused her discretion by not admitting the evidence, and that such error materially prejudiced the accused.[232]

In its opinion, the CAAF emphasized that there is no per se rule that precludes sentencing evidence that addresses the effect of a punitive discharge on retirement benefits when the accused is not retirement eligible. The decision to admit or exclude this type of evidence should not be based solely on the number of months remaining until retirement.[233]

Not long after the CAAF published *Luster*, the court again was faced with deciding an issue relating to sentencing evidence that dealt with the effect that a punitive discharge would have on retirement benefits in *United States v. Boyd*.[234] In *Boyd*, the CAAF gave some firm guidance on when the issue of the financial impact a discharge would have on retirement benefits becomes relevant.

Captain Boyd was a nurse with fifteen and one-half years of active service in the Air Force when he was convicted by general court-martial of drug use and the larceny of drugs.[235] At the time of trial, a physical evaluation board recommended the accused for temporary disability retirement; however, this information was not presented to the members.[236] During a presentencing hearing, the defense requested that the military judge instruct the members on the effect a punitive discharge would have on possible retirement benefits for length of service. The judge declined to give the instruction requested by the defense; however, he did give the members an instruction explaining the effect and stigma associated with a dismissal.[237] Once the military judge finished instructing the members, the president of the court-martial asked the judge a question about the impact of a punitive discharge. The question asked was whether the accused could continue to serve in the military if he was not sentenced to a punitive discharge. The military judge did not answer the specific question; rather, he repeated the instruction describing the effect and stigma of a dismissal. The members sentenced the accused to a dismissal.[238]

On appeal before the CAAF, the accused asserted that it was error for the military judge to not instruct the members on the impact a punitive discharge would have on the accused's potential retirement benefits. The government's position was that the accused was not "perilously close" to retirement; therefore, the military judge did not err in refusing to give the defense-requested instruction.[239] The CAAF did not decide whether fifteen and one-half years of service as an officer entitles the accused to the instruction. Rather, the court assumed the military judge erred in not instructing the members about the effect a discharge would have on retirement benefits, and held that

227. *See* United States v. Greaves, 46 M.J. 133 (1997) (holding that it was error for the military judge to not instruct the members on the adverse impact a punitive discharge would have on retirement benefits when the accused had nineteen years, ten months on active duty); United States v. Becker, 46 M.J. 141 (1997) (concluding that it was error for the military judge to exclude evidence of potential loss of retirement benefits when the accused had nineteen years, eight and one-half months on active duty); United States v. Henderson, 29 M.J. 221 (C.M.A. 1989) (upholding a military judge's decision to exclude evidence estimating the impact a punitive discharge would have on retirement benefits when the accused had seventeen years on active duty, but was not retirement eligible under his current enlistment contract).

228. *Luster*, 55 M.J. at 67.

229. *Id.* at 68.

230. *Id.* at 69. The prosecutor argued that the accused's time until retirement (two years) was "too long to be confusing the members about the effects of [her] retirement." *Id.*

231. *Id.* at 70.

232. *Id.* at 72.

233. *Id.* at 71.

234. 55 M.J. 217 (2001).

235. *Id.* at 219.

236. *Id.* at 218.

237. *Id.* at 219.

238. *Id.* at 220.

under the circumstances in the case, any error committed by the military judge in not giving the instruction was harmless.[240]

In reaching its decision, the court made the following pronouncement:

> [W]e will require military judges in all cases tried after the date of this opinion to instruct on the impact of a punitive discharge on retirement benefits, if there is an evidentiary predicate for the instruction and a party requests it. We expect that military judges will be liberal in granting requests for such an instruction. They may deny a request for such an instruction only in cases where there is no evidentiary predicate for it or the possibility of retirement is so remote as to make it irrelevant to determining an appropriate sentence.[241]

The court ruled that this analysis applied to both a retirement for length of service and a temporary disability retirement.[242]

But what constitutes an "evidentiary predicate?" The above language seems to indicate that an evidentiary predicate does not take much to establish. In the opinion, the CAAF identified several ways an evidentiary predicate may be satisfied. For example, direct evidence by the defense that shows the impact a punitive discharge would have on the accused. The court also recognized other non-evidentiary means an evidentiary predicate may be established, such as comments made by the accused during his unsworn statement, or comments made by counsel during argument.[243] What is apparent from *Boyd* is that the military judge should liberally grant requests to introduce retirement impact evidence and instructions addressing the same. Furthermore, if information is presented that satisfies the requisite evidentiary predicate, yet neither side requests an instruction, then the CAAF will test the failure of the military judge to instruct under the plain error doctrine, unless the trial judge obtains a waiver from both sides.[244]

The Ineradicable Stigma of a Punitive Discharge: United States v. Rush[245]

A special court-martial, composed of members, convicted Private Rush, U.S. Army, of aggravated assault and wrongfully communicating a threat. While instructing the members on sentencing, the military judge read the standard bad-conduct discharge instruction, but "did not read any portion of the standard ineradicable stigma instruction."[246] When finished reading the sentencing instructions, the military judge asked counsel if they had any objections to the instructions given or wanted additional instructions. The defense asked the judge to instruct the members about the ineradicable stigma of a punitive discharge. Without explanation, the military judge denied the defense counsel's request.[247]

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239. *Id.*

240. *Id.* at 222.

241. *Id*. at 221. A footnote to the pronouncement indicates that the prosecution may be entitled to an instruction on the "legal and factual obstacles to retirement faced by a particular accused." *Id*. at 221 n.*. This seems to suggest that the only time the prosecution may be entitled to an instruction explaining the impact of a punitive discharge on retirement benefits is when the defense requests it first. It is hard to imagine that *Boyd* stands for the proposition that the military judge must give an instruction on retirement benefits whenever an evidentiary predicate exists. A fair interpretation of *Boyd* is that the defense holds the key to the instruction if an evidentiary predicate exists, and if given, the prosecution is then entitled to an instruction explaining the obstacles to retirement by the accused. *See* United States v. Burt, 56 M.J. 261 (2002) (holding that it was a logical tactical decision for the defense counsel to reject a proposed instruction concerning the loss of retirement benefits).

The CAAF encouraged judges to tailor instructions on retirement benefits appropriately to the facts of the case. At a minimum, the court suggested the following instruction: "In addition, a punitive discharge terminates the accused's military status and the benefits that flow from that status, including the possibility of becoming a military retiree and receiving retired pay and benefits." *Boyd*, 55 M.J. at 221 (citing BENCHBOOK, *supra* note 3, para. 2-6-10).

242. *Boyd*, 55 M.J. at 221.

243. *Id.* Ironically, the accused's unsworn statement is not evidence, yet may still be used to satisfy the evidentiary predicate threshold.

244. *Id.* at 222 (citing United States v. Grier, 53 M.J. 30, 34 (2000)).

245. 54 M.J. 313 (2001).

246. *Id*. at 314. The military judge used the standard bad-conduct discharge instruction contained in the 1996 version of the *Benchbook*. The ineradicable stigma instruction reads as follows:

> You are advised that the ineradicable stigma of a punitive discharge is commonly recognized by our society. A punitive discharge will place limitations on employment opportunities and will deny the accused other advantages which are enjoyed by one whose discharge characterization indicates that (he)(she) has served honorably. A punitive discharge will affect an accused's future with regard to (his)(her) legal rights, economic opportunities, and social acceptability.

BENCHBOOK, *supra* note 3, at 69-70 (30 Sept. 1996).

Both the ACCA and the CAAF agreed that it was error for the military judge to refuse to give the standard ineradicable stigma instruction when requested by the defense. In reaching this conclusion, the CAAF viewed the ineradicable stigma instruction as a "standard instruction," and that "the military judge [had] a duty to explain why he [was] refusing to give a standard instruction requested by the defense."[248] The court concluded, however, that the error was harmless under the facts in the case.[249]

Rush does not require that the military judge give the ineradicable stigma instruction in all sentencing cases in which a punitive discharge is authorized. Rather, the decision highlights that a military judge has a duty to explain why he is denying the counsel's request to give the ineradicable stigma instruction, or any other requested standard instruction.[250]

The Ambiguous Request for a Punitive Discharge:
United States v. Pineda,[251] United States v. Bolkan,[252]
and United States v. Burt[253]

Pineda, *Bolkan*, and *Burt* are three cases recently decided by the CAAF that address the situation of an apparent conflict between what the accused desires and what the defense counsel requests regarding a punitive discharge. With these three cases, the CAAF makes clear that the military judge *shall* make appropriate inquiries to resolve any conflict.

In *Pineda*, the accused, a corporal in the U.S. Marine Corps, pled guilty before a military judge at a special court-martial to numerous offenses.[254] In his unsworn statement, the accused "implicitly acknowledged the reasonable certainty of a punitive discharge."[255] During the sentencing argument, the accused's defense counsel conceded that a bad-conduct discharge was an appropriate sentence in hopes to persuade the military judge not to adjudge a lengthy period of confinement. At no time did the military judge question the accused about his understanding of the ramifications of a punitive discharge.[256] The military judge's sentence included a bad-conduct discharge.[257]

On appeal, the accused asserted that his defense counsel erred when he argued for a punitive discharge, and that such error resulted in prejudice that warranted a sentence rehearing. The NMCCA agreed that the accused's defense counsel erred by conceding the appropriateness of a bad-conduct discharge; however, it held that such error was not prejudicial. The CAAF affirmed the service court's decision.[258]

In reaching its decision, the CAAF recognized that the defense counsel erred when he argued for a punitive discharge on behalf of his client when it was unclear that his client was requesting one. The court also recognized that when this scenario occurs, the military judge should clarify any ambiguity that may exist between what the accused has indicated and what the defense counsel is arguing for.[259] Despite the error, under the facts in *Pineda*, the court did not find prejudice.[260]

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247. *Rush*, 54 M.J. at 314.

248. *Id.* at 315.

249. *Id.*

250. *See also* United States v. Greszler, 56 M.J. 745 (A.F. Ct. Crim. App. 2002). In *Greszler*, the AFCCA held that the military judge did not err when he instructed on the stigma of a punitive discharge, but did not use the term "ineradicable stigma." "The military judge refused to use the word 'ineradicable' because he believed the term 'stigma' was the appropriate descriptive term for a bad-conduct discharge and that 'ineradicable' was redundant." *Id*. at 746. In supporting its decision, the AFCCA cited to the dictionary in defining "ineradicable" as "incapable of being eradicated." *Id.* The court asserted that the stigma of a punitive discharge may be eradicated, therefore the more appropriate term is "stigma." *Id.*

Greszler does not conflict with *Rush*. In *Greszler*, the military judge explained why he was deviating from the standard ineradicable stigma instruction—a duty the CAAF mandated in *Rush*. Furthermore, the court determined that the instruction the military judge gave satisfied the purpose of the standard ineradicable stigma instruction.

251. 54 M.J. 298 (2001).

252. 55 M.J. 425 (2001).

253. 56 M.J. 261 (2002).

254. *Pineda*, 54 M.J. at 299. The accused pled guilty to, and was found guilty of, "unauthorized absence, nine specifications of making false official statements, forgery, and six specification of fraud against the United States." *Id.*

255. *Id*. at 301.

256. *Id.* at 300.

257. *Id.* at 299. The accused was sentenced to a bad-conduct discharge, confinement for four months, forfeiture of $600 pay per month for four months, and reduction to pay grade E-1. *Id.*

258. *Id.* at 300.

In *Bolkan*, the CAAF focused on the response by the military judge to defense counsel's concession that a punitive discharge was an appropriate sentence.[261] During the sentencing argument, the defense counsel told the members that if they "must choose between confinement and a bad-conduct discharge [they should] give [the accused] the punitive discharge."[262] In his unsworn statement, the accused informed the members that he wished to remain in the service.[263] The military judge did not question the accused concerning whether the defense counsel's argument that a discharge is better than confinement reflected the accused's desires. The court determined that the military judge's failure to question the accused about this matter was error; however, under the facts of the case, the error was harmless.[264]

In a concurring opinion, Judge Baker emphasized that the military judge erred by not inquiring into the apparent contradiction between the accused's unsworn statement and the defense counsel's argument. He asserted that "case law dictates that judges test an apparent ambiguity between counsel's argument and the accused's desires."[265] If not clear before, after *Bolkan* there should be no doubt that a military judge has an affirmative duty to clarify with the accused any conflict that occurs between the accused's desires regarding a punitive discharge and the defense counsel's argument.

In *Burt*, the CAAF found that the civilian defense counsel did not concede that a punitive discharge was appropriate or that the accused did not have any rehabilitative potential.[266] In finding no error, the court again emphasized that "[c]ounsel errs by conceding the appropriateness of a punitive discharge when an accused wishes to remain in the service or otherwise avoid such a separation."[267]

Thus, the trilogy of *Pineda*, *Bolkan*, and *Burt* highlight two vital rules. They are: (1) defense counsel errs by conceding the appropriateness of a punitive discharge when the accused indicates a desire to remain in the service; and (2) the military judge must clarify with the accused any apparent conflict between counsel's argument and the accused's desires regarding a punitive discharge.

Conclusion

This article captures the developments in instructions over the past CAAF term in the areas of substantive law, evidence, and sentencing. Hopefully, military judges and counsel alike will find this review a useful supplement to the primary source on instructions, the *Military Judges' Benchbook*. Practitioners should heed the advice from the CAAF and the service courts presented in this article, and remain alert for decisions from the CAAF on the issues for which it has granted review.

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259. *Id.*

260. *Id.* at 301. The CAAF relied on the following facts when determining there was no prejudice: the accused was convicted of numerous offenses of a serious nature, the accused had committed some of the charged offenses while he was a noncommissioned officer, the accused had a below average military record, and the trial was before a military judge alone. *Id.*

261. United States v. Bolkan, 55 M.J. 425, 428 (2001). The CAAF assumed that the defense counsel conceded the appropriateness of a punitive discharge. On appeal, the accused did not attack the effectiveness of his representation. *Id.*

262. *Id.*

263. *Id.* at 427.

264. *Id*. at 428 (citing *Pineda*, 54 M.J. at 298). In dissenting opinions, Judges Sullivan and Effron opine that the errors committed by the defense counsel and the military judge were not harmless. *Id.* at 431 (Sullivan, J., dissenting), (Effron, J., dissenting).

265. *Id.* at 429 (Baker, J., concurring in the result).

266. United States v. Burt, 56 M.J. 261, 264 (2002).

267. *Id.* at 264; *see also* United States v. Robinson, 25 M.J. 43 (C.M.A. 1987); United States v. Webb, 5 M.J. 406 (C.M.A. 1978); United States v. Holcomb, 43 C.M.R. 149 (C.M.A. 1971).