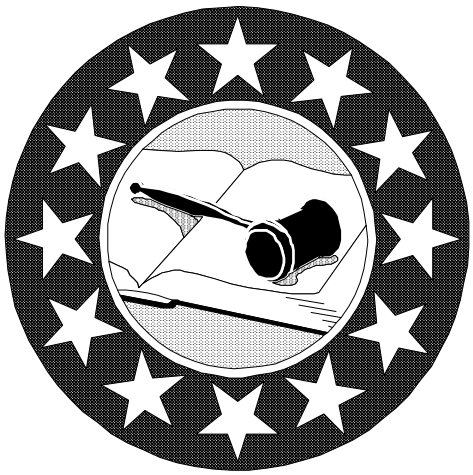

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Articles

Foreword

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Welcome to the Eighth Annual *Military Justice Symposium*. In this year's *Symposium*, published as a single volume, members of the Criminal Law Department provide practitioners with an overview of significant Court of Appeals for the Armed Forces (CAAF) cases, as well as other important criminal cases from the past year. More importantly, the articles provide a critical analysis of case law in addition to identifying trends in particular areas. New to this year's *Symposium* is a welcome addition by Lieutenant Colonel Mike Hargis, currently a member of the trial judiciary and a distinguished alumnus of the Department, discussing new developments in instructions. We are also pleased to include the remarks of Colonel Denise Vowell, Chief Trial Judge of the U.S. Army Trial Judiciary, who recently spoke at the graduation ceremony for the Ninth Court Reporters' Course.

Last year saw the publication of the 2002 edition of the *Manual for Courts-Martial* (*MCM*) and the revision of *Army Regulation* (*AR*) *27-10*. Each brought significant changes to the practice of military justice. Major Brad Huestis explores the 2002 Amendments to the *MCM* and the *AR 27-10* changes. He highlights major changes, such as the expansion of special court-martial (SPCM) jurisdiction, to include punishments of confinement for up to one year, the increased value threshold for certain property offenses, the authority of SPCM convening authorities to convene SPCMs empowered to adjudge bad-conduct discharges, and the limitation of Article 58a (automatic reduction) to sentences of enlisted soldiers that involve punitive discharges or confinement for more than six months.

In addition to the review of *MCM* and regulatory changes, this year's *Symposium* contains a survey of new developments in crimes and defenses, evidence, and the ever-present issue of jurisdiction. This year's *Symposium* will also include reviews of significant events in the areas of search and seizure, confrontation, post-trial, and self-incrimination, as well as the article on instructions from Lieutenant Colonel Hargis.

We have included a chart that the CAAF compiles and provides annually. This chart lists the number of majority, concurring, and dissenting opinions each judge wrote or joined. It provides an insightful snapshot into the individual judges and their proclivity to join fellow judges in consensus opinions, as well as their proclivity to separate from the majority in dissent.

As the Criminal Law Department strives to serve military justice practitioners in the field, we continually look for your input. Accordingly, we welcome your thoughts and suggestions. Finally, a word about the Criminal Law Department team is appropriate here. This year marks the final *Symposium* issue for several of the Department's professors. In fact, next year's *Symposium* reader will find almost a complete change in the Department's membership. Six of the Department's nine members are leaving. To that end, I know *The Army Lawyer* readers will join me in thanking these officers for their hard work in completing this Herculean task. They read hundreds of opinions, and synthesized the important issues into what we hope is a quality product that is both interesting and helpful to the field. Thank you: Lieutenant Colonel Mike Stahlman, Major Tyler Harder, Major Charlie Rose, Major Chrissy Ekman, Major Brad Huestis, and Major Dave Velloney.

Opinion Statistics for the 2002 Term of Court[1]

	SJC	HFG	ASE	JEB	ERS	WTC	PC	**TOTAL**
TOTAL OPINIONS	**42**	**20**	**25**	**24**	**51**	**1**	**5**	**168**
Majority Opinions	16	17	15	13	8	1	5	75
Separate Opinions	26	3	10	11	43	0	N/A	93

1. E-mail from Colonel (Ret.) Fran Gilligan, Commissioner, Court of Appeals of the Armed Forces (Mar. 2003). The 2002 term began on 1 October 2001 and ended 30 September 2002. An opinion that is joined by one or more judges or authored by one or more judges is counted for the judge listed first. *Id.*

Breakdown of Separate Opinions

	SJC	HFG	ASE	JEB	JES	WTC	**TOTAL**
Concur	1	0	0	1	6	0	8
Concur in Result	3	0	0	5	15	0	23
Concur in Part & in Result	5	1	3	3	7	0	19
Concur in Part & in Result & Dissent in Part	0	0	0	0	1	0	1
Concur in Part & Dissent in Part	4	1	2	0	5	0	12
Dissent in Part & Concur in Result	0	0	0	0	1	0	1
Dissent	13	1	5	2	8	0	29

Abbreviations Key:

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

Moving Towards the Apex: Recent Developments in Military Jurisdiction

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Introduction

"A court-martial always has jurisdiction to determine whether it has jurisdiction."[1]

Military jurisdiction has undergone significant changes since the enactment of the Uniform Code of Military Justice (UCMJ) fifty-three years ago. Although the current list of persons subject to military jurisdiction found in Article 2, UCMJ, has not changed substantially from the original Article 2 language of 1950, several watershed events have significantly altered the jurisdictional landscape of today. For example, Supreme Court decisions in the 1950s clarified and limited the grant of jurisdiction over civilians that Congress had initially extended to the military.[2] In 1969, the Supreme Court ushered in the service-connection era with its decision in *O'Callahan v. Parker*,[3] only to reverse itself eighteen years later in *United States v. Solorio*.[4] Reacting to obvious shortcomings in jurisdiction over Reservists, Congress passed legislation in 1986 that would subject Reservists "in Federal status to the same disciplinary standards as their regular component counterparts."[5] More recently, at the end of 2000, Congress passed the Military Extraterritorial Jurisdiction Act (MEJA),[6] extending federal jurisdiction over U.S. civilians accompanying the armed forces overseas.

So what will be the next historical milestone to alter the jurisdictional landscape in the military? Time will tell, but some noteworthy changes this past year may have moved us nearer to the apex of the next watershed event than many realize. The Court of Appeals for the Armed Forces (CAAF) had its hand in settling a few minor jurisdictional issues, refining the law regarding court-martial jurisdiction. The service courts took on several interesting issues, addressing areas such as fraudulent discharges and reserve jurisdiction. Perhaps the most telling (but thus far, least talked-about) new development is a provision in the 2003 National Defense Authorization Act calling for a model state code of military justice and a model state manual for courts-martial.[7]

This article discusses the significant changes in military jurisdiction in 2002. The first part addresses the cases decided by the CAAF and the various service courts, while the second part discusses the recent congressional amendment to 32 U.S.C. §§ 326-333 found in the 2003 National Defense Authorization Act.

Court-Martial Jurisdiction

Rule for Courts-Martial (RCM) 201(b) lists five requirements for a court-martial to have jurisdiction. Those are: (1) the court-martial must be convened by a proper official; (2) the court-martial must be properly composed with respect to the number and qualifications of the members and the military judge; (3) the charges must be properly referred to the court-martial by a competent authority; (4) there must be jurisdiction over the accused; and (5) there must be jurisdiction over the offense.[8] The first part of this article is divided into three sections, with each section addressing a different jurisdictional element. The first section discusses a recent CAAF decision focusing on the second element listed above, proper court-martial composition. The second section discusses three opinions touching on the fourth element, jurisdiction over the accused, otherwise known as personal jurisdiction. The final section discusses two opinions addressing the fifth element, jurisdiction over the offense, or subject-matter jurisdiction.

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1. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 201(b) (2002) [hereinafter MCM].

2. *See, e.g.*, Reid v. Covert, 354 U.S. 1 (1957); United States *ex rel.* Toth v. Quarles, 350 U.S. 11 (1955).

3. 395 U.S. 258 (1969).

4. 483 U.S. 435 (1987).

5. *See* Willenbring v. Neurauter, 48 M.J. 152, 169 (1998) (citing H.R. REP. NO. 99-718, 2d Sess. 225 (1986)).

6. 18 U.S.C.S. §§ 3261-3267 (LEXIS 2003).

7. Bob Stump National Defense Authorization Act for Fiscal Year 2003, Pub. L. No. 107-314, § 512, 116 Stat. 2458, 2537 (2002) (codified at 32 U.S.C.S. § 326 (LEXIS 2003)).

8. MCM, *supra* note 1, R.C.M. 201(b)(1)-(5).

A Properly Composed Court-Martial: Substantial Compliance Revisited

The second element needed to perfect court-martial jurisdiction is a properly composed court. Rule for Courts-Martial 201(b)(2) requires that the court-martial be composed in accordance with the rules addressing the requisite number and qualifications of the members and the military judge.[9] Articles 16 and 25, UCMJ, are two such rules addressing court-martial composition. Article 16 authorizes a court-martial consisting of only a military judge, without any members, if the accused requests.[10] Similarly, Article 25 authorizes enlisted members to serve on courts-martial if requested by an enlisted accused.[11] In 1997, the CAAF addressed the requirements of Article 16 in *United States v. Turner.*[12] The CAAF held that there had been a violation of Article 16 but that the violation did not require reversal of the conviction. Although the accused, and not the defense counsel, should have made the request for trial by a military judge alone, the court determined that it was a non-jurisdictional procedural error. The court found that under the circumstances, there had been substantial compliance with Article 16.[13]

Three years later, the CAAF extended the substantial compliance doctrine to Article 25 in *United States v. Townes*.[14] The accused in *Townes* never personally requested that enlisted members serve on his court-martial panel, as required by Article 25. Rather, the defense counsel made the request on the record in the accused's presence. Nonetheless, the CAAF found "sufficient indication" that the accused had personally requested enlisted members. Just as in *Turner*, the CAAF held that although there was error, it was not jurisdictional error.[15]

The CAAF revisited the substantial compliance doctrine this past year in *United States v. Morgan*,[16] when it again addressed the requirements of Article 25. In *Morgan*, the military judge advised the accused at his arraignment of his right to request that enlisted members sit on his court-martial. The defense counsel deferred forum selection, and the military judge set a trial date, with a 21 October deadline for the accused to make his forum selection. The defense counsel faxed a "Notice of Plea and of Forum" to the military judge on 21 October, indicating that the "defense will request trial before a court-martial consisting of at least one third enlisted members."[17] The court-martial reconvened two weeks later, and at no time during the ensuing four-day trial, from voir dire through sentencing, did the accused object to the enlisted members on the panel.[18] On appeal, the accused argued that the record failed to show that he personally requested enlisted members to sit on his panel, thus violating Article 25 and creating a jurisdictional error.[19] The service court ordered a *DuBay* hearing to determine the relevant facts surrounding the accused's forum election.[20] After the

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

10. UCMJ art. 16(1)(B) (2002). Article 16(1)(B) provides that a court-martial may consist of "only a military judge, if before the court is assembled the accused, knowing the identity of the military judge and after consultation with defense counsel, requests orally on the record or in writing a court composed only of a military judge and the military judge approves." *Id*.

11. Article 25(c)(1) provides, in part:

> Any enlisted member of an armed force on active duty is eligible to serve on general and special courts-martial for the trial of any enlisted member . . . only if, before the conclusion of a session called by the military judge under section 839(a) of this title (Article 39(a)) prior to trial or, in the absence of such a session, before the court is assembled for the trial of the accused, the accused personally has requested orally on the record or in writing that enlisted members serve on it.

UCMJ art. 25(c)(1).

12. 47 M.J. 348 (1997). In *Turner*, the military judge advised the accused at arraignment of his right to choose either a trial composed of members or a trial composed of military judge alone. The accused initially deferred his election. Before trial, the accused's defense counsel submitted a written request for trial by military judge alone. The defense counsel, in the presence of the accused, confirmed that request orally at trial. The accused never personally made the forum selection. *Id*. at 349.

13. *Id.* at 350. The CAAF noted that the military judge had informed the accused of his forum choices on the record, that the accused had discussed his choices with his defense counsel, that the defense counsel elected trial by military judge alone on the accused's behalf and in his presence, and that at no time did he ever object. *Id.*

14. 52 M.J. 275 (2000). In *Townes*, the military judge advised the accused at arraignment of his choice of forum, including the right to be tried by a court-martial composed of at least one-third enlisted members. The accused stated that he understood these rights. At a later session, in the presence of the accused, the defense counsel orally requested enlisted members to serve on the panel. The accused never personally made the request. *Id.* at 276.

15. *Id*. at 277. In finding substantial compliance with Article 25, the court noted that the accused had been advised of and understood his forum choices, that the defense counsel requested enlisted members in the presence of the accused, and that the accused was present during ten days of trial, to include testifying for an entire day in front of the enlisted members. *Id.*

16. 57 M.J. 119 (2002).

17. *Id*. at 120.

18. *Id*. at 121.

DuBay hearing, the service court affirmed the case, concluding that there had been substantial compliance with Article 25, UCMJ.[21]

The accused and both of his defense counsel testified at the *DuBay* hearing. The accused recalled being advised of his forum choices as well as seeing enlisted members on the panel at his trial. He reaffirmed that he understood those choices and understood that the choice belonged to him, not his attorney. Both of his defense counsel acknowledged that the request for enlisted members accurately reflected the accused's wishes, and that if their client had wanted a forum other than one with enlisted members, they would have informed the court.[22] The military judge then made findings of fact. First, he found that the accused had been advised of his forum choices, to include his choice to elect a panel composed of both officers and enlisted members. Second, the judge found that the accused understood those forum choices. Third, he found that the trial judge had set a deadline for submission of forum election, and that the defense counsel met that deadline by providing written notice that the accused would request a panel consisting of officer and enlisted members. Finally, he found that the defense counsel had discussed the various forum choices with the accused before the deadline, and that the accused "personally chose to be tried by a court consisting of at least one-third enlisted members."[23]

On appeal, the CAAF affirmed, holding that the failure to get the accused's forum selection on the record was a procedural error, but not a jurisdictional defect. It agreed with the service court that there had been substantial compliance with Article 25, noting that the accused never objected to the presence of the enlisted members, either at trial, in his post-trial submissions, or his initial appellate pleadings. The CAAF stated that in this case, as "in *United States v. Townes* . . . and *United States v. Turner*, . . . the record establishes that the selection of an enlisted forum was appellant's choice. There were many opportunities to voice an objection to having enlisted members on the panel, and none was made."[24]

The obvious significance of the holding in *Morgan* is the expansion of the substantial compliance doctrine as applied to Article 25. In both *Turner* and *Townes*, the CAAF held that there is substantial compliance with Articles 16 and 25, respectively, when the defense counsel makes a forum selection on behalf of the accused on the record and *in the accused's presence*. In *Morgan*, the court now finds substantial compliance with the statutory requirement that an accused personally request "orally on the record or in writing" his forum choice in a situation where the defense counsel makes the request *outside the accused's presence*. As Judge Effron notes in his dissenting opinion, the only record of forum selection at trial was the faxed notice signed by the defense counsel indicating that the defense "*will* request" enlisted members.[25] Judge Effron argues that the request must be made at trial, orally on the record, or in the case of a written request, personally signed by the accused. While Judge Efron is willing to find substantial compliance in a situation where the defense counsel makes a forum selection on behalf of the accused on the record in the accused's presence, he is not willing to find substantial compliance in a situation where the forum selection is made by the defense counsel without any indication that the accused had knowledge of the request.[26]

The majority opinion continues the trend the CAAF has seemed to follow for the last few years when determining jurisdictional issues—to look beyond procedural and administrative defects and focus on the pragmatic effect of any errors.[27] While that may be reassuring to judges and prosecutors, it should be emphasized that in all these cases, the rules were not followed and the CAAF found error. Insofar as proper court-martial composition is concerned, both Articles 16 and 25 still *require* that the accused, either orally on the record or in writing, personally make the forum selection.

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19. *Id.* at 120.

20. *See* United States v. Dubay, 37 C.M.R. 411 (C.M.A. 1967).

21. *Morgan*, 57 M.J. at 122.

22. *Id.* at 121.

23. *Id.* at 122.

24. *Id.*

25. *Id.* at 126 (Effron, J., dissenting).

26. *Id.* at 125. Judge Effron states that it was error for the appellate courts to rely on the post-trial *DuBay* hearing to cure the defective trial proceedings. He writes, "A jurisdictional deficiency cannot be corrected through a post-trial reconstruction of events in a *DuBay* hearing." *Id.*

27. *See* Major Tyler J. Harder, *Recent Developments in Jurisdiction: Is This the Dawn of the Year of Jurisdiction?*, ARMY LAW., Apr. 2001, at 3; Major Tyler J. Harder, *All Quiet on the Jurisdictional Front . . . Except for the Tremors from the Service Courts*, ARMY LAW., Apr. 2002, at 5 [hereinafter Harder, Apr. 2002] (discussing this jurisdictional trend).

Personal Jurisdiction: Retirees, Prisoners, and Fraudulent Discharges

The fourth requirement of court-martial jurisdiction is that the "accused must be a person subject to court-martial jurisdiction."[28] This element of *in personam* jurisdiction requires that an accused occupy a status as a person subject to the UCMJ at the time of trial.[29] A list of those subject to the UCMJ is found in Article 2, UCMJ.[30] In 2001, the Navy-Marine Corps Court of Criminal Appeals (NMCCA) decided *United States v. Morris*,[31] a case that focused on members of the Fleet Reserve and Fleet Marine Corps Reserve, one class of persons listed in Article 2(a) as being subject to military jurisdiction.[32] In *Morris*, the NMCCA determined that the requirement of RCM 204(b)(1) to place a member of the Reserve Component (RC) on active duty before arraignment does not apply to retirees and members of the Fleet Reserve or Fleet Marine Corps Reserve.[33] The court held that members of the Fleet Reserve and Fleet Marine Corps Reserve are not members of the RC as envisioned by RCM 204(b)(1), and concluded that jurisdiction existed over the accused at trial based upon his "status as a member of the Fleet Marine Corps Reserve, and not upon the fact that he had been recalled to active duty."[34] During the past year, the NMCCA decided *United States v. Huey*,[35] a case that focused on another status of persons listed in Article 2(a), retirees of a regular component.[36]

The accused, Petty Officer First Class Huey, served twenty years on active duty in the Marine Corps and the Navy. He was transferred to the Fleet Reserve on 1 August 1982, and then placed on the retired list on 1 January 1989.[37] In 1996, the accused, his wife, and their three adopted children moved from Hawaii to Okinawa, where the accused worked as a Navy civilian employee. Shortly after arriving on Okinawa, he began engaging in forcible sexual intercourse with his teenage daughter several times a week over a nine-month period. Around March 1997, the rapes stopped, but not before the accused's daughter was pregnant with his child.[38] In August 1997, Mrs. Huey requested an early return of dependents for her pregnant daughter and revealed her belief that her husband was molesting their daughter. Following an investigation, the accused was charged, and a court-martial convicted him of rape, forcible sodomy, and indecent assault.[39]

At trial, the military judge denied the accused's motion to dismiss the charges for lack of personal jurisdiction. On appeal, the accused argued that the military judge erred in denying his motion because the exercise of court-martial jurisdiction over him was a violation of constitutional due process under the Fifth Amendment.[40] While he conceded that Article 2(a)(4), UCMJ, and case law subjected retirees to court-martial jurisdiction, the accused, citing *United States ex rel. Toth v. Quarles*,[41] argued that he had obtained "civilian status" as a factual matter. He argued that it was highly unlikely he would ever be recalled

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28. MCM, *supra* note 1, R.C.M. 201(b)(4).

29. *Id.* R.C.M. 202(c) discussion.

30. *See* UCMJ art. 2(a) (2002).

31. 54 M.J. 898 (N-M. Ct. Crim. App. 2001). Staff Sergeant Morris was charged with sexual acts with his minor daughter that investigators had discovered after he retired from active duty. Although the Marine Corps recalled him to active duty for trial by court-martial, Staff Sergeant Morris argued on appeal that he was not on active duty at the time of his trial, and that RCM 204(b)(1) required him to be on active duty. *Id.*

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

33. MCM, *supra* note 1, R.C.M. 204(b)(1) ("[A] *member of a reserve component* must be on active duty prior to arraignment at a general or special court-martial.") (emphasis added).

34. *Morris*, 54 M.J. at 904. The Commander, Marine Reserve Forces, had requested and received permission from the Secretary of the Navy to recall the accused to active duty, but the NMCCA held that Staff Sergeant Morris did not need to be recalled to active duty for purposes of exercising court-martial jurisdiction. *Id.* at 902; *see* Harder, Apr. 2002, *supra* note 27, at 6 (discussing *Morris* in greater detail).

35. 57 M.J. 504 (N-M. Ct. Crim. App. 2002).

36. UCMJ art. 2(a)(4).

37. *Huey*, 57 M.J. at 505. Transfer from the Regular Marine Corps or Marine Corps Reserve to the Fleet Marine Corps Reserve is made at the member's request following twenty or more years of active service. Once transferred, the member begins receiving retainer pay. *See* 10 U.S.C. § 6330 (2000). After the member has completed thirty years of service, the member is then transferred to the retired list of the Regular Marine Corps or the Marine Corps Reserve and begins receiving retired pay. *See id.* § 6331. For jurisdictional purposes, there is no distinction between retired pay and retainer pay. *See Morris*, 54 M.J. at 899.

38. *Huey*, 57 M.J. at 506.

39. *Id.* at 507.

40. *Id.* at 506.

41. 350 U.S. 11 (1955) (holding that it is unconstitutional to subject a former service member to trial by court-martial after he had been discharged from the Air Force).

to active duty to defend his country, pointing to his retirement pay as the only remaining connection he had with the military. This de facto civilian status entitled him to all the due process rights available in a civilian courtroom, and it was his contention that trial by court-martial deprived him of those constitutional rights.[42]

The service court quickly dispatched this argument, noting that *Toth* had been "decided in the infancy of our modern system of military justice."[43] Disagreeing with the accused's characterization of his status as a "civilian," the NMCCA found his likelihood of being recalled to active duty irrelevant, stating that there "is no doubt that a court-martial has the power to try a person receiving retired pay."[44]

While *Huey* is no new revelation of law, it still contains two points worth noting. First, it reaffirms the fact that retirees from a regular component are forever subject to military jurisdiction. The accused had been off active duty for over fifteen years at the time he was charged with these offenses. It appears that under the circumstances, the case was prosecuted at a court-martial because it was the only option available.[45] Nonetheless, it is clear that military jurisdiction continues to exist over retired members of a regular component even long after they leave active duty. Second, in answering a rather easy jurisdictional question, the NMCCA may have touched upon a deeper issue. When the UCMJ was enacted in 1950, Congress provided for military jurisdiction over civilians in several situations.[46] The first Supreme Court decisions restricting this congressional grant of jurisdiction over civilians were decided almost fifty years ago.[47] The military justice system has undergone significant changes in the interim, and if the Supreme Court were faced with similar situations today, it is entirely possible that the Court would decide these issues differently. In *Huey*, the accused argued that his de facto civilian status entitled him to "due process rights unavailable to him in a court-martial."[48] As the NMCCA noted, "Given the broad panoply of due process accorded a military accused in our current system of military justice, the general concerns expressed by the U.S. Supreme Court in *Toth v. Quarles* do not support the appellant's argument."[49] Could not the same Supreme Court that overruled *O'Callahan v. Parker* agree with the NMCCA's sentiments regarding civilians accompanying the armed forces overseas during peacetime? This is certainly something to consider.[50]

While *Huey* focused on retirees, the NMCCA decided another personal jurisdiction case during the past year that focused on a different status of persons listed in Article 2(a)—persons in custody serving a court-martial sentence.[51] In *Fisher v. Commander, Army Regional Confinement Facility*,[52] the NMCCA addressed the status of a military prisoner serving a civilian sentence and addressed the principle of continuing jurisdiction.[53]

On 13 June 1991, the accused, Anthony Fisher, was arraigned at a general court-martial on charges of rape and assault consummated by a battery. After the arraignment, he deserted the Navy. A court-martial tried him in absentia on 9 August 1991, and convicted him of desertion, in addition to the rape and battery. His sentence included confinement for seven years and a dishonorable discharge. During his unauthorized absence, the accused was shot and wounded during an armed robbery in California, and was subsequently arrested by local law enforcement officials. Military authorities took custody of

42. *Huey*, 57 M.J. at 506.

43. *Id.*

44. *Id.*

45. The offenses occurred in Okinawa before passage of the Military Extraterritorial Jurisdiction Act of 2000, 18 U.S.C.S. §§ 3261-3267 (LEXIS 2003). *Huey*, 57 M.J. at 506. Thus, unless the host nation was willing to prosecute or the accused was charged under a statute having extraterritorial jurisdiction in a federal civilian court, the only other option was a court-martial.

46. *See* UCMJ art. 2(10) (1951) (extending UCMJ jurisdiction to "persons serving with or accompanying an armed force during time of war"); UCMJ art. 2(11) (extending UCMJ jurisdiction to "persons serving with, employed by, or accompanying the armed forces outside the United States"); UCMJ art. 2(12) (extending UCMJ jurisdiction to "persons within an area leased by, reserved or acquired for the United States and under control by a Department Secretary which is outside the United States").

47. *See, e.g.*, Reid v. Covert, 354 U.S. 1 (1957); United States *ex rel*. Toth v. Quarles, 350 U.S. 11 (1955).

48. *Huey*, 57 M.J. at 506.

49. *Id.*

50. The service court set aside the findings and sentence, dismissed the charges, and abated the proceedings in *Huey* on 29 August 2002, due to the accused's death on 2 July 2002 (ten days before the court decided the case). United States v. Huey, No. 200000995, 2002 CCA LEXIS 186 (N-M. Ct. Crim. App. Aug. 29, 2002).

51. UCMJ art. 2(a)(7) (2002).

52. 56 M.J. 691 (N-M. Ct. Crim. App. 2001).

53. *Id*.

him from the State of California on 25 August 1991, at which time he began serving his court-martial sentence. The military turned him back over to the State of California five days later to face trial for the armed robbery charges in state court. The accused was convicted and sentenced to sixteen years in state prison on 6 February 1992. On 5 November 1999, the accused completed his civilian sentence, and the State of California returned him to military control to serve out the remainder of his court-martial sentence.[54] On 17 July 2001, the accused filed a petition for extraordinary relief with the NMCCA, requesting a writ of habeas corpus on the ground that he was being held unlawfully after the completion of his court-martial sentence to confinement.[55]

The accused made two arguments to support his petition. First, he argued that his court-martial sentence to confinement had run concurrently with his civilian sentence to confinement, and therefore, he had finished serving the seven years of military confinement before the State of California returned him to military control in 1999. Second, he argued that the military had no authority to confine him because military jurisdiction over him terminated when he received his dishonorable discharge certificate in civilian confinement.[56]

The accused argued that under the Interstate Agreement on Detainers Act (IADA),[57] his military confinement continues to run "while the military prisoner is temporarily in state custody."[58] The NMCCA acknowledged that the IADA applies to the military, and that under the IADA, if invoked, military confinement would continue to run while the accused was in state custody.[59] It found, however, that the IADA had not been invoked in this case. The NMCCA determined that the delivery of military prisoners to state authorities may be accomplished in two ways—under the IADA, or pursuant to Article 14, UCMJ.[60] The court looked to the regulatory authority of the *Manual of the Judge Advocate General* (*JAGMAN*), which provides that "delivery of custody shall be governed by Article 14, UCMJ" when the IADA is not invoked.[61] The court determined that a transfer under the IADA "occurs only '[u]pon request under the Act by either State authorities or the prisoner.'"[62] It held that neither the State of California nor the accused made such a request under the IADA. Because neither invoked the IADA, the accused's transfer to the state was under Article 14, UCMJ. By the clear language of Article 14, transfer from military to civilian authorities interrupts the court-martial sentence until the accused is "returned to military custody for the completion of his sentence."[63]

The accused next argued that, even if his delivery to state authorities was pursuant to Article 14, UCMJ, the military lost jurisdiction over him when he received his dishonorable discharge in a civilian prison.[64] The NMCCA found the principle of continuing jurisdiction dispositive of this issue. Jurisdiction over the accused attached at the time of his trial and continued through the completion of his sentence and punishment. The execution of his dishonorable discharge certificate "merely executed that part of the petitioner's sentence extending to the dishonorable discharge."[65]

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54. *Id*. at 692.

55. *Id*. at 693. The accused's petition requested relief in the nature of a writ of habeas corpus, error *coram nobis*, and mandamus. *Id.* at 692.

56. *Id*. at 694-95.

57. 18 U.S.C. app. § 2 (2000). The IADA is an agreement between the United States, forty-eight States, the District of Columbia, Puerto Rico, and the Virgin Islands. It is designed to facilitate the expeditious disposition of pending charges by one jurisdiction against a person already incarcerated in another jurisdiction. *See Fisher*, 56 M.J. at 693 n.1 (citing Carchman v. Nash, 473 U.S. 716, 719 (1985); 18 U.S.C. app. § 2, art. I).

58. *Fisher*, 56 M.J. at 694 (citing U.S. DEP'T OF NAVY, JAG INSTR. 5800.7C, MANUAL OF THE JUDGE ADVOCATE GENERAL § 0613(b) (3 Oct. 1990) [hereinafter JAGMAN]).

59. *Id*. at 693 n.1, 694.

60. UCMJ art. 14 (2002).

61. *Fisher*, 56 M.J. at 694 (citing JAGMAN, *supra* note 58, § 613(c)).

62. *Id*. (citing JAGMAN, *supra* note 58, § 613(b)).

63. Article 14(b) states:

> When delivery under this article is made to any civil authority of a person undergoing sentence of a court-martial, the delivery, if followed by a conviction in a civil tribunal, *interrupts the execution of the sentence of the court-martial*, and the offender after having answered to the civil authorities for his offense shall, upon the request of competent military authority, be returned to military custody *for the completion of his sentence.*

UCMJ art. 14(b) (emphasis added).

64. *Fisher*, 56 M.J. at 694.

65. *Id*. (citing MCM, *supra* note 1, R.C.M. 201(c)(1); Coleman v. Tennessee, 97 U.S. 509 (1878)).

It is interesting that the NMCCA also addressed the accused's status as a military prisoner under Article 2(a)(7), UCMJ.[66] The court noted that the accused's discharge "terminated his status as an active duty service member, but not his status as a 'military prisoner.'"[67] Referring to the requirement that the state turn the accused back over to the military pursuant to Article 14, UCMJ, the court stated, "[W]e believe he effectively remained a prisoner subject to military control . . . . In other words, delivery of *temporary* custody to state authorities did not relinquish military control over him, nor did it change his status as a military prisoner."[68] This was apparently in response to the accused's argument that he was no longer a military prisoner because he was not physically under military control. The significance of his status as a military prisoner subject to military jurisdiction under Article 2(a)(7), however, is unclear. While the court's analysis is basically correct (that is, Article 2(a)(7) does give the military jurisdiction over the accused), it is also unnecessary, because continuing jurisdiction already applied in this case. The accused did not need to be a military prisoner for the principle of continuing jurisdiction to apply to him. Continuing jurisdiction is the concept that military jurisdiction continues over an individual even after a valid discharge, but only for the limited purpose of executing the sentence and completing appellate review of the case.[69] Since the accused had not completed his sentence to confinement, it would seem that the concept of continuing jurisdiction would apply for that limited purpose—completion of the sentence. If the military sought jurisdiction over the accused to try him for a *new* offense, then his status as a military prisoner might be significant; as it was, the military already had jurisdiction over the accused for the limited purpose of completing the sentence of "someone who already was tried and convicted while in a status subject to the UCMJ."[70]

The last personal jurisdiction case this article will discuss is *United States v. Brevard*,[71] a case that stems from a government appeal under Article 62, UCMJ.[72] The Army Court of Criminal Appeals (ACCA) originally addressed *Brevard* in November 2002,[73] and discussed Article 3(b), UCMJ, and fraudulent discharges.[74] The accused, Sergeant (SGT) Brevard, was flagged on 4 May 2001, and his commander preferred charges against him on 12 July 2001. Before the Article 32 pretrial investigation, the accused advanced his expiration of term of service (ETS) date to 11 August 2001, by canceling his tour extension, and then, without authority, requested clearing papers and orders from the transition center.[75] The accused was told during his out-processing that he was flagged, so he submitted a forged document to the transition center purporting to lift the flag. On 10 August, he presented forged clearing papers to the transition center for his final out-processing.[76] After receiving a courtesy copy of his DD Form 214[77] and reviewing his final pay computations with the installation-level finance personnel, the accused departed his unit and left Germany on 11 August. On 16 August, after SGT Brevard failed to appear for the Article 32 investigation, the Finance Commander directed that SGT Brevard's final pay not be processed.[78] On 8 November 2001, Army authorities detained the accused at Fort Meyer, Virginia, and on 23 November, flew him back to Germany for trial. In

66. *Id*. Article 2(a)(7) provides for jurisdiction over persons "in custody of the armed forces serving a sentence imposed by a court-martial." UCMJ art. 2(a)(7).

67. *Fisher*, 56 M.J. at 694.

68. *Id.* at 694-95.

69. *See* Smith v. Vanderbush, 47 M.J. 56 (1997) ("[T]he concept of continuing jurisdiction may be applied for the limited purpose of permitting appellate review and execution of the sentence in the case of someone who already was tried and convicted while in a status subject to the UCMJ.").

70. *Id.* at 59; *see also* United States v. Byrd, 53 M.J. 35 (2000) (holding that the concept of continuing jurisdiction extends beyond the execution of a punitive discharge).

71. United States v. Brevard, 58 M.J. 124 (2003).

72. UCMJ art. 62 (2002).

73. United States v. Brevard, 57 M.J. 789 (Army Ct. Crim. App. 2002).

74. Article 3(b) provides a two-step process in establishing jurisdiction over a person who fraudulently obtains a discharge from the service. It provides:

> Each person discharged from the armed forces who is later charged with having fraudulently obtained his discharge is . . . subject to trial by court-martial on that charge and is after apprehension subject to this chapter while in the custody of the armed forces for that trial. Upon conviction of that charge he is subject to trial by court-martial for all offenses under this chapter committed before the fraudulent discharge.

UCMJ art. 3(b).

75. *Brevard*, 57 M.J. at 790.

76. *Id.* at 790-91. The accused never cleared the various sections in his unit, nor did he ever receive the authority to begin the clearing process. *Id.*

77. U.S. Dep't of Defense, DD Form 214, Certificate of Release or Discharge from Active Duty (Nov. 1988). The DD Form 214 indicated a discharge date of 11 August 2001. *Brevard*, 57 M.J. at 791.

December, the Army released the accused's final pay to his bank, but then recalled it before he gained access to it.[79] The court did not arraign SGT Brevard until 13 February 2002, at which time he argued lack of personal jurisdiction.[80] Two weeks later, the military judge ruled that the accused had not completed the clearing process, had not received his final pay, and had received his discharge fraudulently. The military judge found, however, that the accused was discharged on 11 August—thereby terminating jurisdiction over him—and abated the proceedings. The military judge ruled that the government must first convict the accused of fraudulent separation before proceeding on the preferred charges.[81] The government then preferred a single charge of fraudulent separation against the accused on 1 April 2002, and referred the case to a court-martial on 15 May. On 10 June, following the arraignment, the defense argued a motion to dismiss based on lack of a speedy trial in front of a different military judge. On 3 July 2002, the second military judge granted the defense motion and dismissed the fraudulent separation charge with prejudice. The military judge found that the accused had "completed the clearing process, albeit deceptively; received a final accounting of pay; and was delivered his DD Form 214."[82] Based on these findings, the military judge concluded that SGT Brevard had been discharged from the Army on 11 August 2001, and that the government had to prove the fraudulent discharge before it could try SGT Brevard on the other offenses.[83]

The government appealed the ruling to the ACCA under the provisions of Article 62, UCMJ. The service court disagreed with the military judge's ruling, finding that the military judge erred as a matter of law. The service court focused on the military judge's conclusion that the accused had been discharged. The ACCA agreed that a trial and conviction for fraudulent discharge was necessary to establish jurisdiction over offenses committed before the discharge; however, it did not agree that a discharge had occurred in this case.[84] Looking at the three elements[85] necessary to effectuate a valid discharge, the court found that the accused had not received a final accounting of pay.[86]

The military judge concluded that SGT Brevard had received a final accounting of his pay because he had processed through the installation finance office and was informed how much money he would receive. The service court disagreed but stopped short of specifically stating what actually constitutes a final accounting of pay. The court, referencing Defense Finance and Accounting Service (DFAS) regulations and policy, conceded that the military cannot extend jurisdiction indefinitely by simply not providing a soldier's final pay; however, the court did not elaborate any further on the issue.[87]

The CAAF granted the accused's petition for review, and on 5 March 2003, affirmed the ACCA's decision to reverse the military judge's dismissal of the fraudulent separation charge. The CAAF viewed the posture of the appeal differently from the ACCA, however. The CAAF specifically held that the military judge erred in finding that there was a speedy trial violation, but declined to rule on the validity of the rulings made in the first court-martial.[88] The CAAF found that the two courts-martial were separate proceedings, and held that the ACCA was without jurisdiction to address any issues stemming from the first court-martial. The government appeal only raised the issue of the motion to dismiss the fraudulent separation charge of the second court-martial. The CAAF stated that while it was

78. *Brevard*, 57 M.J. at 791. "According to testimony at trial, actual receipt of eighty percent of final pay usually occurs seven to ten days after ETS. The remaining twenty percent of final pay is paid approximately twenty days later, after a second and final DFAS computer check." *Id.* at 791 n.6.

79. *Id.* at 791.

80. *Id.* Generally, a valid discharge terminates jurisdiction. *See* MCM, *supra* note 1, R.C.M. 202(a) discussion. A discharge is complete upon: (1) a delivery of a valid discharge certificate; (2) a final accounting of pay; and (3) undergoing a clearing process required under appropriate service regulations to separate a service member from military service. 10 U.S.C. §§ 1168-1169 (2000); United States v. Keels, 48 M.J. 431, 432 (1998); United States v. King, 27 M.J. 327, 329 (C.M.A. 1989).

81. *Brevard*, 57 M.J. at 792. The military judge also abated the proceedings to permit the government to appeal her ruling; however, the Government Appellate Division, after failing to file the necessary documentation on time, elected not to appeal on 29 March 2002. *Id.*

82. *Id*.

83. *Id.* In essence, it was impossible for the government to establish jurisdiction over the accused because it first had to prove the fraudulent discharge, but the military judge had dismissed the fraudulent separation charge with prejudice. The military judge found a speedy trial violation and determined that the government decision not to proceed on the fraudulent separation charge earlier was "based on a grossly negligent and unreasonable interpretation of both the undisputed facts and the existing case law." United States v. Brevard (Headquarters, 1st Infantry Division, July 3, 2002) (order granting defense motion to dismiss) (on file with author).

84. *Brevard*, 57 M.J. at 794.

85. *See supra* note 80.

86. *Brevard*, 57 M.J. at 794 ("[H]ere we hold that a final accounting of pay did not occur under the facts of [Sergeant Brevard's] attempted separation.").

87. *Id.* at 794 n.14.

88. United States v. Brevard, 58 M.J. 124, 127 (2003).

appropriate for the ACCA to consider matters from the first trial for "the limited purpose of reviewing the speedy trial ruling" of the second court-martial, the service court could not rule on issues arising out of the first court-martial.[89] The CAAF recognized that the military judge at the accused's first court-martial had determined by a preponderance of the evidence that the accused had been discharged, and therefore found it necessary for the government to prove that the discharge had been fraudulently obtained beyond a reasonable doubt at the second court-martial.[90]

The *Brevard* decision sends the case back to the second court-martial for trial on the fraudulent separation charge. If the accused is convicted of that charge, jurisdiction in the first court-martial will be established, and the government can proceed with the original charges that were referred to the first court-martial. Article 3(b), UCMJ, clearly indicates that this two-part process is necessary in fraudulent discharge cases. Practitioners may find a lesson, however, in the fact that the ACCA apparently felt that there had been no discharge, fraudulent or otherwise. Had the government appealed the ruling of the military judge from the first court-martial, the ACCA would have had jurisdiction over the issue and could have properly addressed the validity of the accused's discharge. Since the service court's opinion made clear that the discharge had not been completed,[91] it appears likely that the case would have continued without the need to ever convict the accused of a fraudulent separation charge.

While the CAAF opinion remained silent on the fraudulent discharge issue this time, it is very likely that the issue will resurface on direct review of the case. The question that the appellate courts must address is whether the discharge, without regard to the fraud, was a complete and valid discharge as the term is currently defined.[92] In *Brevard*, the question boiled down to whether there had been a final accounting of pay. Is this requirement satisfied when the money leaves the government's hands, when it reaches the service member's account, or when the service member withdraws the money? Is the determination based upon something else entirely? In an age of electronic transfers of money from one account to another, this is now an issue that requires more specificity. When exactly is the final accounting of pay completed? In many cases, the answer to this question will also be the answer to when jurisdiction terminates.

Subject-Matter Jurisdiction and Reservists

The fifth element necessary for court-martial jurisdiction is that the offense be subject to court-martial jurisdiction.[93] This element is further enunciated in RCM 203, which provides, "To the extent permitted by the Constitution, courts-martial may try any offense under the code . . . ."[94] An additional aspect of subject-matter jurisdiction unique to the military is the status of the accused at the time the offense is committed. The U.S. Supreme Court addressed this in *Solorio v. United States*,[95] when it held that court-martial jurisdiction over an offense depends on the status of the accused and not on the "service connection" of the offense charged.[96] Therefore, in determining whether subject-matter jurisdiction exists, it is necessary to look at the service member's status at the time the offense is committed. If the service member is lacking a military status at the time of the offense, there is no jurisdiction over that offense, regardless of whether the offense violates any UCMJ article.[97] For active duty personnel, the question of military status at the time of the offense seldom requires much analysis. For members of the Reserve Component, however, the question becomes much more significant and is often difficult to answer. There are two military statuses in Article 2 that apply to reservists; the first is found in Article 2(a)(1), providing jurisdiction over "persons lawfully called . . . to duty in or for training in, the armed forces."[98] The second is found in Article 2(a)(3), providing for jurisdiction over "[m]embers of a reserve component while on inactive-duty training."[99] For a court-martial to have subject-matter jurisdiction over an offense committed by a

89. *Id*. ("The issue of what, if any, action may be taken with respect to the charges in the first court-martial is not before this court in the present appeal.").

90. *Id*.

91. *Brevard*, 57 M.J. at 794.

92. *See supra* note 80.

93. MCM, *supra* note 1, R.C.M. 201(b)(5).

94. *Id*. R.C.M. 203.

95. 483 U.S. 435 (1987).

96. *Id*. at 436 (overruling *O'Callahan v. Parker*, 395 U.S. 258 (1969), and abandoning the requirement that the offense charged be "service-connected").

97. The various statuses subject to military jurisdiction are found in Article 2, UCMJ. The question of military status at the time of the offense is one of subject-matter jurisdiction. *See Solorio*, 483 U.S. at 439; MCM, *supra* note 1, R.C.M. 203 discussion; *id* R.C.M. 203 analysis, at A21-12. Since these are also the same statuses that are used in determining personal jurisdiction (status at the time of trial), it is common, but incorrect, to view that aspect of subject-matter jurisdiction as an issue of personal jurisdiction.

98. UCMJ art. 2(a)(1) (2002). Active duty includes Active Duty (AD), Active Duty for Training (ADT), and Annual Training (AT). *See id*.

reservist, therefore, the reservist must either be on active duty or on inactive-duty training at the time the offense is committed.[100] This well-settled rule was at issue in two cases this past year, one decided by the CAAF, and another decided by the Air Force Court of Criminal Appeals (AFCCA).

In *United States v. Oliver*,[101] the accused, a member of the Marine Corps Reserve, reported to Camp Lejeune for a period of active duty. The period of active duty was to begin on 25 August 1997 and continue until 27 September 1997. On 25 August, Staff Sergeant (SSG) Oliver checked into the Bachelor Enlisted Quarters (BEQ). He checked out of the BEQ on 7 September, and then checked back into the BEQ on 11 September, staying there until 29 September. On 29 September, he filed a travel claim for his period of active duty and claimed $1888 for lodging expenses.[102] Along with his travel claim, SSG Oliver submitted a computer-generated hotel receipt indicating that he stayed at a nearby hotel from 23 August to 11 September. The receipt contained several obvious alterations and raised the suspicions of personnel at the disbursing office.[103] Following an investigation, SSG Oliver was charged with and convicted of three specifications under Article 132, UCMJ (making a false claim, presenting a false claim, and using an altered lodging receipt in support of the claim).[104] At trial, and in response to the military judge's inquiry into the status of the accused, the trial counsel stated that SSG Oliver was on "medical hold" and would remain on active duty until his medical problems were resolved. The defense did not object to this response, and even stated during opening statement that the accused "was on active duty and 'continues on active duty as a reservist here today.'"[105]

On appeal to the NMCCA, SSG Oliver argued lack of subject-matter jurisdiction.[106] He contended that his active duty ended on 27 September (28 September if one day of travel time is included), and that it was not until 29 September that he made and submitted his travel claim and hotel receipt. He argued that he was not subject to the UCMJ at the time he submitted the alleged false claim.[107] In a 2001 NMCCA opinion, the court found that SSG Oliver received medical treatment on 20 September, which resulted in the Marine Corps placing him on medical hold on 28 September. The court determined that Staff SSG Oliver's medical hold status continued him on active duty, without interruption, past the expiration of his active duty orders and through the date of arraignment and sentencing.[108]

On appeal to the CAAF last year, SSG Oliver argued that "the government must prove sufficient facts to establish subject-matter jurisdiction" over a reservist at trial.[109] He based his argument on his belief that the language at the beginning of Article 132 established a separate element for the offense.[110] The CAAF disagreed, holding that that language, "any person subject to this chapter," was nothing more than a basic jurisdictional prerequisite or baseline that must be met before jurisdiction existed.[111] The court further held that jurisdiction "is an interlocutory issue, to be decided by the military judge, with the burden placed on the Government to prove jurisdiction by a preponderance of the evidence."[112] Staff Sergeant Oliver did not challenge the jurisdiction of the court at trial, but rather raised the issue on appeal. The government, recognizing its burden, then attached SSG Oliver's medical records indicating that he was on medical hold and continued on active duty beyond the expiration of his orders.[113] The CAAF disposed of

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99. UCMJ art. 2(a)(3). Inactive duty training (IDT) typically consists of the weekend drills conducted by Reserve units.

100. *See* UCMJ art. 2(a)(1), 2(a)(3), 2(d).

101. 57 M.J. 170 (2002).

102. *Id.* at 171.

103. United States v. Oliver, 56 M.J. 695, 698 (N-M. Ct. Crim. App. 2001). On the receipt, the middle initial of the patron, the month of arrival, the date of departure, and the room rate had all been altered by hand. *Id.*

104. *Id.* at 697. The NMCCA held that the first two specifications (making a false claim and presenting a false claim) were multiplicious and dismissed the first specification, affirming the findings as to the remaining two specifications. *Id.* at 704.

105. *Oliver*, 57 M.J. at 171-72.

106. *Oliver*, 56 M.J. at 698. An appellant may raise lack of jurisdiction for the first time on appeal. *See* MCM, *supra* note 1, R.C.M. 905(e).

107. *Oliver*, 56 M.J. at 698.

108. *Id.* at 699-700.

109. *Oliver*, 57 M.J. at 171.

110. Article 132, like most of the other punitive articles of the UCMJ, begins with the language, "Any person subject to this chapter . . . ." UCMJ art. 132 (2002).

111. *Oliver*, 57 M.J. at 172.

112. *Id.* (citations omitted).

the issue by finding that medical hold was a valid reason for extending a reservist on active duty.[114]

The CAAF resolved the issue in *Oliver* without addressing the tougher questions of *when* the offense was committed or *when* a reservist's active duty or inactive duty training begins and ends. If a reservist submits a fraudulent travel claim or settlement voucher, does it matter when he signed the paper work? Or is the only important issue the fact that the service member filed the claim in an official capacity? When *does* training for reservists officially begin and when *does* it officially end? While it was unnecessary for the CAAF to address these questions in *Oliver*, the Air Force service court has squarely faced these issues twice in the recent past.

In 2000, the AFCCA decided *United States v. Morse*,[115] an unpublished opinion, factually similar to *Oliver.* The service court found subject-matter jurisdiction existed where an Air Force Reserve colonel filed false travel vouchers, even if the claims had been signed by the accused *after* he completed his travel.[116] Although the court determined that there was ample evidence at trial to conclude that the accused signed the forms before his departure from the base, it stepped beyond the traditional parameters of Reserve jurisdiction by noting that it was irrelevant *when* the accused signed the forms.[117] In its concluding paragraph on this issue, the court stated:

> Finally, even if we were to ignore the overwhelming evidence of subject matter jurisdiction noted above, we would still find jurisdiction based upon the simple and undeniable fact that *the appellant signed these forms in his official capacity as a reserve officer* in the United States Air Force. It was part of *his duty incident to these reserve tours or training* to complete these forms with truthful information and that *duty was not complete until the forms were signed*, regardless of whether or not he completed travel pursuant to his orders. Therefore, it is *immaterial if the appellant did not sign these forms until after completing his travel*. He did so in a duty status.[118]

This analysis of subject-matter jurisdiction is a significant departure from past decisions that viewed status at the time of the offense as *the* determining factor in deciding whether subject-matter jurisdiction exists. Past cases have focused on the accused's military status at the precise moment the offense was committed.[119] The CAAF denied a petition for review in *Morse*,[120] probably because there was ample evidence to support the finding that Colonel Morse signed the forms before he departed from his active duty or inactive duty training. Whether the CAAF agrees with the AFCCA's analysis in *Morse*—that jurisdiction existed because the forms were signed in "his official capacity as a reserve officer"—remains to be seen.

In 2002, the AFCCA decided another case addressing subject-matter jurisdiction over reservists, *United States v. Phillips*.[121] Lieutenant Colonel Phillips was a Reserve nurse ordered to perform her two-week annual training from 12 July 1999 through 23 July 1999. Her orders authorized her one travel day (11 July) to get from her home in Pittsburgh to her duty station at Wright-Patterson Air Force Base, Ohio.[122] She left her home around 1200 hours on 11 July, arrived at her duty station around 1630, and checked into her government quarters. That evening in her quarters, she consumed three marijuana brownies that she brought with her from home. The accused

113. *Id.* at 172-73.

114. *Id.* at 173 ("The medical records submitted clearly indicate that appellant was retained on active duty beyond the expiration of his orders and, therefore, established that the court-martial possessed subject matter jurisdiction over the offense.").

115. No. ACM 33566, 2000 CCA LEXIS 233 (A.F. Ct. Crim. App. Oct. 4, 2000) (unpublished), *petition for review denied*, 55 M.J. 473 (2001). The accused, a colonel in the Air Force Reserve, submitted various travel vouchers for reimbursement for active duty tours and inactive duty training between 15 October 1995 and 3 November 1996. On these forms, the accused swore that he traveled from and returned to Plano, Texas. Based on these forms, the accused was charged with and found guilty of attempted larceny and filing false travel vouchers. *Morse*, 2000 CCA LEXIS 233, at *2.

116. *Morse*, 2000 CCA LEXIS 233, at *17-19. At trial, the accused stipulated that he was serving on active duty or inactive duty for training when he signed the forms, but on appeal he argued that the trial court lacked subject-matter jurisdiction because he signed the forms *after* he was released from active duty or inactive duty for training. *Id.* at *2, 15.

117. *Id.* at *15-19.

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

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

120. United States v. Morse, 55 M.J. 473 (2001).

121. 56 M.J. 843 (A.F. Ct. Crim App. 2002).

122. *Id.* at 844-45.

tested positive for marijuana as part of a random urinalysis test conducted on 16 July. A court-martial later convicted her of wrongful use of marijuana.[123]

On appeal, the accused argued that the court lacked jurisdiction over her wrongful use of marijuana because the use occurred before her two-week active duty period began.[124] The service court disagreed and held that jurisdiction existed under two separate provisions. First, the court found that the accused was "subject to UCMJ jurisdiction on 11 July under Article 2(a)(1), because she was a person 'lawfully called or ordered into . . . duty in or for training . . . from the dates when [she was] required by the terms of the call or order to obey it.'"[125] Second, it found the accused subject to jurisdiction under Article 2(c), the constructive enlistment provision.[126]

With regard to the first provision, the court held that jurisdiction existed under Article 2(a)(1) because the accused was called to active duty pursuant to orders that authorized an optional travel day. The orders gave her a choice; she could be called to duty on 12 July or she could choose the travel day and be called to duty on 11 July. She chose to use the travel day, thus extending her active duty time to 11 July.[127] The court recognized that the accused, in completing her orders at the end of her training, "specifically noted that her tour of duty began on 11 July."[128] The court also held that jurisdiction existed under Article 2(c), the constructive enlistment provision. Article 2(c) provides for jurisdiction over persons serving with the military who: (1) submitted voluntarily to military authority; (2) met the mental competence and minimum age qualifications at the time of voluntary submission; (3) received military pay and allowances; and (4) performed military duties.[129] The court found that all four requirements had been satisfied in this case. First, the accused voluntarily chose to use her travel day and thereby submitted to military authority on that day.[130] Second, it was undisputed that the accused met the mental competence and minimum age requirements. Third, the accused filed for and received full military pay and allowances for 11 July. Fourth, the court found that the accused performed military duties on 11 July, noting that "[t]ravel is a normal part of military duty."[131]

While the dissent believes that the decision is contrary to the holding in *United States v. Cline*,[132] the majority finds that the accused was in a status on 11 July that made her subject to military jurisdiction. The rationale behind both arguments is logical. The dissent relies on the clear holding in *Cline* interpreting the language in Article 2(a)(1) literally. That is, jurisdiction begins *from the date* the soldier is lawfully called to duty, and not the travel day before the date the accused is to begin duty. On the other hand, the majority attempts to apply Articles 2(a) and 2(c) "in a common sense and straightforward manner, consistent with plainly stated congressional intent to subject reservists to UCMJ jurisdiction to the same extent as active duty members."[133] Are reservists subject to military jurisdiction during authorized travel to and from active duty training? The CAAF granted review of this issue, so an answer to this question should be forthcoming.[134]

123. *Id.* at 845.

124. *Id*. The accused claimed that the Air Force did not have in personam jurisdiction over her marijuana use. *Id.* This is simply incorrect as the issue is one of subject-matter jurisdiction, not personal jurisdiction. *See supra* notes 93-97 and accompanying text.

125. *Phillips*, 56 M.J. at 845 (quoting UCMJ art. 2(a)(1) (2002)).

126. *Id*. at 846-47 (citing UCMJ art. 2(c)).

127. *Id.* Later in the opinion, the court notes that when she accepted the optional travel day, the accused filed for and received full military pay and allowances for that day, including a Reserve point for retirement purposes. *Id.* at 846-47.

128. *Id.* at 846.

129. UCMJ art. 2(c).

130. *Phillips*, 56 M.J. at 846. The court determined that the accused had three options: (1) travel to the base on 11 July and simply claim her mileage; (2) travel to the base on 12 July, the day her training was to begin; or (3) accept the authorized travel day, claiming travel reimbursement and full pay and allowances. The accused elected the third option. *Id*.

131. *Id.* at 847. The dissent disagrees with the majority that traveling to the base qualifies as "performing military duties." *Id*. at 848 (Pecinovsky, J., concurring in part and dissenting in part).

132. 29 M.J. 83 (C.M.A. 1989) (finding that jurisdiction over reservists begins at one minute past midnight on the day the orders require the reservist to report for active duty).

133. *Phillips*, 56 M.J. at 847. Congress amended Articles 2 and 3 in 1986 to provide for greater military jurisdiction over reservists. The House Armed Services Committee stated in its report that the changes "would conform the UCMJ to the total-force policy by subjecting members of the reserve components in Federal status to the same disciplinary standards as their regular component counterparts." Willenbring v. Neurauter, 48 M.J. 152 (1998) (quoting H.R. REP. NO. 718, 99th Cong., 2d Sess. 225 (1986)).

134. *See* United States v. Phillips, 57 M.J. 428 (2002) (order granting review). The CAAF affirmed the case as this article was going to print. *See* United States v. Phillips, 58 M.J. 217 (2003).

The AFCCA is certainly leading the way in expanding the traditional lines of subject-matter jurisdiction. Through its decisions in *Morse* and *Phillips*, the court has provided interesting ways to expand the traditional lines of subject-matter jurisdiction over reservists, potentially encompassing acts that occur during periods of time outside active duty or inactive duty training.

As previously stated, the rule is fairly clear: there is no jurisdiction over a reservist who commits an offense when not on active duty or inactive duty training. The AFCCA has expanded this rule, however, to possibly include misconduct that occurs while the service member is engaged in "official duties" incident to active duty or inactive duty training, such as filing travel settlement vouchers or while traveling to a duty station. How far the courts can expand those lines before legislative change is required remains to be seen.

National Guard Jurisdiction

Perhaps the most significant event concerning military jurisdiction this year came in the form of legislative change. The recently enacted 2003 National Defense Authorization Act (NDAA) contains an important tasking for the Secretary of Defense that will potentially simplify future courts-martial of National Guard members when not in federal service.[135]

Jurisdiction over members of the National Guard generally rests with either the federal government or the state to which their National Guard unit belongs. When National Guard members are in a federal status (commonly referred to as a "Title 10" status), court-martial jurisdiction over them rests with the federal government, and soldiers and airmen who commit offenses while in this status are subject to the UCMJ.[136] When National Guard soldiers are in a state status (commonly referred to as a "Title 32" status), court-martial jurisdiction rests with the state. Soldiers and airmen who commit offenses while in a state status are not subject to the UCMJ, but are subject to state laws governing their respective National Guard units. Generally, when the federal government calls National Guard members to active duty, they are in federal service. National Guard members are generally in a state status during their typical weekend drills, and the soldiers and airmen would thus not be subject to the UCMJ during these drills.[137]

Sections 326 and 327 of Title 32 provide general jurisdictional authority for convening courts-martial of National Guard members when in a state status. At first glance, the NDAA appears to change the existing authority to convene courts-martial over National Guard members that are not in federal service.[138] A closer look, however, reveals no substantive changes to existing law. The Act reorganizes the sections by placing essentially the same provisions from sections 328 through 331 into sections 326 and 327, and repealing sections 328 through 333.[139] Members of the National Guard not in federal service are still subject to the "laws of the respective States and Terri-

135. *See* Bob Stump National Defense Authorization Act for Fiscal Year 2003, Pub. L. No. 107-314, § 512, 116 Stat. 2458, 2537 (2002) (codified at 32 U.S.C.S. § 326 (LEXIS 2003)).

136. *See* UCMJ arts. 18-20 (2002).

137. *See id*. art. 2(a)(3) (stating that members of the Reserve Component are subject to the UCMJ "while on inactive-duty training, but in the case of members of the Army National Guard of the United States or the Air National Guard of the United States[,] only when in Federal service").

138. 116 Stat. at 2537. Initial reactions to this legislation indicated that jurisdiction over members of the National Guard not in federal service had been expanded. *See FastTrack*, MARINE CORPS TIMES, Dec. 23, 2002, at 6.

139. 32 U.S.C.S. §§ 326-333 (LEXIS 2003). The provisions addressing punishment were repealed and addressed in section 327 ("Punishments shall be as provided by the laws of the respective States and Territories, Puerto Rico, and the District of Columbia."). Section 328 (Special courts-martial of National Guard not in federal service) and section 329 (Summary courts-martial of National Guard not in federal service) are now contained in new subparagraphs of section 327, which reads as follows:

> (a) In the National Guard not in Federal service, general, special, and summary courts-martial may be convened as provided by the laws of the respective States and Territories, Puerto Rico, and the District of Columbia.
> (b) In the National Guard not in Federal service—
> (1) general courts-martial may be convened by the President;
> (2) special courts-martial may be convened—
> (A) by the commanding officer of a garrison, fort, post, camp, air base, auxiliary air base, or other place where members of the National Guard are on duty; or
> (B) by the commanding officer of a division, brigade, regiment, wing, group, detached battalion, separate squadron, or other detached command; and
> (3) summary courts-martial may be convened—
> (A) by the commanding officer of a garrison, fort, post, camp, air base, auxiliary air base, or other place where members of the National Guard are on duty; or
> (B) by the commanding officer of a division, brigade, regiment, wing, group, detached battalion, detached squadron, detached company, or other detachment.
> (c) The convening authorities provided under subsection (b) are in addition to the convening authorities provided under subsection (a).

Id. § 327.

tories, Puerto Rico, and the District of Columbia," and not the UCMJ.[140] This essentially creates more than fifty different jurisdictions within the National Guard. In what appears to be an attempt to conform the various National Guard jurisdictions to one uniform code of military justice, the NDAA requires the Secretary of Defense to "prepare a model State code of military justice and a model State manual for courts-martial to recommend to the States for use with respect to the National Guard not in Federal service."[141] Proposals of both models are to be submitted within one year of the date of enactment of the NDAA, along with a "discussion of the efforts being made to present those proposals to the States for their consideration for enactment or adoption."[142] The goal seems to be a future consolidation of all the various National Guard military justice statutes into one uniform state code and manual. This achievement would obviously eliminate the differences that currently exist between the various states, and would create a uniform justice system that, through the jurisdiction of the respective states, applies to all National Guard members—a much-needed new development.

Conclusion

Throughout the past fifty years, the changes to military jurisdiction have been marked by various milestones, brought about by needs for clarification, change, or both. The current problems facing the scope of military jurisdiction today are much like the problems of the past. Today, the lack of appropriate jurisdiction over members of the Reserve Component and National Guard seems to be the largest and most immediate concern. While some of the cases discussed here have little or no significant impact on this concern, some of this year's developments are moving us towards the apex of the next jurisdictional watershed event. The two most significant developments are the AFCCA decision in *Phillips*, a case in which the CAAF has granted review, and the legislative efforts to create a uniform code of military justice for the National Guard. The lack of appropriate jurisdiction over reservists and guardsmen will probably continue to plague the vision of a "total force," at least in the immediate future. While the courts can extend jurisdiction over members of the Reserve Component through judicial interpretation in some situations, it will likely take legislative change to truly resolve the problem. That is a discussion for another day, however. At least for now, practitioners must continue to achieve military justice, both in the active and Reserve components, within the jurisdictional framework that currently exists—until we reach the apex of the next watershed event in military jurisdiction.

140. *See id.* § 326.

141. § 512(e)(1), 116 Stat. at 2537. "State" includes the District of Columbia, Puerto Rico, the Virgin Islands, and Guam. *Id.* § 512(e)(5).

142. § 512(e)(4), 116 Stat. at 2537.

You Say You Want a Revolution:[1] New Developments in Pretrial Procedures

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Introduction

The media paid considerable attention to the military justice system this year.[2] This resulted, in part, from the possibility of military tribunals playing a role in America's Global War on Terror, and to lingering debates on the merits of the Cox Commission Report.[3] Civilian commentators focused not only on sensational cases, but also on the process of how the military handles justice. In particular, these articles gravitated to pretrial procedure issues such as convening authority discretion to select panels, refer cases to the courts they convene, and bind the government to pretrial agreements.

Criticism of the military's pretrial process is not new.[4] Four years ago, Congress expressed concern about the panel selection process in the National Defense Authorization Act of 1999.[5] This law required the Secretary of Defense to develop a plan for random selection of members of court-martial panels as a potential replacement for the current selection process. The result, The Joint Service Committee Report (JSC Report),[6] concluded that the current practice of senior commanders personally selecting members best suits the unique needs of the military.[7] Two years later, the National Institute of Military Justice (NIMJ)[8] sponsored a commission to write a report on the state of military justice to commemorate the fiftieth anniversary of the Uniform Code of Military Justice (UCMJ).[9] Senior Judge Walter T. Cox III chaired this effort.[10] The commission's

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1. The Beatles, *Revolution 1*, *on* The White Album (Apple Records 1968).

> You say you want a revolution;
> Well you know,
> We all want to change the world;
> You tell me that it's evolution;
> Well you know,
> We all want to change the world;
> But when you talk about destruction,
> Don't you know you can count me out-in;
> Don't you know it's gonna be alright . . . .

Id.

2. *See, e.g.*, Beth Hillman, *Chains of Command: The U.S. Court-Martial Constricts the Rights of Soldiers—And That Needs to Change*, Legal Affairs, May/June 2002, at 50-52; Edward T. Pound, *Unequal Justice*, U.S. News & World Rep., Dec. 16, 2002, at 19-30.

3. National Institute of Military Justice, Report of the Commission on the 50th Anniversary of the Uniform Code of Military Justice (May 2001) [hereinafter Cox Commission Report], *available at* http://www.badc.org/html/militarylaw_cox.html.

4. *See, e.g.*, Major John P. Saunders, *Hunting for Snarks: Recent Developments in the Pretrial Arena*, Army Law., Apr. 2001, at 14; Major Gregory Coe, *On Freedom's Frontier: Significant Developments in Pretrial and Trial Procedure*, Army Law., May 1999, at 1.

5. Strom Thurmond National Defense Authorization Act for Fiscal Year 1999, Pub. L. No. 105-261, § 562, 112 Stat. 1920, 1925 (1998).

6. U.S. Dep't of Defense, Joint Service Committee on Military Justice, Report on the Methods of Selection of Members of the Armed Forces to Serve on Courts-Martial (Aug. 1999) [hereinafter JSC Report].

7. *See* Manual for Courts-Martial, United States pt. I, ¶ 3 (2002) [hereinafter MCM] ("The purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote effectiveness in the military establishment, and thereby to strengthen the national security of the United States.").

8. The NIMJ is a private non-profit organization based in Washington, D.C. The NIMJ Web site is at http://www.nimj.com.

9. *See* 10 U.S.C.S. §§ 801-946 (LEXIS 2003).

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

report sharply disagreed with the JSC Report. With regard to panel selection, Judge Cox's Commission observed, "[T]here is no aspect of military criminal procedures that diverges further from civilian practice, or creates a greater impression of improper influence, than the antiquated process of panel selection."[11] The Cox Commission called on Congress to modify the pretrial role of the convening authority in selecting court members and making other pretrial legal decisions.[12]

This year's twist to the debate came in the form of mass media focus on military justice. Two articles, Beth Hillman's *Chains of Command*[13] and Edward Pound's *Unequal Justice*,[14] echoed many of the findings and recommendations of the Cox Commission Report. At least with regard to Professor Hillman's article, this was no great surprise; because she served as the Cox Commission's reporter.[15]

Dramatic changes did affect the military justice system this year; however, they were not the fundamental changes called for by Hillman and Pound. Further, these changes came not from Congress, but from the executive branch in the form of a Presidential Executive Order (EO)[16] and an Army Regulation (AR).[17] Taken together, these regulatory changes go far beyond superficially tinkering with the military justice system. They expand rather than limit the role of the convening authority within the military justice system. Specifically, they greatly enhance the authority of Army special court-martial convening authorities (SPCMCAs).[18] Against this turbulent backdrop, the Court of Appeals for the Armed Forces (CAAF)[19] heard cases, wrote opinions, and provided civilian oversight of the military justice system.[20]

This article discusses the media attacks upon the UCMJ, the significant regulatory changes to the *Manual for Courts-Martial* (*MCM*) and *AR 27-10*, and new pretrial developments flowing from service court and CAAF case law. These cases touched on issues regarding court-martial convening authorities, panel member selection, counsel voir dire of members, causal and preemptory challenges, staff judge advocate responsibilities, providence of guilty pleas, and the terms of pretrial agreements.

Media Scrutiny

Chains of Command and *Unequal Justice*[21] both generated considerable discussion among military justice practitioners and scholars. Many of those familiar with trials by court-mar-

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11. *Id.* at 5. The Cox Commission recommended action in four broad areas of court-martial practice and procedure. Three of the recommendations pertain to pretrial practice:

> 1. Modify the pretrial role of the convening authority in both selecting court-martial members and making other pre-trial legal decisions that best rest within the purview of a sitting military judge.
> 2. Increase the independence, availability, and responsibilities of military judges [including the creation of standing circuits staffed by tenured judges who serve fixed terms].
> 3. Implement additional protections in death penalty cases [including trial by twelve-member panels and supplying counsel "qualified" to try capital cases].
> 4. [R]epeal 10 U.S.C. §§ 920 [and] 925, and the offenses specified under the general article, 10 U.S.C. § 134, that concern criminal sexual misconduct[, to be replaced] with a comprehensive Criminal Sexual Conduct Article, such as is found in the Model Penal Code or Title 18 of the United States Code.

Id. Soon after the publication of this report, Congress passed legislation regarding the commission's recommendation to increase capital panel size from five members to twelve. National Defense Authorization Act for Fiscal Year 2002, Pub. L. No. 107-107, § 582, 115 Stat. 1012 (2001) (amending 10 U.S.C. ch. 47, §§ 816(1)(A), 829(b)).

12. Judge Cox sent the completed report to the NIMJ on 25 May 2001. Letter from Judge Walter T. Cox to Eugene R. Fidell, President of the NIMJ (May 25, 2001) (on file with author). The report was then forwarded to the Secretary of Defense and members of Congress on 5 September 2001. Letter from Eugene Fidell, President, National Institute of Military Justice, to Hon. Donald Rumsfeld, Secretary of Defense (Sept. 5, 2001) (on file with author).

13. Hillman, *supra* note 2.

14. Pound, *supra* note 2.

15. Hillman, *supra* note 2, at 52.

16. *See* MCM, *supra* note 7, A25-54.

17. U.S. Dep't of Army, Reg. 27-10, Military Justice (6 Sept. 2002) [hereinafter AR 27-10].

18. UCMJ art. 23 (2002).

19. *See* UCMJ arts. 141-145.

20. UCMJ art. 67.

21. *See supra* note 2.

tial, to include the collective senior leadership of the Judge Advocate General's Corps,[22] strongly disagree with Hillman and Pound's ultimate conclusion that the military justice system fails to protect due process of law for those in uniform. The military justice system, like any system of justice, certainly has room for improvement. The Hillman and Pound articles, however, mislead readers by failing to acknowledge the positive aspects of military practice. Those who understand the strengths of the military justice system, as well as its weaknesses, may hesitate before jumping on the bandwagon to recast the military justice system in a more "civilian" mold.

In evaluating Professor Hillman and Mr. Pound's call to civilianize the military justice system, readers should give special attention to the balancing test expressed by Congress in 10 U.S.C. § 836 (Article 36, UCMJ). Under this statute, Congress charged the President with prescribing rules for courts-martial that "shall, so far as he considers *practicable* . . . apply the principles of law . . . generally recognized in the trial of criminal cases in the United States district courts."[23] Given the explicit statutory goal of mirroring civilian practice to the extent practicable, it is no wonder that military panel selection draws harsh criticism. Stopping the analysis short, however, leads to inaccurate conclusions.

With regard to seating panel members, it is important to note that military counsel exercise causal and peremptory challenges. This right is grounded in 10 U.S.C. § 841 (Article 41, UCMJ). Further, military cases interpreting *Batson v. Kentucky*[24] illustrate how the UCMJ delivers due process to service members in a unique and effective manner. The CAAF chose to move beyond *Batson* and its progeny by being more protective of a member's right to serve on a court-martial panel than a civilian's right to serve on a jury. For example, in *United States v. Moore*,[25] the CAAF eliminated the need for the defense to make a prima facie showing of discrimination before requiring the government to provide a race-neutral reason for exercising a peremptory challenge.[26] In *United States v. Tulloch*,[27] the CAAF went beyond the Supreme Court's holding in *Purkett v. Elem*,[28] requiring the challenged party to provide not just a genuine, but also a reasonable, race- and gender-neutral reason for exercising a peremptory challenge.[29]

Examples of enhanced UCMJ protections of accused service members' due process rights abound. For example, 10 U.S.C.

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22. The DOD General Counsel and the service TJAGs wrote to *U.S. News and World Report* to express their displeasure with Mr. Pound's article. *U.S. News and World Report* chose not to publish the first paragraph, which read,

> Your December 16 cover article, "Unequal Justice," insults your publication as well as the military justice system. Its lack of balance and objectivity also insults the public. We regret that your article did not treat the topic with the same fairness that the military justice system accords service members.

The portion of the letter that *U.S. News and World Report* did publish states:

> "Unequal Justice" leaves the reader with the impression that "lawmakers" have not reviewed the Uniform Code of Military Justice in over 30 years and that civilian oversight of the system does not exist. Every year, the military and civilian leadership of the Department of Defense formally reviews the UCMJ and proposes improvements. In each of the past six years, the Congress and the President have "fine-tuned" the UCMJ. The Court of Appeals for the Armed Forces (five civilian judges appointed by the President and confirmed by the Senate) and the Supreme Court of the United States also oversee and review the military justice system. Military justice proceedings are not "shrouded in secrecy." Unlike the much more secretive grand jury system used in most states and federal courts, the equivalent military procedure allows the defendant and defense lawyer to participate fully, an extraordinary right in comparison with American civilian systems of justice. Other aspects of the UCMJ compare equally favorably with our civilian judicial system. For example, the UCMJ provides defendants with more rights against self-incrimination, broader discovery prior to trial, highly qualified defense counsel at no expense, and a host of other protections that defendants and defense attorneys would love to have in the civilian sector. As Sen. Patrick Leahy, chairman of the Senate Judiciary Committee, observed: "American military justice is the best in the world and includes open trials, right to counsel, and judicial review." It works well every day in vastly different operational settings. It holds the 1.4 million men and women of the armed forces accountable for their actions, but it also treats them fairly and with dignity and respect.

Letter from William J. Haynes II, General Counsel of the Department of Defense; Rear Admiral Michael F. Lohr, Judge Advocate General of the Navy; Major General Thomas J. Romig, Judge Advocate General of the Army; Major General Thomas J. Fiscus, Judge Advocate General of the Air Force; Rear Admiral Robert F. Duncan, Chief Counsel, United States Coast Guard; and Brigadier General Kevin M. Sandkuhler, Staff Judge Advocate to the Commandant, U.S. Marine Corps, to the Editor, U.S. News and World Report (Dec. 23, 2002) [hereinafter Letter to the Editor] (on file with author).

23. UCMJ art. 36 (emphasis added).

24. 476 U.S. 79 (1986) (holding that a party alleging that an opponent was exercising a peremptory challenge for the purpose of obtaining a racially-biased jury must make a prima facie showing of such intent before the party exercising the challenge is required to explain the reasoning behind the challenge).

25. 28 M.J. 366 (1989).

26. *Id.* at 368-69.

27. 47 M.J. 283 (1997).

28. 514 U.S. 765 (1995).

§ 831 (Article 31, UCMJ) codifies the military equivalent of *Miranda*[30] rights. This statute preceded the Supreme Court's decision in *Miranda v. Arizona* by a decade. To this day, the statute offers the military accused superior protections, such as notice of the offense and the requirement that any person subject to the Code give the warnings before questioning a military suspect. In the military, merely being a suspect triggers the Article 31 warnings; civilians' *Miranda* rights are not triggered until they are subject to *custodial* interrogation.[31]

Another example of expansive military due process is 10 U.S.C. § 832 (Article 32, UCMJ), which codifies the military equivalent of grand juries. These military pretrial hearings offer superior protections for the accused, including the right to be present during the taking of evidence; the right to representation by counsel; the right to call, question, and cross-examine witnesses; and the right to remain silent, testify, or make an unsworn statement.[32] As a result, the military pretrial investigation serves as an engine of pretrial discovery for the defense—a right that the civilian defense bar does not enjoy.

In his *U.S. News & World Report* article, Pound cited patently misleading court-martial conviction statistics,[33] choosing not to explain the enhanced set of rights soldiers enjoy when they "cut a deal" and enter into a pretrial agreement. First, service members do not have the right to pled guilty. They may not pled guilty unless they honestly and reasonably believe they are guilty and are able to explain their guilt to the satisfaction of the military judge.[34] Despite entering into a pretrial agreement with the convening authority, service members are still entitled to a full sentencing hearing. And, if the accused "beats" the deal by getting a lower sentence from a judge or panel, the accused benefits by receiving the lesser punishment.[35]

Mr. Pound implies that a commander acting on the findings and sentence of a court-martial is a bad thing. What he fails to explain is that when the commander acts on a court-martial sentence under the authority of 10 U.S.C. § 860 (Article 60, UCMJ), the commander has the option of disapproving, disapproving in part, or approving the findings and sentence, but may *never* increase a punishment adjudged by a court-martial. Thus, every military member who is convicted of an offense gets "a second bite at the apple" in the form of commander clemency before appellate review. Although convening authorities retain great power, they may never change findings of not guilty to guilty, or increase punishments.[36]

The military justice system, like the civilian criminal justice system, must continue to evolve. Contrary to Hillman's observations, the military has not turned a blind eye to the differences between civilian and military practice or the recommendations of the Cox Commission Report.[37] Hillman and Pound both risk throwing the baby out with the bath water. They both reach flawed conclusions because they fail to acknowledge the unique strengths of the military justice system. The center of gravity in the debate about the future of the military justice system is—and must remain—the requirement to promote justice without adversely affecting the efficiency and effectiveness of the military establishment.

The 2002 Amendments

On 11 April 2002, President Bush signed an executive order (EO) enacting the 2002 Amendments to the MCM.[38] These amendments took effect on 15 May 2002. The last EO had been published almost three years earlier.[39] As a result, the 2002 Amendments addressed a backlog of issues, bringing many

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

30. Miranda v. Arizona, 384 U.S. 435 (1966) (requiring rights warnings prior to custodial interrogation).

31. *See* UCMJ art. 31 (2002).

32. *See* 10 U.S.C. § 832(b) (2000).

33. Pound, *supra* note 2, at 29. In a shadow box titled "Slam Dunk," Pound states, "[F]or every 1 acquittal, military prosecutors win more than 9 convictions." He lays out the service conviction rates as: Air Force—92% between 1992 and 2001, Army—92% between 1997 and 2001, and Navy/Marine Corps—96% between 1997 and 2001. *Id.* As presented, these statistics are particularly misleading because they do not break out the number of convictions that resulted from guilty pleas. Between fiscal years 2000 and 2002, 76.9% of Army general courts-martial were guilty pleas. Excluding these cases, the conviction rates for contested Army general courts-martial were 79.1% in 2000, 82.6% in 2001, and 82.5 % in 2002. U.S. Dep't of Army, *Army Court of Criminal Appeals, at* http://www.jagcnet.army.mil/ACCA (last visited Mar. 25, 2003).

34. MCM, *supra* note 7, R.C.M. 910.

35. *Id*. R.C.M. 705.

36. *See* UCMJ art. 60 (2002).

37. *See* Major General (Ret.) Michael J. Nardotti, *Military Commissions*, ARMY LAW., Mar. 2002, at 1 (explaining the unique need for a military justice system); Major Bradley J. Huestis, *New Developments in Pretrial Procedures: Evolution or Revolution?*, ARMY LAW., Apr. 2002, at 20 (analyzing recent case law through the lens of the Cox Commission Report).

38. Exec. Order No. 13,262, 67 Fed. Reg. 18,773 (Apr. 17, 2002), *reprinted in* MCM, *supra* note 7, app. 25, at A25-54 to -73.

minor changes to the practice of military law, and several sweeping changes as well.

The EO amended RCM 201(f)(2)(B), expanding special court-martial (SPCM) jurisdiction to authorize up to one year of confinement and forfeitures of pay. In effect, this increased the SPCM maximum punishment from six months to one year.[40] An amendment to RCM 1003(b)(3) also authorizes SPCMs to impose fines in lieu of or in addition to forfeitures. These changes give SPCMAs greater flexibility to handle misconduct at their own command level. They also align SPCMs more closely with misdemeanor offenses[41] and general courts-martial with felony offenses.[42] Other changes fine-tuned issues affecting discovery, crimes and defenses, protective orders, definitions of prior convictions, and sentencing. The EO also modified rules pertaining to preparing and maintaining records of trial, and post-trial processing.[43]

The EO almost immediately generated one published appellate case, *Taylor v. Garaffa*.[44] In *Taylor*, the accused used cocaine before the EO's effective date, 15 May 2002, but his court-martial was convened and his case referred after 15 May 2002. The defense argued that an internal Navy memorandum, designating the date of commission of an offense as the cut-off for expanded SPCM jurisdiction, should bind the court. The Navy-Marine Court of Criminal Appeals (NMCCA) denied his motion for relief, holding that the cut-off date for the expanded SPCM jurisdiction was the date the convening authority convened the court-martial. Because the SPCM convened Taylor's court-martial after the effective date of the EO, the NMCCA held that the maximum punishment at his special court-martial included confinement and forfeitures for up to twelve months.[45]

The passage of time makes the holding of *Taylor* less important to counsel actively trying cases, but any practitioner who tries cases before a standing panel should still double-check the date the special court-martial was convened. When the offense, investigation, preferral, and referral all take place after 15 May 2002, the lower jurisdictional limits might still apply. This bizarre situation could occur if the court-martial was convened—that is, the members selected—before the effective date of the EO, and the trial judge follows the holding of *Taylor.*

AR 27-10

The Department of the Army published a revised *AR 27-10* on 6 September 2002, with an effective date of 14 October 2002.[46] Paragraph 5-27b now authorizes Army SPCMCAs to refer cases to SPCMs empowered to adjudge bad-conduct discharges (BCD).[47] This change greatly increases the authority of Army commanders who serve as SPCMCAs[48] by deleting previous regulatory restrictions that effectively prevented them from referring cases to BCD SPCMs. For SPCMs involving confinement for more than six months, forfeitures of pay for more than six months, or BCDs, however, the servicing staff judge advocate (SJA) must prepare a pretrial advice, "following generally the format of R.C.M. 406(b)."[49] Consequently, Army SJAs should prepare Article 34-type pretrial advice for all SPCMs. In addition, SJAs must ensure court reporters are detailed to all SPCMs. The rules governing the requirements for verbatim records of trial remain unchanged.[50]

Other changes to *AR 27-10* affected nonjudicial punishment, automatic reductions pursuant to court-martial convictions, national security coordination, automatic suspension of favor-

39. *See* Exec. Order No. 13,140, 64 Fed. Reg. 55,115 (Oct. 26, 1999), *reprinted in* MCM, *supra* note 7, at A25-49 to -53.

40. 67 Fed. Reg. at 18773; *see* MCM, *supra* note 7, app. 25, at A25-54. This change implemented the amendment to 10 U.S.C. § 819 (Article 19, UCMJ) contained in section 577 of the National Defense Authorization Act for Fiscal Year 2000, Pub. L. No. 106-65, 113 Stat. 512 (1999).

41. BLACK'S LAW DICTIONARY 1014 (7th ed. 1999) ("A crime that is less serious than a felony and is usu[ally] punishable by fine, penalty, forfeiture, or confinement (usu[ally] for a brief term) in a place other than prison (such as a county jail).").

42. *Id*. at 633 ("A serious crime usu[ally] punishable by imprisonment for more than one year or death.").

43. *See infra* app. I and II (Summary of Amendments to Punitive Articles and Summary of Amendments to the Rules for Courts-Martial).

44. 57 M.J. 645 (N-M. Ct. Crim. App. 2002).

45. *Id.* at 653.

46. AR 27-10, *supra* note 17.

47. *See id.* para. 5-27. No authority prohibits Navy or Air Force SPCMCAs from exercising their full authority under the *MCM* to send cases to BCD SPCMs. *See* UCMJ art. 19 (2002). Under the previous version of *AR 27-10*, however, Army SPCMCAs did not have the full authority of their counterparts in other services. U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE para. 5-25 (20 Aug. 1999); *cf.* AR 27-10, *supra* note 17, para. 5-27b.

48. *See* UCMJ art. 23 (defining SPCMCAs and their authority). In the Army, brigade-level commanders (O-6 level officers) usually serve as SPCMCAs. Compare this to the Marine Corps, where battalion commanders (O-5 level officers) serve as SPCMCAs. *See* U.S. DEP'T OF NAVY, JUDGE ADVOCATE GENERAL INSTR. 5800.7C, MANUAL OF THE JUDGE ADVOCATE GENERAL § 0120b(1) (27 July 1998) (authorizing commanding officers of Marine Corps battalions to convene special courts-martial); *see also* UCMJ art. 23(a)(7).

49. AR 27-10, *supra* note 17, para. 5-27b. This new quasi-Article 34 pretrial advice requirement applies at SPCMs involving confinement in excess of six months, forfeiture of pay for more than six months, or BCDs. *Id.*

able personnel actions, personal privacy protected in the record of trial, personnel records admissibility, records of trial, military magistrate review, court-martial policy in the reserve component, sexual offender registration, and changes impacting the relationship between the Trial Defense Service and SJAs.[51]

Court-Martial Personnel

New case law has further defined the roles and responsibilities of convening authorities, staff judge advocates, panel members, and counsel. Military appellate courts generally continue to look past technical form to substantive matters. If there is any over-arching pattern, it is the courts' continuing deference to convening authorities, government counsel, and military judges.

Convening Authorities—Who May Convene Courts-Martial?

Convening authorities are commanders whom Congress has empowered to convene or assemble a particular level of court-martial, send soldiers' cases to that level of court-martial, and act on the findings and sentence of courts-martial at that level.[52] The result of the court-martial is not final until the convening authority approves the result. Convening authorities have broad authority to approve, disapprove, or modify the findings and sentence, but may never change a finding from not guilty to guilty or increase a punishment.[53]

There were four noteworthy convening authority cases this year; two were interesting and two were disquieting. The interesting cases were *United States v. Hundley*[54] and *United States v. Brown*.[55] They were particularly interesting because they help define who may properly act as a convening authority.

In *Hundley*, the defense challenged the authority of the accused's battalion commander to convene a SPCM empowered to adjudge a BCD. The commander was a Marine Corps major in charge of a training battalion. The NMCCA declined to perform a functional analysis of whether the convening authority commanded a "separate" battalion and upheld the case because the Secretary of the Navy had designated all Marine Corps battalion commanders as SPCMCAs.[56] Under Article 23(7), UCMJ, therefore, the battalion's commanding officer had the authority to convene a special court-martial.[57]

In *Brown*, the issue was whether the proper convening authority took post-trial action in the accused's case. One SPCMCA convened and referred the accused's case to trial. A second SPCMCA approved the sentence. The NMCCA held that this was error because the action violated the terms of Article 60(c)(1), UCMJ, and RCM 1107(a). The court rejected the government's argument that the accused needed to demonstrate material prejudice to obtain relief. Noting that the clemency stage was the accused's best opportunity to obtain sentence relief, the court held that the government was required to follow the statutory and regulatory scheme as written.[58]

The disquieting convening authority cases were *United States v. Davis*[59] and *United States v. Gudmundson*.[60] They were disquieting because they confront the insidious issue of commander bias in exercising convening authority responsibilities.

Davis, like *Brown*, dealt with the convening authority's duty to approve the findings and sentences of courts-martial, but unlike *Brown*, *Davis* focused on convening authority bias in carrying out these duties. In *Davis*, the convening authority said those caught using illegal drugs would be prosecuted. He also warned those convicted of drug offenses, "[D]on't come crying to me about your situation or your families."[61] The accused asserted in his clemency matters and on appeal that the convening authority should be disqualified because of his "unwillingness to impartially listen to clemency petitions by those convicted of illegal drug use."[62] The CAAF reviews claims of convening authority disqualification to take post-trial action de novo.[63] If the CAAF finds the convening authority is "an accuser, has a personal interest in the outcome of the case, or has a personal bias toward the accused," or "display[s] an

50. AR 27-10, *supra* note 17, para. 5-11a.

51. *See generally* AR 27-10, *supra* note 17; *infra* app. III.

52. UCMJ arts. 22-24.

53. UCMJ art. 60(c); *see also* MCM, *supra* note 7, R.C.M. 1107(b)(4), (c), (d)(1).

54. 56 M.J. 858 (N-M. Ct. Crim. App. 2002).

55. 57 M.J. 623 (N-M. Ct. Crim. App. 2002).

56. *Hundley*, 56 M.J. at 859.

57. *Id*. at 859 (citing UCMJ art. 23(7)).

58. *Brown*, 57 M.J. at 626.

59. 58 M.J. 100 (2003).

60. 57 M.J. 493 (2002).

inelastic attitude toward the performance of [his] post trial responsibility," the court will disqualify him.[64] The CAAF found that the convening authority's direct reference to those convicted of using illegal drugs reflected an inflexible attitude toward the fulfillment of his post-trial responsibilities. Noting that the convening authority's attitude was "the antithesis of the neutrality required," the court reversed the Air Force Court of Criminal Appeals (AFCCA) and returned the case to the Judge Advocate General of the Air Force for action by a different convening authority.[65]

In *United States v. Gudmundson*,[66] the accused also questioned the convening authority's handling of a drug use case. Unlike *Davis*, however, the CAAF ultimately rejected the defense arguments and affirmed the accused's conviction and sentence.

In *Gudmundson*, the convening authority in question ordered that the first one hundred airmen entering the base between 0300 and 0600 hours must provide a urine sample. Airman Gudmundson was one of these airmen and his urine tested positive for lysergic acid diethylamide (LSD). When the defense attempted to suppress the urinalysis evidence as the result of an unlawful search, the convening authority was called to testify to defend his motive for ordering the "inspection" of Gudmundson's urine. The military judge found the urinalysis result was the product of a valid inspection. The same convening authority later took post-trial action on Gudmundson's case. The accused did not raise the issue of convening authority disqualification at trial or in his clemency submission, raising it for the first time on appeal. The CAAF, noting that the defense was aware of the convening authority's involvement, held that Airman Gudmundson waived the issue by failing to object.[67] Defense counsel take heed: raise convening authority disqualification issues at trial or in clemency, or risk waiver![68]

Staff Judge Advocates

Staff judge advocates play a critical role in the pretrial process and must maintain a degree of detachment to be able to provide independent, impartial assessments of cases to their convening authorities.[69] The tension between remaining neutral and detached and becoming partisan advocates for the government, however, may overwhelm SJAs who normally would strive to remain "above the fray." Some SJAs, for example, may feel a responsibility to act as stalwart "gatekeepers" in screening actions for their convening authorities. This principle, when taken to extremes, may lead SJAs to usurp convening authorities' power by holding or delaying defense submissions they view as non-meritorious.

The Cox Commission took the extreme position that "[t]he impression that [SJAs] possess too much authority over the court-martial process is nearly as damaging to perceptions of military justice as the over-involvement of convening authorities at trial."[70] To combat this impression, the Commission suggested, "Staff judge advocates, who act as counsel to commanding officers and not as independent authorities, should not exert influence once charges are preferred, should work out plea bargains only upon approval of the convening authority, and deserve a clear picture of what their responsibil-

61. *Davis*, 58 M.J. at 102. The convening authority's approach was not unlike that expressed by Mark Twain over 100 years ago. Mr. Twain, commenting on pardons, said:

> I have had no experience in making laws or amending them, but still I cannot understand why, when it takes twelve men to inflict the death penalty upon a person, it should take any less than twelve more to undo their work. If I were a legislature, [and] had just been elected [and] had not had time to sell out, I would put the pardoning [and] commuting power into the hands of twelve able men instead of dumping so huge a burden upon the shoulders of one poor petition-persecuted individual.

Letter from to Mark Twain to Whitelaw Reid (Mar. 7, 1873), *available at* http://www.twainquotes.com. The problem is not the attitude alone, but the fact that a legislature (Congress) put the clemency power into the hands of the convening authority alone.

62. *Davis*, 58 M.J. at 106-07.

63. *Id.* (citing United States v. Conn, 6 M.J. 351, 353 (C.M.A. 1979)).

64. *Id.* (citations omitted).

65. *Id.* at 113-14.

66. 57 M.J. 493 (2002).

67. *Id*. at 494. The convening authority, in his capacity as installation commander, ordered "Operation Nighthawk" on the night after a "rave." In his motion to suppress, the accused unsuccessfully argued that Operation Nighthawk was a pretext for an illegal search. *Id*.

68. *See also* Lieutenant Colonel Patricia A. Ham, *Making the Appellate Record: A Trial Defense Attorney's Guide to Preserving Objections—The Why and How*, ARMY LAW., Mar. 2003, at 10 (noting that the CAAF has abandoned past paternalistic tendencies and that very few issues are not subject to waiver).

69. *See, e.g.*, UCMJ art. 34 (2002).

70. COX COMMISSION REPORT, *supra* note 3, at 12.

ities are."[71] The Commission also pointed out that there is a danger that unlawful command influence could flow from SJAs as well as commanders. As such, the Commission recommended that "[t]he Code and the Manual for Courts-Martial should be amended to stress the need for impartiality, fairness and transparency on the part of staff judge advocates as well as all attorneys, investigators, and other command personnel involved in the court-martial process."[72]

Some SJA duties, such as providing Article 34, UCMJ, pretrial advice, require the independent exercise of legal judgment.[73] Other tasks, such as processing defense immunity requests, are more administrative in nature. The CAAF examined both roles when it decided *United States v. Gutierrez*[74] and *United States v. Ivey.*[75]

In *Gutierrez*, the CAAF examined the limits of SJA bias as it relates to the exercise of independent legal judgment.[76] The case turned on whether the SJA, who also served as the chief of justice (COJ), was disqualified from giving the convening authority post-trial advice. Before entry of pleas, the accused moved to dismiss all charges and specifications for alleged violations of his speedy trial rights. The COJ testified in opposition to the motion, claiming that the government processed the accused's case diligently. The military judge denied the motion and accepted the accused's guilty pleas to multiple specifications of larceny, conspiracy to commit larceny, robbery, conspiracy to commit robbery, and receiving stolen property. The court then sentenced Gutierrez to forfeiture of all pay and allowances, reduction to E-1, confinement for five years, and a dishonorable discharge. Afterwards, the COJ assumed duties as the SJA and prepared the post-trial recommendation (PTR) in the appellant's case.[77]

The defense objected, claiming that the COJ should be disqualified from preparing the PTR because of her involvement in the case, based on her testimony in opposition to the speedy trial motion. Since the COJ, as a government counsel, assumed a prosecutorial role in appellant's case before her appointment as SJA, she was disqualified from preparing the SJA post-trial recommendation, which involved evaluating the prosecution.[78] Resolving the issue in favor of the defense, the CAAF held that a staff legal officer who merely gives general advice is not disqualified; however, when the same advisor becomes a participant in the prosecution, she is disqualified.[79]

Gutierrez is especially important because in the future, Army SJAs will be called upon to exercise independent legal judgment more often when carrying out their pretrial duties. Although the UCMJ and the *MCM* only require Article 32, UCMJ, investigations and Article 34, UCMJ, pretrial advice before referral to general courts-martial, new language in *AR 27-10* now requires Article 34-type advice from SJAs to SPCMCAs before referral to a BCD SPCM.[80] This means that SJAs who currently provide Article 34, UCMJ, pretrial advice only to their GCMCAs will now have to provide similar written advice to SPCMCAs within their GCMCA jurisdictions.[81]

In *United States v. Ivey,*[82] the CAAF examined the more mundane and administrative side of the SJA role. At issue was whether the government failed to properly process the accused's requests for immunity for four civilian witnesses. Three days prior to trial the defense requested that the convening authority grant four alleged co-conspirators testimonial immunity. Because these potentially exculpatory witnesses were civilians, the request would ultimately go to the Department of Justice (DOJ) for final approval by the Attorney General. The convening authority did not take action on the defense request before trial. The defense counsel asked the trial judge to grant the requested immunity, or in the alternative, to abate the proceedings pending action by the convening authority. The military judge denied both defense requests. After the

71. *Id.* at 12-13.

72. *Id.* at 13.

73. *See* UCMJ art. 34.

74. 57 M.J. 148 (2002).

75. 55 M.J. 251 (2001).

76. *Gutierrez*, 57 M.J. at 148.

77. *Id.* at 149.

78. *See id.* (citing United States v. Lynch, 39 M.J. 223, 229 (C.M.A. 1994); United States v. Willis, 46 C.M.R. 112, 114 (C.M.A. 1973)).

79. *Id.* at 149-50.

80. AR 27-10, *supra* note 17, para. 5-27b. In Army SPCMs involving confinement in excess of six months, forfeitures of pay for more than six months, or BCDs, the "servicing staff judge advocate will prepare a pretrial advice, following generally the format of [RCM] 406(b)." *Id.*

81. *See id.*

82. 55 M.J. 251 (2001).

accused was convicted at trial, the convening authority took action and denied the defense request.[83]

Addressing the issue on appeal, the CAAF expressly noted that government counsel do not have the authority to de facto deny requests for immunity by withholding them from convening authorities. The court noted that SJAs must submit all requests for immunity, whether from the prosecution or the defense, to the convening authority for decision.[84] With regard to immunity for civilian witnesses, the CAAF held that convening authorities do not have to forward requests they intend to deny to the Attorney General.[85]

In *Ivey*, the CAAF found no discriminatory use of immunity or government overreaching, and found that the proffered testimony was not clearly exculpatory. The court held that the military judge did not abuse his discretion by refusing to order the immunity or abate the proceedings to wait for action by the convening authority.[86]

Convening a Court-Martial—Panel Member Selection

Convening authorities have a statutory duty to personally select panel members according to specific criteria, rather than randomly.[87] Congress requires that convening authorities select members who, in their opinion, are best qualified by virtue of their "age, education, training, experience, length of service, and judicial temperament."[88]

In 2001, the CAAF wrestled with the requirement that convening authorities personally select members for court-martial duty in *United States v. Benedict*.[89] Although this case has been on the books for two years, it remains an important reminder of the responsibilities the UCMJ and the *MCM* place upon commanders exercising court-martial convening authority. In *Benedict*, a Coast Guard admiral's Chief of Staff (COS) selected nine members from a pool of approximately thirty nominees submitted by subordinate commanders.[90] The COS then submitted this list to his convening authority for signature. Shockingly, a majority of the CAAF voted to affirm, noting that it is common practice for convening authorities to rely upon staff assistance to select members. The court held that the convening authority had met the requirements of Article 25, UCMJ, by "personally" selecting the members set forth by his COS.[91]

The majority relied upon pretrial motion transcripts to conclude the convening authority did not completely abandon his responsibility.[92] Judge Baker, concurring, and Judge Effron, dissenting, both raised concerns about the trial court's failure to call the convening authority to testify.[93] To students of the "randomly selected" versus "blue ribbon" panel debate, Judge Effron's dissent contains a valuable discussion of the policies and history behind Article 25. It discusses the legislative ratio-

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83. *Id*. at 254.

84. *Id*. at 256.

85. *Id*.

86. *Id*. at 257.

87. UCMJ art. 25 (2002).

88. *Id*. A majority of the CAAF will analyze a challenge to panel selection not only under Article 25, but also under Article 37, UCMJ. It is simply not enough for the defense to show that qualified potential members appear to be systematically excluded. Defense counsel must also show that this occurred in an attempt to "unlawfully influence" the court. *See, e.g.*, United States v. Upshaw, 49 M.J. 111, 113 (1998) (holding that the good faith administrative error resulting in exclusion of otherwise eligible members, E-6s, was not error). The reasoning of *Upshaw* has been applied by the Air Force and Army service courts of appeal in *United States v. Brocks*, 55 M.J. 614 (A.F. Ct. Crim. App. 2001), and *United States v. Simpson*, 55 M.J. 674 (Army Ct. Crim. App. 2001). In both cases, the convening authority, who excluded members of particular units from consideration for panel member duty, did not err because his motive was to find an unbiased and objective panel. The court remains vigilant, however, when convening authorities appear to use rank as a selection criteria. *See, e.g*., United States v. Kirkland, 53 M.J. 22 (2000). The SJA in *Kirkland* used a memo signed by the SPCMCA to solicit nominees from subordinate commanders. The memo sought nominees in various grades. The chart had a column for E-9s, E-8s, and E-7s, but no place to list nominees in lower grades. To nominate an E-6 or other nominee of lower rank, the nominating officer would have had to modify the form. The convening authority did not nominate or select anyone below E-7 for the panel. The CAAF held that where there was an "unresolved appearance" of exclusion based on rank, "reversal of the sentence is appropriate to uphold the essential fairness and integrity of the military justice system." *Id*. at 25 (quoting United States v. McClain, 22 M.J. 124, 133 (Cox, J., concurring in the result)).

89. 55 M.J. 451 (2001).

90. *Id*. at 452.

91. *Id*. at 454.

92. *Id*. at 454-55.

93. *Id*. at 455, 459. Pretrial testimony from the COS and the SJA indicated that the convening authority signed the convening order without asking any questions or making any changes. Both maintained that had he wanted to do so, the convening authority could have made changes to the list. The CAAF did not order a *DuBay* hearing, but instead relied on pretrial motion transcripts that did not include any testimony from the convening authority. *See id*. at 452-55.

nale behind Article 25 and explains the recommendations within the JSC Report. Most importantly, it communicates the idea that if commanders abdicate their convening authority responsibility to personally select the "best qualified" members, they risk losing their central role in the military justice system.[94]

It is noteworthy that the nominee system the convening authority used in *Benedict* is grounded neither in the UCMJ nor the *MCM*. It is simply a child of tradition. In *United States v. Dowty*,[95] the Assistant Judge Advocate used a novel approach to solicit a pool of court-martial panel nominees; he placed the functional equivalent of a "help wanted" advertisement in a command news bulletin. In the advertisement, the command requested volunteers for panel member duty. Neither the trial judge nor the NMCCA endorsed this practice, but did not reverse it, concluding that the nominee system is preferred, but not required.[96] Given the increased punishments that SPCMs may now dispense, the *Dowty* case takes on greater importance. *Dowty* reminds practitioners that commanders may carry out their duty to personally select members with little or no staff assistance. While it is unlikely that corps or division commanders would welcome this approach, brigade commanders may feel comfortable sitting down with a unit roster and selecting members without the assistance of nominee rosters provided by their staffs or subordinate commanders. *Dowty* stands for the proposition that novel approaches may not curry judicial favor, but will pass legal muster when they fall within the limits of Article 25.

Court Members—Voir Dire and Challenges

Voir dire and challenge case law has highlighted the CAAF's continuing deference to the role of the military judge in the trial process.[97] This trend flows in the same direction as the recommendations of the Cox Commission Report[98] and recent media attacks on the UCMJ.[99] As a result, practice before courts-martial increasingly resembles that in federal district courts. No two cases more clearly illuminate this trend than *United States v. Dewrell*[100] and *United States v. Lambert*.[101] Both cases affirmed military judges' authority to control the conduct of voir dire from the bench. Taken together, these cases demonstrate that military judges have almost unlimited power to control voir dire.[102]

Master Sergeant Dewrell was convicted of committing an indecent act upon a female less than sixteen-years old. On appeal, the defense alleged that the military judge abused his discretion by refusing to allow any defense voir dire questions concerning the members' prior involvement in child abuse cases, or their notions regarding pre-teen girls' fabrications about sexual misconduct. Analyzing the issue under an abuse of discretion standard, the CAAF upheld the trial judge's practice of having counsel submit written questions seven days before trial, not allowing either side to conduct group voir dire, and rejecting the defense counsel's request for case-specific questions.[103] The court reasoned that the military judge did not abuse his discretion because his questions properly tested for a fair and impartial panel and allowed counsel to intelligently exercise challenges.[104]

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94. *Id.* at 456-58.

95. 57 M.J. 707 (N-M. Ct. Crim. App. 2002).

96. *Id.* at 715.

97. *See* Coe, *supra* note 4, at 1 n.8 (discussing the CAAF's "reaffirmation of power and respect" for the military judge).

98. COX COMMISSION REPORT, *supra* note 3, at 6-12.

99. *See, e.g.*, Hillman, *supra* note 2; Pound, *supra* note 2.

100. 55 M.J. 131 (2001).

101. 55 M.J. 293 (2001).

102. *See Dewrell*, 55 M.J. at 131; *Lambert*, 55 M.J. at 293.

103. *Dewrell*, 55 M.J. at 131.

104. *Id.* at 137.

In *Lambert*, the CAAF addressed judicial control of voir dire after an allegation of member misconduct.[105] After the members announced a verdict of guilty to one specification of indecent assault, the accused's civilian defense counsel told the military judge that a member took a book entitled *Guilty as Sin*[106] into the deliberation room. The military judge asked if anyone had the book during deliberations. The military judge conducted voir dire of the member, who identified herself, but did not allow the defense counsel an opportunity to conduct individual or group voir dire. The CAAF noted that "[n]either the UCMJ nor the [*MCM*] gives the defense the right to individually question the members."[107] Analyzing the issue under an abuse of discretion standard, the court held that the military judge did not err by refusing to allow the defense to question the members.[108]

What message should the field take from *Dewrell* and *Lambert*? First, counsel who do not take the time and energy to plan and prepare effective voir dire will not only miss an advocacy opportunity, but also invite the bench to foreclose participation in this critical stage of litigation. Second, the failure of military counsel to prepare effective voir dire creates the risk that military counsel will become silent observers of voir dire, like civilian attorneys who try cases in federal courts.[109] This would be a step backward, because trial and defense counsel are in a far better position to know their cases than military judges. Counsel can and should assist the court in ferreting out actual and implied bias.[110] Fortunately, the most recent amendments to the *Military Judges' Benchbook* leave the voir dire script unchanged. The script continues to prompt military judges to invite counsel questioning of the members.[111] Hopefully, this practice will continue. The fact that trial judges in federal district court generally foreclose counsel participation in voir dire does not mean it is the best way to try a court-martial case.

Causal Challenges

After questioning has been completed and the military judge has sequestered the members, counsel have the opportunity to exercise causal challenges.[112] If counsel show proper grounds for challenges, military judges must grant those challenges.[113] If counsel argue that a member "[s]hould not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality,"[114] the military judge may decide to grant or deny the challenge based on whether the member has an actual or implied bias.[115] Actual bias is a credibility test, viewed through the subjective eyes of the trial judge. Implied bias is an appearance test, viewed through the objective eyes of the public.[116]

United States v. Wiesen[117] did not change the substantive law in the area of peremptory challenges and implied bias, but it is nevertheless a landmark case. A panel of officer and enlisted members convicted Sergeant Wiesen of two specifications of attempted forcible sodomy with a child, indecent acts with a child, and obstruction of justice. He was sentenced to a dishonorable discharge, confinement for twenty years, total forfeitures, and reduction to the lowest enlisted grade.[118] During voir dire, Colonel (COL) Williams, a brigade commander and the senior panel member, identified six of the ten members as his subordinates. The defense, arguing implied bias, challenged

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

106. *See generally* TAMI HOAG, GUILTY AS SIN (1997).

107. *Lambert*, 55 M.J. at 296 (citing *Dewrell*, 55 M.J. at 136).

108. *Id*.

109. MCM, *supra* note 7, R.C.M. 912(d), at A21-61 ("Examination of Members. This subsection is based on Fed. R. Crim. P. 24(a).").

110. United States v. Weisen, 56 M.J. 72, 73 (2001) ("[A] member shall be excused in cases of actual bias and implied bias.").

111. U.S. DEP'T OF ARMY, PAM. 27-9, LEGAL SERVICES: MILITARY JUDGES' BENCHBOOK 45-46 (1 Apr. 2001). Change 1 was published after *Dewrell* and *Lambert* on 1 September 2002. According to the script—which did not change—the military judge asks the members twenty-eight standardized questions and then asks, "Do counsel for either side desire to question the court members?" *Id*. The note then states, "TC and DC will conduct voir dire if desired and individual voir dire will be conducted if required." *Id.*

112. *See* UCMJ art. 46 (2002); MCM, *supra* note 7, R.C.M. 912(f)(2).

113. MCM, *supra* note 7, R.C.M. 912(f)(1)(A)–(M).

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

115. *Id.*

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

117. 56 M.J. 172 (2001) [hereinafter *Weisen I*], *petition for recons. denied*, 57 M.J. 48 (2002) [hereinafter *Weisen II*].

118. *Weisen I*, 56 M.J. at 173.

COL Williams. The military judge denied this causal challenge. The defense then used its peremptory challenge to remove Colonel Williams, but preserved the issue for appeal by stating that "but for the military judge's denial of [the defense] challenge for cause against [COL] Williams, [the defense] would have peremptorily challenged [another member]."[119]

On appeal, a three-judge majority of the CAAF concluded that "[w]here a panel member has a supervisory position over six of the other members, and the resulting seven members make up the two-thirds majority sufficient to convict, we are placing an intolerable strain on public perception of the military justice system."[120] The court held that "the military judge abused his discretion when he denied the challenge for cause against [COL] Williams."[121] Finding prejudice, the court reversed the Army Court of Criminal Appeals (ACCA) and set the findings and sentence aside.[122]

Although *Wiesen* did not change the substantive law in the area of implied bias, it expanded the doctrine to include inter-panel chain-of-command issues. Although all members of the panel made credible disclaimers as to their impartiality, the majority of the CAAF found that the public would objectively view command relationships among members as unfair. Chief Judge Crawford railed against the majority's reasoning in two strong dissenting opinions.[123] She was in complete disagreement with the majority's analysis, which reviewed the trial judge's ruling from the objective point-of-view of the public.[124] In the wake of *Wiesen*, trial judges and counsel must give heightened scrutiny to whether two-thirds of the members work within the same chain of command. If the trial judge denies a defense causal challenge, trial counsel should consider joining the defense challenge to avoid reversal on appeal.

Notwithstanding *Wiesen*, the CAAF recently rejected a defense argument that a military judge abused his discretion by denying a causal challenge against a panel member who admitted that she vacationed with and bought a car from the trial counsel prosecuting the case at bar. In *United States v. Downing*,[125] the court held that "an objective observer . . . would distinguish between officers who are professional colleagues and friends based on professional contact and those individuals whose bond of friendship might improperly find its way into the members deliberation room."[126] While *Downing* did not directly contradict the court's holding in *Wiesen*, because the cases turned on different issues, *Downing* does show the court's reluctance to slide down the slippery slope of implied bias as a basis for reversal. Arguably, an objective public would have more difficulty with a member with close social ties to one of the counsel (*Downing*) than a member with merely professional ties to the senior panel member (*Wiesen*).[127]

Peremptory Challenges—Batson[128]

Once the military judge has ruled on all government and defense causal challenges, each party may then exercise one peremptory challenge.[129] Under *Batson v. Kentucky*, the Supreme Court eliminated racially discriminatory use of peremptory challenges by the government.[130] The Supreme Court has never specifically applied *Batson* to the military, but in *United States v. Santiago-Davila*,[131] the CAAF applied *Batson* to the military through the Fifth Amendment.[132] The mili-

119. *Id.* at 174.

120. *Id.* at 175.

121. *Id.* at 172.

122. *Id.* at 177.

123. *Wiesen II*, 57 M.J. at 50; *Weisen I*, 56 M.J. at 177. Judge Sullivan also filed separate dissenting opinions. *See Weisen II*, 57 M.J. at 56; *Weisen I*, 56 M.J. at 181.

124. *Wiesen II*, 57 M.J. at 50; *Weisen I*, 56 M.J. at 177. A quote from Mark Twain, although not used in any of the opinions, captures the spirit of the twin dissents: "We all do no end of feeling and we mistake it for thinking. And out of it we get an aggregation which we consider a boon. Its name is public opinion. It is held in reverence. It settles everything. Some think it is the voice of God." Mark Twain, *Corn-pone Opinions*, *available at* http://www.twainquotes.com/Public_opinion.html (last visited Mar. 13, 2003).

125. 56 M.J. 419 (2002).

126. *Id*. at 423.

127. *Id.* (Crawford, C.J., concurring in part and in the result), and 424 (Sullivan, S.J., concurring in the result).

128. Batson v. Kentucky, 476 U.S. 79 (1986) (holding that a party alleging racially discriminatory use of a peremptory challenge must make a prima facie showing of such intent; opponent must then explain the racially neutral reasoning behind the challenge).

129. UCMJ art. 41(b)(1) (2002); MCM, *supra* note 7, R.C.M. 912(g).

130. *Batson*, 476 U.S. at 100.

131. 26 M.J. 380 (C.M.A. 1988).

tary courts have even gone beyond *Batson* and its progeny by being more protective of a member's right to serve on a panel than civilian courts have been of a civilian's right to serve on a jury. For example, in *United States v. Moore*,[133] the CAAF eliminated the need for the defense to make a prima facie showing of discrimination before requiring the government to provide a race-neutral reason for exercising a peremptory challenge.[134] In *United States v. Tulloch*,[135] the CAAF went beyond the Supreme Court decision in *Purkett v. Elem*,[136] requiring the challenged party to provide a reasonable, race- and gender-neutral reason for exercising a peremptory challenge.[137] Against this backdrop, the CAAF continues to develop military case law relating to peremptory challenges.

In two cases decided in 2000, the CAAF seemed to back away from *Tulloch* and move toward the less restrictive standard the Supreme Court set in *Purkett*. In *United States v. Norfleet*,[138] the trial counsel challenged the sole female member of the court. In response to the defense counsel's request for a gender-neutral explanation, the trial counsel stated the member "had far greater court-martial experience than any other member" and would dominate the panel, and that she had potential "animosity" toward the SJA office.[139] The CAAF ruled that the military judge's failure to ask the trial counsel to explain the "disputes" between the member and the SJA office was not an abuse of discretion.[140] The CAAF upheld the denial of the defense's *Batson* challenge, finding that the government responded to the objection with a valid reason and a separate reason that was not inherently discriminatory, and for which the defense could not demonstrate any pretext.[141]

The CAAF further limited *Tulloch* when it decided *United States v. Chaney*.[142] The trial counsel in *Chaney*, as in *Norfleet*, used a peremptory challenge against the sole female member. After a defense objection, trial counsel explained that the reason for the challenge was "her profession, not her gender."[143] The member in question was a nurse. The military judge interjected that in his experience, trial counsel rightly or wrongly felt members of the medical profession were overly sympathetic, but that this was not a gender issue. The defense did not object to the judge's comment or request further explanation from the trial counsel.[144] The CAAF, noting that the military judge's determination is given great deference,[145] upheld the military judge's ruling permitting the peremptory challenge. The CAAF stated that it would have been better for the military judge to require a more detailed clarification by the trial counsel, but that the defense failed to show that the trial counsel's occupation-based peremptory challenge was "unreasonable, implausible or made no sense."[146]

In 2001, the CAAF confronted the issue of whether playing the "numbers game" could survive a *Batson* challenge in *United States v. Hurn*.[147] In *Hurn*, the defense objected after the trial counsel exercised a peremptory challenge against the panel's only non-caucasian officer.[148] The trial counsel said that his basis "was to protect the panel for quorum."[149] The CAAF

132. U.S. CONST. amend. V.

133. 28 M.J. 366 (C.M.A. 1989).

134. *Id.* at 368-69.

135. 47 M.J. 283 (1997).

136. 514 U.S. 765 (1995).

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

138. 53 M.J. 262 (2000).

139. *Id.* at 271.

140. *Id.* at 272.

141. *Id.*

142. 53 M.J. 383 (2000).

143. *Id.* at 384.

144. *Id.*

145. *Id.* at 385.

146. *Id.* at 386.

147. 55 M.J. 446 (2001). The "numbers game" refers to the use of challenges to manipulate the number of members who sit on the panel and ultimately cast votes for the court's findings and sentence. Although most findings of guilt require a "guilty" vote by at least two-thirds of the members, the de facto percentage required is significantly higher when the panel is composed of five, seven, or eight members. *See* MCM, *supra* note 7, R.C.M. 921(c)(2)(B).

held that the reason proffered did not satisfy the underlying purpose of *Batson*, *Moore*, and *Tulloch*, which is to protect the participants in judicial proceedings from racial discrimination.[150] With this decision, the CAAF appeared to reverse the deferential trend set in *Chaney* and *Norfleet*. *Hurn* seems to favor the more restrictive, objective standard of reasonableness the court applied in *Chaney* in 1997.

Pleas and Pretrial Agreements

Pleas and pretrial agreements are an area where appellate courts are likely to hold military judges and convening authorities accountable for errors that might be deemed harmless in other areas.[151] This conservative approach might be explained by the fact that military plea-bargaining is not grounded in statute, and has only been formally recognized by the President in RCM 705 since 1984.[152] During this term, Judge Baker clearly articulated the CAAF's continued cautious approach in this area:

> Courts have long recognized that the decision to pled guilty is a serious and consequential decision. . . . [It] is also a sobering decision because it involves the waiver of a number of individual constitutional rights . . . . These concerns are no less important in our military system of justice . . . . To ensure that the requirements of due process are complied with, the federal civilian system and the military system have created a number of protective measures to ensure that pleas are entered into voluntarily and knowingly. . . . The military justice system imposes even stricter standards on military judges with regards to guilty pleas than those imposed on federal civilian judges. . . . [M]ilitary judges, unlike civilian judges, [are required] to resolve inconsistencies and defenses during the providence inquiry . . . . In *United States v. Care*, this Court imposed an affirmative duty on military judges, during providence inquires, to conduct a detailed inquiry into the offenses charged, the accused's understanding of the elements of each offense, the accused's conduct, and the accused's willingness to pled guilty.[153]

The CAAF's approach is clear; any differences between the civilian and military law regarding pleas and pretrial agreements accrue in favor of the military accused. For example, the military system goes to great lengths to avoid convicting the innocent. As a result, service members do not have the right to pled guilty.[154] They may not pled guilty unless they honestly and reasonably believe that they are guilty, and can explain their guilt to the satisfaction of the military judge.[155] If service members attempt to enter guilty pleas "improvidently or through lack of understanding of [their] meaning and effect," or if they fail or refuse to pled, "a plea of not guilty will be entered."[156] In capital cases, the accused may never pled guilty.[157]

Last term, the CAAF addressed the military judge's burden to secure a voluntary and intelligent guilty plea from the accused in *United States v. Roeseler*.[158] Under the terms of Specialist Roeseler's pretrial agreement, he pled guilty to conspiracy to murder a soldier in his unit and attempted murder of two people who did not exist.[159] On appeal, the accused argued that

148. *Id.* at 447-48.

149. *Id.* at 448.

150. *Id.* at 449 (reversing the NMCCA and remanding the case for a *DuBay* hearing to address the issue of the trial counsel's post-trial affidavits). These affidavits detail additional reasons the government exercised its peremptory challenge against the lone minority member. *Id.* at 450. This spring, after the *DuBay* hearing, the CAAF affirmed on grounds unrelated to the "protecting quorum" rationale given by government counsel at trial. 58 M.J. 199 (2003).

151. In particular, military judges need to be careful to ensure the accused is truly provident before accepting a guilty plea. *See, e.g.*, United States v. Care, 18 C.M.R. 535 (C.M.A. 1969). In addition, convening authorities must avoid stepping on the unintended consequences landmine by refusing to enter into pretrial agreements whose terms might be beyond the convening authorities' power. *See, e.g.*, United States v. Mitchell, 50 M.J. 79 (1999).

152. Major Mary M. Foreman, *Let's Make a Deal!—The Development of Pretrial Agreements in Military Criminal Justice Practice*, 170 MIL. L. REV. 53 (2001).

153. United States v. Perron, 58 M.J. 781 (2003) (citing *Care*, 18 C.M.R. at 535).

154. *See* UCMJ art. 45 (2002); MCM, *supra* note 7, R.C.M. 910(d).

155. *See Care*, 18 C.M.R. at 535.

156. UCMJ art. 45(a). *See also Care*, 18 C.M.R. at 535.

157. UCMJ art. 45(b).

158. 55 M.J. 286 (2001).

159. *Id.* at 286-87.

his guilty pleas regarding the fictitious individuals were improvident because the military judge failed to instruct on the defense of impossibility, and because one of the conspirators knew that the targets did not exist.[160] The CAAF agreed with the accused that guilty pleas must be both voluntary and intelligent and that the military judge has the responsibility to ensure that the accused understands the nature of the offenses to which he is pleading guilty. The court, however, disagreed that the accused was "entitled to a law school lecture on the difference between bilateral and unilateral conspiracy."[161] Reasoning that the trial judge must have some leeway concerning the exercise of her responsibility to explain a criminal offense to an accused, the court held that the military judge's explanations in this case were sufficient.[162]

This term, the CAAF again looked at the military judge's duty to ensure that an accused's plea is knowing and voluntary. In *United States v. Redlinski*,[163] the CAAF examined a record of trial to determine whether the military judge erred by failing to adequately explain the elements of attempted distribution of marijuana to Seaman Apprentice Redlinski, thereby rendering his pleas of guilty improvident. Reversing the Coast Guard Court of Criminal Appeals (CGCCA), the CAAF held that the *Care* inquiry conducted at trial was inadequate. Although the military judge accurately told Redlinski the elements of the offense, he failed to explain any of them explicitly. In other words, the record recited the four elements of attempt, but failed to demonstrate the accused understood any of the concepts involved.[164]

Redlinski does not overrule *Roeseler*; it stands for the proposition that for a guilty plea to be provident, the record of trial must show that the military judge adequately explained the elements of each offense. If the military judge fails to do so, there is reversible error, unless it is clear from the entire record that the accused knew the elements, admitted them freely, and pled guilty because he was guilty. *Roeseler* continues to stand for the proposition that the accused is not entitled to a "law school lecture" on the technicalities of the law.[165] Taken together, both opinions show that the CAAF will look at the context of the entire record to determine whether an accused is aware of the elements, either explicitly or inferentially, rather than focusing on a technical listing of the elements of an offense.

It is important to note that in *Roeseler* and *Redlinski*, the court focused more on the adequacy of the trial judge's explanations than on the factual predicate for the accused's pleas. The CAAF's decisions during its last term continue to follow this paternalistic view.

Factual Predicate for Guilty Plea

In *United States v. Sims*,[166] the accused pled guilty to committing an indecent act by momentarily touching the breast of a female service member after she lifted her shirt up for him. Staff Sergeant Sims and the "victim" were in his bedroom with the door closed (but unlocked) during a party at his assigned military quarters. The CAAF held that the consensual sexual act was not open and notorious, as required to establish an indecent act based on otherwise lawful conduct. The CAAF reasoned that under the circumstances, the touching was not reasonably likely to be seen by others; therefore, there was no factual predicate for Staff Sergeant Sims's conclusory stipulation that there was a substantial risk that persons entering the room would discover his activity. The CAAF held that the guilty plea was improvident and reversed the case.[167]

In *United States v. Jordan*,[168] the accused pled guilty to unlawfully entering a houseboat. The basis of the charge was that the accused leaned over the gunwale of a civilian boat. He admitted doing so, stating that he also lost his balance and that his feet momentarily lifted from the dock. The CAAF reversed the accused's conviction for unlawful entry under Article 134, UCMJ, because the providence inquiry did not sufficiently establish that his conduct was prejudicial to good order and discipline, or that it was of a nature to bring discredit upon the armed forces.[169]

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160. *Id.* at 288.

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

162. *Id.* at 290.

163. 58 M.J. 117 (2003).

164. *Id.* at 119.

165. *Id.*

166. 57 M.J. 419 (2002).

167. *Id.* at 422.

168. 57 M.J. 236 (2002).

169. *Id.* at 240.

The question in *United States v. Bullman*[170] was whether the providence inquiry established the necessary factual predicate to support a guilty plea to dishonorable failure to pay a just debt. Captain Bullman, an Air Force officer stationed in Korea, pled guilty to failure to pay a debt to the Army and Air Force Exchange Service (AAFES). The majority of the CAAF found his guilty plea improvident because the trial judge failed to define dishonorable conduct with respect to an AAFES debt, failed to elicit a factual predicate for dishonorable conduct regarding the debt, and failed to resolve inconsistencies which indicated an inability to pay the debt and a lack of deceit or evasion. The CAAF concluded that a mere failure to pay a debt does not establish dishonorable conduct; a negligent failure to pay a debt is not dishonorable. The term "dishonorable" connotes a state of mind amounting to gross indifference or bad faith, and is "characterized by deceit, evasion, false promises, denial of indebtedness, or other distinctly culpable circumstances."[171]

Chief Judge Crawford filed feisty dissents in each of the three cases discussed above.[172] In each dissent, she argued that the majority should look beyond the accused's responses to the totality of the record in deciding whether a factual predicate exists for each and every element of each specification. The majority opinions nevertheless illustrate that military judges must be extremely careful to elicit facts from the accused to support guilty pleas. Military judges must be meticulous and, if necessary, take extra time on the record to clarify potential issues—or even reject improvident pleas at trial—rather than invite further litigation on appeal.

Permissible Use of Pleas and Providence Inquiry

The application of the rules concerning the use of guilty pleas took center stage as the CAAF reversed the ACCA in *United States v. Kaiser.*[173] In *Kaiser*, the reversible error resulted from the military judge's decision to inform the members that the accused had pled guilty to some offenses, but not others.[174] *Kaiser* and cases such as *United States v. Grijalva*[175] serve as important reminders of how to try a mixed-plea case.

Before discussing the facts of *Kaiser*, a review of the general rules concerning the use of an accused's pleas and providence inquiry admissions is appropriate. Once the military judge finds an accused's guilty plea provident, the government may try to use the accused's plea and sworn statement made during the providence inquiry to prove greater or additional offenses, or as aggravation evidence during sentencing.[176] As a general rule, military judges should defer informing court members about the offenses to which the accused pled guilty until after the announcement of findings on the contested offenses.[177] There are two exceptions to this general rule: (1) when the accused asks the court to inform the members about the earlier guilty plea; and (2) when the guilty plea is to a lesser-included offense and the government intends to prove the greater offense.[178] Unless the exceptions apply, trial judges may not tell the members about guilty pleas until after the announcement of findings on any contested offenses.[179] The rules regarding the use of the accused's statements during the providence inquiry are even more restrictive than the rules regarding the use of pleas. The government may not use the accused's statements from the providence inquiry to prove additional offenses. The

170. 56 M.J. 377 (2002).

171. *Id.* at 382-83 (quoting MCM, *supra* note 7, pt. IV, ¶ 71c).

172. *Sims*, 57 M.J. at 423; *Jordan*, 57 M.J. at 243; *Bullman*, 56 M.J. at 383. Senior Judge Sullivan also wrote dissenting opinions in *Jordan*, 57 M.J. at 244, and *Bullman*, 56 M.J. at 384.

173. 58 M.J. 146 (2003).

174. *Id.* at 149-150.

175. 55 M.J. 223 (2001). In *Grijalva*, the accused shot his sleeping wife in the back. At trial, the accused described the shooting, but vacillated in his response to the question of whether he actually wanted to kill his wife. As a result, the military judge rejected the accused's plea of guilty to attempted premeditated murder, but accepted his plea to the lesser included offense of aggravated assault by intentional infliction of grievous bodily harm. The government then elected to "prove up" the greater offense. On the merits, tried before the military judge alone, the trial judge used not only the accused's plea to the lesser offense, but also his admissions during the providence inquiry. The military judge convicted the accused of attempted premeditated murder. The CAAF held that the trial judge properly used the accused's plea to the lesser included offense, but erred by considering statements made by the accused during the plea inquiry. Although it found error, the CAAF found that the error was harmless beyond a reasonable doubt and affirmed. *Id.* at 228.

176. *See* MCM, *supra* note 7, R.C.M. 913(a) discussion.

177. *Id.* (stating that, if the accused has entered mixed pleas, the military judge should ordinarily defer informing the members of the offenses to which the accused pled guilty until after the members have announced their findings on the remaining contested offenses); *see also* United States v. Smith, 23 M.J. 118, 120 (C.M.A. 1987); United States v. Hamilton, 36 M.J. 723 (A.C.M.R. 1993) (observing that it was inappropriate to so advise court members; testing for prejudice and finding that remedial measures were needed).

178. MCM, *supra* note 7, R.C.M. 913(a) discussion; United States v. Irons, 34 M.J. 807 (N.M.C.M.R. 1992) (holding that the military judge committed error in not cleaning up the flyer, which reflected the greater offense to which the accused pled not guilty and which the government did not intend to pursue; holding that the accused's failure to object did not waive this issue).

government may, however, use the accused's statements as aggravation evidence during the sentencing phase of trial.[180]

In *Kaiser*, the accused was a married training non-commissioned officer assigned to the Defense Language Institute. Sergeant Kaiser pled guilty to two of four specifications alleging that he disobeyed his commander's order to refrain from forming non-professional relationships with trainees. He also pled guilty to two of three charged adultery specifications.[181] At a trial before members, in which the government sought to prove the remaining, contested specifications, the government gave the court a flyer that included the specifications to which Sergeant Kaiser had pled guilty. Cutting off a defense objection, the military judge said, "If you take a look at Page 46 of *DA Pam 27-9* [the *Military Judges' Benchbook*], you'll note that the members are informed that that has occurred. That's why those specifications remain on it. Okay?"[182] The CAAF noted that the *Benchbook* "does not contain such a requirement."[183] The *Benchbook*, RCM 913(a), and the discussion under RCM 910(g), all contain the same guidance: Do not inform the members about a guilty plea unless the defense requests or it involves a lesser-included offense. Concluding that the military judge's decision was prejudicial error, the CAAF reversed and set aside the panel's findings of guilty.[184]

Permissible and Impermissible Terms in Pretrial Agreements

The *MCM* recognizes the right of an accused to make certain promises or waive certain procedural rights as bargaining chips in negotiating a pretrial agreement.[185] There are, however, provisions that an accused may not waive.[186] For example, the *MCM* prohibits provisions that violate public policy.[187] In addition to disapproving the use of certain terms, the CAAF has sanctioned the use of several pretrial agreement provisions that are not specified in the *MCM*.[188]

This year, the CAAF heard *United States v. Edwards*,[189] in which the accused argued that a provision of the pretrial agreement impermissibly waived his right to litigate an issue pertaining to his Sixth Amendment right to counsel.[190] This was an issue of first impression for the CAAF.[191]

Airman Edwards was prosecuted for wrongful use of LSD.[192] After his defense counsel provided notice to military investigators that all requests for questioning must go through counsel, the Air Force Office of Special Investigations interrogated the accused without providing notice to the defense counsel. As part of a negotiated pretrial agreement, the defense agreed to drop constitutional arguments that the interrogation violated the Sixth Amendment.[193] The CAAF noted that it would strike any term that violated public policy from a pretrial

179. MCM, *supra* note 7, R.C.M. 910(g). Typically, the military judge will enter findings immediately after acceptance of a plea. *Id.* When the accused pleads guilty to a lesser included offense, however, and the prosecution intends to go forward on the contested charge, (1) the military judge should *not* enter findings after the accused pleads guilty to the uncontested offenses, *id.* R.C.M. 910(g)(2), and (2) before commencement of trial on the merits, the military judge must instruct the members that they should "accept as proved the matters admitted in the plea, but must determine whether the remaining elements are established." *Id*. R.C.M. 920(e) discussion.

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

181. United States v. Kaiser, 58 M.J. 146 (2003).

182. *Id*. at 147.

183. *Id*. at 149-50.

184. *Id.* at 150-54.

185. MCM, *supra* note 7, R.C.M. 705(c)(2).

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

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

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

189. 58 M.J. 49 (2003).

190. *Id*. at 58.

191. *Id.*

192. *Id*. at 50.

193. *Id*. at 54.

agreement, but held that this particular waiver did not violate public policy.[194]

The CGCCA also heard a case of first impression last term. In *United States v. Libecap*,[195] the accused contended that his pretrial agreement, which required him to request a BCD at trial, was unenforceable. The CGCCA concluded that RCM 705(c)(1) prohibited the provision because it deprived the accused of a complete sentencing proceeding by negating the value of putting on a defense sentencing case. The requirement to request a BCD also improperly placed the accused in the position of either giving up a favorable pretrial agreement or foregoing a complete sentence proceeding.[196] For similar reasons, the CGCCA also held that this provision was against public policy. The court held that this provision prejudiced the accused, even though he had not requested a BCD at trial, because it still precluded him from telling the military judge that he wanted a second chance and from arguing for a sentence that did not include a punitive discharge. Since the accused had specifically stated that the error did not affect the voluntariness of his pleas, the appellate court determined that the appropriate remedy was a rehearing on sentence.[197]

Unintended Consequences

The nightmare issue of unintended consequences versus mutual misunderstanding has been haunting military practitioners for the last four years. Simply stated, a guilty plea entered pursuant to a pretrial agreement is not provident unless the accused receives the benefit for which he bargained. The impact of this principle is often delayed, and thus devastating to the government's case. For example, if the accused has bargained for his pay to go to his family post-trial and the convening authority is unable to direct pay and allowances to his family, the appellate courts will set aside the underlying conviction. This may occur years after the accused enters his original guilty pleas.

In cases spanning from 1960 to 1995, military appellate courts found such issues to be collateral and did not consider them sufficient justification to upset prior guilty pleas.[198] Four years ago, however, the CAAF decided *United States v. Mitchell*.[199] In *Mitchell*, the court departed from settled military case law and applied a 1971 Supreme Court case, *Santobello v. New York*,[200] to military practice. The heart of *Santobello* is the idea that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such a promise must be fulfilled."[201]

By applying the holding of *Santobello* to the facts of *Mitchell*,[202] the CAAF focused on ensuring that the accused received the "benefit of his bargain."[203] The court also signaled that when personal and financial regulations obviate the terms of a pretrial agreement, such impact will no longer be considered collateral.

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194. *Id.* at 59-63.

195. 57 M.J. 611 (C.G. Ct. Crim. App. 2002).

196. *Id.* at 615.

197. *Id.* at 618.

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

199. 50 M.J. 79 (1999).

200. 404 U.S. 257 (1971).

201. *Id.* at 262.

202. Mitchell, approaching the end of a six-year enlistment, agreed to voluntarily extend his enlistment for nineteen months. Before he entered the extension period, he committed misconduct and faced trial. The accused and the convening authority signed a pretrial agreement whereby the convening authority agreed to suspend any adjudged forfeiture of pay and allowances to the extent that such forfeiture would result in the accused receiving less than $700 per month. The accused was tried five days before the beginning of the extension to his enlistment. Under Air Force personnel regulations, he lost his eligibility to extend and his entitlement to pay because he was confined. *Mitchell*, 50 M.J. at 80. The defense argued that the unanticipated termination of this pay status reflected substantial misunderstanding of the effects of his pretrial agreement. *Id.* at 81-82. The CAAF remanded the case for a *DuBay* hearing. On rehearing, the Air Force Court of Criminal Appeals found that the approval of the accused's retirement was taken without regard to his pretrial agreement, but that, for a number of reasons, no further relief was required. United States v. Mitchell, No. 31421, 2000 CCA LEXIS 150 (A.F. Ct. Crim. App. May 26, 2000) (unpublished). Despite the fact that Mitchell's retirement mooted the issue in his case, the decision set a precedent. If the accused did not receive the benefit of his bargain, the CAAF would find the pleas improvident and set the findings aside.

203. *Mitchell*, 57 M.J. at 80-82.

The CAAF followed the precedent set in *Mitchell* when it decided *United States v. Williams* (*Williams I*)[204] and *United States v. Hardcastle*.[205] In both cases, the CAAF found that the accused had not received the benefit of his bargain, and that the faulty provision was material in that it had induced the pleas. As a result, the CAAF set aside the guilty pleas, reversed the cases, and authorized rehearings.[206]

In *United States v. Smith*,[207] the CAAF vented its frustration at practitioners for their failure to avoid stepping on the unintended consequences landmine. In a concurring opinion, Chief Judge Crawford wrote, "We are once again faced with the unfortunate, if not inexcusable, situation where an accused was beyond his ETS date at trial and, apparently, none of the participants recognized the significance of this important fact."[208] In reversing and remanding *Smith*, the CAAF stated that the remedy "is either specific performance of the agreement or an opportunity for the accused to withdraw from the plea."[209] The CAAF, citing *Mitchell*, also noted that the government "may provide alternative relief if it will achieve the objective of the agreement."[210]

An ounce of prevention is worth a pound of cure, but what can the government do if an issue is missed at trial and pokes through the post-trial muck years later, like an unmarked landmine? Could "alternative relief" defuse this fatal situation? That was precisely the issue that the CAAF faced in *United States v. Perron*.[211] In *Perron*, the accused agreed to pled guilty in exchange for sentence limitations, including a waiver of forfeitures in favor of his family. Before the trial, however, the accused's term of service expired. After his conviction, the accused entered a no-pay status. In his clemency request, the defense counsel asked the convening authority to release the accused from confinement "to gain immediate employment . . . to allow for the financial relief his family desperately needs."[212] The convening authority did not grant the request, opting instead to grant alternative relief.[213]

A tortured set of appeals and remands followed, in which counsel argued over the adequacy of the alternative relief.[214] The issue that finally reached the CAAF was whether convening authorities and appellate courts may "fashion an alternative remedy of [their] own choosing" against the accused's wishes.[215] The CAAF responded that they may not. The court first reasoned, "It is fundamental to a knowing and intelligent plea that where an accused pleads guilty in reliance on the promises made by [the] Government in a pretrial agreement, the voluntariness of that plea depends on the fulfillment of

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204. 53 M.J. 293 (2000) [hereinafter *Williams I*]. In *Williams I*, the accused was on legal hold after his term of service expired. *Id.* at 294-95; *see* MCM, *supra* note 7, R.C.M. 202(c) ("[T]he servicemember may be held on active duty over objection pending disposition of any offense for which held and shall remain subject to the code during the entire period."). Neither the government nor the defense was aware of the Department of Defense (DOD) regulation that required a service member on legal hold and subsequently convicted of an offense to forfeit all pay and allowances. On appeal, the government conceded that the pretrial agreement, which required the convening authority to disapprove forfeitures when none would exist after trial, invalidated the providence inquiry. *Williams I*, 53 M.J. at 295.

205. 53 M.J. 299 (2000). In *Hardcastle*, the accused's pretrial agreement required the convening authority to defer and waive forfeitures in excess of $400 per month. After his court-martial, the accused's enlistment expired, placing him in a no-pay status. *Id*.

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

207. 56 M.J. 271 (2002). In *Smith*, the accused submitted RCM 1105 matters to the convening authority. In these matters, he pointed out that the convening authority had not ensured that pay and allowances went to the accused's dependents. In lieu of the bargained-for financial support, the accused requested early release from confinement so he could support his family. Although the convening authority only approved thirty-six months of the accused's forty-month sentence of confinement, neither the convening authority nor his staff judge advocate commented on the government's inability to defer and waive automatic forfeitures once the accused, who was on legal hold, was convicted. *Id*. at 275-77. As a result, the government's failure to fulfill the material term of the pretrial agreement made the accused's pleas improvident. *Id*. at 279-80.

208. 56 M.J.271, 280 (2002) (Crawford, C.J., concurring in part and in the result).

209. *Id*. at 273.

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

211. 58 M.J. 78 (2003).

212. *Id*. at 80.

213. *Id*.

214. United States v. Perron, 53 M.J. 774, 777 (C.G. Ct. Crim. App. 2000) (finding that none of the trial participants realized the appellant would enter a no-pay status upon confinement, that the financial term was material, and remanding to the convening authority to set aside findings or grant alternative relief). The appellant argued that the convening authority's alternative relief of disapproving confinement, which allowed the pay center to pay the appellant, was ineffective because the back pay was too late to assist his family. The CGCCA then set aside the appellant's reduction, reasoning that the difference in pay should exceed any "reasonable interest calculation." United States v. Perron, 57 M.J. 597, 599 (C.G. Ct. Crim. App. 2001). The appellant, continuing to argue that his pleas were improvident, appealed to the CAAF. *Perron*, 58 M.J. 78.

215. *Id.* at 81.

those promises by the Government."[216] The court ultimately concluded that "imposing alternative relief on an unwilling appellant to rectify a mutual misunderstanding of a material term in a pretrial agreement violates the appellant's Fifth Amendment right to due process."[217]

What should government counsel do? First, they must stay alert and prevent their convening authorities from entering into agreements they cannot fulfill. Next, they must remain vigilant throughout trial. A recent case illustrates how attention to detail can save the government from stepping on the unintended consequences landmine.

In *United States v. Williams* (*Williams II*),[218] the accused contended that he was denied the benefit of his pretrial agreement because his pay and allowances ended with the expiration of his term of service (ETS).[219] Relying on *Williams I* and *Hardcastle*, the accused argued that this mutual misunderstanding rendered his guilty plea improvident.[220] The CAAF affirmed the ACCA's decision that the pleas remained provident. The court distinguished *Williams I* and *Hardcastle*; in *Williams II*, the pretrial agreement made no representations about entitlements to pay beyond the accused's ETS date. Neither the trial counsel nor the military judge made any such representations during trial. In *Williams II*, the military judge even asked the defense counsel about the potential impact of the accused's pending ETS. The defense counsel assured the military judge that he had discussed the impact of the pending ETS with his client.[221]

Williams II shows that attention to detail at trial can save a case from possible reversal over a fatal defect in the quantum portion of the pretrial agreement. Does it also open the door for specific language in the pretrial agreement itself? What if the agreement contained disclaimers that the defense counsel had discussed the potential impact of pending ETS with the accused? What if the quantum portion explicitly stated, for example, that the convening authority would exercise "due diligence to direct all pay and allowances to the maximum extent allowed by law and regulation, to the accused's family?" While *Williams II* did not address these questions, potential solutions flow from the reasoning of the opinion.

The CAAF's opinion in *Perron* also seems to offer potential solutions to convening authorities who attempt to navigate the unintended consequences minefield. Although the CAAF did not permit the appellate courts and convening authorities to fashion alternative relief unilaterally, the appellate defense counsel did argue that "[t]he proper remedy is either specific performance, withdrawal of plea, or another remedy agreeable to the accused."[222] The holding of *Perron* thus encourages post-trial negotiations between the accused and the convening authority.

Another possible solution is working its way through the appellate process. In *United States v. Bayle*,[223] a Coast Guard boatswain's mate bargained for waiver of the automatic forfeitures of his pay. Because the accused entered a no-pay status after his conviction, the convening authority was unable to fulfill a term required by the pretrial agreement. On appeal, however, the CGCMA asserted the court's implicit authority to waive the forfeitures. This novel and direct approach may remedy situations where the timeliness of pay and allowances was not a material issue that induced the accused to enter into the pretrial agreement, but may fall short in cases that parallel *Perron*. Only time—and further litigation—will tell whether this approach will be effective.

With regard to military pleas and pretrial agreements, one thing remains certain: "The military justice system imposes even stricter standards on military judges with regard to guilty pleas than those imposed on federal civilian judges."[224] Counsel, trial judges, and appellate courts must apply Supreme Court cases like *Santobello* to the unique facts, procedures, and issues that face the military justice system. In doing so, practitioners should be creative, conservative, and attentive to the delicate balance between good order and discipline and the due process rights of the accused.[225]

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216. *Id.* at 85.

217. *Id*. at 88.

218. 55 M.J. 302 (2001).

219. *Id.* at 303.

220. *Id.* at 306.

221. *Id.* at 307.

222. United States v. Perron, 58 M.J. 78, at 82 (2003).

223. 56 M.J. 762 (C.G. Ct. Crim. App. 2002), *petition for review denied*, 57 M.J. 107.

224. *Perron*, 58 M.J. at 80.

225. *See* United States v. Santobello, 404 U.S. 257 (1971).

Conclusion

There is no doubt that 2002 marked a minor revolution in military justice. Several years had passed since the last EO had amended the *MCM*. President Bush cleared the resulting backlog of needed improvements when he signed EO 13,262.[226] More sweeping changes came when the Department of the Army published a revised *AR 27-10*.[227] These executive and regulatory changes generally cut against the grain of the observations made in popular media articles written in the wake of the Cox Commission Report, and they most certainly did not mark the beginning of the revolution for which Hillman and Pound called.

Media critics did succeed in fueling discussion of the merits of the military justice system. Although they may have moved Congress to require twelve-member capital panels, other issues they raise are less likely to see change in the short term. For example, will Congress ever require the random selection of panel members? Will military judges ever be detailed after preferral, rather than after referral, in order to more tightly control the pretrial process? Both changes would move the military justice system more closely in line with practice in federal district courts, but both would likely face stiff opposition from the military services. One constant remains: the center of gravity for this debate should continue to be the national security requirement that the military justice system must "promote justice" and maintain "good order and discipline" without adversely affecting the "efficiency and effectiveness" of the armed forces.[228]

Against this backdrop, the CAAF continues to elevate substance over form, in exercising primary civilian oversight over the military justice system. The end result is deference to convening authorities, staff judge advocates, and military judges. Appellate courts have shown a strong inclination to forgive these court-martial personnel for technical errors that do not affect the reliability of the outcome. One area where this trend does not hold true is the liberal granting of challenges for cause based on implied bias.[229] The CAAF also showed little deference toward the conduct of providence inquiries[230] or the impact of unintended consequences in pretrial agreements.[231] As appellate courts continue to fine-tune the military justice system, their opinions stand as evidence of a healthy, maturing system that strives to hold "the 1.4 million men and women of the armed forces accountable for their actions," while also treating them "fairly and with dignity and respect."[232]

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226. *See* MCM, *supra* note 7, at A25-54 to –60.

227. *Id.*

228. MCM, *supra* note 7, pt. I, ¶ 3.

229. United States v. Weisen, 56 M.J. 172 (2001), *petition for recons. denied*, 57 M.J. 48 (2002).

230. United States v. Redlinski, 58 M.J. 117 (2003).

231. United States v. Perron, 58 M.J. 78 (2003).

232. Letter to the Editor, *supra* note 22.

Appendix I—Summary of Amendments to Punitive Articles[233]

Article	Summary of Change
103—Captured or Abandoned Property	Increases the dollar amount triggering the sentence aggravator from greater than $100 to greater than $500.
107—False Official Statements	The new amendments delete explanatory language pertaining to "Statements made during an interrogation."
108—Sale, Loss, Damage, Destruction or Wrongful Disposition of Military Property of the United States	Increases the dollar amount triggering the sentence aggravator from greater than $100 to greater than $500.
109—Waste, Spoilage, or Destruction of Property Other Than Military Property of the United States	Increases the dollar amount triggering the sentence aggravator from greater than $100 to greater than $500.
118—Murder	Mandatory minimum punishment for premeditated murder is now life with the possibility of parole.
120—Rape and Carnal Knowledge	New maximum punishment is life without parole.
121—Larceny and Wrongful Appropriation	Paragraph 46c(1)(h) is amended by adding a paragraph discussing "Credit, Debit, and Electronic Transactions," which clarifies the nature of these offenses (wrongful obtaining) and the victim (the entity delivering the goods, i.e., store or bank, rather than the card holder). Increases the dollar amount triggering the sentence aggravator from greater than $100 to greater than $500.
123a—Making, Drawing, or Uttering Check, Draft or Order Without Sufficient Funds	Increases the dollar amount triggering the sentence aggravator from greater than $100 to greater than $500.
125—Sodomy	New maximum punishments for forcible sodomy and sodomy with a child under twelve is life without parole.
126—Arson	Increases the dollar amount triggering the sentence aggravator from greater than $100 to greater than $500.
132—Frauds Against the United States	Increases the dollar amount triggering the sentence aggravator from greater than $100 to greater than $500.
134—Adultery	Paragraph 62c is amended to include a discussion of the nature of the offense of adultery, factors to be considered in connection with the prosecution of the offense, and describing the defense of mistake of fact as applied to adultery.
134—Kidnapping	New maximum punishment is life without parole.
134—Knowingly Receiving, Buying, or Concealing Stolen Property	Increases the dollar amount triggering the sentence aggravator from greater than $100 to greater than $500.
134—Obtaining Services Under False Pretenses	Increases the dollar amount triggering the sentence aggravator from greater than $100 to greater than $500.

233. MCM, *supra* note 7, pt. IV; *cf.* MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV (2000) [hereinafter 2000 MCM].

Appendix II—Summary of Amendments to the Rules for Courts-Martial[234]

RCM	Summary of Change
701(b)(4)	The amendments narrow the scope of the reports, tests, and examination results that the defense counsel must disclose under certain circumstances, to exclude materials covered by the psychotherapist privilege.
806	Explicitly authorizes military judges to issue protective orders limiting extrajudicial statements.
1001(b)(3)(A)	A conviction is now defined as "any disposition following an initial judicial determination or assumption of guilt, such as when guilt has been established by guilty plea, trial, or plea of nolo contendere, regardless of the subsequent disposition, sentencing procedure, or final judgment. However, a 'civilian conviction' does not include a diversion from the judicial process without a finding or admission of guilt; expunged convictions; juvenile adjudications; minor traffic violations; foreign convictions; tribal court convictions; or convictions reversed, vacated, invalidated or pardoned because of errors of law or because of subsequently discovered evidence exonerating the accused."
1003(b)(7)	Now provides that "when confinement for life is authorized, it may be with or without eligibility for parole."
1004(e)	Amends the rules pertaining to other punishments that may be imposed in a capital case.
1006(d)(4)(b)	Amends the rules pertaining to the three-fourths voting requirement.
1009(e)(3)(B)(ii)	Pertaining to the more than one-fourth voting requirement for reconsideration.
1103(b)(2)(B)(i) 1103(c)(1)	Under the 2002 amendments, a verbatim record of trial is now required in a general court-martial when "[a]ny part of the sentence adjudged exceeds six months confinement, forfeiture of pay greater than two-thirds pay per month, or any forfeiture of pay for more than six months or other punishments that may be adjudged by a special court-martial."
1103(c)(1)	A verbatim record is now also required in a SPCM in which a BCD, confinement for more than six months, or forfeiture of pay for more than six months, has been adjudged.
1103(f) 1107(d)(4)	The amendments have modified the rules concerning the limitations on sentences that convening authorities may approve in the case of loss of notes or recordings of proceedings or other non-verbatim proceedings.
1104(a)(2)(A)	Amends the rules concerning which SPCM records of trial must be authenticated by the military judge.
1104(e) 1106(a)	Now requires a post-trial recommendation by the SJA "before the convening authority takes action under [RCM] 1107 on a record of trial by special court-martial that includes a sentence to a BCD or confinement for one year."
1107(d)(5)	This new subparagraph limits the sentence the convening authority may approve when the "cumulative impact of the fine and forfeitures, whether adjudged or by operation of Article 58b, would exceed the jurisdictional maximum dollar amount of forfeitures that may be adjudged at that court-martial."

234. MCM, *supra* note 7, pt. II; *cf.* 2000 MCM, *supra* note 233, pt. II.

1109(e) 1109(e)(1)	The convening authority must now hold a hearing before vacating the suspension of a SPCM punishment that does not include a BCD or confinement for one year.
1109(f) 1109(f)(1)	The convening authority must now comply with RCM 1109(d) before vacating the suspension of a SPCM punishment that includes a BCD or confinement for one year.
1110(a)	The accused may now waive or withdraw appellate review in a SPCM in which the approved sentence includes a BCD or confinement for one year.
1111(b)	The TJAG must now review all records of trial in a SPCM in which the approved sentence includes either a BCD or confinement for one year.
1112(a)(2)	A judge advocate must now review all records of trial in SPCMs in which the approved sentence includes neither a BCD nor confinement for one year.
1305(d)(2)	Provides that "the original and one copy of the record of trial [in a SCM] shall be forwarded to the convening authority" after service on the accused.

Appendix III—Summary of Changes to *AR 27-10*[235]

Para. 2-7	**National Security Cases Coordination**. Requires SJAs to provide an unclassified EXSUM via E-mail to the Office of The Judge Advocate General (OTJAG) for cases having national security implications before the preferral of charges.
Para. 3-18g(1)	**Nonjudicial Punishment (NJP)**. Clarifies that within the limitations of *AR 27–26*, judge advocates may attend Article 15 proceedings and provide advice to clients (often an SJA advising a general officer imposing an Article 15). Advice should be provided during a recess in the proceedings. When defense counsel, military or civilian, attend Article 15 hearings, they do so as spokespersons for the accused and not in a representative capacity.
Para. 3-35, Para. 3-37b(1)(a)	**Filing Determination for Non-Judicial Punishment**. Appellate authorities may now change filing determinations, but only to the advantage of the appealing soldier.
Para. 3-39	**Records of Non-Judicial Punishment**. Mandates use of DA Form 5110-R, Article 15 Reconciliation Log, to insure proper execution of reductions and forfeitures by finance offices. Logs must be maintained for two years and inspected at least annually by CLNCO or designee. Also requires CLNCO or designee to verify quarterly, with PERSCOM, proper filing in the OMPF of soldiers when such filing is directed.
Para. 5-11a	**Court Reporters and Clerical Personnel**. SJAs must detail court reporters at all SPCMs; in addition, they should detail clerical personnel to them as needed to prepare a record of the proceedings.
Para. 5-15b	**Automatic suspension of favorable personnel actions (FLAGS)**. Upon the preferral of any charge, the Charge Sheet (DD Form 458) automatically suspends all favorable personnel actions, including discharge, promotion, and reenlistment. Any action purporting to discharge or separate a soldier, and any issuance of a discharge certificate, is void until the charge is dismissed, or the convening authority takes initial action on the case; all other favorable personnel actions taken under these circumstances are voidable.
Para. 5-26, Para. 12-5b	**Personal Privacy Protected in the Record of Trial**. Home addresses and social security numbers will not be used to identify witnesses. Social security numbers, other than the accused's, will only be used to verify that the members actually detailed by the convening authority are present. Thereafter, no documents that include social security numbers, other than documents related to the accused, will be maintained in the record of trial.
Para. 5-27	**Power to Convene BCD SPCM**. Army SPCMCAs may now refer cases to BCD SPCMs.
Para. 5-27b	**Pretrial Advice for Special Courts-Martial**. In Army SPCMs involving confinement in excess of six months, forfeitures of pay for more than six months, or BCDs, the "servicing staff judge advocate will prepare a pretrial advice, following generally the format of [RCM] 406(b)."
Para. 5-28	**Personnel Records Admissibility**. Under RCM 1001(b)(2), the trial counsel may present a personnel record made or maintained under departmental regulations as sentencing evidence at a court-martial. Personnel records now include, but are not limited to, local NJP files, corrections files, and records contained in the Official Military Personnel File (OMPF) or Career Management Information File (CMIF).
Para. 5-28e	**Automatic Reduction Under Article 58a, UCMJ**. The automatic reduction to E-1 mandated by Article 58a now applies only to enlisted soldiers with an approved sentence that includes a punitive discharge or more than six months of confinement.

235. AR 27-10, *supra* note 17; *cf*. U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE (24 June 1996).

Para. 5-40	**Records of Trial**. Materials related to pretrial confinement (including, but not limited to, a copy of the commander's checklist and the military magistrate's memorandum) must be inserted as part of the record of trial.
Para. 5-40b	**Documentation of Speedy Trial Compliance**. SJA offices are required to annotate the time from initiation of investigation of most serious arraigned offense to the date of arraignment for that offense on DD Forms 490 and 491 (Record of Trial and Summarized Record of Trial Chronology Sheet).
Para. 5-46a.	**Maintenance of Summarized Records of Trial**. Records of trial for SCMs and SPCMs that do not involve a BCD or confinement in excess of six months will be maintained under *AR 25-400-2, The Modern Army Record Keeping System*, for a period of ten years after final action.[236]
Para. 6-4h	**Changes Impacting the Trial Defense Service/SJA Relationship**. Expands guidance to SJAs on the provision of administrative and logistical support to Trial Defense Service offices. Enlisted clerical and support personnel will be under the direct supervision of the senior defense counsel and will be rated or senior rated by the senior defense counsel, or sole defense attorney in the case of a one-attorney office. Assigned enlisted and support personnel normally will not be assigned legal duties within the local legal office and normally will be assigned to a USATDS office for at least one year in order to provide a stable defense work environment. The adequacy of support provided by host installations will be a subject of special interest to TJAG in making his or her statutory visits under Article 6, UCMJ.
Para. 6-5	**Funding of Trial Defense Services**. Under the previous edition of *AR 27-10*, the U.S. Army Legal Services Agency (USALSA) paid for the travel of defense counsel to depart their installations and represent accused at GCMs, SPCMs, or Article 32 Investigations. The new provision shifts responsibility to Commander, USALSA, to fund defense counsel travel expenses related to interviewing the accused or any witness, taking depositions, and case investigation. Convening authorities will continue to fund all other authorized costs related to judicial and administrative proceedings, including, those related to the employment of expert witnesses.
Para. 6-7a	**Remote Installations and Trial Defense Services**. Encourages the use of appropriate technology (e.g., telephones, desktop video teleconferencing) at installations where defense services are unavailable.
Para. 9-5b(1)	**Military Magistrate Review**. Eliminates government "appeal" of magistrate decision to release soldier from pretrial confinement. This change reflects current case law.
Para. 13-12	**Representation in Capital Cases**. Provides habeas corpus assistance in death penalty cases, allowing TJAG to appoint military counsel to assist counsel appointed by the U.S. District Court or individually retained counsel throughout the appellate process.
Para. 21-8, Para. 21-12, Appendix E	**Courts-Martial Policy in the Reserve Component**. Allows GCMs or SPCMs of Reserve Component (RC) soldiers only while serving on active duty (AD). Continues the policy of withholding authority of most RC commanders to convene courts-martial, but as an exception, authorizes all commanders of USAR Regional Support Commands (RSC) with full-time judge advocates available to convene SPCMs for members of their organizations and all units that report to them. Additionally, USAR units that do not report to a RSC may convene SPCMs when they have access to a full-time judge advocate. Finally, the regulation establishes military justice area support responsibilities based on the geographic location of RC units and activities.
Chapter 24	**Sex Offender Registration**. Implements the requirements of 42 U.S.C. § 14071 by requiring trial counsel to provide notice of registration requirement to those convicted of a covered offense that are not sentenced to confinement.

236. *See* U.S. Dep't of Army, Form 4430, Result of Trial (18 Mar. 2002). This form has also been modified to include two new entries, to reflect (1) whether the convicted service member must submit to DNA processing, 10 U.S.C. § 1565, and (2) whether the conviction requires sex offender registration under 42 U.S.C. § 14071.

New Developments: Crop Circles in the Field of Evidence[1]

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Introduction

In the darkness of the night, on a schedule understood by no man and with no one watching, giant geometric formations appear throughout the crop fields of the world.[2] They are mysterious, alluring, and for some, they call into question our solitary existence within the universe.[3] Others see them as the acts and pranks of a few peculiar individuals. Movies have been made,[4] books have been written, and people have wondered how to interpret the sudden appearance of the unexplained in their daily lives.

Some trial lawyers in the military have viewed the recent evidentiary decisions of the Court of Appeals for the Armed Forces (CAAF) with the same sense of questioning wonder others reserve for the appearance of crop circles. Others have attempted to see behind the decisions, looking for the alien in the pantry.[5] We need only turn our faces on high toward the decisions themselves to properly interpret the mystical signs that appeared in our evidentiary field over the last year. The contortions of the rule of completeness, the admissibility of appropriate rebuttal evidence, and an understanding of the impact of privileges are all present in the circles, squares, and geometric lines of the crop circles found in the fields of evidence.

While some counsel feel bewildered and confused by the plethora and breadth of the "signs" that have appeared recently, there is no reason to feel that way. The decisions of the CAAF are not mystic symbols from above, but rather constitute a careful, reasoned, and fair application of the driving policy issues and concerns that the military rules of evidence were drafted to address. This article analyzes those issues and comments on the underlying reasons behind the court's decisions, while offering practical advice to the counsel and military judges who must apply these decisions throughout the coming year.

To that end, this article addresses each development of evidentiary law sequentially as they appear in the Military Rules of Evidence (MRE). Subjects include: (1) applying the rule of completeness under MRE 106[6] and MRE 304;[7] (2) determining when evidence is relevant under MRE 401[8] and MRE 402;[9] (3) the proper application of the attorney-client privilege,[10] the spousal privilege,[11]and the priest-penitent privilege;[12] (4) the

1. The rules of evidence form the bones—the foundation, if you will—of everything else that takes place within the confines of a courtroom. This responsibility is best illuminated by Mark Twain, who wrote,

> It was not my opinion; I think there is no sense in forming an opinion when there is no evidence to form it on. If you build a person without any bones in him he may look fair enough to the eye, but he will be limber and cannot stand up; and I consider that evidence is the bones of an opinion.

MARK TWAIN, PERSONAL RECOLLECTIONS OF JOAN OF ARC 4-5, *reprinted in* THE COMPLETE NOVELS OF MARK TWAIN (Nelson Doubleday Inc. ed. 1969).

2. For a documentary treatment of this subject, see Open Edge Media, *Crop Circles: Quest for Truth*, *at* http://www.cropcirclesthemovie.com (last visited Feb. 11, 2003).

3. For an interesting scientific analysis on the creation of crop circles, see Brian Hussey, *Theories on the Formation of Crop Circles*, *at* http://www.paradigm-shift.com/theories.html (last visited Feb. 11, 2003).

4. *See* Touchstone Pictures, *Signs*, *at* http://bventertainment.go.com/movies/signs (last visited Feb. 11, 2003).

5. *Id*. In *Signs*, the main character, played by Mel Gibson, confronts an alien trapped in a neighbor's pantry. He reacts with fear, violence, and inadvertent humor, much as some counsel react to evidentiary rulings that they do not substantively agree with. *Id*.

6. MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 106 (2002) [hereinafter MCM].

7. *Id*. MIL. R. EVID. 304(h)(2).

8. *Id*. MIL. R. EVID. 401.

9. *Id*. MIL. R. EVID. 402.

10. *Id*. MIL. R. EVID. 502.

11. *Id*. MIL. R. EVID. 503.

requirements for the medical hearsay exception under MRE 803(4);[13] and (5) the intersection of the business records exception[14] and the urinalysis program. The ultimate goal is to remove the mystery behind the crop circles, allowing the farmers of the fields of justice to get on with planting, tending, and harvesting their crops.

Recent Developments in Evidence

The Rule of Completeness

The CAAF has wrestled with the dilemma presented by the presence of multiple statements made by the accused on more than one occasion,[15] particularly when investigating agent request that suspects reduce earlier oral confessions to writing. As often happens in such instances, the accused either remembers or inserts information that was not present in the oral confession. This sets the stage for trial counsel to argue that the written confession contains inadmissible exculpatory hearsay, and for the defense counsel to respond that such evidence is admissible under MRE 106 and MRE 304(h)(2). The CAAF has addressed the interplay between MRE 106 and MRE 304(h)(2) in a series of cases including *United States v. Goldwire*,[16] *United State v. Rodriguez*,[17] and *United States v. Gilbride*.[18] Taken together, these cases create a template that counsel can rely on when arguing the admissibility of subsequent written or oral statements. Understanding the contours of this template begins with a review of the CAAF's decision in *Goldwire* last year.

In *Goldwire*[19] the CAAF addressed the intersection of MRE 106,[20] Federal Rule of Evidence (FRE) 106,[21] the common law rule of completeness,[22] MRE 304 (h)(2),[23] and their interactions with the admissibility of hearsay statements at trial. As noted last year, the court's reasoning was convoluted and difficult to understand. Some members of the court indicated a willingness to accept and apply the common law rule of completeness to the military rule of completeness, while others were more inclined to parse the difference between the written rule of completeness vis-à-vis written or recorded statements, and the common law rule of completeness for oral statements. The court discussed the differences between these doctrines at length, but ultimately decided the case based upon MRE 304(h)(2). The court's decision to apply MRE 304(h)(2) created a bright-line rule that is much easier to understand and apply from a trial practitioner's perspective.[24]

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12. *Id.* MIL. R. EVID. 504.

13. *Id.* MIL. R. EVID. 803(4).

14. *Id.* MIL. R. EVID. 803(6).

15. *See* Major Charles H. Rose III, *New Developments in Evidence: Counsel, Half-Right Face, Front Leaning Rest Position—Move!*, ARMY LAW., Apr. 2002, at 69.

16. 55 M.J. 139 (2001).

17. 56 M.J. 336 (2002).

18. 56 M.J. 428 (2002).

19. 55 M.J. at 142-43.

20. Military Rule of Evidence 106 states:

> Rule 106. Remainder of or related writings or recorded statements. When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require that party at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

MCM, *supra* note 6, MIL. R. EVID. 106.

21. Federal Rule of Evidence 106 is virtually identical to the military rule and states:

> Rule 106. Remainder of or Related Writings or Recorded Statements. When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

FED. R. EVID. 106.

22. *Goldwire*, 55 M.J. at 142. Unlike both the federal and military rules, the common law rule of completeness allows for completing oral as well as written or recorded statements. *Id.* (citing Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 172 (1988)).

23. Military Rule of Evidence 304(h)(2) states: "(2) *Completeness.* If only part of an alleged admission or confession is introduced against the accused, the defense, by cross-examination or otherwise, may introduce the remaining portions of the statement." MCM, *supra* note 6, MIL. R. EVID. 304(h)(2).

24. *See* Rose, *supra* note 15, at 69.

The CAAF continued to develop military jurisprudence for the rule of completeness this year, clarifying its interpretation of these rules in both *Rodriguez* and *Gilbride*. In *United States v. Rodriguez*,[25] the CAAF considered whether the military rule of completeness applied to a series of statements made over several days. The appellant argued that under the rule of completeness, once the trial court admitted the first statement, it should have admitted a series of statements he made over several days. The CAAF disagreed.[26] The court began its opinion by discussing the facts in chronological order. On 3 January 1998, someone strangled the appellant's wife. On 5 January 1998, the appellant called his mother-in-law from a pay phone.[27] This phone conversation became the first in a series of seven statements the appellant made to other individuals. He told his mother-in-law that burglars had abducted him and his wife. His mother-in-law stated that he appeared excited and disoriented. He also told his mother-in-law that someone had hit him on the head, and that the last time he saw his wife, she was bound and gagged in the car. After hanging up the phone with his mother-in-law, the appellant dialed 911. The call to the 911 operator became the appellant's second statement. He told the 911 operator that he was disoriented, that a burglar had attacked the appellant and his wife and abducted them, and that he had only recently been able to escape. The 911 operator dispatched members of the Honolulu Police Department to the pay phone where Rodriguez was located.[28]

The appellant next made a series of statements to the Honolulu Police Department. He made his first statement immediately after the 911 call. He repeated the gist of his 911 story to the Police Department. Later that same day, the Honolulu Police Department formally interviewed the appellant for the first time. In that interview, he told the police that two males had attacked him and his wife while burglarizing their home. He claimed they had placed a bag over his head, bound his arms, and struck him. The appellant told the police that he kept slipping in and out of consciousness. Eventually, he described being able to get away from his kidnappers. He remembered kicking his captors and escaping while they tried to shoot him. During that first formal interview, the appellant told the Honolulu Police Department that the last time he heard his wife, she was upstairs in their home screaming while under attack by the intruders. Shortly after this first formal interview, the Honolulu Police Department found the body of the appellant's wife in a car about one mile from the pay phone the appellant used to call both his mother-in-law and the 911 operator.[29]

The Honolulu Police Department continued to investigate. They compared the appellant's statements to the evidence from the crime scene and determined that the statements did not match the physical evidence.[30] On 6 January 1998, they called the appellant back for a second formal interview. That interview was custodial in nature, and the Honolulu Police Department videotaped it. When confronted with the inconsistencies in his story, the appellant confessed to killing his wife and fabricating the story about the burglary and kidnapping. On 7 January 1998, the Honolulu Police Department interviewed the appellant a third time. During this interview, he reiterated his 6 January 1998 confession, but stated that his wife's death was the accidental result of a spousal dispute.[31]

During the trial, the prosecution chose not to offer the appellant's last two statements to the Honolulu Police Department. They relied on the earlier statements, including the call to his mother-in-law, the 911 call, and the original statement given to the police. The government then called an expert witness, the Honolulu Police Department medical examiner. The expert testified that the nature of the wife's injuries was consistent with an individual who had been choked to death. The expert witness reviewed all of the appellant's statements, including the last two confessions that the police had videotaped, before forming his opinion. At no time during its case-in-chief did the prosecution introduce the appellant's fifth, sixth, or seventh statement into evidence.[32]

The defense built its theory of the case around the idea that the accused had inadvertently choked his wife during a spousal dispute. From a defense perspective, the last two statements contained exculpatory information explaining how the offense occurred, statements that mitigated or contradicted evidence of the appellant's intent to commit murder.[33] If the prosecution had offered portions of the last two statements through the testimony of an appropriate witness, the defense would have been able to use MRE 106 to force the government to offer the remainder of the statements. When the prosecution chose not to offer any portion of those statements, they denied the defense

25. 56 M.J. 336 (2002).

26. *Id.* at 342-43.

27. *Id*. at 337.

28. *Id.* at 337-38.

29. *Id*. at 338.

30. *Id*.

31. *Id.* at 339. The exculpatory statements made by the appellant in this last interview appear to have driven several trial decisions. The existence of this potentially exculpatory, or self-serving, statement impacted directly on the manner the parties presented evidence at trial, as well as the type of evidence they presented. *See id.*

32. *Id*.

the opportunity to get substantive evidence concerning their theory before the panel without placing the accused on the stand and subjecting him to cross-examination. By choosing to not offer the last two statements, the prosecution forced the defense counsel to make a difficult choice. The defense could either have the appellant testify or offer his statements under the appropriate hearsay exception or exemption. Unfortunately for the defense, no hearsay exemption or exception applied, and the multiple statements of the accused created an opportunity for an effective government cross-examination. The defense counsel argued to the military judge that all of the statements should be considered as a single admission over a period of time and that the rule of completeness allowed the defense to introduce the last three statements because the government had already introduced the accused's first four statements. The trial judge disagreed.[34]

As previously discussed, the expert witness who testified during the government's case-in-chief had reviewed the last two statements containing the exculpatory information before she testified. The trial defense counsel cross-examined the expert witness, establishing that the expert had reviewed all of the accused's statements before forming her opinion.[35] The defense counsel then chose not to cross-examine her on the information in those last two statements, or to offer those statements independently under MRE 106 or MRE 304(h)(2). This was a fatal error.

The CAAF began its analysis by noting that there are two distinct rules of completeness in military practice. The first rule of completeness is found in the combination of MRE 106, FRE 106, and the common-law doctrine of completeness. The court noted that each of these rules is primarily concerned with the order of proof.[36] They allow an opposing party to force the adverse party to admit evidence during its case-in-chief. The rule is structured in this way to ensure that the finder of fact does not take the evidence out of context. Military Rule of Evidence 106 is concerned with written or recorded statements. The rule, however, does not address what should happen if the evidence in question is otherwise inadmissible.[37] As noted previously, the accused could potentially open the door to his character for truthfulness by using the rule of completeness to get his own statements before the finder of fact without testifying.[38]

The court next discussed how MRE 304(h)(2) deals with statements by the accused. The court began by noting that there is no FRE counterpart to MRE 304(h)(2), explaining that the rule reflects a long-standing military practice concerning statements by the accused. This practice ensures that the court will always consider any statement by the accused in its entirety. The court noted that such a specific rule is necessary, given the dual nature of the military justice system as both a system of justice and a tool for discipline. Under the rule, whenever a trial counsel admits a portion of an admission or confession by the accused, the defense counsel has the ability to introduce the remainder of the statement through cross-examination or otherwise under MRE 304(h)(2). The purpose behind the rule is to ensure that the court can consider the complete substance of the statement in question. The question is one of fairness, and long-standing military practice demands it.[39]

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33. *Id*. The opinion stated,

> The defense sought to convince the panel that the death was the result of an accident during a domestic dispute that escalated into a physical confrontation in which appellant's wife was the aggressor. Although appellant did not testify, the defense attempted to introduce his testimony through appellant's sixth and seventh statements, the taped custodial interviews conducted on January 6 and 7 by Detectives Tamarshiro and Wiese.

Id.

34. *Id*.

35. *Id*. at 343.

36. *Id*. at 339. The "primary concern of Rule 106 is the order of proof," permitting an adverse party to compel the introduction of favorable evidence during the opponent's case. *Id*. at 340 (citing 1 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 106.02[2], at 106-11 (Joseph M. McLaughlin ed., 2d ed. 2001)).

37. *Id*. The court noted that the jurisdictions are split upon whether invocation of the rule of completeness allows for the introduction of evidence that is otherwise inadmissible. The court noted that such evidence, to the extent that it does come in, comes in at the insistence of the adverse party, who may waive the benefit of the rule. (citing STEPHEN A. SALTZBURG, LEE D. SCHINASI, & DAVID A. SCHLUETER, MILITARY RULES OF EVIDENCE MANUAL 92-93 (4th ed. 1997)).

38. Rose, *supra* note 15, at 69-70.

39. The opinion in *Rodriguez* states as follows:

> It would be manifestly unfair to an accused to permit the prosecution to pick out the incriminating words in the statement or discussion and put them in evidence while at the same time excluding the remainder of the statement or conversation, in which the accused seeks to explain the incriminating passages.

Rodriguez, 56 M.J. at 341 (citing United States v. Harvey, 25 C.M.R. 42, 50 (C.M.A. 1957)).

There are four primary differences between MRE 106 and MRE 304(h)(2). The first difference is who holds the power to invoke the rules. Either the government or the defense can use MRE 106 to force the opposing side to complete the statement in question during its case-in-chief.[40] Military Rule of Evidence 304(h)(2), on the other hand, is a rule specifically written for the use of the accused through counsel.[41] The defense is the only party that may invoke MRE 304(h)(2), to force the court to admit the remaining substance of the statement in question. As the court noted in *Rodriguez*, if the defense fails to exercise that ability under MRE 304(h)(2), the military judge does not have a sua sponte duty to do it for them.[42] The second difference deals with the types of statements that the rules are designed to address. Military Rule of Evidence 106 and FRE 106 are written specifically to address written or recorded statements. Military Rule of Evidence 304(h)(2) is broader in application; it also applies to oral statements. The third difference between the two rules is their primary purpose. Military Rule of Evidence 106 is concerned with the timing of when the evidence is presented, while MRE 304(h)(2) is concerned with the substance of the information that is presented. Military Rule of Evidence 304(h)(1) is based on a commitment to fairness.[43] Finally, under MRE 106, the military judge has discretion, based upon his determination of fairness, to decide whether the rule requires admission of the remaining portions of the statement. That discretion is not available under MRE 304(h)(2). Military Rule of Evidence 304(h)(2) requires the military judge to admit the evidence when the defense counsel establishes the predicate facts under the rule.[44]

While the court spent considerable time analyzing the interplay between MRE 106 and MRE 304(h)(2), it ultimately avoided deciding the case based upon this reasoning. Instead, it focused on the decision of the defense counsel not to cross-examine the expert witness regarding the exculpatory information in the last two recorded statements. The court held that because the defense counsel chose to not introduce that evidence through cross-examination, he waived the issue on appeal. The court went on to say that absent a defense request to admit the statements, there was no requirement that the military judge rule on these statements' potential admissibility. The court found no error and affirmed[45] without deciding the ultimate question of whether a series of statements made to a police entity or a commander could be admissible under the doctrine of completeness.[46]

The court's analysis suggests that an argument to admit multiple statements as one under the rule of completeness will not be successful unless the defense counsel can meet the court's requirements for contemporaneous statements.[47] Those requirements include showing whether the accused was precluded from completing the content of his statements. The defense counsel must also show that the statements were not made at a different time, different place, or to a different set of persons. When statements of the accused are separated in time, the CAAF is unlikely to allow the defense counsel to use the doctrine of completeness to require admission of subsequent statements.[48]

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40. MCM, *supra* note 6, MIL. R. EVID. 106.

41. *Id*. MIL. R. EVID. 304(h)(1)-(2).

42. As the opinion in *Rodriguez* explains,

> [t]he rule of completeness under Rule 304(h)(2) is a tool that is available to the defense if the defense chooses to use it. In the absence of a defense request, the military judge was not called upon to decide whether the rule of completeness applied after references to appellant's confessions were elicited by the defense during cross-examination, and, if so, which statements by appellant were covered by the rule of completeness.

Rodriguez, 56 M.J. at 343.

43. *Id.* at 342.

44. MCM, *supra* note 6, MIL. R. EVID. 304(h)(1)-(2); *cf. id*. MIL. R. EVID. 106.

45. *Rodriguez*, 56 M.J. at 342-43.

46. *See id*.

47. The court stated,

> Appellant has not shown, with respect to any of these communications, that he was somehow precluded from completing the content of his statements. Appellant's subsequent statements, which he sought to introduce at trial under the rule of completeness, were made at a different time, at a different place, and to a different set of persons. Although the latter statements may rebut, explain, or modify the content of his earlier statements, they are not admissible under the rule of completeness because they were not part of the same transaction or course of action.

Id. at 342.

48. *See id*. at 343; United States v. Goldwire, 55 M.J. 139, 142-43 (2001).

In *United States v. Gilbride*,[49] the CAAF addressed whether both an oral and written statement should be considered together for purposes of the rule of completeness. In *Gilbride*, a physician in a local hospital examined the leg injury of the appellant's stepson. The doctor determined that the child had a severe spiral fracture of the left femur and suspected that the injury was the result of child abuse. The physician later testified that the appellant told him that the boy had been injured when he fell from the sofa, and that the child had been able to walk without any problem after the fall. The physician believed this type of injury usually resulted from a child twisting his leg, and that in his opinion, such an injury would have made the child unable to walk without assistance. The doctor reported the suspected abuse to the Air Force Office of Special Investigation (AFOSI).[50]

The AFOSI interviewed the appellant, who waived his rights and answered their questions. He told the agent several different versions of what had happened, but he eventually admitted that his son's leg was injured when the appellant twisted it while trying to dress the child. This admission included a demonstration on a doll the agents provided. After the appellant admitted injuring his stepson, the agent asked him to provide a written statement. The appellant agreed, and his written statement was similar to his verbal statement, except for the following additional information:

> I'm telling the truth when I say that I didn't mean to hurt [JB]. I couldn't ever imagine hurting a little child on purpose and I truly didn't mean to hurt him. I'm not some psychopath child beater. I didn't mean to hurt him, I just wanted to get his pants put back on him.[51]

The appellant was in the AFOSI office for about six hours. The entire interrogation from beginning to end took place during this time. During that six-hour period, the appellant gave both oral and written statements, and no significant break occurred between the statements.[52] The AFOSI agent testified about the substance of the appellant's oral confession. The trial counsel deliberately avoided asking about the written statement. After his direct examination of the AFOSI agent, the trial counsel requested an Article 39(a) session.[53]

During the hearing, the trial counsel tried to prevent the defense from presenting the written statement through cross-examination. The defense counsel argued that the written statement was admissible under both MRE 106 and 304(h)(2). The military judge disagreed, holding that the statement was inadmissible exculpatory hearsay and that it was not needed to complete the statement. The judge did indicate, however, that he would reconsider his decision if the written statement became admissible for some other purpose.[54]

Later during the government's case-in-chief, the trial counsel presented an expert witness to testify about the child's injuries. During cross-examination, the defense counsel asked the expert if he had considered the written statement of the accused before testifying. The doctor admitted that he reviewed the statement. The military judge then allowed the defense counsel to introduce the written statement into evidence. The defense counsel argued that the statement negated the specific intent element of the charged offense, intentional infliction of bodily harm on a child under sixteen years of age. The panel agreed, and instead found the accused guilty of the lesser-included offense of aggravated assault.[55]

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49. 56 M.J. 428 (2002).

50. *Id*. at 429.

51. *Id*.

52. *Id.*

53. Article 39(a), UCMJ states:

> At any time after the service of charges which have been referred for trial to a court-martial composed of a military judge and members, the military judge may, subject to section 835 of this title (article 35), call the court into session without the presence of the members for the purpose of (1) hearing and determining motions raising defenses or objections which are capable of determination without trial of the issues raised by a plea of not guilty; (2) hearing and ruling upon any matter which may be ruled upon by the military judge under this chapter, whether or not the matter is appropriate for later consideration or decision by the members of the court; (3) if permitted by regulations of the Secretary concerned, holding the arraignment and receiving the pleas of the accused; and (4) performing any other procedural function which may be performed by the military judge under this chapter or under rules prescribed pursuant to section 836 of this title (article 36) and which does not require the presence of the members of the court. These proceedings shall be conducted in the presence of the accused, the defense counsel, and the trial counsel and shall be made a part of the record. These proceedings may be conducted notwithstanding the number of members of the court and without regard to section 829 of this title (article 29).

UCMJ art. 39(a) (2002).

54. *Gilbride*, 56 M.J. at 429.

55. *Id*. at 428.

On appeal, the CAAF focused on whether the written statement was separate and unrelated to the oral confession, or part of the same transaction or course of action. They considered the following facts about MRE 304(h)(2) when making that determination: (1) it applies to both written and oral statements; (2) it controls when the defense may introduce applicable evidence; (3) it allows the defense to introduce the remainder of a statement when the remaining matter is partly a confession or admission, or otherwise is explanatory of or relevant to the confession or admission, even when the remaining portions would otherwise constitute inadmissible hearsay, and; (4) it requires a case-by-case determination of whether a series of statements should be treated as part of the original confession or omission or as a separate transaction or course of action for purposes of the rule. Based on these factors, as the court outlined them in *Rodriguez*, the CAAF determined that the trial judge abused his discretion when he excluded the accused's written statement.[56] The CAAF determined, however, that the judge's error did not materially prejudice a substantial right of the accused under Article 59 (a), UCMJ,[57] because the panel acquitted him of the specific intent offense.[58]

This case provides counsel a list of factors they should apply to cases when the accused has made a combination of written and oral statements. While the opinion in *Gilbride* does not make clear whether these factors are exclusive,[59] counsel should be prepared to argue them in light of the facts in their particular cases. Defense counsel seeking to admit their clients' written statements should carefully tie their particular facts to the factors laid out in *Gilbride*, while trial counsel must delineate the differences between their cases and the court's interpretation of the *Gilbride* factors when they argue to exclude such statements. Trial judges should pay particular attention to the factual circumstances surrounding any series or combinations of statements.

The analysis and factors the CAAF provided in Rodriguez—and reiterated in Gilbride—provide defense counsel with a template for arguing that the court must admit such evidence.[60] The weight of recent CAAF authority concerning the rule of completeness, however, suggests that a defense counsel faces an uphill battle when attempting to admit the statements of the accused through the rule of completeness. The CAAF seems particularly reluctant to allow the accused to provide the equivalent of testimony without undergoing the crucible of cross-examination. Defense counsel should also remember that if they successfully introduce this type of information into evidence, they are opening the door to evidence impeaching the accused's character for truthfulness.[61] Trial counsel must take the time to understand these cases to ensure that the defense does not place impermissible evidence before the finder of fact. Defense counsel choosing to use the rule of completeness under MRE 106 or MRE 304(h)(2) will at a minimum place the character of their client for truthfulness squarely in issue. Trial counsel must be prepared to attack the credibility of the accused successfully when that happens.[62]

Hair Analysis and Relevance

United States v. Will[63] is an unreported case that provides insight into potential uses for hair analysis evidence at trial, while addressing the potential relevance of such evidence. The appellant's command charged him with two specifications of wrongful use of methamphetamine in violation of Article 112a, UCMJ.[64] Appellate defense counsel alleged a number of errors at trial, including the military judge's exclusion of a negative hair analysis. The Navy and Marine Corps Court of Criminal Appeals (NMCCA) ruled that the military judge's refusal to conduct a *Daubert* hearing to determine if the defense could introduce evidence of a negative hair analysis was prejudicial error and overturned the case.[65] The court began by noting that

56. *Id.* at 430 (citing United States v. Rodriguez, 56 M.J. 336, 341-42 (2002)).

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

58. *Gilbride*, 56 M.J. at 430.

59. *See id*.

60. *See id*.

61. *See* MCM, *supra* note 6, MIL. R. EVID. 608(a).

62. *See id*.

63. No. 9802134, 2002 CCA LEXIS 218 (Army Ct. Crim. App. Sept. 27, 2002) (unpublished). While this unpublished opinion does not serve as precedent, it is a thorough and impartial analysis of the appropriate way to apply *Daubert* and *Houser* factors when determining the admissibility of scientific evidence. It also provides an excellent template for defense counsel who wish to lay the foundation for admissibility or to preserve the issue for appeal.

64. *Id.* at *1. "Any person subject to this chapter who wrongfully uses, possesses, manufactures, distributes, imports into the customs territory of the United States, exports from the United States, or introduces into an installation, vessel, vehicle, or aircraft used by or under the control of the armed forces a substance described in subsection (b) shall be punished as a court-martial may direct." MCM, *supra* note 6, pt. IV, ¶ 37(a)-(c).

65. *Will*, 2002 CCA LEXIS 218, at *15. The court noted that the military judge applied the inappropriate standard under MRE 401 for relevance. *Id.*

the standard for review of a trial judge's decision to exclude expert testimony is an abuse of discretion,[66] an interesting backdrop to the analysis of this case.

The appellant was charged with two separate specifications of methamphetamine use, one occurring on 31 December 1996,and the other on 8 December 1997.[67] The government's case relied on the testimony of an expert witness from the Navy drug laboratory to explain the results of the urinalysis reports. The defense presented evidence of the appellant's good character and an alternative theory that prescription drugs caused a false positive screening for methamphetamine, and argued that the appellant's urine specimen may have been the subject of tampering. As part of his theory that the 8 December 1997 urine sample had been tampered with, the appellant had his hair tested at a private lab in February 1998. The laboratory results were negative for methamphetamine.[68] If this testimony was admissible, the appellant had substantive expert evidence refuting the government's 8 December 1997 specification.

The defense made an oral proffer of the expert evidence it expected to introduce and offered the mass spectrometry analysis laboratory report to support its request for a *Daubert*[69] hearing, where the military judge could determine the admissibility of hair analysis testing. The defense counsel attached this laboratory report to the record of trial as an appellate exhibit,[70] and argued that *United States v. Bush*[71] established that evidence of hair analysis is sufficiently reliable for admission on a case-by-case basis. The defense then offered to make a more formal proffer in a question-and-answer form. The government argued that this type of evidence did not meet the *Daubert* standard and opposed its introduction. The military judge agreed with the government and made an initial ruling that the evidence was not relevant.[72] He never held a *Daubert* hearing to determine if the evidence was reliable. More importantly—and contrary to CAAF precedent—he did not address the *Houser* factors that form the military version of *Daubert.* The military judge used his initial lack of relevance determination under MRE 401 to obviate the need for a *Daubert* hearing. The price of this key error was reversal on appeal.

The defense informed the military judge that it intended to call its expert during the defense case-in-chief to lay a foundation for the admissibility of the hair test. When questioned by the military judge, the defense counsel indicated that he was calling the expert witness to qualify him. The military judge refused to allow the defense to call the expert witness. The military judge stated, "I'll stand by my previous rulings. I still think that the testimony of an expert witness would be irrelevant and, if not just irrelevant, I don't want a trial within a trial here."[73] The military judge went on to make specific findings of fact supporting the basis for his ruling that evidence of hair analysis was not admissible.[74]

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66. *Id*. at *4 (citing United States v. Houser, 36 M.J. 392, 397 (C.M.A. 1993)). The court described the contents of a sufficient proffer of expert testimony:

> An adequate proffer includes: (1) qualifications of the expert; (2) subject matter of the expert testimony; (3) basis for the expert's opinion; (4) legal relevance of the evidence; (5) reliability of the evidence; and (6) probative value of the testimony.

Id. at *12-13 (citing United States v. Dimberio, 56 M.J. 20, 26-27 (2001); *Houser,* 36 M.J. at 397).

67. *Id.* at *5-10.

68. *Id.* at *5.

69. *See* Kumho Tire v. Charmichael, 526 U.S. 137 (1999); Gen. Elect. v. Joiner, 522 U.S. 136 (1997); Daubert v. Merrell Dow Pharm., 509 U.S. 579 (1993).

70. *See Will*, 2002 CCA LEXIS 218, at *12.

71. 47 M.J. 305 (1997).

72. *Will*, 2002 CCA LEXIS 218, at *5.

73. *Id.* at *10 (quoting the Record of Trial at 413).

74. *Id.* The military judge's findings were as follows:

> 1. Request for services of Mr. Velasco is denied. No adequate showing of necessity or relevance. That hair analysis conducted 2 months after the positive test of December 1997 has little, if any probative, value.
>
> 2. Proffered testimony from civilian defense counsel, that Mr. Velasco would testify that "negative test cannot rule out the possibility of use," and proffered testimony from trial counsel, LT Frank, that Mr. Velasco told him that "negative result is not probative of an occasional user" supports court's [sic] finding that Mr. Velasco has no relevant testimony with respect to any hair analysis.
>
> 3. Inasmuch as this court finds Mr. Velasco's proffered testimony to be irrelevant and defense has not attempted [sic] establish the reliability of hair analysis, a legal analysis on hair testing in accordance with *Daubert* . . . is unnecessary. A ruling on admissibility of hair testing is not required in this case.

Id. (quoting the Record of Trial at 413) (citing *Daubert*, 509 U.S. at 579; *Bush*, 47 M.J. at 305).

The NMCCA began its analysis of the military judge's decision by reviewing the rules of evidence concerning relevance. The court noted that all relevant evidence is generally admissible under MRE 402.[75] When determining whether evidence is relevant, the trial judge must make an MRE 401[76] determination. Under MRE 401, evidence is relevant if it has a tendency to make more or less probable a "fact that is of consequence to the determination of the action."[77] The court noted that once the military judge determines that evidence is relevant and generally admissible, he should apply MRE 403, balancing the competing interests for and against admission of the evidence. Military Rule of Evidence 403 allows the exclusion of evidence if its "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay."[78] The NMCCA took issue with the trial judge's MRE 401 determination; it held that the military judge placed an undue burden on the defense through his improper application of MRE 401. This unnecessarily high burden resulted in the exclusion of potentially relevant evidence. The court held that the trial judge's misapplication of MRE 401 was an abuse of discretion.[79]

The court reiterated that the proponent of expert evidence must make an adequate proffer as required under MRE 103[80] and MRE 702.[81] The court cited to the *Houser* factors,[82] including the qualifications of the expert, the subject matter of the testimony, the basis for the opinion, the legal relevance and reliability of the evidence, and the probative value of the testimony.[83] The court specifically noted that the civilian defense counsel had done a more than adequate job of laying the predicate foundation requiring a *Daubert* hearing.[84]

The trial judge found that the hair analysis expert and the results of his testing did not meet the minimally relevant standard required by MRE 401. The appellate court disagreed with the trial judge, holding that the trial judge's decision requiring the defense to show that the evidence they proffered would conclusively negate the government's evidence was an incorrect standard.[85] The appellate court held that the military judge should have held a *Daubert* hearing if the defense showed that the evidence it proffered had a tendency to make an issue of consequence in the case more or less probable than it would be without the proffered evidence. The NMCCA, noting that the threshold for logical relevance is extremely low,[86] held that the defense met that threshold burden, and it was an abuse of dis-

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75. MCM, *supra* note 6, MIL. R. EVID. 402.

76. *Id.* MIL. R. EVID. 401.

77. *Id*. Military Rule of Evidence 402 states:

> All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States as applied to members of the armed forces, the code, these rules, this Manual, or any Act of Congress applicable to members of the armed forces. Evidence which is not relevant is not admissible.

Id. MIL. R. EVID. 402.

78. Military Rule of Evidence 403 states:

> Although relevant, evidence may be excluded if its probative value is *substantially outweighed* by the danger of *unfair* prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Id. MIL. R. EVID. 403 (emphasis added).

79. *Will*, 2002 CCA LEXIS 218, at *14-15.

80. Military Rule of Evidence 103 states in part:

> (a) Error may not be predicated upon a ruling which admits or excludes evidence unless the ruling materially prejudices a substantial right of a party, and (1) In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context . . . .

MCM, *supra*, note 6, MIL. R. EVID. 103(a).

81. Military Rule of Evidence 702 states: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." *Id.* MIL. R. EVID. 702.

82. United States v. Houser, 36 M.J. 392 (C.M.A. 1993).

83. *Id.* at 397.

84. *Will*, 2002 CCA LEXIS 218, at *15-16.

85. *Id*.

cretion for the military judge not to conduct a *Daubert* hearing.[87]

The court next addressed the issue of an improper spillover instruction regarding the 8 December 1997 and 31 December 1996 specifications. During a preliminary Article 39(a) hearing, the defense moved to sever the two specifications under Article 112(a) and try them separately. The defense team based its motion on the fact that the charged offenses were similar in nature. The military judge denied that request.[88] This meant that the NMCCA could not test his erroneous ruling on the hair analysis issue for prejudice because the court had tried the two drug specifications—one of them potentially rebuttable by the hair analysis—together. The court held that the military judge failed to provide an adequate spillover instruction concerning the 31 December 1996 and 8 December 1997 specifications. It noted that the *Benchbook* has changed the spillover instruction to ensure that judges do not make such mistakes. The court presumed that the panel followed the instructions of the military judge; accordingly, it was impossible for the appellate court to determine the validity of the conviction for the specification that the hair analysis testimony would not have potentially rebutted.[89]

Defense counsel should use *Will* as a template for preserving any issues regarding the admissibility of expert testimony on appeal. The defense made an appropriate proffer under MRE 103, provided the military judge with substantive evidence, offered to make a more in-depth proffer through the preliminary testimony of the expert witness, and attempted, after the military judge ruled against them, to call the expert witness at trial. The defense was careful to tie its proffer to relevant case law, making certain that the type of testimony it sought to introduce met the *Houser* standards to the extent that the military judge would allow during these preliminary issues. The defense counsel's carefully crafted series of proffers, arguments, and substantive case law placed the military judge in a difficult position. He could either grant the *Daubert* hearing and make an adequate determination as to the admissibility of the evidence, or summarily deny the defense the opportunity to show that the evidence was reliable and relevant. The military judge made the wrong call, and the NMCCA overturned the case.

In *United States vs. Cravens*,[90] the CAAF dealt with hair analysis evidence from a different perspective. The appellant was a Staff Sergeant in the Air Force. On 1 April 1998, civilian law enforcement personnel initially stopped him for driving his vehicle in violation of the California Vehicle Code.[91] During the traffic stop, they saw that the appellant had a firearm. One of the law enforcement personnel also thought that the appellant was acting in a manner consistent with someone who had used a stimulant.[92] The officer conducted a variety of field tests and determined that the appellant was under the influence of a stimulant. During the light accommodation test, the appellant volunteered the following, "If you want to know if I did some dope, I did a line earlier," or words to that effect. They arrested the appellant for driving under the influence of an illegal stimulant and locked him up in the county jail. During booking, they offered him the opportunity to provide a urine sample to prove or disprove the presence of the stimulant or legal narcotic in his system. He declined.[93]

The AFOSI learned of the appellant's arrest on 4 April 1997. Based on their experience, the AFOSI agents determined that it was too late to take a relevant urine sample from the appellant, but their training materials indicated it might be possible to identify drug use with a hair sample. Using proper procedures, the agents procured a search warrant and obtained hair samples from the appellant. The samples tested positive for the presence of methamphetamine metabolites. At trial, the military judge allowed the government to admit the results of the hair analysis over defense objection. The government used the results of the hair analysis to corroborate the appellant's admission.[94]

The CAAF addressed the defense arguments that the result of the hair analysis was not admissible under MRE 401 and 403. The appellant argued that the failure of the drug expert to

86. *Id*. at *14 (citing United States v. Schlammer, 52 M.J. 80 (1999)).

87. *Id* at *15.

88. *Id*. The military judge was well within his rights to deny this request. Normally charges are handled in one court-martial. *See* MCM, *supra* note 6, R.C.M. 906(b)(10) and discussion. The fact that the specifications were similar in nature does not require severance. By failing to allow the defense to present evidence rebutting the December 1997 charge, however, the military judge incurred an obligation to properly instruct the members on the impermissible spillover between the two specifications. *See Will*, 2002 CCA LEXIS 218, at *14.

89. *Will*, 2002 CCA LEXIS 218, at *14.

90. 56 M.J. 370 (2002).

91. *Id.* at 370.

92. *Id.* at 371.

93. *Id*. at 372.

94. *Id*. at 373.

segment the hair properly resulted in evidence that could not support the charge of methamphetamine use on or about 1 April 1997. The CAAF disagreed, holding that such evidence was relevant for purposes of corroborating the appellant's confession.[95] The CAAF also addressed the appellant's contention that the nature of such scientific evidence rendered it too confusing for admissibility under the MRE 403 standard. The court noted that the defense cited no legal authority for a *Daubert* attack on the admissibility of hair analysis evidence, and then refused to second-guess the decision of the trial judge in this particular instance to admit such evidence. The CAAF then affirmed the case.[96]

Trial counsel should take note of this application of hair analysis results. When the accused has admitted drug use but too much time has elapsed to conduct a urinalysis, hair analysis may potentially provide enough corroboration for the confession. The difficulty from a proof perspective is that hair analysis will not always give a positive result for an occasional user. When a urine or blood test is impractical, hair analysis is a good way to obtain corroborating evidence. Defense counsel should research and clearly understand the limitations of hair analysis so that from a relevancy standpoint they can exclude this type of evidence when possible.[97]

Reputation and Opinion Evidence—Character Counts

In *United States v. Lowe*,[98] the appellant engaged in a pattern of misconduct from May 2000 through August 2000. He pled guilty at trial, and the military judge found his pleas provident. During the sentencing case, the appellant's defense counsel requested that the military judge relax the rules of evidence.[99] The military judge did so, and the defense counsel then introduced a letter from a Navy psychologist.[100]

In response to the letter by the Navy psychologist, the trial counsel introduced, over defense objection, a seventeen-page incident report with twenty-eight pages of attached statements. The trial counsel offered this sentencing evidence to rebut the information in the Navy psychologist's letter. On appeal, the appellant asserted that the trial counsel's rebuttal evidence constituted impermissible aggravation evidence. The government appellate counsel argued that the evidence was proper aggravation evidence, and in the alternative, that the defense's request to relax the rules of evidence for sentencing allowed the government to admit the type of evidence on rebuttal that would otherwise not be admissible.[101]

The court first considered whether the trial counsel's evidence constituted proper aggravation evidence.[102] If so, then it would be the type of evidence clearly admissible under RCM 1001(b)(4), without the need for classifying it as rebuttal evidence. The court noted that it would have to be evidence concerning a continuous course of conduct involving similar crimes and the same victims. The court determined that in this particular case this evidence did not meet that standard and was not proper aggravation evidence. It next turned to whether it was proper rebuttal evidence.[103]

To determine whether the document was proper rebuttal evidence, the court looked at the impact that MRE 405[104] reputation and opinion evidence has when considered in concert with the relaxation of evidentiary standards contemplated by RCM 1001(c)(3) and RCM 1001(d).[105] The court determined that the requirements of these rules deal with authenticity and reliabil-

95. *Id.* at 374.

96. *Id*. at 376.

97. *See* United States v. Bush, 47 M.J. 305 (1997).

98. 56 M.J. 914 (2002).

99. *See* MCM, *supra* note 6, R.C.M. 1001(c)(3) ("*Rules of evidence relaxed.* The military judge may, with respect to matters in extenuation or mitigation or both, relax the rules of evidence. This may include admitting letters, affidavits, certificates of military and civil officers, and other writings of similar authenticity and reliability.").

100. *Lowe*, 56 M.J. at 915 ("During the presentencing phase of Appellant's court-martial, trial defense counsel requested that the evidentiary rules for the court be relaxed, pursuant to [R.C.M. 1001(c)(3)].").

101. *Id.* at 916.

102. Rule for Courts-Martial 1001(b)(4) states in part:

> *Evidence in aggravation.* The trial counsel may present evidence as to any aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty. Evidence in aggravation includes, but is not limited to, evidence of financial, social, psychological, and medical impact on or cost to any person or entity who was the victim of an offense committed by the accused and evidence of significant adverse impact on the mission, discipline, or efficiency of the command directly and *immediately resulting from the accused's offense*.

MCM, *supra* note 6, R.C.M. 1001(b)(4) (emphasis added.).

103. *Lowe*, 56 M.J. at 917.

ity, rather than the scope of the evidence presented. The court noted that the governing rule for the admission of reputation or opinion evidence is MRE 405, and remarked that "the Government, under [MRE] 405(c), could have presented a written opinion from another expert to rebut [the psychologist, but] it could not rely upon [MRE] 405(c) as authority permitting extrinsic evidence of specific instances of misconduct to rebut an opinion."[106] The court was not persuaded by the government's argument regarding the relaxation of the rules of evidence, noting that the government was clearly on notice regarding the letter by the Navy psychologist and had ample opportunity to prepare appropriate rebuttal evidence. Their decision not to do so was to the government's detriment.[107]

United States v. Humpherys[108] is a classic character evidence case pitting the testimony of difficult trainees against the word of a lecherous drill sergeant. The government accused the appellant of misconduct with a number of trainees. During a pretrial session, the defense counsel moved to exclude portions of the anticipated testimony of two privates because it contained inadmissible evidence of uncharged misconduct.[109] The military judge ruled that the anticipated testimony was admissible to show intent under MRE 404(b)[110] and conditionally admitted the evidence, subject to review if it did not emerge as anticipated at trial.[111] The witnesses testified as anticipated. The military judge allowed the testimony concerning the uncharged misconduct, but later gave a limiting instruction concerning the use of the uncharged misconduct evidence.[112]

At the close of the government's case-in-chief, the prosecution attempted to offer the appellant's pretrial statement into evidence. The defense counsel objected to the first page of the statement because it also contained evidence of uncharged misconduct.[113] The trial counsel argued that the first page was admissible to show the appellant's course of conduct in violating local regulations, and as rebuttal evidence to the good soldier testimony elicited by the defense through the cross-examination of government witnesses. The military judge admitted the entire sworn statement as proper rebuttal evidence

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104. *Id.*; *see* MCM, *supra* note 6, R.C.M. 405(a). This provision states,

> *Reputation or opinion.* In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

Id.

105. *Lowe*, 56 M.J. at 917; *see* MCM, *supra* note 6, R.C.M. 1001(d). This provision states,

> (d) *Rebuttal and surrebuttal.* The prosecution may rebut matters presented by the defense. The defense in surrebuttal may then rebut any rebuttal offered by the prosecution. Rebuttal and surrebuttal may continue, in the discretion of the military judge. If the Military Rules of Evidence were relaxed under subsection (c)(3) of this rule, they may be relaxed during rebuttal and surrebuttal to the same degree.

Id.

106. *Lowe*, 56 M.J. at 917 (citing Únited States v. Wingart, 27 M.J. 128, 134 (C.M.A. 1988)).

107. *Id*.

108. 57 M.J. 83 (2002).

109. *Id.* at 86.

110. *Id*. at 91. Military Rule of Evidence 404(b) provides in part:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . . .

MCM, *supra* note 6, MIL. R. EVID. 404(b).

111. *Humpherys*, 57 M.J. at 86.

112. *Id*. at 91.

113. *Id*. at 92. Referring to the appellant's statement, the court noted,

> On that page, appellant answered questions about why he took four female trainees, including PVTs Q and F, with him in a van at 12:10 a.m. to go to the hospital to pick up two other soldiers, in violation of local installation regulations. The defense argued that this evidence of misconduct was not relevant to any of the charges or, alternatively, that the danger of unfair prejudice substantially outweighed its probative value.

Id. (citing MCM, *supra* note 6, MIL. R. EVID. 402, 403).

on the issue of whether the accused complied with the Fort McClellan regulation.[114]

The issue raised by these facts is contentious and unsettled. What happens when a court admits otherwise impermissible character evidence? Does the other side then have the ability to admit the same type of impermissible evidence in rebuttal? Some jurisdictions argue that the defense opens the door for admission of this type of rebuttal evidence when it offers improper use of extrinsic acts under the guise of reputation or opinion testimony.[115] In *Humpherys*, the defense counsel arguably used extrinsic acts evidence when he asked a government witness on cross-examination if the accused followed Fort McClellan regulations in his training methods.[116]

The CAAF agreed with the military judge's application of MRE 404(b). It applied the *Reynolds* analysis and determined that the military judge did not abuse his discretion in admitting the evidence.[117] This case serves as another example of the court's reliance upon the factors laid out in *United States v. Reynolds*.[118]

The application of MRE 403 to MRE 404(b) was not the only important issue in *Humpherys*. A more significant development is the CAAF's application of MRE 405 to rebuttal evidence. The majority of the court found this type of evidence to be within the range of appropriate reputation and opinion testimony. The court also noted that even if it had been evidence of impermissible extrinsic acts, the acts in question did not relate to the charged offenses, and still would not have opened the door to improper government rebuttal evidence. The CAAF did not reach the issue of whether improper use evidence opened the door to improper rebuttal evidence. The separate opinion of the concurrence, however, argued for just such a position.[119]

After the military judge ruled that the written statement of the accused was admissible as rebuttal evidence, the trial counsel offered the testimony of two privates to testify about what happened immediately before the events described in the first page of the appellant's sworn statement. When the first private started to testify, the defense counsel objected for lack of relevance. Trial counsel responded that the evidence was offered to rebut the accused's assertion then he did not treat female trainees differently than male trainees. The military judge then allowed the witness to testify over the objection of the defense.[120]

Defense appellant counsel argued that the admission of this evidence violated the restrictions of MRE 404(b). The CAAF disagreed, noting that the military judge admitted this evidence under the theory that it was rebuttal evidence in response to the appellant's good soldier defense.[121] The court reiterated the right of a soldier to present a good soldier defense under MRE 404(a)(1)[122] when evidence of good military character is pertinent to the charged offense. The court recognized that although the government may rebut this type of evidence, case law does not allow for rebuttal evidence to circumvent the restrictions of MRE 405.[123]

The court noted that the error in this case was the form of the rebuttal evidence. The court began by re-establishing that extrinsic evidence of prior acts misconduct is not admissible to rebut opinion evidence of good military character. Those specific acts should form the basis of cross-examination questions for reputation and opinion witnesses. The government may not call other witnesses to testify about those acts. Although the

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114. *Id*.

115. *Id*. ("The separate opinion suggests that appellant 'opened the door' for admission of this evidence. There is a split in authority as to whether an improper use of extrinsic acts by the defense in such circumstances opens the door to rebuttal by the prosecution."); *see also* MCM, *supra* note 6, MIL. R. EVID. 401; United States v. Reed, 44 M.J. 825, 826 (A.F. Ct. Crim. App. 1996). The federal circuit courts of appeal are split regarding this question. *Compare* United States v. Benedetto, 571 F.2d 1246, 1250 (2d Cir. 1977) (holding that rebuttal evidence is not permitted), *with* Ryan v. Bd. of Police Comm'rs, 96 F.3d 1076, 1082 n.1 (8th Cir. 1996) (holding that similar rebuttal evidence is permitted).

116. *Humpherys*, 57 M.J. at 92.

117. *Id.*

118. *See* United States v. Reynolds, 29 M.J. 105 (C.M.A. 1989). The CAAF continues to reference its seminal holding regarding the MRE 403 balancing test in *Reynolds*. *See, e.g.*, United States v. Tyndale, 56 M.J. 209, 213 (2001); United States v. Young, 55 M.J. 193, 196 (2001).

119. *Humpherys*, 57 M.J. at 92.

120. *Id*.

121. *Id*.

122. *See* MCM *supra* note 6, MIL. R. EVID. 404(a) ("*Character of the accused.* Evidence of a pertinent trait of the character of the accused offered by an accused, or by the prosecution to rebut the same . . . .").

123. *Humpherys*, 57 M.J. at 93 ("Extrinsic evidence of prior acts of misconduct is not admissible to rebut opinion evidence of good military character. Normally, the prosecution tests such opinion evidence through cross-examination 'into relevant specific instances of conduct.' That procedure was not followed in the present case.") (citations omitted).

CAAF found error, it affirmed based upon a lack of prejudice to the accused. The court noted that the military judge gave a proper limiting instruction concerning this evidence, and that the other evidence of guilt was overwhelming.[124]

Counsel should consider the court's opinions in both *Lowe* and *Humpherys*. Both cases make it clear that MRE 405 does not allow counsel to relax the scope of evidence during sentencing or rebuttal. Counsel should pay particular attention during case development to ensure that evidence offered during the rebuttal phase comports with those evidentiary restrictions. This will normally concern the form of reputation and opinion testimony for a particular character trait of the accused or victim. If both parties are aware of the appropriate format and timing of such evidence, they can properly prepare their case to ensure that the evidence they want to get before the panel gets admitted.

Riding the Privilege Merry-Go-Round

Attorney-Client Privilege

United States v. Pinson[125] dealt with improper disclosure of attorney-client information. The appellant was first tried by court-martial in February 1996. At that court-martial, a witness perjured herself. She later disclosed to civilian police that the appellant forced her to commit perjury by beating and threatening her. She provided several threatening letters to support her allegations. The Naval Criminal Investigative Service (NCIS) and the Icelandic Police initiated separate investigations into her allegations. NCIS obtained a search authorization for the appellant's quarters. During the search, they seized several books containing the appellant's writings and comments about the victim. Some of those writings allegedly contained attorney-client privileged material.[126]

The CAAF noted the following facts when beginning its analysis of this issue: (1) the government did not use any privileged documents as direct evidence at trial; (2) the NCIS seized the documents in question properly; (3) the NCIS temporarily gave the documents to the Icelandic police; (4) at the time the NCIS agents seized the documents, none of the investigators recognized the documents as potentially privileged information; (5) no one recognized that the documents were potentially privileged until the trial counsel discovered this fact, one year after seizure; and (6) with the exception of the superintendent for the Icelandic police, no other individual had read the content of the documents in question. The court then noted that these documents were only used for handwriting exemplars and their comparisons.[127]

The CAAF specifically identified other measures the trial court took to ensure that the attorney-client privilege was protected. Those measures included findings by the military judge that the contents of those documents had been fully disclosed through communications to others, that none of the material was used directly or indirectly against the accused at his second court-martial, and that, as a matter of law, comparing the physical appearance of the accused's lawfully seized handwriting is not protected by the attorney-client privilege. The appellant conceded that the government did not use any privileged information against him at trial, but argued in the alternative that the government indirectly produced privileged documents as exemplars and comparisons. The appellant argued that this required dismissal and a new indictment. The CAAF disagreed.[128]

In its opinion, the CAAF noted that the Supreme Court has addressed the standard for granting a new trial based on violation of the attorney-client privilege. The CAAF pointed out that in *Weatherford v. Bursey*,[129] the Supreme Court refused to adopt a per se rule that any interference with the attorney-client privilege required reversal.[130] The CAAF also considered cases in which agents of the government met with suspects they knew to be represented by counsel.[131] Absent substantial temporary or permanent damage to the quality of the representation, the court noted that this, in and of itself, did not demand reversal of

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124. *Id.*

125. 56 M.J. 489 (2002).

126. *Id.* at 490.

127. *Id.*

128. *Id.* at 491.

129. 429 U.S. 545 (1977). This case involves an undercover agent who was arrested with his co-conspirator for breaking into a Selective Service office. The agent remained undercover before trial, and met with his co-conspirator and their defense attorney on two occasions. The undercover agent was careful to not discuss any information with his superiors or the prosecuting attorney for that case, and never volunteered information for either the defense counsel or his co-conspirator. Although the court held that the government violated the defendant's attorney-client privilege, it also held that the violation did not require reversal in this instance. *Id.* at 551.

130. *Pinson*, 56 M.J. at 492.

131. *See* United States v. Morrison, 449 U.S. 361 (1981). In this case, the DEA agents met with the defendant outside the presence of his attorney, knowing he had counsel. The court looked to see if the defendant could demonstrate any prejudice to the attorney-client relationship. *Id.* at 364.

the conviction.[132] When the appellant cannot show demonstrable prejudice or the substantial threat of prejudice, the remedy for a violation of the attorney-client privilege is to deny the prosecution the fruits of the transgression. The court held that the use of the privileged documents to obtain handwriting examples was not an improper use and ruled that the military judge's decision at trial was not an abuse of discretion.[133]

Priest-Penitent Privilege

In *United States v. Benner*,[134] the CAAF dealt with the intersection of an accused's right against self incrimination and the "priest-penitent," or "communications with clergy," privilege. The appellant was stationed with his wife and stepdaughter in Babenhausen, Germany. In May 1998, the appellant performed sodomy and indecent acts on his four-year-old stepdaughter while his wife was in the hospital. The following month, the stepdaughter told her grandmother about the abuse. Later, when her mother got out of the hospital, the victim told her mother about being abused. The mother confronted the appellant, who confessed to his wife. No member of the family informed the chain of command or told the military police. The grandmother took the child back to her home in the United States. The mother also left Germany and joined her mother and daughter.[135]

In September 1998, the appellant decided to seek counsel from Chaplain (Captain) S. He did so in part at the urging of his wife. When he met with the chaplain for the first time, the appellant was extremely emotional. He confessed to the chaplain that he had had an inappropriate relationship with his stepdaughter. The chaplain told the appellant at the end of their meeting that he might have to report the child abuse. After meeting with the appellant, the chaplain called the Army Family Advocacy office. A representative of the office told the chaplain that he was required to report the abuse.[136] This advice was specifically contrary to MRE 503,[137] the requirements of *Army Regulation* (*AR*) *165-1*,[138] and *AR 608-18*.[139]

The next time he met with the appellant, the chaplain told him that he had to report the earlier admission of child abuse. The appellant then broke down and confessed to even more details about how he sexually abused his daughter.[140] Upon hearing the additional details, the chaplain told the appellant that it would be better for him to confess to the authorities on his own. The chaplain then offered to go with him to the military police station. The chaplain told the appellant how forgiveness included forgiving himself, and that confessing might be a step the appellant could take to begin seeking forgiveness. The appellant did not want to go to the military police station. At trial, the chaplain testified that, in his opinion, if he had not volunteered to go to the station with the appellant, he doubted that the appellant would have reported himself. The chaplain

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132. *Id.*

133. *Pinson*, 56 M.J. at 493.

134. 57 M.J. 210 (2002).

135. *Id.* at 211.

136. *Id*.

137. Military Rule of Evidence 503 states:

> (a) *General rule of privilege.* A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a clergyman or to a clergyman's assistant, if such communication is made either as a formal act of religion or as a matter of conscience.
> (b) *Definitions.* As used in this rule—
> (1) A "clergyman" is a minister, priest, rabbi, chaplain, or other similar functionary of a religious organization, or an individual reasonably believed to be so by the person consulting the clergyman.
> (2) A communication is "confidential" if made to a clergyman in the clergyman's capacity as a spiritual adviser or to a clergyman's assistant in the assistant's official capacity and is not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the purpose of the communication or to those reasonably necessary for the transmission of the communication.
> (c) *Who may claim the privilege.* The privilege may be claimed by the person, by the guardian, or conservator, or by a personal representative if the person is deceased. The clergyman or clergyman's assistant who received the communication may claim the privilege on behalf of the person. The authority of the clergyman or clergyman's assistant to do so is presumed in the absence of evidence to the contrary.

MCM, *supra* note 6, MIL. R. EVID. 503.

138. U.S. DEP'T OF ARMY, REG. 165-1, CHAPLAIN ACTIVITIES IN THE UNITED STATES ARMY para. 4-4 (26 May 2000) [hereinafter AR 165-1]. This provision lays out the requirements that any communication that is a formal act of religion or matter of conscience cannot be disclosed to a third person if the individual making the communication does not want it disclosed. Chaplains are directed to not divulge privileged communications without the written consent of the person(s) authorized to claim the privilege. *Id.*

139. U.S. DEP'T OF ARMY, REG. 608-18, THE FAMILY ADVOCACY PROGRAM (1 Sept. 1995) [hereinafter AR 608-18].

140. *Benner*, 57 M.J. at 211.

eventually convinced the appellant to go to the military police station and accompanied him there.[141]

When they got to the station, the chaplain told the Military Police commander that the appellant was there to make a statement about his "improper relationship with his stepdaughter."[142] The commander called CID, and two agents arrived about an hour later. They advised the appellant of his rights under the Fifth Amendment, Article 31(b), UCMJ, and MRE 305(d). The CID agents did not give a "cleansing" warning about the appellant's earlier confession to the chaplain. The appellant waived his rights and eventually produced a detailed, six-page, handwritten confession.[143]

The CAAF began its analysis by reiterating that the prosecution must establish that a confession was voluntary by a preponderance of the evidence to introduce it at trial.[144] The court noted that the question of whether a confession was voluntary is an extremely important one. In accordance with Supreme Court precedent,[145] the CAAF stated that it reviews a military judge's determination that a confession was voluntary de novo. Having established the standard of review and the court's ability to address the issues raised, the court then discussed the history and application of the priest-penitent privilege.[146]

The court next described how confidentiality between a priest and penitent has been recognized as one of the most sacred privileges at common law. The military justice system recognized this in the *1951 Manual for Courts-Martial*,[147] and when the Military Rules of Evidence were promulgated, MRE 503 expressly recognized a "communications to clergy" privilege.[148] The court noted that *AR 165-1* and *AR 608-18* both recognize this privilege.[149]

The dual nature of a chaplain in the military as an officer and a member of the clergy is important to this case. As a member of the clergy, any communication between the chaplain and a penitent that falls under MRE 503 and *AR 165-1* is protected. The chaplain cannot disclose the contents of that communication without the consent of the penitent. When the chaplain is acting solely as an officer, however, he has a duty under *AR 608-18* to report any instance of child abuse to the appropriate authorities.[150] The court noted that in this case, the chaplain became confused between his responsibilities as an officer and as a chaplain. He ultimately acted as an army officer, and that decision violated MRE 503, *AR 165-1*, and *AR 608-18*. The court applied the particular circumstances involved in this violation of the priest-penitent privilege and determined that the confession of the appellant was involuntary. It noted that the actions of the chaplain forced the appellant to confess and violated the privilege, and that the actions of the CID agents in taking his confession did not overcome the appellant's resulting lack of free will. The CAAF noted that under these circumstances, due process was offended, and remanded the case.[151]

Any trial counsel handling a similar issue in the future should concentrate on developing the facts to support an argument that the appellant confessed voluntarily. If the appellant freely chose to make the confession, then he has waived the privilege. Trial counsel who cannot lay that foundation should consider Chief Judge Crawford's dissent in this case. The Chief Judge raises an interesting issue concerning the application of an exclusionary rule based upon the violation of a privilege.

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141. *Id.* at 213.

142. *Id.* at 212.

143. *Id*. Article 31, UCMJ, states,

> No person subject to this chapter may interrogate, or request any statement from an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.

UCMJ art. 31(b) (2002).

144. *See* United States v. Bubonics, 45 M.J. 93, 95 (1996).

145. *See* Arizona v. Fulminante, 499 U.S. 279 (1991).

146. *Benner*, 57 M.J. at 212.

147. *Id.* (citing MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. III, ¶ 151b(2) (1951)) ("Also privileged are communications between a person subject to military law and a chaplain, priest, or clergyman of any denomination made in the relationship of penitent and chaplain, priest, or clergyman, either as a formal act of religion or concerning a matter of conscience.").

148. *See* MCM, *supra* note 6, MIL. R. EVID. 503; *supra* note 137.

149. *Benner*, 57 M.J. at 212 (citing AR 165-1, *supra* note 138, para. 4-4m; AR 608-18, *supra* note 139, para. 3-9).

150. *Id.* at 213 (citing AR 608-18, *supra* note 139, para. 3-9).

151. *Id.* at 214.

She notes that the court has never before excluded evidence based upon a privilege. While this argument is interesting, it does not fully consider the position of the majority. The majority was careful to base its decision to remand this case on the involuntary nature of the appellant's confession, not the mere violation of the privilege.[152] While the effect in this case is to exclude the confession, the court narrowly decided the issue based on the involuntary nature of the appellant's actions. Future cases that lack this degree of specificity are unlikely to have the same result based solely upon a violation of the priest-penitent privilege. Trial counsel should nonetheless consider the arguments in the Chief Judge's dissent when they look for ways to convince a trial judge to not exclude a confession based solely upon a prophylactic violation of the privilege.

In *United States v. Walker*,[153] the Army Court of Criminal Appeals (ACCA) and the CAAF considered whether the trial judge erroneously admitted information protected by the husband-wife privilege.[154] The appellant was charged with sexually abusing his daughter's eleven-year-old friend during a sleepover. The victim testified at trial, and after cross-examination, the trial counsel called an expert rebuttal witness to explain the reasons that victims of abuse often delay reporting. The trial counsel next introduced—over defense objection—a redacted statement the appellant's wife made to a CID agent. That statement read as follows: "Around 17 Aug 97, I returned to Illesheim from Poland. [The appellant] did tell me what happened; however, I do not wish to disclose what he said."[155] The appellant's daughter testified, refuting portions of the victim's testimony. The appellant also testified.[156]

The ACCA reviewed the case and determined that the military judge erred in admitting the wife's statement to the CID agent. The court concluded that the appellant's wife had invoked the spousal privilege in her statement to the CID agent.[157] At trial, the trial counsel had argued that the appellant's statement to his wife was admissible as an admission by a party opponent under MRE 801(d)(2).[158] The trial counsel also argued that the statement was admissible under the residual hearsay exception.[159] The defense counsel countered by arguing that the statement was a "confidential communication" and privileged under MRE 504(b).[160] The court noted that the wife's statement to the CID agent did not constitute an admission by the appellant, but was instead an assertion of privilege.[161] Having determined that the statement by the wife to CID was an assertion of privilege, the court ruled that admission of the statement was error. The court held, however, that

152. *See id*.

153. 54 M.J. 568 (Army Ct. Crim. App. 2000), *rev'd*, 57 M.J. 174 (2002).

154. *Id*.; *see* MCM, *supra* note 6, MIL. R. EVID. 504.

155. *Walker*, 54 M.J. at 570.

156. *Id.*

157. *Id.* at 571.

158. *Id*. at 570. Military Rule of Evidence 801(d)(2) defines admissions of party opponents as follows:

> *The statement is offered against a party and is (A) the party's own statement in either the party's individual or representative capacity, or (B) a statement of which the party has manifested the party's adoption or belief in its truth*, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment of the agent or servant, made during the existence of the relationship, or (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy. The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment relationship and the scope thereof under subdivision (D), or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E).

MCM, *supra* note 6, MIL R. EVID. 801(d)(2) (emphasis added).

159. *Walker*, 54 M.J. at 570.

160. Military Rule of Evidence 504, the husband-wife privilege, defines the privilege as follows:

> (b) *Confidential communication made during marriage.* (1) General rule of privilege. A person has a privilege during and after the marital relationship to refuse to disclose, and to prevent another from disclosing, any confidential communication made to the spouse of the person while they were husband and wife and not separated as provided by law.

MCM, *supra* note 6, MIL R. EVID. 504(b)(1).

161. *Walker*, 54 M.J. at 571 ("The second phrase, in essence, constitutes Mrs. Walker's invocation of her privilege not to reveal confidential spousal communications, pursuant to MRE 504(b).").

while the military judge may have abused her discretion, the error was harmless. The ACCA affirmed the case.[162]

The CAAF reviewed the ACCA's holding de novo. The CAAF's opinion begins by noting that both parties briefed and argued the issue as a non-constitutional evidentiary error. The court reiterated the test for review of both constitutional and non-constitutional error, and then stated that because the government failed to meet the burden for either standard, the court did not need to decide whether the error was constitutional. The CAAF focused on the nature of this specific trial, noting that in the final analysis, it came down to a credibility contest between the appellant and the victim. The court discussed the erroneous decision of the military judge to admit the alleged statement, and how the trial counsel's impermissible inference argument in closing compounded the earlier error. Given the close nature of the credibility issues at trial, the court was left in grave doubt as to the whether the military judge's erroneous admission of the statement was harmless. Based on these grave doubts, the court concluded that it had no choice but to reverse the case.[163]

It is imperative that trial counsel make clear, cogent, and relevant arguments for the admissibility of evidence. The record indicates that the trial counsel failed to develop the evidentiary issues fully. A parsing of the appellant's wife's actual statement to the CID agent clearly establishes that it never contained a statement by the appellant.[164] A review of MRE 504 and MRE 512 should have shown the trial counsel that the evidence proffered at trial was an invocation of privilege and not admissible. The fact that the trial counsel chose to argue in the alternative for admissibility under the residual hearsay rule[165] clearly indicated the existence of faulty evidentiary logic or admissibility problems.

Military judges should listen carefully to the arguments posited by counsel. When counsel begin to argue residual hearsay in situations that do not involve prior statements by child abuse victims, alarm bells should go off. In this case, no one heard the bells ringing. Defense counsel dealing with similar issues must make certain that they adequately preserve their objections under MRE 103.[166] They must make timely objections and state them with specificity. When the issue is the potential exclusion of evidence, counsel must also make offers of proof. Defense counsel must ensure that military judges rule on their objections; when they lose, they must note the basis for their objections on the record. Finally, the CAAF's treatment of this case is an indication of its continued commitment to fully developing the boundaries of applicable evidentiary rulings at trial.

Out of Court Statements—Hearsay

Medical Treatment Exception

In *United States v. Hollis*,[167] the CAAF expanded the boundaries of MRE 803(4),[168] admitting statements of a child about witnessing her sister's sexual abuse. The child made those statements during a physical examination performed by a doctor, Captain Craig, at the request of the defense counsel. Before the examination, the appellant and his children were stationed in Italy, where one of the daughters told their nanny that her father had sexually abused her. The nanny took the child to her

162. *Id.*

163. United States v. Walker, 57 M.J. 174, 178 (2002).

164. *Walker*, 54 M.J. at 570.

165. *See id*.

166. Military Rule of Evidence 103(a) states as follows:

> Ruling on Evidence. (a) *Effect of erroneous ruling.* Error may not be predicated upon a ruling which admits or excludes evidence unless the ruling materially prejudices a substantial right of a party, and
>
> (1) *Objection.* In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or
>
> (2) *Offer of proof.* In case the ruling is one excluding evidence, the substance of the evidence was made known to the military judge by offer or was apparent from the context within which questions were asked. The standard provided in this subdivision does not apply to errors involving requirements imposed by the Constitution of the United States as applied to members of the armed forces except insofar as the error arises under these rules and this subdivision provides a standard that is more advantageous to the accused than the constitutional standard.

MCM, *supra* note 6, MIL R. EVID. 103(a).

167. 57 M.J. 74 (2002).

168. Military Rule of Evidence 803(4) states,

> (4) *Statements for purposes of medical diagnosis or treatment.* Statements made for purposes of medical diagnosis or treatment and described medical history, or past or present symptoms, pain, or sensation, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

MCM, *supra* note 6, MIL. R. EVID. 803(4).

pediatrician. The pediatrician saw the child and told her that he would help her and that she should tell the truth. He then took a medical history from the child, who told him of the sexual abuse.[169] At the end of the interview, the pediatrician invited other personnel present—including a special agent—to ask questions. The pediatrician then performed a complete physical exam. Afterwards, the children were removed from the appellant's home, and they went to live with their grandparents in the United States.[170]

Before trial, the appellant's defense attorney contacted the family and asked them to allow Captain Craig to interview the children. The defense's theory was that another perpetrator had committed the abuse when the children lived with their mother. They wanted their own expert to interview the children to determine if this theory was viable. Captain Craig interviewed the children and asked them about their mother's boyfriend, and whether he had abused them. One child said that her mother's boyfriend had done something bad to her but that she did not want to talk about that. When Captain Craig began to ask about Italy, one of the girls told her that something "bad" had happened with her father in Italy in the bedroom. She then told Captain Craig that her father told her not to tell anyone about what they did because he could go to jail.[171] The child was so emotionally upset by telling Captain Craig about the abuse that he terminated the interview. Captain Craig returned later and conducted a physical examination of the abused child and her younger sister. During the examination of the younger sister, she told Captain Craig that she had seen her father doing "yucky" and "bad" things to her older sister.[172]

At trial, the military judge admitted the testimony of the treating pediatrician and Captain Craig, over defense objections. The judge held that the statements of the older sister to both physicians fell under MRE 803(4) and were clearly admissible.[173] The judge ruled that the statements of the younger sister to Captain Craig during her examination were also admissible under MRE 803(4).[174] The CAAF agreed.[175]

The CAAF began its analysis by noting that the state of mind of the individual making the statement to treating medical personnel is a preliminary question of fact under MRE 104(a).[176] The court noted that the testimony of the treating official can establish the patient's state of mind, and that the military judge is responsible for ensuring that the evidence meets both prongs of MRE 803(4). Once a court rules on the admissibility of the evidence at trial, an appellate court will not overturn the decision on appeal unless it is clearly erroneous. Based on this standard and the facts, the CAAF affirmed the case. Judge Effron's concurring opinion, however, indicates that the court is beginning to express some concerns about the expansion of MRE 803(4). Despite his reservations, Judge Effron noted that although his application of the facts to the second prong of MRE 803(4) would have required excluding the statements of the younger girl to Captain Craig, the overwhelming evidence against the appellant rendered that error harmless.[177]

Counsel should consider the concurring opinions of Judge Effron and Judge Sullivan as they prepare to use MRE 803(4) at trial. Trial counsel must ensure they lay adequate foundations for both prongs of MRE 803(4) before offering evidence of this nature. Defense counsel should attack attempts by trial counsel to lay foundations for such evidence, paying particular attention to the patient's state of mind. While the trial counsel can lay the foundation for this kind of testimony by questioning the treating physician, the defense counsel should consider conducting a strenuous voir dire of the physician, supported by testimony from the alleged victim and other individuals present during the medical treatment. The ability to show inconsistencies between different witnesses may be sufficient to keep the evidence out—that is, if the CAAF begins to consider the foundations for admitting this evidence more closely in the future.

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169. *Hollis*, 57 M.J. at 76.

170. *Id.* at 77.

171. *Id.*

172. *Id.* at 78.

173. *Id.*

174. *Id.* at 75.

175. *Id.* at 80.

176. Military Rule of Evidence 104(a) states,

> *Questions of admissibility generally.* Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, *the admissibility of evidence*, an application for a continuance, or the availability of a witness shall be determined by the military judge. In making these determinations the military judge is not bound by the rules of evidence except those with respect to privileges.

MCM, *supra* note 6, MIL. R. EVID. 104(a) (emphasis added).

177. *Hollis*, 57 M.J. at 81-82 (Effron & Sullivan, JJ., concurring).

Business Record Exception—Corroborating a Confession

In *United States v. Grant*,[178] the CAAF dealt with a question of first impression for the military courts—the requirements for a foundation under the business record exception[179] when the business record in question is created by a third party, the third party is not present before the court, and the record is incorporated into the business records of the testifying party. This issue arose under an interesting set of circumstances. The ruling of the court could have long-term consequences for how the military handles the prosecution of drug cases.

In *Grant*, the appellant was stationed at an Air Force Base in Turkey. He was found unconscious at a club complex and taken to a base hospital. The on-call emergency room doctor followed standard protocol and ordered a screening urinalysis. The hospital released the appellant before it received the urinalysis results. The record of the urinalysis test indicated the presence of cannabinoids.[180] The lab report did not indicate the specific amount, and the record does not indicate that the testing facility used the standard Department of Defense nanogram cutoff levels.[181] The hospital personnel did not make a record of the urine sample's chain of custody or use standard evidence handling procedures when they sent the sample to the laboratory for testing. The hospital forwarded the results of the test to the local AFOSI office. When AFOSI special agents interviewed the appellant, he confessed to using an illegal substance.[182]

At trial, the government offered the results of the urine test as a business record under MRE 803(6). The lab results themselves were self-authenticating under MRE 902(4)(a).[183] The government specifically offered the lab results as a business record for the limited purpose of corroborating the appellant's confession. The government called two witnesses to lay the appropriate business record foundation.[184]

The CAAF addressed the question of whether one business entity could rely upon a third party's preparation of a portion of its business record. In *Grant*, the government introduced the third-party laboratory's test results as a part of the hospital business records, even though the hospital did not have control over the laboratory's testing procedures, and received the results of the report as an e-mail.[185] The court noted that this was a case of first impression for the military and looked to federal courts for guidance on how to apply this fact scenario to MRE 803(6).[186]

Federal jurisdictions consider business records containing portions of another business's records to be admissible if: (1)

178. 56 M.J. 410 (2002).

179. Military Rule of Evidence 803(6) governs the hearsay exception for business records. It states:

> *Records of regularly conducted activity.* A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes the armed forces, a business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit. Among those memoranda, reports, records, or data compilation normally admissible pursuant to this paragraph are enlistment papers, physical examination papers, outline-figure and fingerprint cards, forensic laboratory reports, chain of custody documents, morning reports and other personnel accountability documents, service records, officer and enlisted qualification records, logs, unit personnel diaries, individual equipment records, daily strength records of prisoners, and rosters of prisoners.

MCM, *supra* note 6, MIL. R. EVID. 803(6).

180. *Grant*, 56 M.J. at 412.

181. *See generally* Major Walter M. Hudson & Major Patricia A. Ham, United States v. Campbell*: A Major Change for Urinalysis Prosecutions?*, ARMY LAW., May 2000, at 38 (discussing the unique requirements for urinalysis prosecutions which include considerably more foundation than the prosecution laid in *Grant*).

182. *Grant*, 56 M.J. at 412.

183. Military Rule of Evidence 902(4)(a) states:

> *Documents or records of the United States accompanied by attesting certificates.* Documents or records kept under the authority of the United States by any department, bureau, agency, office, or court thereof when attached to or accompanied by an attesting certificate of the custodian of the document or record without further authentication.

MCM, *supra* note 6, MIL. R. EVID. 902(4).

184. *Grant*, 56 M.J. at 413-14.

185. *Id.* at 412.

186. *Id.* at 414.

the second business integrates the first business's record into its own record; and (2) the second business relies on such records in the ordinary course of its business. In federal court, a proponent can lay the foundation for admissibility of this type of business record through the testimony of a qualified witness from the incorporating entity.[187] For that testimony to be sufficient, the proponent must satisfy four tests: (1) the incorporating entity received the record in question; (2) the incorporating entity kept the record in the normal course of business; (3) the incorporating entity relies on the incorporated record in its normal course of business; and (4) other circumstances indicate the trustworthiness of the record. The CAAF adopted and applied the federal test to the facts in *Grant*.[188] The court held that the government laid the appropriate foundation, and that the drug test in *Grant* was admissible for the limited purpose of corroborating a confession.[189]

This case could potentially have far-reaching consequences for military practice. It is common for CID agents to bring soldiers in for questioning after positive urinalysis results. Soldiers often admit to illegal drug use when the agents question them. Under *Grant*, the business record exception should permit the government to introduce a laboratory report to corroborate the accused's confession without bringing the technician from the laboratory to testify about the validity of the drug testing. While the defense could request the technician as a witness, the government would not need to do so to prove its case. This would force the defense to call the technician in its own case-in-chief, thereby losing the opportunity to cross-examine him. This presents a much easier way for the government to corroborate confessions.

Trial counsel should be able to use the unit Prevention Leader[190] or the post drug testing and screening office to lay the predicate foundation to admit the results under the rubric of a business record. This could change the way trial counsel prosecute drug cases when the only reason for admitting the results of the urinalysis is to corroborate a confession. Perhaps this case will point the way out of the circular fields of thought that have dominated urinalysis cases over the last two years. While this development is limited to corroboration cases, it simplifies and streamlines the prosecution of cases when a confession exists. It also increases the pressure on defense counsel to justify calling drug experts from the laboratory, and to deal with them as witnesses for the defense.

Conclusion

Each year brings a new crop of evidentiary rulings that further develop the vast field of evidentiary jurisprudence. The reasoned and measured opinions of the CAAF exhibit a continued interest in the proper growth and maturation of evidence law in the military courtroom. The CAAF appears to realize that the most important decisions are made at the trial level. The evidentiary decisions of trial judges have a tremendous impact on the ability of either side to try cases, and the decisions of the CAAF this year provide welcome guidance to members of the judiciary facing difficult and complex evidentiary issues. These decisions have fertilized those fields that needed it while pruning back other overgrown branches of evidentiary law. It remains to be seen what new plants will spring forth from the seeds the court planted during the last year, but as surely as the rain falls, they will grow. With proper attention and application of the law by trial judges and learned counsel, perhaps next year's crop of evidence will not grow in circles.

187. *Id.* (citing Air Land Forwarders, Inc. v. United States, 172 F.3d 1338 (Fed. Cir. 1999); MRT Constr., Inc. v. Hardrives, 158 F.3d 478 (9th Cir. 1998); United States v. Doe, 960 F.2d 221 (1st Cir. 1992); United States v. Jakobetz, 955 F.2d 786 (2d Cir. 1992); United States v. Ullrich, 580 F.2d 765 (5th Cir. 1978); United States v. Carranco, 551 F.2d 1197 (10th Cir. 1977)).

188. *Id.* at 415.

189. *Id.* at 416.

190. The Unit Prevention Leader is formally known as the Unit Drug and Alcohol Coordinator. *See generally* U.S. DEP'T OF ARMY, ARMY CENTER FOR SUBSTANCE ABUSE PROGRAMS (ACSAP), COMMANDER'S GUIDE & UNIT PREVENTION HANDBOOK, at II-1 (1 June 2002).

Recent Developments in Substantive Criminal Law: A Continuing Education

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Introduction

> *As by the fires of experience, so by commission of crime you learn real morals. Commit all crimes, familiarize yourself with all sins, take them in rotation (there are only two or three thousand of them), stick to it, commit two or three every day, and by and by you will be proof against them. When you are through you will be proof against all sins and morally perfect. You will be vaccinated against every possible commission of them. This is the only way.*[1]

Most commanders and judge advocates would not advise soldiers to follow Mark Twain's advice on acquiring moral perfection. Yet, soldiers often learn what is reasonably acceptable behavior in the military when they commit crimes or see other soldiers crossing the line. "An incidental but very important function of the criminal law is to teach the difference between right and wrong."[2] The *Manual for Courts-Martial* (*MCM*) states that "[t]he purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States."[3] In fulfilling its dual purposes of promoting justice and maintaining discipline, military law looks to the substantive crimes delineated by Congress in the punitive articles of the Uniform Code of Military Justice (UCMJ)[4] to teach soldiers what is intolerable. The opinions written by the Court of Appeals for the Armed Forces (CAAF) continue this education process by interpreting exactly what conduct Congress intended to proscribe in the punitive articles.

The decisions of the CAAF during the 2002 term[5] reflect four intriguing trends. First, the CAAF decided three cases involving indecency offenses.[6] The cases indicate that the court will closely scrutinize "consensual" sex offenses to ensure the evidence supports all the required elements. The court will pay particular attention to the elements that convert acceptable consensual sexual activity into criminal conduct, such as the indecent or open and notorious nature of the acts. The CAAF's decisions provide practitioners with a continuing education regarding its interpretation of what areas of sexual activity Congress and the President intend to proscribe under the punitive articles.[7]

Second, the CAAF provided guidance regarding the necessity of proving actual physical or mental harm to sustain convictions for some offenses.[8] While the first trend may signal the court's desire to limit the field of proscribed conduct in the area of consensual sexual activity, the second trend shows the court's willingness to expand the reach of some offenses even when an accused causes no actual physical or mental harm to a victim. Specifically, maltreatment under Article 93, UCMJ,[9] only requires an objective showing "that the accused's actions reasonably could have caused physical or mental harm or suffering."[10] Also, in one of its first cases of the 2003 term,[11] the

1. Mark Twain, Theoretical and Practical Morals, Address Before the New Vagabonds Club of London (June 29, 1899), *available at* http://www.boondocksnet.com/twaintexts/speeches/mts_theoretical.html.

2. ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 6 (3d ed. 1982).

3. MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. I, ¶ 3 (2002) [hereinafter MCM].

4. UCMJ arts. 77-134 (LEXIS 2003).

5. The 2002 term began 1 October 2001 and ended 30 September 2002. *See* U.S. Court of Appeals for the Armed Forces, *Opinions and Digest*, *at* http://www.armfor.uscourts.gov/Opinions.htm (last visited March 3, 2002) [hereinafter CAAF Opinions Web Site].

6. United States v. Sims, 57 M.J. 419 (2002); United States v. Baker, 57 M.J. 330 (2002); United States v. Graham, 56 M.J. 266 (2002).

7. The President enumerates offenses under Article 134 that proscribe conduct that is prejudicial to good order and discipline or service discrediting. The President enumerates the offenses under the authority Congress granted him to set maximum punishments. UCMJ art. 56 (2002); *see* MCM, *supra* note 3, pt. IV, ¶¶ 61-113 (listing the enumerated offenses of the UCMJ).

8. United States v. Vaughn, No. 02-0313, 2003 CAAF LEXIS 108 (Jan. 24, 2003); United States v. Carson, 57 M.J. 410 (2002).

9. UCMJ art. 93.

CAAF affirmed a conviction for child neglect under Article 134, UCMJ.[12] The court again expressed a standard requiring only a showing that an "accused's actions reasonably could have caused physical or mental harm or suffering."[13]

The third and fourth trends seen in this year's CAAF opinions build on decisions discussed in last year's edition of the *Military Justice Symposium*.[14] The court definitively reiterated the principle touched on last year in *United States v. New*,[15] that military judges may properly decide whether orders are lawful as interlocutory questions of law.[16] The CAAF also added clarity to its previous rulings regarding multiplicity and conduct unbecoming an officer. The court reiterated its message to the field[17] that the government may not obtain multiplicious convictions under Article 133, UCMJ,[18] and another substantive offense for the same underlying misconduct.[19]

This article analyzes each of the four trends in detail. The decisions discussed reflect an understanding by the CAAF that it must continue to do its part to help teach soldiers and practitioners exactly what conduct is proscribed under military law. The article will start with the most contentious of the trends—the developing definition of when consensual sexual behavior becomes criminal conduct.

Indecent Sexual Activity Under Article 134

United States v. Baker: *Consent and Age Relevant to Indecency*

Eighteen-year-old Airman Basic (E-1) Bobby Baker began dating fifteen-year-old "KAS" during the summer of 1999. The dating relationship quickly became physical. Airman Baker consensually touched and kissed KAS's breasts and "gave her hickies on her stomach, upper chest, and back,"[20] but did nothing to KAS in public, other than hugging and kissing her. KAS was not offended by Airman Baker's conduct "because it comported with her ideas of normal activities within a boyfriend/girlfriend dating relationship."[21]

For his conduct with KAS, an officer and enlisted panel found Airman Baker guilty of committing indecent acts with a female under the age of sixteen.[22] In his closing argument, the assistant trial counsel argued that the relative ages of Airman Baker and KAS and the fact that she consented to the physical relationship were irrelevant.[23] Specifically, he argued:

> Now, one potential warning here. These two are, as the elements show, close in age. He

10. *Carson*, 57 M.J. at 415.

11. The 2003 term began 1 October 2002 and will end 30 September 2003. CAAF Web Site, *supra* note 5.

12. UCMJ art. 134.

13. *Vaughn*, 2003 CAAF LEXIS 108, at *20.

14. Major David D. Velloney, *Recent Developments in Substantive Criminal Law: Broadening Crimes and Limiting Convictions*, ARMY LAW., Apr. 2002, at 52-55, 57-59.

15. 55 M.J. 95 (2001).

16. United States v. Jeffers, 57 M.J. 13, 16 (2002).

17. *See generally* Velloney, *supra* note 14, at 59.

18. UCMJ art. 133 (2002).

19. United States v. Palagar, 56 M.J. 294 (2002); *see also* United States v. Frelix-Vann, 55 M.J. 329 (2001); United States v. Cherukuri, 53 M.J. 68 (2000); United States v. Timberlake, 18 M.J. 371 (C.M.A. 1984).

20. United States v. Baker, 57 M.J. 330, 331 (2002).

21. *Id*.

22. *Id*. at 330. The elements of Indecent Acts with a Child under Article 134, UCMJ:

> (a) That the accused committed a certain act upon or with the body of a certain person;
> (b) That the person was under 16 years of age and not the spouse of the accused;
> (c) That the act of the accused was indecent;
> (d) That the accused committed the act with intent to arouse, appeal to, or gratify the lust, passions, or sexual desires of the accused, the victim, or both; and
> (e) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

MCM, *supra* note 3, pt. IV, ¶ 87b(1).

23. *Id*. at 331-32.

> was 18 and she was 15. Now, first of all, do you see anything in the elements that would show that it matters that these two are close in age? No, because there isn't anything like that. All the crime requires is that the recipient of the indecent act be under the age of 16, and in this case [KAS] was 15.
>
> Now, when a person is under 16, it means that they can't consent for themselves. So don't be deceived by the fact that [KAS] let him do these things in some kind of a boyfriend-girlfriend relationship. Consent is not an element. It's irrelevant. He groped her naked breasts with his hands. He kissed her naked body. She's under 16, that's indecent acts with a child, no matter how you look at it.[24]

Given the explanation in the *MCM* following the elements for indecent acts with a child, the assistant trial counsel appeared to be on solid ground. The *MCM* states that "[l]ack of consent to the act or conduct is not essential to this offense; consent is not a defense."[25] Yet, as discussed below, case law indicated that the panel should consider factual consent as well as the relative ages of the parties on the issue of indecency.[26] The defense counsel did not object to the assistant trial counsel's assertions but argued to the members that they should consider the ages of Airman Baker and KAS. He urged the panel not to "find the sexual contact between them to be indecent *per se*."[27]

The military judge gave standard instructions and definitions directly from the *Military Judges' Benchbook* for the offense of indecent acts with a child.[28] Because Airman Baker was also charged with forcible sodomy[29] of another young dependent, "CAB," the military judge also provided a mistake of fact as to consent instruction for the forcible element of the sodomy charge. The instruction directed the panel to "consider the accused's age, education, experience, prior contact with [CAB], the nature of any conversations between [appellant] and [CAB], along with the other evidence on this issue."[30] During the panel's deliberations, a member sent a question to the military judge asking whether or not they should consider Airman Baker's age, education, experience, and prior contact with KAS when determining if his acts were indecent.[31] The military judge responded with a "broad, unfocused, instruction to the members to consider 'all the evidence you have, and you've heard on the issue of what's indecent.'"[32]

In a three-to-two decision,[33] the CAAF held that the military judge committed plain error by not providing tailored instructions on the issue of indecency in response to the panel member's question.[34] The majority reasoned that the military judge "should have corrected the assistant trial counsel's misstatement of the law, and clearly instructed them that the charged sexual acts could not be found indecent solely on the basis that the alleged victim was under the age of 16."[35] Second, the CAAF held that the military judge should have told the panel to disregard the government counsel's arguments regarding the irrelevance of consent.[36] Third, the military judge should have "expressly instructed the members that the appellant's youthful age, the proximity in age between appellant and KAS, their prior relationship, and the alleged victim's factual consent were

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24. *Id*. at 332.

25. MCM, *supra* note 3, pt. IV, ¶ 87c(1).

26. *Baker*, 57 M.J. at 335-36 (citing United States v. Strode, 43 M.J. 29 (1995) (finding that twenty-two-year-old airman's plea to indecent acts with thirteen-year-old girl was improvident because he asserted that he thought she was at least sixteen years old); Pierson v. State, 956 P.2d 119 (Wyo. 1998)).

27. *Baker*, 57 M.J. at 332.

28. *Id*. at 332. The judge defined indecency using the following language from the *Military Judge's Benchbook*: "Indecent acts signify that form of immorality relating to sexual impurity which is not only grossly vulgar, obscene, and repugnant to common propriety, but tends to excite lust and deprave the morals with respect to sexual relations." *Id*. (quoting U.S. DEP'T OF ARMY, PAM. 27-9, LEGAL SERVICES: MILITARY JUDGE'S BENCHBOOK, ¶ 3-87-1d (30 Sept. 1996) [hereinafter BENCHBOOK]).

29. UCMJ art. 125 (2002).

30. *Baker*, 57 M.J. at 333.

31. *Id*. at 332-33.

32. *Id*. at 336.

33. *Id*. at 330. Chief Judge Crawford and Judge Baker dissented. *Id*. at 339-42.

34. *Id*. at 331.

35. *Id*. at 336.

36. *Id*.

circumstances that could be considered in deciding whether the charged acts were indecent."[37]

The majority pointed out that the court "has never held that all sexual conduct between a service person and a person under the age of 16 is *per se* indecent and therefore a crime."[38] In *United States v. Strode*,[39] the CAAF found a twenty-two-year-old airman's guilty plea to indecent acts with a thirteen-year-old girl improvident. The court based its ruling on the accused's assertions during his providence inquiry that he thought the girl was at least 16 years old.[40] The *Strode* opinion "observed that 'age is relevant to prove the elements that the act was indecent and service discrediting.'"[41] The majority in *Baker* also posited that the court has never held that sexual conduct "is indecent because the alleged victim is legally incapable of consenting to sexual acts."[42] Therefore, the assistant trial counsel's assertion that factual consent of the alleged victim was irrelevant on the issue of indecency was incorrect. The assistant trial counsel's misstatements of law and the military judge's failure to clear up the panel's resulting confusion adequately led the majority to reverse Airman Baker's conviction for indecent acts with a child.

Chief Judge Crawford and Judge Baker wrote stinging dissents. Chief Judge Crawford focused on the lack of plain error and argued that because indecency is case and fact-specific, the panel members properly heard the evidence and placed the accused's actions with KAS in context.[43] Judge Baker echoed Chief Judge Crawford's claims regarding plain error. He also added that "[t]he majority manufactures plain error in this case by coupling trial counsel's argument with the military judge's answer to a question regarding indecency."[44] Both dissenting opinions stressed that the military judge told the panel members to "consider all the evidence you have."[45] Chief Judge Crawford argued that the broad instruction unduly benefited the accused because the military judge essentially told the members that they "had to give appellant the benefit of the honest and reasonable mistake of fact instruction (which was not applicable to the offense of indecent acts)."[46] Judge Baker argued that "In essence, she told the members, 'Yes, you should consider the accused's age, education, experience, prior contact with KAS, and proximity of age. Consider all the evidence you have.'"[47]

The dissenting opinions offer well-reasoned critiques of the majority's use of the plain error doctrine to reach "an apparently result-oriented conclusion."[48] They both appear, however, to sidestep the reality that military officers and noncommissioned officers expect to receive, give, and follow specific guidance and orders. As the majority noted, the panel member's specific question deserved a specific response.[49]

The dissenting opinions also lose credibility by exhibiting their own orientation toward reaching a particular result rather than focusing solely on legal error. Chief Judge Crawford concluded her opinion by detailing all of the misconduct for which Airman Baker was tried, including his "dating" relations with all three young females and his disobedience of no-contact orders regarding KAS. She then used the facts regarding these other offenses to "bootstrap"[50] her own proposition regarding the legal sufficiency of the indecent acts specification. Chief Judge Crawford acknowledges that the "age of the 'child' is important and certainly element dispositive."[51] Her conclusions about what *Strode* teaches, however, seem to indicate that the government can prove the indecency element of the enumerated offense by simply showing the service-discrediting

37. *Id*.

38. *Id*. at 335.

39. 43 M.J. 29 (1995).

40. *Id*. at 32-33.

41. *Baker*, 57 M.J. at 335 (quoting *Strode*, 43 M.J. at 32).

42. *Id*. at 335.

43. *Id*. at 340 (Crawford, J., dissenting).

44. *Id*. at 342 (Baker, J., dissenting).

45. *Id*.

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

47. *Id*. at 342 (Baker, J., dissenting).

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

49. *Id*. at 334-35.

50. *Id*. Chief Judge Crawford used the word "bootstrap" to describe the majority's late discovery of error in the assistant trial counsel's argument to reach "an apparently result-oriented conclusion, while not straying too far afield from the plain error issue specified and argued." *Id*.

nature of the acts or that the acts would constitute foreplay to sodomy or carnal knowledge.[52] The indecent nature of the acts, however, constitutes an essential element specifically listed by the President, necessary to turn otherwise consensual sexual activity into proscribed criminal misconduct.[53]

The opening paragraph of Judge Baker's dissent signals his views on Airman Baker's conduct without regard to the legal issues in the case.

> Military service is a line of departure to adulthood. After taking the service oath, a young man or woman is no longer judged by the standards of an adolescent teenager, but rather as an adult by, among other things, the standards contained in the Uniform Code of Military Justice (UCMJ). Changes in maturity, discipline, and values may be less immediate.[54]

Judge Baker's opinion is well reasoned with respect to the plain error doctrine, but the fact that he begins his dissent with such unequivocal language regarding Airman Baker's adulthood colors his analysis at least as much as the relative ages of the parties seems to drive some of the majority's reasoning. Judge Baker goes to great lengths to emphasize that "[t]his is a plain error case," regarding the adequacy of the military judge's instructions.[55] Yet, he sidesteps the obvious error created by the assistant trial counsel's closing argument. He addresses the issue simply by citing to the military judge's standard instruction, admonishing members not to consider counsel's exposition of the law.[56] If the members fully understood the law of consent, age and indecency, then they would not have asked questions about it during their deliberations. The very fact that the members asked such a specific question indicates that the assistant trial counsel's argument had an impact on the panel. At least one member did not fully understand the law as originally instructed by the military judge. The member asked a specific question. The panel members needed clear guidance. They did not receive it.[57]

The importance of *Baker* from a substantive criminal law perspective is partially lost in the discussion of plain error and the military judge's instructions. On the issue of indecency, panel members should consider all relevant facts and circumstances, including the accused's youthful age, the proximity in age between the accused and alleged victim, any prior relationship, and the alleged victim's factual consent.[58] Government counsel should present evidence and structure arguments that show how the relevant factors actually assist panel members to conclude that the acts were indecent. Language from the beginning of Judge Baker's dissent may help government counsel structure such arguments if they are faced with a fact scenario similar to that in *Baker.* In other cases, the same factors that worked in Airman Baker's favor may hurt service members who try to dispute the indecency of their actions. Particularly in cases of consensual sexual activity, trial counsel must learn to craft arguments that use all the relevant circumstances in their favor to show why panel members should consider the conduct criminal.

Baker also illustrates how defense counsel can use consent as a "defense" in indecent act cases. Because the panel must consider factual consent on the issue of what constitutes indecent conduct, counsel have an opportunity to provide evidence of consent to the members and argue that it negates the indecency of the acts. *Baker* also provides a valuable lesson to defense counsel regarding substantive criminal law. Knowing the law, objecting when trial counsel misstates the law, and crafting tailored instructions can often make the difference between winning and losing at trial. Good defense counsel make solid, well-reasoned closing arguments. Great defense counsel tie their closing arguments to the military judge's instructions. Outstanding defense counsel craft their own instructions using the law to benefit their clients to the maximum extent possible.

United States v. Sims:
Sexual Contact Not "Open and Notorious" When in Private Bedroom with Door Closed but Not Locked

Staff Sergeant (SSG) Kendall Sims hosted a promotion party in his quarters while stationed in Riyadh, Saudi Arabia. About forty people attended the party. The attendees danced and ate

51. *Id*. at 340.

52. *Id*. (quoting United States v. Strode, 43 M.J. 29, 32 (1995) ("Sexual acts may be made the basis for an indecent-acts offense if the resulting conduct is service-discrediting or if the acts constitute foreplay to the ultimate criminal sexual acts of sodomy or carnal knowledge.")).

53. *See* MCM, *supra* note 3, pt. IV, ¶ 87

54. *Baker*, 57 M.J. at 341 (Baker, J., dissenting).

55. *Id*. at 343.

56. *Id*.

57. *Id*. at 333-34.

58. *Id*. at 336.

in two rooms next to SSG Sims's private bedroom.[59] SSG Sims "kept a supply of hard liquor in his bedroom . . . . He had also told the women present at the party that they could leave their purses and personal items in his bedroom."[60] At about 2400 hours, SSG Sims asked Private First Class (PFC) AB back to his bedroom for a private party, along with three other soldiers. The three soldiers left after five to ten minutes. After SSG Sims and PFC AB were alone in the bedroom, the accused consensually fondled PFC AB's breasts. During the sexual activity, "the door was closed but not locked . . . . [N]o one knocked on the door or came into the room."[61]

The accused pled guilty to committing an indecent act with PFC AB.[62] During the plea inquiry, the military judge explained the indecency requirement of the offense as follows:

> Consensual sexual conduct ordinarily—and in your case would ordinarily be—not a criminal offense if done in private. However, it can constitute an indecent act if done in public. And "public" includes that there is a substantial risk that your conduct—your activities could be viewed by another or it's reasonably likely that your conduct could be viewed by another. So I'm trying to figure out what is the indecent nature of the conduct and the contact you had with Private [AB] that would make this indecent, that is, that would make it likely or reasonably likely or a substantial risk that you could be discovered. So that's what I'm trying to find out. You're the guy pleading guilty, not anybody else.[63]

The accused admitted that someone could have discovered his activity because there was nothing preventing anyone from walking into the room at any time.[64]

The CAAF held that SSG Sims's plea to an indecent act was improvident and reversed the finding of guilty. The court found that there was an insufficient factual predicate to support the conclusion that it was reasonably likely under the circumstances that others would see the accused touching PFC AB's breasts. Therefore, the acts did not constitute "open and notorious" sexual conduct.[65]

In *United States v. Berry*,[66] the Court of Military Appeals (COMA)[67] established that criminalizing otherwise consensual and lawful sexual activity required that the act be done in the known presence of a third party.[68] In *United States v. Izquierdo*,[69] the CAAF accepted a broader rule of criminal liability. "*Izquierdo* clarified the *Berry* definition . . . by holding that it was not necessary to prove that a third person actually observed the act, but only that it was reasonably likely that a third person would observe it."[70] In *Izquierdo*, the court upheld the legal sufficiency of an indecent act specification "where the accused had sexual intercourse with a woman in his barracks room while his two roommates were in the room, even though he blocked their view by hanging up a sheet 'that substantially blocked his roommates' view of his side of the room.'"[71] In the same case, however, the CAAF reversed as legally insufficient

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59. United States v. Sims, 57 M.J. 419, 420 (2002).

60. *Id*.

61. *Id*.

62. *Id*. at 421. The elements of Indecent Acts with Another under UCMJ Article 134 are:

> (a) That the accused committed a certain wrongful act with a certain person;
> (b) That the act was indecent; and
> (c) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

MCM, *supra* note 3, pt. IV, ¶ 90b.

63. *Sims*, 57 M.J. at 425.

64. *Id*. at 421.

65. *Id*. at 422.

66. 20 C.M.R. 325 (1956).

67. The Court of Military Appeals (COMA) is now referred to as the Court of Appeals for the Armed Forces (CAAF). U.S. Court of Appeals for the Armed Forces, *Establishment*, at http://www.armfor.uscourts.gov/Establis.htm (last visited Mar. 5, 2003).

68. *Sims*, 57 M.J. at 421 (citing *Berry*, 20 C.M.R. at 330).

69. 51 M.J. 421 (1999).

70. *Sims*, 57 M.J. at 422.

"an indecent act where the accused had sexual intercourse in a shared barracks room, with the door closed but unlocked and no one else present in the room."[72]

Although *Izquierdo* was a contested case, the CAAF used its closely analogous fact pattern to decide that SSG Sims's plea to an indecent act was improvident. The court reasoned that SSG Sims had a greater expectation of privacy in his private bedroom than Izquierdo had in his shared room and that neither SSG Sims nor PFC AB had disrobed. Additionally, the court expressed that the parties could have terminated the act quickly had anyone attempted to enter the room.[73] Thus, given the facts elicited by the military judge from SSG Sims, the sexual activity committed behind a closed but unlocked door was not enough to constitute an indecent act. Judge Sullivan concurred in the result, but he argued that dicta in *Izquierdo* did not establish a broader rule of criminal liability than that expressed in *Berry*. He eschews the majority's clear adoption of the *Izquierdo* standard.[74]

Chief Judge Crawford's dissent in *Sims* sheds significant light on her view of how the court has dealt with military sex offenses in recent years. The Chief Judge agrees with the majority that *Izquierdo* established the correct standard for analyzing what constitutes open and notorious conduct.[75] She differs from the majority, however, because she feels that it was reasonably likely that others would view SSG Sims's conduct.[76] She further argues that "[t]he majority opinion effectively establishes a *per se* rule that if a sexual act takes place behind a closed door without intrusion, the act cannot be 'indecent' as a matter of law."[77] After listing her recent dissenting opinions in cases involving sex offenses, the Chief Judge signals her increasing displeasure with the direction the court has taken regarding sex offenses. Particularly, she expresses serious concern about "the impact of the majority opinion on prevailing jurisprudence, the rights of victims, and the public perception of military justice."[78]

Sims is significant for military justice practitioners for three reasons. First, Chief Judge Crawford's dissent clearly shows her dissatisfaction with the court's recent decisions in sex cases. Although her concerns about victims' rights seem a bit unfounded in *Sims*, a case involving consensual acts,[79] trial and particularly appellate practitioners should remain aware of her established inclination to affirm convictions in sex cases whenever possible. Second, *Sims* clarifies that practitioners should refer to and use the *Izquierdo* standard for evaluating whether or not conduct meets the open and notorious requirement for criminality. Third, although *Sims* relies on the broader *Izquierdo* standard for criminal liability, the case appears to narrow the scope of the "reasonably likely that a third person would observe it" language. This narrowing is consistent with the CAAF's overall trend in cases involving consensual sexual activity. The court requires the government to pay particular attention to proving the element that makes the conduct criminal.

United States v. Graham:
Indecent Exposure in Bedroom Sufficient "Public View"

Corporal Quinton T. Graham asked his child's fifteen-year-old babysitter to come into the bedroom of his home. He then exposed himself to her by allowing a towel that was wrapped around his waist to fall to the floor. The babysitter was "completely unrelated to and uninvolved with him, and [she] neither invited nor consented to his conduct."[80] A panel of officer and enlisted members convicted the accused of indecent exposure.[81]

The CAAF affirmed the conviction for indecent exposure, holding that the accused's actions were in the "public view."[82] The court specifically stated its desire to "expressly make clear what was always implicit . . . regarding the definition of 'public view.'"[83] Because the facts were clear that the exposure was

71. *Id*. at 421 (quoting *Izquierdo*, 51 M.J. at 423).

72. *Id*.

73. *Id*. at 422.

74. *Id*. at 422-23 (Sullivan, J., concurring in the result).

75. *Id*. at 424 (Crawford, J., dissenting).

76. *Id*. at 427.

77. *Id*. at 423.

78. *Id*. Chief Judge Crawford cites her dissents in the following sex offense cases to support and illustrate her concerns: United States v. Baker, 57 M.J. 330, 337 (2002); United States v. Ayers, 54 M.J. 85, 95 (2000); United States v. Tollinchi, 54 M.J. 80, 83 (2000); United States v. Morrison, 52 M.J. 117, 124 (1999); United States v. Hoggard, 43 M.J. 1, 4 (1995); United States v. Cage, 42 M.J. 139, 147 (1995).

79. *Sims*, 57 M.J. at 421. The majority responded to Chief Judge Crawford's concerns in a footnote to its opinion. "The military judge's explanation clearly shows that this case is not about victim's rights, as the dissent suggests. Appellant pleaded guilty to a consensual act. The alleged unlawfulness of the act was based on its public nature, not the co-actor's lack of consent." *Id*. at 421 n.1.

80. United States v. Graham, 56 M.J. 266, 267 (2001).

willful and indecent, the court quickly turned its legal sufficiency analysis to whether the conviction should be "set aside because it occurred in his bedroom, as opposed to some other, more public location."[84]

In interpreting what definition of "public view" governs the Article 134 offense of indecent exposure, the CAAF differentiated between statutes that use the word "public" as an adjective and those that use it as a noun.

> "Public place" means a location that is public, and in that context, "public" is an adjective that describes the place as one "accessible or visible to the general public," to use the *Romero* court's definition. 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.[85]

Although Corporal Graham exposed himself in a non-public place, he did so in view of a member of the public. "[H]e made certain that an unsuspecting and uninterested member of the general population had no choice but to see him naked."[86]

Graham provides practitioners with clear guidance that the scope of misconduct covered by the offense of indecent exposure includes exposures that occur in privately owned homes and other nonpublic places. The case explicitly defines "public view" to mean in view of any unsuspecting and uninterested member of the public. It also summarizes the two distinct types of indecent exposure that the CAAF recognizes for military practice: "(1) exposure in a public place, the very fact of which tends to prove it was willful, and (2) exposure that does not occur in a public place . . . but . . . may still constitute the offense of indecent exposure if other evidence proves that it was."[87] As a practical matter, both trial and defense counsel should use the two-pronged summary to distinguish the type of exposure involved in their case. Then they can properly craft arguments based on relevant evidence and appropriate inferences.

Trends Regarding Consensual Sex Offenses: "Be Good and You Will Be Lonesome"[88]

Although *Graham* does not deal directly with the issue of indecency, the CAAF cites *Graham* in *Baker* to support its conclusion that "all the facts and circumstances of a case including the alleged victim's consent, must be considered on the indecency question."[89] The court makes reference to a brief section in *Graham* where it states,

> He did not expose himself to his spouse or girlfriend, or to a family member or other person involved with him in such a way that a given exposure might not be indecent. Appellant exposed himself to a fifteen-year-old girl who was completely unrelated to and uninvolved with him, and who neither invited nor consented to his conduct. Thus, appellant does not contest the legal sufficiency of the evidence relating to the indecency element of his offense, and we hold that the court below did not err in concluding appellant's exposure was indecent.[90]

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81. *Id*. at 266. The elements of Indecent Exposure under Article 134, UCMJ are:

> (a) That the accused exposed a certain part of the accused's body to public view in an indecent manner;
> (b) That the exposure was willful and wrongful; and
> (c) That, under the circumstances, the accused's conduct was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

MCM, *supra* note 3, pt. IV, ¶ 88b.

82. *Graham*, 56 M.J. at 266.

83. *Id*. at 266-67 (citing United States v. Shaffer, 46 M.J. 94 (1997)).

84. *Id*. at 267.

85. *Id*. at 269 (quoting State v. Romero, 710 P.2d 99, 102-03 (N.M. 1985)).

86. *Id*. at 268.

87. *Id*.

88. JOHN BARTLETT, FAMILIAR QUOTATIONS 527:21 (1992) (quoting MARK TWAIN, FOLLOWING THE EQUATOR 527 (1897)).

89. United States v. Baker, 57 M.J. 330, 336 (2002).

90. *Graham*, 56 M.J. at 267.

Thus, the CAAF either directly or indirectly signals in *Graham*, *Baker*, and *Sims* that it will closely scrutinize "consensual" sex offenses to ensure that the evidence supports all the required elements. The *Graham* fact pattern does not immediately suggest that it is a case about "consensual" sexual activity. Because the CAAF specifically cites the part of the case where indecent behavior is distinguished from acceptable behavior, however, practitioners can properly look to *Graham*, as well as *Baker* and *Sims*, for an idea of what standard of legal sufficiency the court will use in the future for "consensual" sex offenses.

In the April 2001 edition of *The Army Lawyer*, Major Timothy Grammel identified a trend regarding nonconsensual sex offenses after analyzing four CAAF opinions written during the 2000 term.[91] He wrote:

> Although the four CAAF opinions involved four different offenses, they have similarities that signal a trend. The CAAF will closely scrutinize this type of case to ensure the evidence supports all the elements of the offenses. As Judge Sullivan argued in his dissenting opinion in *Johnson*, it appears that the court is using a higher standard than the law provides for legal sufficiency.[92]

This year in *Sims*, Chief Judge Crawford cited her dissents in two of the cases discussed by Major Grammel (*Ayers*[93] and *Tollinchi*[94]), along with her dissent in *Baker*,[95] when expressing growing concerns about the negative impact of the majority's opinions.[96] Certainly, if the Chief Judge senses a pattern, then practitioners should also pay close attention to any trends apparent in the opinions.

In 2000, the factual issues in the nonconsensual sex cases were close calls.[97] This year, *Baker* and *Sims* present close consensual sex cases. In 2000, the CAAF decided the four cases together and reversed all four. This year, the CAAF decided *Baker* and *Sims* together and reversed them both.[98] The clear message in 2000 was that the CAAF "will not tolerate overcharging" in sex cases.[99] The court will closely scrutinize the evidence to see that it supports all the elements of the offenses. The message this year is similar. The court will not tolerate calling consensual sexual activity criminal unless the elements that make it criminal are clearly proven. Whether the pertinent elements refer to the indecent character of the conduct or its open and notorious nature, the CAAF wants any and all relevant factors considered and established before it will include consensual sexual activity within the scope of proscribed conduct.

Particularly in consensual sex cases, trial counsel must ensure they clearly meet their burden of proving each element beyond a reasonable doubt. The CAAF will hold the prosecution to that burden on appellate review. As seen in *Baker*, through the court's plain error analysis of the military judge's instructions, the majority may look beyond a normal legal sufficiency review to scrutinize these cases. Defense counsel should take every opportunity to preserve issues in sex cases by challenging whether or not the alleged misconduct even fits within the range of activity intended to be proscribed by Congress or the President. Appellate defense counsel should not let any opportunity pass to challenge the legal sufficiency of nonconsensual as well as consensual sex cases, especially given the majority's leanings in recent years.

Necessity of Proving Actual Physical or Mental Harm

United States v. Carson:
No Requirement of Actual Harm for Maltreatment Under Article 93, UCMJ[100]

Sergeant (SGT) Claude B. Carson was the supervising desk sergeant at the military police (MP) station in Vilseck, Germany. During an eighteen-month period, SGT Carson allegedly fraternized with, indecently exposed himself to, and maltreated

91. Major Timothy Grammel, *Justice and Discipline: Recent Developments in Substantive Criminal Law*, ARMY LAW., Apr. 2001, at 71 (analyzing United States v. Fuller, 54 M.J. 107 (2000); United States v. Ayers, 54 M.J. 85 (2000); United States v. Tollinchi, 54 M.J. 80 (2000); United States v. Johnson, 54 M.J. 67 (2000)).

92. *Id.* at 71 (citing *Johnson*, 54 M.J. at 70 (Sullivan, J., dissenting)).

93. 54 M.J. at 95.

94. 54 M.J. at 83.

95. 57 M.J. 330 (2002).

96. United States v. Sims, 57 M.J. 419, 423 (2002) (Crawford, J., dissenting). *See supra* note 78.

97. Grammel, *supra* note 91, at 71.

98. *Baker* and *Sims* were decided on 30 September 2002. *See Baker*, 57 M.J. at 330; *Sims*, 57 M.J. at 419. *Johnson* was decided on 7 September 2001, and *Ayers*, *Tollinchi*, and *Fuller* were all decided on 11 September 2001. *See* United States v. Johnson, 54 M.J. 67 (2000); United States v. Tollinchi, 54 M.J. 80 (2000); United States v. Ayers, 54 M.J. 85 (2000); United States v. Fuller, 54 M.J. 107 (2000).

99. Grammel, *supra* note 91, at 71.

several junior enlisted subordinates.[101] At trial, the military judge acquitted SGT Carson of many offenses, but she found him guilty of three specifications of indecent exposure and five specifications of maltreatment. The military judge sentenced SGT Carson to a bad-conduct discharge, confinement for forty-two months, and reduction to the lowest enlisted grade.[102]

One of SGT Carson's victims was PVT G, a twenty-year-old female MP who had been in the Army for less than one year. SGT Carson was also PVT G's duty supervisor. At about 1:00 a.m., during PVT G's shift, the accused twice exposed his penis to her. He made no effort to cover himself and expressly drew PVT G's attention to his penis while it was exposed. The accused did not touch PVT G or make any sexual comments to her. After PVT G's shift ended at 6:00 a.m., she told another young female MP what happened, but she did not report the misconduct until 4:00 or 5:00 p.m. At trial, "[s]he testified that she was 'shocked' and 'bothered' by the exposure, and felt like 'a victim.'"[103]

Sergeant Carson's defense counsel moved for a finding of not guilty[104] on all the maltreatment specifications at the conclusion of the government's case. The defense counsel argued:

> [T]he alleged victims have not experienced the anguish that the cases refer to. *Hanson* talks about mental suffering, mental cruelty, physical cruelty or suffering, and looking at the maltreatment standard would be some level of pain, some suffering that's caused, that simply hasn't been satisfied by any testimony or any evidence that we've heard presented by the Government today.[105]

The prosecution responded by citing to the definition of maltreatment provided in the *Manual for Courts-Martial*.[106] The trial counsel argued that the definition contemplates an objective standard for maltreatment, not a standard based on a victim's subjective beliefs. Thus, the government was not required to show that the accused actually harmed the victims emotionally or physically.[107] The military judge dismissed one maltreatment specification, but denied the motion with regard to the other specifications, including the one involving PVT G.[108]

The CAAF affirmed the maltreatment conviction. The court concluded "that in a prosecution for maltreatment under Article 93, UCMJ, it is not necessary to prove physical or mental harm or suffering on the part of the victim."[109] The CAAF reasoned that the legislative history surrounding Article 93 did not indicate that Congress intended to exclude misconduct meeting an objective standard. Further, "in other instances in which Congress intended actual harm to be an element of an offense under the UCMJ, the statute clearly expressed such a requirement."[110] To sustain a maltreatment conviction, the government must only show, "as measured from an objective viewpoint in light of the totality of the circumstances, that the accused's actions

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100. The elements of maltreatment under UCMJ Article 93 are:

> (a) That a certain person was subject to the orders of the accused; and
> (b) That the accused was cruel toward, or oppressed, or maltreated that person.

MCM, *supra* note 3, pt. IV, ¶ 17b.

101. United States v. Carson, 57 M.J. 410, 411 (2002).

102. *Id.* at 410.

103. *Id.* at 411.

104. MCM, *supra* note 3, R.C.M. 917.

105. *Carson*, 57 M.J. at 411.

106. The explanation section for Article 93 states, in pertinent part,

> *Nature of act*. The cruelty, oppression or maltreatment, although not necessarily physical, must be measured by an objective standard. Assault, improper punishment, and sexual harassment may constitute this offense. Sexual harassment includes influencing, offering to influence, or threatening the career, pay, or job of another person in exchange for sexual favors, and deliberate or repeated offensive comments or gestures of a sexual nature. The imposition of necessary or proper duties and the exaction of their performance does not constitute this offense even though duties are arduous or hazardous or both.

MCM, *supra* note 3, pt. IV, ¶ 17c(2).

107. *Carson*, 57 M.J. at 411.

108. *Id.* at 412.

109. *Id.* at 415.

110. *Id.*

reasonably could have caused physical or mental harm or suffering."[111]

The question of the necessity of proof of actual mental or physical pain or suffering was one of first impression for the CAAF.[112] In *United States v. Fuller*,[113] the court "noted with approval the Manual's use of an objective standard and the application of Article 93, UCMJ, to sexual harassment."[114] The new development in *Carson* was the court's additional step of specifically eliminating any need to show actual harm in maltreatment cases. Trial counsel must remain wary, however, of overcharging maltreatment in situations without actual harm, particularly if the misconduct could be categorized as consensual sexual activity. First, as the CAAF specifically noted in *Carson*, "[P]roof of such harm or suffering may be an important aspect of proving that the conduct meets the objective standard."[115] Second, *Fuller* indicates that even under the objective standard, the court will closely scrutinize cases involving consensual conduct.[116]

Interestingly, *Fuller* was one of the four cases from two years ago that signaled the CAAF's apparent use of a higher standard of legal sufficiency in sex cases.[117] The *Fuller* court approved the use of the broad objective standard for assessing criminal culpability in maltreatment cases with approval, but it still reversed the conviction. The charge in *Fuller* was based on consensual sexual relations, and the accused did not exercise sufficient "dominance and control" to coerce the alleged victim to have sex with him.[118] At first, one might conclude that the broader objective standard of liability affirmed in *Carson* signals a competing trend to the one mentioned earlier in the article regarding the CAAF's close scrutiny of the decisive elements in consensual sex cases. Practitioners, however, must read *Carson* in conjunction with *Fuller.* Despite the fact that the government does not have to prove actual harm for a maltreatment conviction, the CAAF will still not tolerate overcharging, particularly when it comes to consensual sexual relations. SGT Carson's actions objectively constituted nonconsensual maltreatment of an unsuspecting and uninterested subordinate. Thus, like the indecent exposure to the babysitter in *Graham*, the court affirmed the conviction. Practitioners should not read the second trend identified by this article as competing with the first trend. Rather, it shows the court's willingness to expand the scope of proscribed conduct[119] to protect clear victims, while continuing to closely scrutinize cases involving sexual activity.

United States v. Vaughan: *Child Neglect Constitutes a Cognizable Offense Under Article 134*

Early in the 2003 term, the CAAF affirmed another conviction where the misconduct in question caused no actual harm or suffering to the victim. In *United States v. Vaughan*,[120] the CAAF affirmed that child neglect that does not result in actual harm is a cognizable offense under the service-discrediting clause of Article 134, UCMJ.[121] The court specifically stated that its approach in *Vaughan* was consistent with its reasoning in *Carson* regarding maltreatment. By doing so, the CAAF identified its preference for adopting objective standards when assessing criminal culpability in situations where the accused has been entrusted to exercise due care with regard to the mental or physical health, safety, or welfare of the victim.[122] In maltreatment cases, the party entrusted to act reasonably is the senior in a senior-subordinate relationship. In child neglect cases, the parent must reasonably avoid the risk of harm.

Airman First Class Sonya Vaughan entered a conditional plea of guilty to child neglect in violation of Clause 2, Article 134, UCMJ.[123] The accused lived off-base with her baby daughter, SK, in Pickliessem, Germany. At the time of the

111. *Id.*

112. *Id*. at 414.

113. 54 M.J. 107, 110 (2000).

114. *Carson*, 57 M.J. at 414. The Drafter's Analysis states, "The example of sexual harassment was added because some forms of such conduct are nonphysical maltreatment." MCM, *supra* note 3, UCMJ art. 93 analysis, at A23-6.

115. *Carson*, 57 M.J. at 415.

116. *Fuller*, 54 M.J. at 111.

117. *See supra* note 92 and accompanying text.

118. *Fuller*, 54 M.J. at 111.

119. *See generally* Velloney, *supra* note 14.

120. No. 02-0313, 2003 CAAF LEXIS 108 (Jan. 24, 2003).

121. *Id.* at *2.

122. *Id*. at *19-20.

offense, SK was forty-seven days old.[124] The accused left SK "alone in her crib for six hours from 11:00 p.m. to 5:00 a.m. while she went to a club that was a 90-minute drive away."[125] Earlier in the day, SK's father agreed to watch the baby starting around 10:30 p.m., but when he did not arrive, the accused elected to go to the club anyway. Because of the father's previous failures, the accused did not actually believe that he would show up that night. SK suffered no actual harm during her mother's absence.[126]

The CAAF resolved a split of opinion with its decision in *Vaughan*. Before affirming the child neglect charge in *Vaughan*,[127] the Air Force Court of Criminal Appeals held in an unpublished opinion in 1990 that child neglect was chargeable as an Article 134 offense.[128] In 1991, the Army Court of Criminal Appeals held in *United States v. Wallace*[129] that "child neglect that does not result in harm is not an Article 134 offense absent a regulation clearly prohibiting the conduct."[130]

In affirming Airman Vaughan's conviction for neglect as an offense under Article 134, the CAAF held that she was on notice of the potential criminality of her conduct. First, state statutes generally served "to provide constructive notice that child neglect through absence of supervision or care, with an attendant risk of harm, can constitute a criminal offense."[131] Second, under a *Parker v. Levy*[132] analysis, military custom and usage may define the scope of proscribed conduct under Article 134. Third, several Department of Defense and service regulations provided notice that neglect was potentially criminal.[133] After specifically addressing notice, the CAAF also held that the military judge properly defined the specific elements of the offense by informing the accused that child neglect "requires culpable negligence and not just simple negligence."[134] Finally, the court refused to adopt a per se rule that child neglect constitutes service-discrediting conduct. The factual predicate elicited by the military judge, however, convinced the court that the accused's plea was provident regarding the service-discrediting element of the offense.[135]

Vaughan has significant ramifications for military justice practitioners, particularly overseas. As states have developed more comprehensive child protection laws, trial counsel stationed in the United States have had state child neglect statutes available to assimilate into the UCMJ under Article 134, clause 3.[136] Government counsel overseas, however, have had to rely solely on inconsistent service regulations and local directives from commanders to prosecute service members. After *Wallace*, prosecuting neglect without proving any resulting harm became especially difficult for Army counsel.

Now, trial counsel overseas have an additional alternative when parents or guardians act with reckless disregard for their children. Although some would argue that child neglect without resulting harm should not be proscribed conduct, *Vaughan*

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123. *Id*. at *1. The explanation of service-discrediting conduct (clause 2) under Article 134 states:

> *Conduct of a nature to bring discredit upon the armed forces (clause 2).* "Discredit" means to injure the reputation of. This clause of Article 134 makes punishable conduct which has a tendency to bring the service into disrepute or which tends to lower it in public esteem.

MCM, *supra* note 3, pt. IV, ¶ 60c(3).

124. *Vaughan*, 2003 CAAF LEXIS 108, at *2.

125. *Id*. at *2-3.

126. *Id*. at *3. The accused was also convicted of assaulting SK by "striking her in the face and stomach and burning the back of her legs with a hair dryer . . . [and] fracturing her child's leg by pulling, jerking, or wrenching it." United States v. Vaughan, 56 M.J. 706, 706 (A.F. Ct. Crim. App. 2001).

127. *Vaughan*, 56 M.J. at 706.

128. *Vaughan*, 2003 CAAF LEXIS 108, at *7-8 (citing United States v. Foreman, No. 28008, 1990 CMR LEXIS 622, at *2 (A.F.C.M.R. May 25, 1990) (unpublished)).

129. 33 M.J. 561 (A.C.M.R. 1991).

130. *Vaughan*, 2003 CAAF LEXIS 108, at *7 (quoting *Wallace*, 33 M.J at 563-64).

131. *Id.* at *9. In an appendix to the majority opinion, Judge Baker provides an excellent list of state statutes that make child neglect criminally punishable. *Id*. at *25-38.

132. 417 U.S. 733 (1974) (holding that UCMJ Articles 133 and 134 are constitutional).

133. *Vaughan*, 2003 CAAF LEXIS 108, at *9-12.

134. *Id*. at *19.

135. *Id*. at *23.

136. Article 134, clause 3 allows prosecution of noncapital offenses that violate federal law, including state law made applicable under the Federal Assimilative Crimes Act. *See* 18 U.S.C. § 13 (2000).

provides an example of the CAAF engaging in that "incidental function of the criminal law"—teaching the difference between right and wrong.[137] If lawmakers feel that child neglect should be criminalized in the military, however, then recognizing an offense under Article 134, clause 2 is not sufficient. The general article simply does not provide sufficient uniformity.[138] "The realistic response is [Department of Defense] action that expeditiously promulgates a punitive regulatory provision for child neglect and provides uniform standards for parental responsibilities."[139]

Consistent standards for dealing with criminal child neglect in the military may not exist for a number of years. The tension between protecting the safety of children and respecting family privacy can be troublesome. In the meantime, trial counsel should not read *Vaughn* as providing a license to prosecute questionable child neglect cases. The standard expressed in the case may not require harm, but it does require "culpably negligent conduct, unreasonable under the totality of the circumstances, that causes a risk of harm to the child."[140] Whenever possible, defense counsel should emphasize the reasonableness of their clients' actions and explain how the conduct does not rise above the level of simple negligence. Through its case law, the CAAF has recognized an additional offense under Article 134. Now, through trial practice and effective advocacy, trial and defense counsel will shape and test the boundaries of proscribed conduct.

Failure to Obey Lawful Orders

United States v. Jeffers:
Lawfulness of Orders Explicitly an Issue of Law for the Military Judge

In *United States v. Jeffers*,[141] the CAAF clarified the standard it expressed last year in *United States v. New.*[142] Military judges may properly decide issues regarding the lawfulness of orders as interlocutory questions of law.[143] Because lawfulness is not a discrete element in disobedience offenses, military judges—and not panels—determine whether or not orders are lawful.[144] Before discussing the significance of *Jeffers*, a brief review of *New* is necessary.[145]

A special court-martial convicted SPC New of failure to obey an order in violation of Article 92(2), UCMJ.[146] Specialist New's commander ordered him to wear a United Nations (UN) blue beret and other insignia as part of his uniform, in preparation for and during a deployment to the Former Yugoslav Republic of Macedonia.[147] At trial, SPC New challenged the legality of the order to wear the modified uniform with UN insignia as well as the legality of the deployment itself. He argued that his commander's order violated the Army uniform regulation.[148] With respect to the deployment, he claimed that "President Clinton misrepresented the nature of the deployment to Congress and failed to comply with the United Nations Participation Act."[149] Despite SPC New's objections, the military judge prevented panel members from deciding issues regarding

137. PERKINS & BOYCE, *supra* note 2, at 6.

138. *See generally* Major Lisa M. Schenck, *Child Neglect in the Military Community: Are We Neglecting the Child?*, 148 MIL. L. REV. 1 (1995); Major David T. Cluxton, *Military Child Neglect: Mucking out the Morass*, 51st Graduate Course Research Paper, The Army Judge Advocate General's School, Spring 2003 (on file with author).

139. Schenck, *supra* note 138, at 78.

140. *Vaughan*, 2003 CAAF LEXIS 108, at *21.

141. 57 M.J. 13 (2002).

142. 55 M.J. 95 (2001).

143. *Jeffers*, 57 M.J. at 16.

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

145. For more analysis of *New*, see Velloney, *supra* note 14, at 52-55.

146. *New*, 55 M.J. at 97. The elements of Failure to Obey and Order under UCMJ Article 92(2) are:

(a) That a member of the armed forces issued a certain lawful order;
(b) That the accused had knowledge of the order;
(c) That the accused had a duty to obey the order; and
(d) That the accused failed to obey the order.

MCM, *supra* note 3, pt. IV, ¶ 16b(2).

147. *New*, 55 M.J. at 98.

148. U.S. DEP'T OF ARMY, REG. 670-1, WEAR AND APPEARANCE OF ARMY UNIFORMS AND INSIGNIA (1 Sept. 1992).

lawfulness. He ruled that the challenge to the deployment's legality was a nonjusticiable political question. He then ruled that the order to wear the uniform with UN accouterments was lawful and instructed the panel that the order was lawful.[150]

In affirming the military judge's actions, the CAAF held that "lawfulness of an order, although an important issue, is not a discrete element of an offense under Article 92."[151] The military judge, therefore, properly considered lawfulness as a question of law.[152] Judges Sullivan and Everett wrote opinions concurring in the result because they considered lawfulness an essential element of the offense.[153] All five judges agreed with the military judge's decision to refrain from ruling on the deployment's legality, however, because it constituted a nonjusticiable political question.[154]

In his concurring opinion, Judge Effron cited consistency and reviewability as important reasons for allowing military judges, as opposed to panel members, to rule on lawfulness.

> Rather than producing the unity and cohesion that is critical to military operations, appellant's approach could produce a patchwork quilt of decisions, with some courts-martial determining that orders were legal and others determining that the same orders were illegal, without the opportunity for centralized legal review that is available for all other issues of law.[155]

By unanimously agreeing on the political question issue, the court as a whole indicated a preference for consistency and reviewability in high-profile cases. Service members should not be allowed to substitute their personal beliefs for that of their commanders or the President regarding the legality of orders. "An order requiring the performance of a military duty or act may be inferred to be lawful and it is disobeyed at the peril of the subordinate."[156]

Before the *New* case, practitioners faced conflicting guidance regarding who should decide factual issues pertinent to the legality of orders.[157] In fact, the *Military Judge's Benchbook* (*Benchbook*)[158] and the discussion in Rule for Courts-Martial (RCM) 801(e) still conflict. The discussion to RCM 801(e) contemplates the military judge ordinarily deciding the lawfulness of an order.[159] The *Benchbook* provides that panel members should decide factual disputes as to whether or not an order was lawful.[160]

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149. *New*, 55 M.J. at 107 (citing United States v. New, 50 M.J. 729, 736 (Army Ct. Crim. App. 1999)).

150. *Id.* at 97.

151. *Id.* at 100.

152. *Id.*

153. *Id*. at 115 (Sullivan, J., concurring in the result); *id*. at 130 (Everett, J., concurring in part and in the result).

154. *Id*. at 107.

155. *Id*. at 110 (Effron, J., concurring).

156. MCM, *supra* note 3, pt. IV, ¶ 14c(2)(a)(i).

157. *New*, 55 M.J. at 115 (Sullivan, J., concurring in the result); *id.* at 111-14 (Effron, J., concurring).

158. BENCHBOOK, *supra* note 28, ¶ 3-16-3.

159. MCM, *supra* note 3, R.C.M. 801(e)(5) discussion. The discussion states, in pertinent part:

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

Id.

160. BENCHBOOK, *supra* note 28, ¶ 3-16-3 n. 3. According to note 3, the military judge should give the following instruction if the lawfulness of the order presents an issue of fact for the members:

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

Id.

At first glance, *New* appeared to establish a bright line rule settling any conflicting guidance. Yet, the plurality of opinions left open some question as to whether or not the court intended for military judges to rule on the lawfulness of *all* potential orders. *New* presented a unique set of facts, and the court could have intended to limit its holding to high-profile situations involving nonjusticiable political questions or those requiring absolute consistency and reviewability. With regard to routine or commonplace orders, are panel members or military judges better suited to evaluate if the directive passes the "military duty test?" [161] "[B]y reason of their age, education, training, experience, length of service, and judicial temperament,"[162] panel members seem uniquely qualified to determine if an order is "reasonably necessary to accomplish a military mission, or safeguard or promote the morale, discipline, and usefulness of members of a command."[163] In *Jeffers*, however, the CAAF cleared up any ambiguity created by *New*. The majority expressed its unequivocal view that military judges should decide all issues regarding the lawfulness of orders.[164]

In *Jeffers*, Captain (CPT) DeHaan ordered Specialist (SPC) Jeffers not to have social contact with Private (PVT) P. The company commander gave the no-contact order after discovering that SPC Jeffers, a married soldier stationed in Korea, was having an extramarital relationship with PVT P. Because SPC Jeffers and PVT P were members of the same company, only "official" contact was authorized. Specialist Jeffers violated the no-contact order twice. Private P visited SPC Jeffers's room on one occasion for fifteen to twenty minutes. On another occasion, SPC Jeffers had social contact with PVT P at the Navy Club on Yongsan Garrison.[165]

Among other charges, a court-martial convicted SPC Jeffers of two specifications of violating CPT DeHaan's no-contact order.[166] During the trial, the military judge instructed the members that "as a matter of law, the order in this case, if in fact there was an order, was lawful."[167] The defense counsel did not object to the instruction.[168] On appeal, SPC Jeffers asserted that the military judge's instruction violated his constitutional and statutory right to have the members determine whether or not the government proved every essential element of the offense beyond a reasonable doubt.[169] Specialist Jeffers specifically argued that the *New* case was "not dispositive because that case involved a question of law."[170] "Here . . . there was a factual issue raised as to whether the order issued by the company commander was 'reasonably necessary,' and that factual decision belonged to the members."[171]

In affirming SPC Jeffers's convictions for disobedience, the CAAF explicitly held that the military judge did not err by deciding the issue of lawfulness himself.[172] Regarding the rather routine and commonplace no-contact order, the majority explicitly held, "[L]awfulness is a question of law."[173] *Jeffers* clarifies for practitioners that the military judge is the gatekeeper regarding lawfulness of all orders, including those that are routine and involve multiple questions of fact. Therefore,

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

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

MCM, *supra* note 3, pt. IV, ¶14c(2)(a)(iii).

162. *Id.* R.C.M. 502(a)(1).

163. *Id.* pt. IV, ¶ 14c(2)(a)(iii).

164. United States v. Jeffers, 57 M.J. 13, 16 (2002).

165. *Id.* at 14.

166. *Id.* at 13-14. The court-martial convicted SPC Jeffers, on mixed pleas, of failing to obey a lawful order (two specifications), rape, forcible sodomy, and adultery (four specifications). *Id*.

167. *Id.* at 15.

168. *Id.*

169. *Id.* at 14.

170. *Id.* at 15.

171. *Id.*

172. *Id.* at 16.

173. *Id.* (quoting United States v. New, 55 M.J. 95, 105 (2001)).

the military judge passes judgment on the nexus between the order and its relationship to military duty. *Jeffers* begs the question of whether or not the CAAF's broad pronouncement regarding all possible orders went too far. As Senior Judge Sullivan noted, military panels evaluate lawfulness as an element for many other offenses.[174] Because panel members are uniquely qualified to analyze the facts regarding the reasonableness and necessity of orders, perhaps they should be allowed to do so in routine cases regardless of any risks to consistency and reviewability.

Although the CAAF appears to have empowered military judges to make lawfulness determinations in all orders cases, defense counsel should continue to present evidence regarding lawfulness and ask for instructions that allow the members to decide whether or not orders reasonably relate to accomplishing a military mission. Counsel should try to analogize the military judge's initial ruling on lawfulness to a decision on the voluntariness of a confession. Even though the military judge rules that a confession is admissible,[175] defense counsel may still present evidence to the members regarding voluntariness.[176] Although significant modifications would be necessary because of the gravity of deciding lawfulness in some cases, a similar model may prove appropriate for allowing panel members to evaluate whether or not orders relate to military duty.

Jeffers provides clear guidance to the field. Military judges decide whether or not orders are lawful. As Judge Effron noted in *New*, however, "[U]nderlying these concerns is the question of which issues involving the legality of an order call for the expertise that a blue ribbon court-martial panel brings to the process and which call for the expertise that a military judge brings to the process."[177] Perhaps the time has come for the Joint Service Committee to address the issue itself and modify the guidance provided in the *MCM*. If practitioners are not satisfied or comfortable with military judges making final determinations of lawfulness, then the President should provide guidance to the field. The CAAF would likely give deference to such guidance.[178]

Although the temptation often is great—with good justification—to allow the law to develop through the process of litigating specific cases, this is an area in which many weighty questions affecting the fundamental rights and obligations of service members remain unanswered. In that context, a serious effort to address the questions concerning the process of adjudicating the legality of orders would appear to be in the best interest of our nation and our men and women in uniform.[179]

Multiplicity

United States v. Palagar: *Conduct Unbecoming and Larceny Multiplicious if Both Refer to the Same Misconduct*

During each of the past three years, the CAAF has decided an important case involving multiplicity and Article 133, UCMJ.[180] In light of this continuing trend, a look back at the legal landscape is appropriate. In 1984, the Court of Military Appeals (COMA) decided *United States v. Timberlake*.[181] In *Timberlake*, the government charged substantially the same misconduct as both conduct unbecoming under Article 133 and forgery under Article 123(2), UCMJ.[182] The COMA found that

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174. *Id.*

175. BENCHBOOK, *supra* note 28, ¶ 4-1 n. 1. Note 1 states:

> Upon timely motion to suppress or objection to the use of a pretrial statement of the accused or any derivative evidence there from, the military judge must determine admissibility by a preponderance of the evidence standard. Military Rules of Evidence 304 and 305 cover pertinent definitions and rules for admissibility. Absent a stipulation of fact, the judge shall make essential findings of fact.

Id.

176. *Id.* ¶ 4-1 n. 3. Note 3 states, in pertinent part:

> If a statement is admitted into evidence, the defense must be permitted to present evidence as to the voluntariness of the statement. The military judge in such a case must instruct the members to give such weight to the statement as it deserves under all the circumstances.

Id.

177. *New*, 55 M.J. at 114 (Effron, J., concurring).

178. *Id*.

179. *Id*.

180. The elements of Conduct Unbecoming an Officer and Gentleman under UCMJ Article 133 are:

> (a) That the accused did or omitted to do certain acts; and
> (b) That, under the circumstances, these acts or omissions constituted conduct unbecoming an officer and gentleman.

MCM, *supra* note 3, pt. IV, ¶ 59b.

the only difference between the two offenses was that the Article 133 charge required proof of unbecoming conduct. The court thus reasoned that it must dismiss the forgery charge as a lesser-included offense.[183] *Timberlake* appeared to establish clear guidance. The government cannot expect to gain a conviction for both a substantive offense and conduct unbecoming using the same underlying misconduct.

Despite the holding in *Timberlake*, many trial counsel continued to charge multiplicious Article 133 offenses whenever an officer committed misconduct. Occasionally, charging in the alternative was necessary. Yet, government counsel often contended that military judges should let both an Article 133 offense and another substantive offense stand for the same underlying misconduct. One cause for the practice was counsel legalistically following language from the explanation section for Article 133 that seemingly justified their actions. The drafters' non-binding explanation stated, "This article includes acts made punishable by any other article, provided these acts amount to conduct unbecoming an officer and a gentleman. Thus, a commissioned officer who steals property violates both this article and Article 121."[184]

During the 2000 term, the CAAF attempted to clarify how multiplicity standards apply to Article 133. In *United States v. Cherukuri*,[185] the court held that a conduct unbecoming specification was multiplicious with four specifications of indecent assault addressing the same underlying misconduct.[186] Then, in the 2001 term, the CAAF decided *United States v. Frelix-Vann*.[187] In *Frelix-Vann*, the accused pled guilty and was convicted one specification of larceny under Article 121 and one specification of conduct unbecoming under Article 133, for the same exact misconduct.[188] Consistent with *Cherukuri*, the CAAF held that the offenses were multiplicious for findings and remanded the case to the Army Court of Criminal Appeals (ACCA) to select which finding of guilt to affirm.[189]

By ruling that larceny under Article 121 and indecent assault under Article 134 were lesser-included offenses of conduct unbecoming,[190] the CAAF exhibited a clear dislike for using Article 133 to overcharge cases against officers.[191] In *United States v. Palagar*,[192] the court continued the effort begun in *Cherukuri* and *Frelix-Vann* to make its position on duplicative convictions abundantly clear. Only one conviction for the same underlying misconduct will withstand scrutiny by the court.

The accused, Chief Warrant Officer Two (CW2) Edwin Palagar, used an International Merchant Purchase Authorization Card (IMPAC) to purchase $2242 worth of merchandise for his personal use.[193] He submitted phony receipts to support the purchases. When an officer was appointed to investigate his suspected misuse of the IMPAC credit card, CW2 Palagar submitted additional phony receipts to the investigating officer. The accused pled guilty to "signing a false official record, larceny, obstructing justice by submitting altered receipts to the investigating officer, and conduct unbecoming an officer by making unauthorized purchases with the IMPAC card and concealing those purchases by creating phony receipts."[194] The defense moved to dismiss the larceny and obstruction of justice charges as multiplicious with the charge of conduct unbecoming an officer. The conduct unbecoming specification referred to facts that formed the basis for both the larceny and obstruct-

181. 18 M.J. 371 (C.M.A. 1984) (holding that, when forgery constitutes the underlying conduct required for conduct unbecoming an officer, Congress intended that forgery would become a lesser included offense of the conduct unbecoming offense); *see also* United States v. Waits, 32 M.J. 274 (C.M.A. 1991); United States v. Taylor, 23 M.J. 314 (C.M.A. 1987).

182. UCMJ art. 123(2) (2002).

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

184. MCM, *supra* note 3, pt. IV, ¶ 59c(2).

185. 53 M.J. 68 (2000).

186. *Id.* at 71-72.

187. 55 M.J. 329 (2001).

188. *Id.* at 330.

189. *Id.* at 333.

190. *Id.*

191. *See generally* Velloney, *supra* note 14, at 55-62; *see also* Major David D. Velloney, *Tactical Charging: Choosing Wisely the Terrain on Which You Want to Fight!*, ARMY LAW., Sept. 2002, at 56-57.

192. 56 M.J. 294 (2002).

193. *Id.* at 295.

194. *Id.*

ing justice specifications. The military judge denied the motion but announced that he considered the overlap between offenses when fashioning an appropriate sentence.[195]

The ACCA found that the obstruction of justice conviction and the conduct unbecoming conviction were multiplicious. The court did not find, however, that the larceny conviction was multiplicious with the conduct unbecoming conviction. The ACCA then allowed the government to elect whether to retain the obstructing justice conviction or the conduct unbecoming conviction. Government appellate counsel chose to retain the obstructing justice conviction but asked the court to also affirm the conduct unbecoming conviction, except for the language that formed the basis for the obstructing justice conviction. The court granted the government's request.[196]

The appellant next argued to the CAAF that the ACCA should have set aside the lesser-included offense of obstruction of justice instead of allowing all three convictions (larceny, obstructing justice, and conduct unbecoming) to stand. The CAAF held that the Army court's methodology was consistent with *Cherukuri* and *Frelix-Vann*, where the higher court remanded the cases to the service court to decided which conviction to retain.[197]

> Instead of dismissing the lesser-included offense, the lower court dismissed only so much of the greater offense as overlapped the lesser-included offense. This action was not inconsistent with the decisions of this Court. The error to be remedied is a double conviction for the same act. The lower court's decision eliminated the double conviction for obstructing justice. Thus, we hold that the lower court did not err by setting aside so much of the conviction of conduct unbecoming an officer as was included in the obstruction of justice.[198]

The CAAF also held, however, that the lower court did err by neglecting "to remedy the multiplicity of larceny and conduct unbecoming by committing larceny."[199] Instead of remanding to let the government make yet another election, the CAAF set aside the conviction for the lesser-included offense of larceny.[200]

Palagar shows that the CAAF will strictly prohibit the government from attaining duplicative convictions for conduct unbecoming and another substantive offense for the same underlying misconduct. Although *Palagar* allows government counsel to elect whether to retain the greater or lesser offense and affirms a government-friendly methodology for remedying multiplicious convictions, the case signals once again that the court will not tolerate overcharging using Article 133. Trial counsel must draft conduct unbecoming specifications that clearly indicate a separate factual basis for the charge. Otherwise, military judges or the appellate courts will force the government to exercise the election described above to remedy multiplicious convictions.

Although Chief Judge Crawford strongly dissents each time the majority strikes down another Article 133 conviction as multiplicious,[201] the CAAF's position has become firmly entrenched throughout the past three years. Practitioners must remain vigilant when charging officers and carefully choose whether to even charge conduct unbecoming. In many situations, a conviction for the substantive offense may more accurately reflect the culpability of the accused. Wise trial counsel will heed the court's warnings and limit use of conduct unbecoming to situations where the accused's opprobrious actions mandate drafting a novel specification under Article 133.

Conclusion

During the 2002 term, the CAAF continued to educate practitioners about the scope of acceptable behavior in the armed forces. The court's decisions in the area of substantive criminal law reflected four distinct trends. First, the court will closely scrutinize "consensual" sexual activity to ensure that charged acts meet the requisite requirements for converting acceptable behavior into criminally culpable conduct. Second, for maltreatment and child neglect cases, if an accused's actions reasonably could have caused physical or mental harm to a victim, actual harm is not required. Third, the court reaffirmed its position that military judges should decide whether orders are lawful. Fourth, the court continued its ongoing commitment to

195. *Id.*

196. *Id.*

197. *Id.* at 296.

198. *Id.* at 296-97.

199. *Id.* at 297.

200. *Id.*

201. *Id.* (Crawford, J., dissenting); United States v. Frelix-Vann, 55 M.J. 329, 333 (2001) (Crawford, J., dissenting); United States v. Cherukuri, 53 M.J. 68, 74-75 (2000) (Crawford, J., dissenting); *see also* United States v. Quiroz, 55 M.J. 334, 343-44 (2001) (Crawford, J., dissenting).

preventing duplicitous convictions for conduct unbecoming an officer under Article 133.

The CAAF once again demonstrated its dedication to the societal purposes of criminal law and the integrity of the military justice system. The court continued its important functions of refining the substantive criminal law and continuing to educate legal practitioners and soldiers regarding the scope of proscribed conduct under the punitive articles of the UCMJ. Following Mark Twain's road to moral perfection will probably land a soldier in confinement, but following the road paved by the CAAF's teachings will keep a soldier out of trouble. Perhaps the best way to conclude this year's discussion of substantive criminal law is with another of Mark Twain's quotes, "Always do right. This will gratify some people and astonish the rest."[202]

202. Greeting Card from Mark Twain to the Young People's Society, Green Point Presbyterian Church, Brooklyn (Feb. 16, 1901), *reprinted in* JOHN BARTLETT, FAMILIAR QUOTATIONS 528:3 (1992).

Recent Developments in Post-Trial Processing: *Collazo* Relief Is Here to Stay!

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Introduction

> *After the entire process has been completed below, then and only then, absent some extraordinary circumstances, is a case ripe for review by this Court . . . . Our role should be limited to reviewing decisions of the Courts of Criminal Appeals as a matter of law. Being so limited, we should not be involved in the minutiae of post-trial proceedings.*[1]

This past term, the Court of Appeals for the Armed Forces (CAAF) remained decisively engaged on the post-trial battlefield, as did the service courts. Over the past year, the CAAF decided *United States v. Emminizer*[2] and *United States v. Tardif*,[3] two decisions significantly impacting post-trial processing. *Emminizer* resolved a conflict between the Army and the Air Force in the processing of automatic and adjudged forfeitures. *Tardif* dealt with appellate courts' authority to grant relief, absent prejudice, for post-trial processing delay. Another notable CAAF decision was *United States v. Harris*,[4] a case addressing what the convening authority may consider before taking action.

In addition, the Army Court of Criminal Appeals (ACCA) decided four cases that all practitioners should read: *United States v. Zimmer*,[5] discussing how to process deferment requests properly; *United States v. Mack*,[6] addressing the requirement to note an "accused's service record, to include length and character of service, awards and decorations received"[7] in the Staff Judge Advocate's post-trial recommendation (SJAR); and *United States v. Chisholm*[8] and *United States v. Maxwell*,[9] both of which are post-trial processing delay cases.

Part I of this article addresses these seven decisions and their impact on the post-trial process. Part II reviews how the recent changes to *Army Regulation* (*AR*) *27-10*[10] impact the post-trial process, and also discusses The Judge Advocate General of the Army's (TJAG) post-trial processing directives.

Part I

The Winds of Change

Forfeitures—To Pay or Not to Pay, and HOW, That Is the Question[11]

United States v. Emminizer[12] provides valuable clarification on forfeiture processing—specifically, the options available to a convening authority when receiving a request to defer or waive forfeitures. Before *Emminizer*, the Air Force and Army courts disagreed on what action a convening authority must take to pay an accused's dependents.[13] The disagreement was based on the mistaken belief that one type of forfeiture had priority over the other.[14] Although adjudged and automatic forfeitures take effect on the same date,[15] they are not the same. The

1. United States v. Wheelus, 49 M.J. 283, 289 (1998).
2. 56 M.J. 441 (2002).
3. 57 M.J. 219 (2002).
4. 56 M.J. 480 (2002).
5. 56 M.J. 869 (Army Ct. Crim. App. 2002).
6. 56 M.J. 786 (Army Ct. Crim. App. 2002).
7. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1106(d)(3)(C) (2002) [hereinafter MCM].
8. No. 9900240, 2003 CCA LEXIS 7 (Army Ct. Crim. App. Jan. 24, 2003).
9. 56 M.J. 928 (Army Ct. Crim. App. 2002).
10. U.S. DEP'T OF ARMY, REG. 27-10, LEGAL SERVICES: MILITARY JUSTICE (6 Sept. 2002) [hereinafter AR 27-10].
11. "To be, or not to be—that is the question—whether 'tis nobler in the mind to suffer the slings and arrows of outrageous fortune or to take arms against a sea of troubles, and by opposing end them?" WILLIAM SHAKESPEARE, HAMLET act 3, sc. 1.
12. 56 M.J. 441 (2002).

command's options regarding the handling of forfeitures are largely dependent on which type of forfeiture is involved. Regardless of the type, *Emminizer* makes clear that the convening authority must address all applicable forfeitures in a case before the government may divert any pay or allowances to an accused or his dependents.[16]

Post-trial processing of an accused's case will rarely be complete in less than fourteen days.[17] As a result, the accused will often request that the convening authority defer or waive any forfeitures. Deferment is the postponement of the running of the sentence,[18] which requires a written request by the accused, and which is available for both adjudged and automatic forfeitures.[19] A deferment ceases automatically at action unless the convening authority rescinds it first.[20] Absent an allotment to the contrary, the government pays deferred funds to the accused during the period of deferment.[21] Waiver, on the other hand, is the "voluntary relinquishment or abandonment of a legal right or advantage."[22] Like deferment, waiver also frees up forfeited funds. Unlike deferment, however, the government may only waive automatic forfeitures, and then only for the benefit of an accused's dependents.[23] The waiver period may not exceed six months, but unlike deferment, waiver of forfeitures may extend past action.[24] The convening authority may also waive the automatic forfeitures sua sponte.[25]

In 1998, the Air Force Court of Criminal Appeals (AFCCA) decided *United States v. Owen*,[26] a general court-martial case in which the appellant was convicted of various sex offenses with a child under sixteen years of age. The appellant was sentenced to a dishonorable discharge, eight years of confinement, forfeiture of all pay and allowances, and reduction to the grade of E-1.[27]

Before the convening authority's action, the appellant requested waiver of forfeitures in favor of his dependents. The case involved both adjudged and automatic forfeitures. The issue facing the AFCCA was the validity of the convening authority's action, which approved the adjudged forfeitures but waived the automatic forfeitures for six months.[28] In upholding the convening authority's action, the court held:

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13. *See* United States v. Kolodjay, 53 M.J. 732 (Army Ct. Crim. App. 1999); United States v. Owen, 50 M.J. 629 (A.F. Ct. Crim. App. 1998).

14. *Owen*, 50 M.J. at 631.

15. Adjudged and automatic forfeitures are effective either "[fourteen] days after the date on which the sentence is adjudged" or "the date on which the sentence is approved by the convening authority," otherwise known as action, whichever date is earlier. UCMJ art. 57 (2002).

16. *Emminizer*, 56 M.J. at 445.

17. All courts-martial with sentences that trigger the automatic forfeiture provision of Article 58b, UCMJ, now require verbatim transcripts. MCM, *supra* note 7, R.C.M. 1103(b)(2)(B); *see* UCMJ art. 58b(a). Even if the transcript is summarized, the rule affords counsel for both sides the opportunity to review the record of trial before the military judge authenticates it. MCM, *supra* note 7, R.C.M. 1103(i)(1)(A)-(B). Once the parties review the record of trial, the military judge authenticates it and it is served on the accused. *Id*. R.C.M. 1104; UCMJ art. 54(d). In all general courts-martial and special courts-martial resulting in punitive discharges or confinement for one year or more, the SJA or legal officer prepares a written SJAR and serves it on the accused and counsel. MCM, *supra* note 7, R.C.M. 1106; UCMJ art. 60(d). The accused then has ten days, plus an additional twenty days, if requested, to submit clemency matters to the convening authority before action in the case. The accused's time to submit clemency matters begins when the accused receives the authenticated record of trial and the SJAR, if required. MCM, *supra* note 7, R.C.M. 1105(b)(2)(B); UCMJ art. 60(b). The defense counsel also has ten, plus an additional twenty days, to respond to the SJAR. This ten- plus twenty-day period begins to run when the government serves the authenticated record of trial on the accused, or when it serves the SJAR on the defense counsel, whichever is later. MCM, *supra* note 7, R.C.M. 1106. The complexity of this process explains why forfeitures will usually become effective before action in a case. *See* United States v. Zimmer, 56 M.J. 869, 872 (Army Ct. Crim. App. 2002).

18. *See Zimmer*, 56 M.J. at 872; *see also* MCM, *supra* note 7, R.C.M. 1101(c)(1); UCMJ art. 57.

19. *See Zimmer*, 56 M.J. at 872-73; MCM, *supra* note 7, R.C.M. 1101(c)(1)-(2); UCMJ arts. 57, 58b.

20. MCM, *supra* note 7, R.C.M. 1101(c)(6); UCMJ art. 57.

21. United States v. Kolodjay, 53 M.J. 732, 735 n.6 (Army Ct. Crim. App. 1999).

22. BLACK'S LAW DICTIONARY 1574 (7th ed. 1999). *See Kolodjay*, 53 M.J. at 736 (defining "waiver" as "a grant of relief from statutorily-mandated, automatic forfeitures, subject to the condition that the pay and/or allowances otherwise subject to automatic forfeiture will be paid directly to a dependent for support"); *see also* MCM, *supra* note 7, R.C.M. 1101(d)(1); UCMJ art. 58b(b).

23. MCM, *supra* note 7, R.C.M. 1101(d)(1); UCMJ art. 58b(b); *see also* United States v. Owen, 50 M.J. 629, 631 (A.F. Ct. Crim. App. 1998); *Kolodjay*, 53 M.J. at 736.

24. *See Kolodjay*, 53 M.J. at 736.

25. *Id*.

26. *Owen*, 50 M.J. at 629.

27. *Id*.

> [I]f the sentence of a court-martial includes a partial forfeiture of pay, or forfeiture of all pay and allowances, and otherwise keys [i.e., triggers] Article 58b(a)(1), and the accused requests a waiver which is granted, the convening authority is not required to first disapprove the adjudged forfeiture in order to effect the waiver. All that is required is approval of the sentence and language in the action directing the amount of the forfeiture to be waived and the duration of the waiver.[29]

The court found that automatic forfeitures take priority over adjudged forfeitures, thus negating any need for the convening authority to disapprove the adjudged forfeitures in order to free up monies for the appellant's dependents. The court stated,

> There is no requirement that adjudged forfeitures first be disapproved, for if the required components are present, it is Article 58b(a) which mandates forfeitures, not the sentence of the court-martial. In other words, "automatic forfeitures take priority over adjudged forfeitures."[30]

The following year, the ACCA took a different perspective on the interplay between adjudged and automatic forfeitures in *United States v. Kolodjay*.[31]

In Kolodjay, the accused was convicted of various drug-related offenses at a general court-martial and sentenced to a dishonorable discharge, thirty-nine months of confinement, forfeiture of all pay and allowances, and reduction to the grade of E-1. Shortly after the trial, the accused requested deferment and waiver of forfeitures. Despite submitting his request for deferment and waiver only fifteen days after trial, the convening authority did not receive the request until the time of action.[32] The SJA recommended a six-month waiver of the forfeiture of allowances only. On 23 August 1997, the convening authority acted on the case as well as the deferment and waiver requests. In so doing, he signed two inconsistent documents, a memorandum to the accused and the action. The memorandum purported to act on all pay and allowances, deferring the forfeitures until action and approving the waiver request for six months, until 10 September 1997.[33] The action, however, approved the sentence as adjudged, "suspended total forfeiture of allowances until 10 September 1997, and waived 'total forfeiture of allowances until 10 September 1997, a period of six months.'"[34]

Analyzing the two documents, the court noted their apparent inconsistency, making it impossible to discern the convening authority's intent.[35] As a result, the court determined that a new post-trial recommendation and action were warranted.[36] Discussing the interplay between adjudged and automatic forfeitures, the court provided guidance in direct contravention of that provided a year earlier by the Air Force court. "[I]f adjudged forfeitures are not deferred prior to action, and are approved without suspension at the time of the Article 60, UCMJ, action, then Article 58b waiver is unavailable because the adjudged forfeitures will be executed, and there will be no automatic forfeitures to waive."[37]

United States v. Emminizer[38] resolves the apparent inconsistency between the ACCA and AFCCA decisions. In *Emminizer*, the accused was convicted at a general court-martial of

28. *Id.* at 630. Appellate counsel sought a new convening authority action "to protect appellant and his family from the prospect of a recoupment action by the United States fiscal authorities *in futuro*." *Id.* Although the government had paid the appellant's family the amount of the waived forfeitures, the appellant's counsel was concerned that the inconsistent action of approving adjudged forfeitures while waiving automatic forfeitures would trigger a subsequent recoupment action. *Id*.

29. *Id.* at 631.

30. *Id*. (quoting U.S. DEP'T OF AIR FORCE, INSTR. 51-201, ADMINISTRATION OF MILITARY JUSTICE para. 9.7.3 (2 Nov. 1999) [hereinafter AFI 51-201]).

31. *Kolodjay*, 53 M.J. at 732.

32. *Id*. at 734-35. Processing of the deferment and waiver requests was delayed, in part, because the government was waiting for an allotment form from the appellant designating his spouse as the recipient of his pay. An allotment was necessary because—unlike with waived forfeitures, which the government may pay directly to a dependent—the government must pay deferred forfeitures to the appellant. *Id*.

33. *Id.* at 735. The date of 10 September 1997 was six months from the date the sentence was adjudged; however, forfeitures are not effective under Article 57, UCMJ, until fourteen days after trial or action, whichever is sooner. *Id.*; *see* UCMJ art. 57 (2002).

34. *Kolodjay*, 53 M.J. at 735.

35. *Id*. The memorandum to the appellant addressed pay and allowances, but the action discussed allowances. Both documents purported to provide forfeiture relief for a six-month period ending on 10 September 1997; however, 10 September 1997 was six months from the end of trial and only five-and-a-half months from the effective date of forfeitures. The action purported to suspend forfeitures for six months, ending on 10 September 1997, but suspension under RCM 1108 is only available after action, which means that the suspension period for appellant was from 23 August 1997 to 10 September 1997, or nineteen days. *Id*.; *see* MCM, *supra* note 7, R.C.M. 1108.

36. *Kolodjay*, 53 M.J. at 735.

37. *Id*. at 736.

four specifications of larceny and three specifications of making a false claim. The court sentenced him to a bad conduct discharge, confinement for eighteen months, forfeiture of all pay and allowances, and reduction to E-1.[39] After trial, and as part of the appellant's Rule for Courts-Martial (RCM) 1105 clemency petition, the defense counsel requested waiver of the forfeitures. Specifically, the defense counsel requested that the "convening authority 'consider utilizing Article [58b] of the UCMJ to waive the forfeitures of SPC Emminizer's pay and allowances and direct that money to be provided directly to SPC Emminizer's young son.'"[40] The SJA recommended disapproval of the request, advising the convening authority, "In order to grant the requested relief on forfeitures, you would have to disapprove the adjudged forfeitures and then grant the accused's request for waiver of the automatic forfeitures pursuant to Article 58b(b), UCMJ, for a period of up to six months."[41] The convening authority followed the SJA's advice and disapproved the request.[42]

On appeal, the appellant argued that the SJA erred in his advice. The appellant relied on the proposition that the convening authority may waive automatic forfeitures "regardless of whether the sentence includes adjudged forfeitures."[43]

The CAAF, disagreeing with *Owen*, noted that mandatory (or automatic) forfeitures are triggered by three conditions occurring simultaneously: (1) the sentence must trigger Article 58b; (2) the soldier must be in confinement or on parole; and (3) the soldier must otherwise be entitled to pay and allowances that are subject to automatic forfeiture.[44] If the convening authority approves the adjudged total forfeitures, then the third condition required for mandatory forfeitures is not met. Stated another way, if the convening authority approves an adjudged sentence of total forfeitures, there is nothing for a convening authority to waive.[45] As for the SJA's advice, the CAAF noted that although it was partially correct, it was incomplete.

> [T]he SJA was correct insofar as he advised the convening authority that if the convening authority disapproved the adjudged forfeitures, he could then waive the resultant mandatory forfeitures. The SJA's advice, however, was incomplete in two important respects. First, he also should have stated that if the convening authority modified or suspended the adjudged forfeitures, he could then waive the resultant mandatory forfeitures. Second, in light of appellant's eighteen-month sentence, the SJA advice reasonably could have been construed by the convening authority to mean that it was necessary to disapprove the forfeitures for the entire eighteen-month period in order to grant appellant's waiver request. The SJA should have advised the convening authority that compensation for dependents under the waiver authority may be paid only for a transitional six-month period, and that the convening authority could grant appellant's request by suspending adjudged forfeitures for six months, and then waiving the resulting mandatory forfeitures for the six-month period.[46]

As a result of the "incomplete advice," the case was returned to the convening authority for a new recommendation and action. As for the conflict between the service courts, the CAAF adopted the ACCA's view regarding the interplay between adjudged and automatic forfeitures.[47]

Practitioners in the field, whether acting on behalf of the government or defense, must be aware of the distinction between adjudged and automatic forfeitures and how they relate to one another. Both deserve attention. As a practical note, defense counsel seeking to maximize payments to an accused's dependents should seek the following: deferment of both adjudged and automatic forfeitures until action and at action, disapproval, suspension for six months, or commutation of the adjudged forfeitures and waiver of the automatic forfeitures for six months.[48] In support of the theme that the request is for the accused's dependents, the defense counsel should also submit a completed allotment form from the client directing

38. 56 M.J. 441 (2002).

39. *Id*. at 441. As a result of the sentence, appellant's case involved not only adjudged forfeitures but also automatic forfeitures. *Id*. at 441-42; *see* UCMJ art. 58b (2002).

40. *Emminizer*, 56 M.J. at 444.

41. *Id*.

42. *Id*.

43. *Id*. (citing United States v. Owen, 50 M.J. 629, 631-32 (A.F. Ct. Crim. App. 1998)).

44. *Id*.

45. *Id*. at 444-45.

46. *Id*. at 445.

payment of all forfeited monies to the accused's named dependents.[49]

The next noteworthy forfeitures decision is the ACCA's decision in *United States v. Zimmer*,[50] addressing convening authorities issuing one-line denials of deferment requests. In *Zimmer*, the appellant was convicted at a general court-martial of wrongful use and distribution of cocaine and sentenced to a bad-conduct discharge (BCD), confinement for seven months, forfeiture of all pay and allowances, and reduction to E-1. At trial, a civilian defense counsel represented the appellant, with assistance from a military defense counsel during the post-trial phase.[51]

One week after trial, the appellant requested deferment of the automatic forfeitures in his case until action.[52] The SJA recommended disapproval. The convening authority followed the recommendation in an "undated, one sentence 'action.'"[53] Neither the SJA's recommendation nor the convening authority's action explained the criteria used by either individual to evaluate the deferment request or provided any rationale for the denial.[54] Similarly, neither document explained the convening authority's reasons for denying the deferment request.

After the denial of the request, the appellant requested waiver of the forfeitures as part of his clemency petition. The petition first detailed why waiver was appropriate. It then went on to address the earlier denial of the deferment request.

> Also, the 82d Airborne Division Criminal Law Office suggested that the request for the waiver of forfeitures should be denied because PFC Zimmer hired a civilian attorney to represent him at his court-martial. The logic is that if a soldier can afford to hire a civilian attorney, he or his family can surely afford to keep up the bills. . . . [T]he bottom line is that Mrs. Zimmer should not be pun-

47. *Id*. at 444. The opinion stated,

> Although the position of the Air Force court reflects a thoughtful attempt to facilitate the provision of transitional compensation to dependents, Congress chose a different approach. The purpose of the statute [10 U.S.C. § 858b], as set forth in its plain language and legislative history, is to restrict payments to servicemembers who are in confinement or on parole under a qualifying sentence . . . . The discretionary authority under Article 58b(b) to ameliorate mandatory forfeitures for a brief period of time applies only when the statute triggers mandatory forfeitures. This provision does not constitute general authority to provide transitional compensation to dependents of convicted servicemembers, and does not provide authority to waive adjudged forfeitures.

Id.

48. From a defense perspective, the preferred approach at action regarding adjudged forfeitures is disapproval; if not disapproval, then suspension for six months; if not suspension, commutation. Commutation is simply a reduction in the amount of forfeitures, freeing up that amount of money not forfeited for waiver. Disapproval, suspension, and commutation can occur only at action. *See* MCM, *supra* note 7, R.C.M. 1107(d)(1); UCMJ art. 60(c) (2002).

49. Deferred monies are paid to an accused, and absent a completed allotment, a convening authority may not be inclined to approve the deferment request knowing that the money will go directly to the accused while confined. *See* United States v. Kolodjay, 53 M.J. 732, 734-35 (Army Ct. Crim. App. 1999).

50. 56 M.J. 869 (Army Ct. Crim. App. 2002).

51. *Id*. at 869-70.

52. *Id*. at 870. The appellant did not request deferment of his reduction in rank, which became effective pursuant to Article 57, UCMJ, fourteen days after the sentence was adjudged. *Id*.

53. *Id.*

54. Rule for Courts-Martial 1101(c)(3) provides a non-exclusive list of factors a convening authority "may consider" in evaluating a deferment request.

> Factors that the authority acting on a deferment request may consider in determining whether to grant the deferment request include, where applicable: the probability of the accused's flight; the probability of the accused's commission of other offenses, intimidation of witnesses, or interference with the administration of justice; the nature of the offenses (including the effect on the victim) of which the accused was convicted; the sentence adjudged; the command's immediate need for the accused; the effect of deferment on good order and discipline in the command; the accused's character, mental condition, family situation, and service record.

MCM, *supra* note 7, R.C.M. 1101(c)(3). Rule for Courts-Martial 1101(d)(2) provides a non-exclusive list of factors a convening authority "may consider" in evaluating a waiver request.

> Factors that may be considered by the convening authority in determining the amount of forfeitures, if any, to be waived include, but are not limited to, the length of accused's confinement, the number and age(s) of the accused's family members, whether the accused requested waiver, any debts owed by the accused, the ability of the accused's family members to find employment, and the availability of transitional compensation for abused dependents under 10 U.S.C. § 1059.

Id. R.C.M. 1101(d)(2).

> ished because of PFC Zimmer's actions or because he exercised his right to hire a civilian attorney.[55]

On appeal, the appellant argued that the convening authority abused his discretion by denying the deferment request for an improper reason—the accused's retention of civilian defense counsel. The appellant also argued that the SJA's addendum was defective because it failed to comment on the allegation of legal error raised by the accused in his clemency petition.[56] After examining RCM 1101(c),[57] the court held that it was error for the convening authority to fail to identify any reasons for denying the appellant's deferment request,[58] emphasizing the Court of Military Appeal's previous guidance in *United States v. Sloan*[59] and further extended its reasoning:

> If there has been any doubt in any quarter before, let us now resolve it: When a convening authority acts on an accused's request for deferment of all or part of an adjudged sentence, the action must be in writing (with a copy provided to the accused) and must include the reasons upon which the action is based.[60]

The court noted, however, that "erroneous omission" of reasons from a deferment denial, absent evidence of denial for an "unlawful or improper reason," does not entitle an appellant to relief.[61] Applying the CAAF's *Wheelus*[62] analysis to the post-trial error in the case, the court found that relief was warranted because the appellant made "a colorable showing of possible prejudice," that is, that the convening authority may have granted his deferment request but for consideration of an improper factor, his retention of civilian counsel.[63] Exercising its Article 66(c), UCMJ, authority, the court provided relief by setting aside the adjudged forfeitures and four months of confinement.[64] As a result, the appellant received sixteen weeks of forfeitures at the pay grade of E-1, ten weeks of forfeitures that would have been deferred if his initial request had been approved, and an additional six weeks to "moot any possible prejudice arising from the SJA's failure to address appellant's allegation of legal error."[65]

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55. *Zimmer*, 56 M.J. at 873.

56. *Id*. at 869-70. Rule for Courts-Martial 1106(d)(4) states, in part:

> Legal errors. The staff judge advocate or legal officer is not required to examine the record for legal errors. However, when the recommendation is prepared by a staff judge advocate, the staff judge advocate shall state whether, in the staff judge advocate's opinion, corrective action on the findings or sentence should be taken when an allegation of legal error is raised in matters submitted under R.C.M. 1105 or when otherwise deemed appropriate by the staff judge advocate.

MCM, *supra* note 7, R.C.M. 1106(d)(4).

57. MCM, *supra* note 7, R.C.M. 1101(c).

58. *Zimmer*, 56 M.J. at 874.

59. 35 M.J. 4 (C.M.A. 1992).

60. *Zimmer*, 56 M.J. at 873 (citing *Sloan*, 35 M.J. at 7).

61. *Id*. at 874.

62. United States v. Wheelus, 49 M.J. 283 (1998).

> The applicable statutory and Manual provisions, as well as our prior cases, establish the following process for resolving claims of error connected with the convening authority's post-trial review. First, an appellant must allege error at the Court of Criminal Appeals. Second, an appellant must allege prejudice as a result of the error. Third, appellant must show what he would do to resolve the error if given such an opportunity. If appellant meets this threshold, then it is incumbent upon the Courts of Criminal Appeals, given their plenary review authority under Article 66(c), as amplified by the guidance found in RCM 1106(d)(6), to remedy the error and provide meaningful relief. Because clemency is a highly discretionary Executive function, there is material prejudice to the substantial rights of appellant if there is error and the appellant "makes some colorable showing of possible prejudice."

Id. at 288-89 (quoting and citing United States v. Chatman, 46 M.J. 321, 323-24 (1997)) (reversing the CAAF's prior policy of treating "new matter" injected into the post-trial process as "presumptively prejudicial").

63. *Zimmer*, 56 M.J. at 874.

64. *Id*. at 874-75.

65. *Id.* Defense counsel requesting deferment or waiver of forfeitures should consider whether a deferment (or suspension after action) of any adjudged reduction in rank is also appropriate. In *Zimmer*, the monetary award or windfall to the appellant was limited to payment at the grade of E-1 because the accused did not request a deferment of reduction in rank. Had the defense counsel made such a request along with the initial deferment of forfeitures request, the court may have awarded the appellant sixteen weeks of pay at his original pay grade. *Id.* at 875.

Military practitioners dealing with deferment or waiver requests should prepare documents for the SJA and convening authority that reference and apply the criteria outlined in RCM 1101(c)(3) or (d)(2), *depending on the request.*[66] Convening authorities should no longer issue one-line denials such as, "Your request for deferment and/or waiver of _____ dated _____ is disapproved." How detailed must these documents be? The SJA's memorandum, if any, and the convening authority's written action should reference and apply the appropriate RCM 1101(c)(3) or (d)(2) criteria, be factually correct, and be tailored to the facts and circumstances of the case.

In sum, *Emminizer*[67] requires the convening authority to address both adjudged and automatic forfeitures when attempting to divert funds to an accused's dependents either before or at action. Approval of a sentence that includes forfeiture of all pay and allowances, while simultaneously waiving the automatic forfeitures, results in the availability of no pay and allowances for an accused's dependents. At action, the convening authority should consider disapproval, suspension, or commutation of the adjudged forfeitures if he is considering waiver of the automatic forfeitures. *Zimmer*[68] tells the post-trial practitioner processing a deferment or waiver request to consider and apply the deferment and waiver factors of RCM 1101(c)(3) and (d)(2), respectively, and to document the decision making process that goes into the action on these requests.

The Staff Judge Advocate's Post-Trial Recommendation (SJAR)— Awards, Decorations, and Prior Service

This year, the ACCA altered the post-trial playing field for the government and defense in *United States v. Mack.*[69] In *Mack*, the SJA's post-trial recommendation omitted the appellant's Purple Heart and characterized his service as "satisfactory," both of which the appellant alleged as error.[70] The ACCA disagreed.[71]

The appellant, the installation chaplain, was tried and convicted of making false official statements and larceny of over $73,000 from the Fort Bliss Consolidated Chaplain's Fund. The appellant was sentenced to dismissal from the service, confinement for six months, and forfeiture of all pay and allowances. Before action, the SJAR noted every award and decoration listed on the appellant's Officer Record Brief (ORB) verbatim.[72] The ORB did not mention the appellant's Purple Heart. The SJAR also described the appellant's prior service as "satisfactory."[73]

On appeal, the appellant argued that the SJAR "failed to accurately and completely portray" his service record. He claimed that it omitted his Purple Heart, mischaracterized his service as "satisfactory," and "failed to provide details concerning his combat service and awards."[74] The appellant also argued that by failing to "agree" with his clemency submissions,[75] the SJA was disputing or disagreeing with his post-trial submissions.[76]

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66. *See* MCM, *supra* note 7, R.C.M. 1101(c)(3), (d)(2).

67. 56 M.J. 441, 444 (2002).

68. 56 M.J. at 869.

69. 56 M.J. 786 (Army Ct. Crim. App. 2002).

70. Rule for Courts-Martial 1106(d)(3)(C) requires that the SJAR concisely reflect an "accused's service record, to include length and character of service, awards, and decorations received, and any records of nonjudicial punishment and previous convictions." MCM, *supra* note 7, R.C.M. 1106(d)(3)(C). *See also* United States v. De Merse, 37 M.J. 488 (C.M.A. 1993) (holding that omission of Vietnam awards and decorations constitutes plain error requiring new action).

71. *Mack*, 56 M.J. at 787.

72. *Id*. at 789.

73. *Id*. at 790.

74. *Id.* at 789. The appellant also alleged error because he did not personally receive a copy of the authenticated record of trial and SJAR in the case until after action. The court noted that although this was "clear error," the appellant failed to make a "colorable showing of possible prejudice" under *Wheelus*, because his complaint was identical to the issues the court addressed in the opinion (i.e., omission of his Purple Heart, characterization of his service as "satisfactory," and failure to "detail" his prior service). Because the appellant failed to meet the *Wheelus* standard for relief, the court held that the untimely service of the record of trial and SJAR did not warrant any relief. *Id.* at 788 n.4. In denying relief based on the late service, the court did note a continued "concern about SJA's [sic] who, through inattention or indifference, fail to fulfill *all* of their basic post-trial responsibilities." *Id*.

75. In this context, "clemency submissions" refers to matters submitted under RCM 1105 and 1106. *See* MCM, *supra* note 7, R.C.M. 1105, 1106.

76. *Mack*, 56 M.J. at 789.

Addressing each allegation separately, the court found they all lacked merit. The SJAR noted all awards and decorations on the appellant's ORB, a record admitted at trial without defense objection. Additionally, the appellant testified in his unsworn statement that he did not feel he deserved the Purple Heart and that he "threw the orders away."[77] Without questioning the appellant's award of the Purple Heart, the court refused to establish a rule requiring the SJAR to mention awards and decorations "[neither] supported by an appellant's service record admitted at trial," such as an ORB, other official military records, or a soldier's copies of citations or orders, nor "established by stipulation of the parties."[78] Regarding the SJAR's characterization of appellant's service as "satisfactory," the court noted that RCM 1106(d)(3)(C) "provides no guidelines or word template to characterize service,"[79] and that based on the appellant's prior relationship with the convening authority, the court was confident that the use of the term "satisfactory" did not mislead the convening authority.[80]

As for the alleged lack of detail regarding the appellant's combat service and awards, the court noted that although *United States v. Barnes*[81] implies that "some narrative discussion about a service member's duty position, responsibilities, and length of service in a combat theater" is required, RCM 1106(d)(3)(C) imposes no such requirement.[82] Finally, the court disagreed with the appellant's argument that the SJA tacitly disputed the appellant's RCM 1105 submissions by failing to comment on them. The court found this argument unsupported by any authority and without merit.[83]

In *Mack*, the SJA and staff did it right. The "SJAR and addendum compl[ied] with the letter and spirit of [RCM] 1106."[84] The lesson for both the government and defense is to document the accused's awards and decorations on the admitted ORB or Enlisted Records Brief (ERB) or stipulate to them. Absent documented evidence of an award or decoration, there is no requirement to mention it in the SJAR. Finally, the SJA need not "detail" an accused's prior service. A mere chronology of prior service will suffice. If there is something that needs to be highlighted for the convening authority, the defense counsel should use the RCM 1105 and 1106 submissions to do so. The defense counsel should not rely on the SJAR to highlight the details of the accused's service.

What Can the Convening Authority Consider at Action?

The next area where the CAAF recently provided insight concerns those matters that a convening authority "may consider" under RCM 1107 before taking action. Rule for Courts-Martial 1107, "Action by the Convening Authority," breaks down those matters a convening authority considers before taking action into two categories: "required matters"[85] and "additional matters."[86] *United States v. Harris*[87] is a decision in which the CAAF addressed the "additional matters" prong of RCM 1107(b)(3).

Corporal Harris was tried and convicted at a general court-martial of various offenses associated with the wrongful pos-

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77. *Id*.

78. *Id*.

79. *Id*. at 790. "In our experience, few SJAs use superlatives to describe the overall service of a court-martialed soldier, notwithstanding that soldier's rank or prior stellar record. Many SJAs simply use 'satisfactory,' 'unsatisfactory,' or similar terms to summarize an accused's overall service record." *Id*.

80. *Id*.

81. 44 M.J. 680 (N-M. Ct. Crim. App. 1996).

82. *Mack*, 56 M.J. at 790 (citing MCM, *supra* note 7, R.C.M. 1106(d)(3)(C)). "To the extent that our Navy-Marine Corps brethren require such award detail, we decline to adopt their decision." *Id*.

83. *Id*.

84. *Id*.

> Like our superior court, this court continues to be perplexed by inaccurate, incomplete SJARs in all too many cases that come before us. Likewise, we are troubled that many of these errors and omissions escape notice and comment by trial defense counsel, as contemplated by RCM 1106(f)(4). The appellant's case presents us with no such concerns.

Id. at 789 (citations omitted).

85. The Rules for Courts-Martial define "required matters" as follows:

> (A) Required matters. Before taking action, the convening authority shall consider:
> (i) The result of trial;
> (ii) The recommendation of the staff judge advocate or legal officer under R.C.M. 1106, if applicable; and
> (iii) Any matters submitted by the accused under R.C.M. 1105, or if applicable, R.C.M. 1106(f).

MCM, *supra* note 7, R.C.M. 1107(b)(3)(A).

session, transportation, and disposition of stolen M-112 demolition charges (C-4 plastic explosives). He was sentenced to a dishonorable discharge, confinement for ten years, forfeiture of all pay and allowances, and reduction to the grade of E-1. The convening authority's action approved the sentence as adjudged and suspended all confinement in excess of forty-nine months for a period of twelve months. The action stated, "I considered the Staff Judge Advocate's recommendation, record of trial, the Service Record Book [SRB] of Corporal Lester R. Harris, and the matters submitted by the defense pursuant to [RCM] 1105, MCM, 1995."[88]

On appeal, the appellant challenged the convening authority's consideration of his SRB. The SRB contained three pages that documented the appellant's criminal misconduct before his entry into the Marine Corps, some of which occurred when he was a juvenile. The appellant specifically challenged a one-page form entitled, "Request for Waiver of Enlistment Criteria," and a two-page memorandum entitled, "Subj: Request for Waiver Case of Harris, Lester R."[89] The documents outlined the appellant's pre-service use of marijuana, cocaine, and LSD.[90]

The appellant argued that the two documents did not fall within those matters in RCM 1107 which the convening authority may consider without providing prior notice to the appellant. Although RCM 1107(b)(3)(B)(ii) states the convening authority may consider the "personnel records of the accused," the appellant argued that "personnel records" was undefined, and that RCM 1001(b)(2)[91] therefore controlled. He then argued that the documents did not meet the RCM 1001(b)(2) definition for personnel records. Thus, the convening authority was prohibited from considering them without first providing him notice and an opportunity to respond. The appellant's second argument was that the documents were not personnel records kept in accordance with service regulations and therefore did not belong in his SRB. Because they did not belong in the SRB, the appellant should not be chargeable with the knowledge of the questioned documents. The appellant's final argument was that because his misconduct all occurred before his enlistment in the Marine Corps, "his past misdeeds should not be held against him."[92] In other words, the appellant argued, consideration of the two documents was unfair.

On appeal, the CAAF granted review of whether the convening authority's "failure to give [the appellant] notice and an opportunity to rebut [a]dverse preenlistment juvenile matters from outside the record"[93] before taking action, as well as his consideration of those matters, prejudiced the appellant.[94] The court summarily dismissed the appellant's argument that "personnel records," as defined in RCM 1107(b)(3)(B)(ii), are defined or limited by RCM 1001(b)(2). Rule for Courts-Martial 1001(b)(2) is a rule governing the admissibility of evidence during the adversarial presentencing process, while RCM 1107(b)(3) vests "broad discretion" with the convening authority on what matters to consider before taking action.[95] Rule for Courts-Martial 1107(b)(3) provides the accused with "constructive notice of the matters that must and may be considered by the convening authority."[96] Finally, a convening authority must provide notice and an opportunity to respond only when considering "matters adverse to the accused from outside the

86. The Rules for Courts-Martial define "additional matters" as follows:

> (B) Additional matters. Before taking action the convening authority may consider:
> (i) The record of trial;
> (ii) The personnel records of the accused; and
> (iii) Such other matters as the convening authority deems appropriate. However, if the convening authority considers matters adverse to the accused from outside the record, with knowledge of which the accused is not chargeable, the accused shall be notified and given an opportunity to rebut.

Id. R.C.M. 1107(b)(3)(B).

87. United States v. Harris, 56 M.J. 480 (2002).

88. *Id.* at 481.

89. *Id.*

90. *Id*.

91. MCM, *supra* note 7, R.C.M. 1001(b)(2) (providing for the admission of personnel records during the pre-sentencing portion of the court-martial proceedings).

92. *Harris*, 56 M.J. at 482.

93. *Id.* at 481.

94. *Id.* at 480.

95. *Id.* at 482.

96. *Id*.

record, with knowledge of which the accused is not chargeable."[97]

In the appellant's case, the *Marine Corps Individual Records Administration Manual* (*IRAM*) governs the SRB. As for the appellant's argument that the SRB is not a personnel record, the CAAF found that "it is beyond peradventure that the SRB is a repository of 'personnel records.'"[98] Next, the court addressed whether the questioned documents belonged in the SRB. After reviewing the *IRAM*, the court determined that paragraph 4001(c)(2)(48) addressed insertion of documents dealing with "[a]ny special authority for enlistment/reenlistment or extension" into the SRB.[99] The court held that the appellant failed to carry his burden to show that the questioned documents were not "special authority" within the meaning of paragraph 4001(c)(2)(48). Finally, the court noted that because the appellant had access to his personnel records, to include his SRB, as well as the opportunity to "address any potentially adverse information contained [therein]" in his RCM 1105 submission, the "appellant was 'chargeable' with the knowledge of the contents of his SRB and was on notice . . . that the enlistment waiver documents could be considered by the convening authority" before action.[100]

A close look at *Harris* reveals that in the future, an accused will be placed in a precarious position. If the accused has access to his personnel records, those records contain adverse material, and the adverse material is not in the record of trial, the convening authority can consider the adverse material without prior notice to the appellant. Part of the rationale on which *Harris* relies is the accused's ability to comment on the adverse material in his RCM 1105 submission to the convening authority.

Corporal Harris, however, would not have known with certainty that the convening authority knew about his juvenile misconduct, only that the misconduct was properly maintained in his SRB, a personnel record.[101] The SJAR in his case did not list the SRB as a matter the convening authority intended to consider. Corporal Harris and his counsel faced a difficult decision when they prepared their RCM 1105 and 1106 submissions—to rebut the adverse material in the SRB or remain silent. The obvious danger of rebutting the adverse material was that the rebuttal would actually highlight adverse matters that the convening authority might not have considered otherwise. Failure to respond to the adverse material, however, waived any objection to its consideration and might have implicitly admitted disputed assertions in those records. Corporal Harris was held to be "chargeable with the knowledge" of the contents of those records. The most prudent course in a particular case depends on the process by which the convening authority normally takes action in that jurisdiction. Defense counsel should talk to their SJAs and learn what their convening authorities routinely consider. This knowledge will help them make intelligent decisions about whether to respond to adverse information of this nature.

Post-Trial Processing Delay—Authority to Grant Relief, the Role of the Military Judge, and "Defense Time"

This last section of Part I discusses three significant cases in the area of post-trial processing delay: *United States v. Tardif*,[102] *United States v. Chisholm*,[103] and *United States v. Maxwell*.[104]

Tardif[105] may be the most significant post-trial decision of the term. *Tardif* addressed the service courts' authority to grant

97. *Id*.

98. *Id*. (citing U.S. DEP'T OF NAVY, MARINE CORPS INDIVIDUAL RECORDS ADMINISTRATION MANUAL ch. 1 (31 May 2002).

99. *Id*.

100. *Id.* at 483.

101. *See id*. The court did not reach the issue of whether a convening authority may consider information improperly maintained in a personnel record without prior notice and an opportunity to rebut. The court reasoned,

> Appellant has not carried his burden of demonstrating before this Court that the enlistment waiver documents maintained in his service record do not constitute "special authority" within the meaning of subparagraph (48). Therefore, we need not decide today whether a document improperly maintained in an accused's SRB may be considered.

Id. at 482-83.

102. 57 M.J. 219 (2002).

103. No. 9900240, 2003 CCA LEXIS 7 (Army Ct. Crim. App. Jan. 24, 2003).

104. 56 M.J. 928 (Army Ct. Crim. App. 2002).

105. *Tardif* was a three-to-two decision in which both Chief Justice Crawford and Senior Judge Sullivan filed separate dissenting opinions. *Id*. at 225-28 (Crawford, C.J., dissenting); *id.* at 228-30 (Sullivan, S.J., dissenting).

relief for post-trial processing delay when the delay has not caused an appellant any actual prejudice. Simply stated, *Tardif* held that "a Court of Criminal Appeals has authority under Article 66(c), UCMJ, 10 U.S.C. § 866(c), to grant appropriate relief for unreasonable and unexplained post-trial delays."[106]

In Tardif, the appellant was tried and convicted at a general court-martial of unauthorized absence and assault upon a child under the age of sixteen. On 29 October 1999, the appellant was sentenced to a dishonorable discharge, confinement for three years, forfeiture of all pay and allowances, and reduction to the grade of E-1. The convening authority took action on 9 June 2000 (223 days after the announcement of the sentence), approving the sentence as adjudged, with the exception of the confinement, which he reduced to two years.[107] Although the convening authority took action on the case in June, the record of trial was not forwarded to Headquarters, U.S. Coast Guard, for appellate review until 2 October 2000 (338 days after sentencing).[108]

On appeal, the appellant alleged prejudice because of the "excessive delay in the post-trial processing of his case."[109] The appellant argued he was prejudiced by "each segment of time that contributed to the ultimate delay of more than twelve months from trial to referral of the record to [the Coast Guard Court of Criminal Appeals]."[110] Despite his conclusory allegations of prejudice caused by the delay itself, the appellant provided no evidence of specific prejudice resulting from the delay in his case.[111]

In evaluating the post-trial processing of the case, the Coast Guard Court of Criminal Appeals (CGCCA) focused on the 115-day delay from 9 June 2000 until 2 October 2000, the post-action, pre-dispatch[112] period. The court commented that the delay during this period was "both unexplained and unreasonable."[113] The court went on to say that "[s]uch delay . . . casts a shadow of unfairness over our military justice system."[114] In spite of these conclusions, the CGCCA determined that, notwithstanding the Army court's decision in *United States v. Collazo*,[115] it was "to be guided by the opinions of the Court of Appeals for the Armed Forces on [the subject of excessive post-trial delay]."[116] In applying the CAAF's guidance, the CGCCA noted that "the Court of Appeals for the Armed Forces has repeatedly determined that an appellant *must* show that the delay, no matter how extensive or unreasonable, prejudiced his substantial rights" before he is entitled to relief.[117] Since the appellant in this case failed to establish any prejudice, the court held that no relief was warranted.[118]

On appeal, the CAAF reversed the CGCCA in a three-to-two decision,[119] holding that "a Court of Criminal Appeals has authority under Article 66(c) . . . to grant appropriate relief for unreasonable and unexplained post-trial delays."[120] The CAAF distinguished Article 59(a), UCMJ, authority from Article

106. *Id*. at 220.

107. United States v. Tardif, 55 M.J. 666, 666-68 (C.G. Ct. Crim. App. 2001).

108. *Tardif*, 57 M.J. at 220. The record was received at Headquarters, U.S. Coast Guard, on 1 November 2000 and referred to the Coast Guard Court of Criminal Appeals on 17 November 2000, 368 and 384 days after sentencing, respectively. *Id.*

109. *Tardif*, 55 M.J. at 668.

110. *Id*.

111. *Id*. Examples of potential prejudice could include release from confinement before action (thus mooting any request for early release through clemency), missed clemency or parole hearings because action was not yet taken in the case, and lost civilian job opportunities because the conviction was not yet final.

112. "Dispatch" is a term commonly used to refer to the forwarding or mailing of a completed, acted upon record of trial, from a legal office, to the appropriate authority for processing and appellate review. *See, e.g.*, United States v. Harms, 56 M.J. 755 (Army Ct. Crim. App. 2002). In *Tardif*, this was the period the Coast Guard Court of Criminal Appeals found problematic. *Tardif*, 55 M.J. at 668.

113. *Tardif*, 55 M.J. at 668.

114. *Id*.

115. 53 M.J. 721 (Army Ct. Crim. App. 2000) (holding that under Article 66(c), UCMJ, appellate courts have authority to grant relief for excessive post-trial delay without any showing of actual prejudice to the appellant); *see also* United States v. Maxwell, 56 M.J. 928 (Army Ct. Crim. App. 2002); United States v. Bauerbach, 55 M.J. 501 (Army Ct. Crim. App. 2001).

116. *Tardif*, 55 M.J. at 669.

117. *Id.* at 668 (emphasis added).

118. *Id.* at 669.

119. In their dissenting opinions, both Chief Judge Crawford and Senior Judge Sullivan viewed the majority decision as creating new law and as judicial rule-making. They also viewed the decision as investing the Courts of Criminal Appeal with equitable powers unsupported by legal authority. *See Tardif*, 57 M.J. at 225-28 (Crawford, C.J., dissenting); *id*. at 228-30 (Sullivan, J., dissenting).

66(c), UCMJ, authority. Article 59(a), UCMJ,[121] addresses an appellate court's authority to deal with errors of law. Article 66(c), UCMJ,[122] deals, in part, with an appellate court's authority to assess the appropriateness of a sentence.

In reviewing the legislative history of both articles, the court noted that both articles, taken together, "'bracket' the authority of a Court of Criminal Appeals."[123] Article 59(a) limits the courts' reversal authority to those cases involving legal errors, while Article 66(c) is a broader, "three-pronged constraint" on a service court's authority to affirm.[124] Before affirming the findings and sentence in a case, a court of criminal appeals must be satisfied (1) that the findings and sentence are correct in law; (2) that they are correct in fact; and that (3) based on the entire record, they should be approved. Only the first prong implicates a service court's Article 59(a), UCMJ, authority. It is the third prong of Article 66(c), the "should be approved" prong, that authorizes courts of criminal appeals to provide relief without a showing of actual prejudice.[125]

After addressing the service courts' authority to grant relief for excessive post-trial delay, the CAAF addressed the issue of appropriate relief, noting that "Courts of Criminal Appeals have authority under Article 66(c) . . . to tailor an appropriate remedy, if any is warranted, to the circumstances of the case."[126] The CAAF remanded the case to the CGCCA to exercise its Article 66(c) authority and determine what sentence should be approved, considering the totality of the circumstances, including the post-trial delay.[127]

Although *Tardif* validated the Army's *Collazo* approach to the handling of excessive post-trial delay, *Tardif* does not mandate relief when excessive post-trial delay has not prejudiced the appellant.[128] It simply clarifies that prejudice is not a prerequisite to Article 66(c) relief. Conversely, *Tardif* does not foreclose the dismissal of the findings and sentence in an otherwise error-free case, when dismissal is an "appropriate remedy" under the totality of the circumstances.

Tardif should have little impact on Army practitioners. The ACCA was granting *Collazo* relief based on post-trial processing delay before *Tardif*, and nothing indicates that this trend will end.[129] Government counsel in the other services, however, can no longer rely on an absence of prejudice to defeat appellants' requests for relief after excessive post-trial delay. The service courts will now have to evaluate the totality of the circumstances surrounding the post-trial processing of an appel-

120. *Id.* at 220.

121. UCMJ art. 59(a) (2002) ("A finding or sentence of court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused.").

122. Article 66(c), UCMJ, states, in part:

> In a case referred to it, the Court of Criminal Appeals may act only with respect to the findings and sentence as approved by the convening authority. It may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved.

UCMJ art. 66(c).

123. *Tardif*, 57 M.J. at 224.

124. *Id*.

125. *Id.* ("We agree with the Army court's conclusion in *Collazo* that a Court of Criminal Appeals has authority under Article 66(c) to grant relief for excessive post-trial delay without a showing of 'actual prejudice' within the meaning of Article 59(a), if it deems relief appropriate under the circumstances.").

126. *Id.* at 225. Practitioners in the post-trial area should note that the *Tardif* decision leaves the door open for appellate courts to dismiss otherwise legal findings and sentences solely for excessive post-trial delay. The CAAF's guidance regarding relief is that the appellate courts have authority to "tailor an appropriate remedy . . . to the circumstances of the case." *Id.* (citations omitted).

> We further conclude that appellate courts are not limited to either tolerating the intolerable or giving an appellant a windfall. . . . Appellate relief under Article 66(c) should be viewed as the last recourse to vindicate, where appropriate, an appellant's right to timely post-trial processing and appellate review.

Id. Despite the language regarding "last recourse," practitioners should understand that *Tardif* does not foreclose dismissal as an appropriate remedy in the appropriate case. *See id.*

127. *Id.*

128. *See, e.g.*, United States v. Dezotell, 58 M.J. 517 (N-M. Ct. Crim. App. 2003) (holding that a fourteen-month post-trial processing delay did not prejudice the appellant).

129. *See, e.g.*, United States v. Maxwell, 56 M.J. 928 (Army Ct. Crim. App. 2002); United States v. Hutchison, 56 M.J. 756 (Army Ct. Crim. App. 2002); United States v. Delvalle, 55 M.J. 648 (Army Ct. Crim. App. 2001); United States v. Nicholson, 55 M.J. 551 (Army Ct. Crim. App. 2001); United States v. Bauerbach, 55 M.J. 501 (Army Ct. Crim. App. 2001); *see also* United States v. Paz-Medina, 56 M.J. 501 (Army Ct. Crim. App. 2001).

lant's case and determine whether the appellant's sentence is appropriate in light of the post-trial delay.

A post-*Tardif* decision, *United States v. Chisholm*,[130] however, should raise eyebrows throughout the Army military justice system. In *Chisholm*, the ACCA sent a message to military judges regarding their post-trial roles and responsibilities, highlighting options available to military judges to remedy slow post-trial processing.[131] Among the options discussed, and the one that will concern chiefs of justice and SJAs the most, is outright dismissal of the findings and sentence in an otherwise error-free case with or without prejudice.[132]

Chisholm, like many cases since *Collazo*, is not a model for efficient post-trial processing. In *Chisholm*, it took the government over sixteen months to take action in a case with an 848-page record of trial.[133]

Sergeant (SGT) Chisholm was convicted at a general court-martial, contrary to his pleas, of conspiracy to commit rape, conspiracy to obstruct justice, false official statement, and rape. A panel of officer and enlisted members sentenced him to a bad conduct discharge, confinement for four years, forfeiture of all pay and allowances, and reduction to the grade of E-1. The convening authority approved the sentence as adjudged.[134]

On appeal, the appellant's only allegation of error was that he was entitled to relief under *Collazo*[135] because of the dilatory post-trial processing of his case.[136] In evaluating the appellant's claim, the court considered the following facts, among others: that the trial was completed on 19 February 1999; that two military judges did not authenticate the record of trial until 21 March 2000 and 10 May 2000; that the convening authority did not take action until 23 June 2000, sixteen months after completion of the trial; and that the record of trial was just 848 pages long.[137] The court agreed with the appellant, but gave him little actual relief. The court reduced his confinement from forty-eight to forty-five months and affirmed the remaining portions of the sentence, as approved by the convening authority.[138]

In addressing the poor post-trial handling of this case, the court discussed the military judge's role in the process at great length. Both Article 38(a), UCMJ,[139] and RCM 1103(b)(1)(A)[140] make the military judge responsible for directing the preparation of the record of trial. The court, after noting that preparation of the record of trial is a "shared responsibility" between the SJA and military judge,[141] stated that military judges "have both a duty and responsibility to take active roles in 'directing' the timely and accurate completion of court-martial proceedings."[142] The court highlighted a military judge's "inherent authority to issue such reasonable orders as may be necessary to enforce that legal duty,"[143] noting that the manner in which the military judge directs completion of the record is a matter within his "broad discretion."[144] The court then suggested several "remedial actions" available to a military judge:

> The exact nature of the remedial action is within the sound judgment and broad discretion of the military judge, but could include, among other things: (1) directing a date certain for completion of the record with confinement credit or other progressive sentence relief for each day the record completion is late; (2) ordering the accused's release from confinement until the record of trial is completed and authenticated; or (3) if all else fails, and the accused has been prejudiced by the delay, setting aside the findings and the sentence with or without prejudice as to a rehearing.[145]

Of the suggested remedial measures, obviously the most disconcerting for government practitioners is the setting aside of the findings and sentence in a case. As for jurisdictions that may choose to ignore a military judge's order regarding preparation of the record of trial, the court stated that "[s]taff judge advocates and convening authorities who disregard such remedial orders do so at their peril."[146]

Chisholm has planted the post-trial Article 39(a) seed in the Trial Defense Service garden. If the post-trial process is taking too long, the military judge should intervene. If the detailed military judge is not actively involved, the trial defense counsel should request a post-trial Article 39(a) session[147] and suggest remedial measures the military judge can take to move the process along. Although *Chisholm* does not create any new substantive rights that counsel may enforce for the accused, it raises the level of judicial scrutiny of post-trial processing. Dilatory post-trial processing is no longer a phrase reserved for use by appellate court judges; trial judges will be using the same or similar terminology in the remedial orders they issue from the bench after trial but before authentication of the trial record. Whether military judges will also use similar language in dismissal orders remains to be seen.

The final post-trial processing case that practitioners should review is *United States v. Maxwell*.[148] Private Maxwell was tried and convicted at a general court-martial for desertion terminated by apprehension and wrongful appropriation of a motor vehicle. The military judge sentenced her to a BCD and confinement for five months. The sole issue the accused raised on appeal was the "unreasonable delay in the post-trial process-

130. No. 9900240, 2003 CCA LEXIS 7 (Army Ct. Crim. App. Jan. 24, 2003).

131. *Id.* at *16-18. The focus of the *Chisholm* decision is the military judge's responsibility to "direct" preparation of the record of trial and focuses on pre-authentication options and remedial measures available to a military judge. *Id.* at *7-8,

132. *Id.* at *17.

ing of her case,"[149] an issue she raised for the first time on appeal because she had previously waived her right to submit RCM 1105 matters. In Private Maxwell's case, it took the government almost twelve months to authenticate a 384-page record of trial, plus two additional months to act on the case.[150] Of the twelve months between trial and authentication, fifty-one days were attributable to the defense, while the defense counsel purportedly reviewed the record of trial.[151]

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133. A detailed chronology of the post-trial processing of SGT Chisholm's case follows:

•19 January 1999—Accused placed in pretrial confinement;

•19 February 1999—Accused sentenced;

•17 June 1999—Defense counsel requests waiver of forfeitures;

•28 June 1999—Convening authority (CA) denies the waiver request;

•8 November 1999—Court-martial tapes sent from Hawaii (25th Infantry Division) to Fort Irwin for transcription;

•9 November 1999—Fort Irwin SJA advises trial defense counsel (TDC) that "local" business, to include a guilty plea tried that same day, had priority over appellant's case;

•18 November 1999—Defense counsel requests that 25th Infantry Division expedite the processing of appellant's case, provide a date certain for completion of the record of trial (ROT), and order a post-trial 39(a) session if no date certain is provided by 1 December 1999;

•1 December 1999—SJA estimates completion of the ROT by mid-December;

•5 January 2000—TDC asks CA to order a post-trial 39(a) session, provides copy of request to the military judge (MJ);

•6 January 2000—CA denies the TDC's 5 January 2000 request; MJ orders daily status reports on the appellant's ROT;

•10 January 2000—ROT completed and forwarded to TDC for review;

•3 February 2000—TDC submits RCM 1105 clemency request to the CA, noting that the ROT was incomplete, requesting deferment of confinement and dismissal of the charges, or alternatively, disapproval of the discharge and reduction of the sentence of confinement to time served;

•10 February 2000—CA responds to 3 February 2000 clemency request, denies deferment of confinement, reserves decision on approval or disapproval of the sentence until action;

•23 February 2000—ROT forwarded to the MJ (two judges presided over appellant's case);

•21 March 2000—First MJ authenticates the ROT;

•13 April 2000—Chief of Military Justice prepares a memorandum for record regarding documents missing from the ROT;

•19 April 2000—Appellant's mother sends a letter to the CA requesting expeditious completion of the ROT;

•24 April 2000—Appellant's wife sends a letter to the CA requesting expeditious completion of the ROT;

•10 May 2000—Second MJ authenticates the ROT;

•22 May 2000—SJA completes his SJAR and responds to the mother and wife;

•4 June 2000—Appellant submits a second clemency request;

•22 June 2000—SJA completes an addendum to the SJAR;

•23 June 2000—CA takes action, approving the sentence as adjudged without granting any clemency.

Id. at *2-8. "In his only assignment of error, appellant asserts that he is entitled to relief under *United States v. Collazo*, 53 M.J. 721 (Army Ct. Crim. App. 2000), for dilatory post-trial processing. We agree." *Id.* at *1-2.

134. *Id*. at *8.

135. *Collazo*, 53 M.J. at 721.

136. *Chisholm*, 2003 CCA LEXIS 7, at *1-2.

137. *Id.* at *1-8, *20.

In addressing the post-trial processing of the appellant's case, the court noted that

> *Collazo* imposes obligations on trial defense counsel, as well as the government, to ensure that an accused's case is timely processed in the post-trial phase. "When the record of trial is not prepared in a timely manner, defense counsel should request specific relief from the convening authority under R.C.M. 1105 concerning the findings of guilty or the sentence, tailored to the facts and circumstances of the particular case, and supported by demonstrated prejudice." In fact, the trial defense counsel's delay in reviewing the record of trial contributed to the denial of the appellant's fundamental right "to secure the convening authority's action as expeditiously as possible, given the totality of the circumstances in appellant's case."[152]

Both the government and defense were responsible for the unreasonable delay in the appellant's case. After deducting the time attributable to the defense,[153] the court held that the remaining government delay was still an "excessive delay of more than ten months between trial and authentication."[154]

Maxwell provides valuable guidance for both government and defense counsel. Government counsel must ensure that all defense time is documented. For example, the government should capture the time spent by defense on errata review or during the preparation of clemency matters. Counsel will often exceed the thirty-day time limit for submission of RCM 1105 and 1106 matters.[155] Defense time captured in the record will not count against the government when determining whether *Collazo* relief is warranted. Defense counsel should also heed the court's guidance and demand relief from the convening

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138. *Id.* at *21. The court reasoned as follows:

> Appellant was one of seven coaccused convicted of offenses stemming from the rape of [PV2] S while she was passed out drunk in a military barracks room. In all, six soldiers were convicted of raping the unconscious PV2 S during the early morning hours of 16 May 1998. Appellant was the only noncommissioned officer among those seven offenders and should have stopped the assaults immediately upon encountering the first rape of Specialist Helton. Instead, appellant exhorted another junior soldier to "do it" to PV2 S while appellant watched. Appellant received one of the most lenient sentences, despite the fact that he could have stopped this series of rapes after the first assault. But for these factors, we would have granted even more sentence relief.

Id. at *20-21.

139. "The trial counsel of a general or special court-martial shall . . . under the direction of the court, prepare the record of the proceedings." UCMJ art. 38(a) (2002).

140. "The trial counsel shall: (A) Under the direction of the military judge, cause the record of trial to be prepared." MCM, *supra* note 7, R.C.M. 1103(b)(1)(A).

141. *Chisholm*, 2003 CCA LEXIS 7, at *9.

142. *Id.* at *14.

143. *Id.* at *10.

144. *Id.* at *14.

145. *Id.* at *16-17.

146. *Id.* at *17.

147. *See* UCMJ art. 39(a) (2002); MCM, *supra* note 7, R.C.M. 1102.

148. 56 M.J. 928 (Army Ct. Crim. App. 2002).

149. *Id.* at 929.

150. *Id.*

151. "Except when unreasonable delay will result, the trial counsel shall permit the defense counsel to examine the record before authentication." MCM, *supra* note 7, R.C.M. 1103(i)(1)(B).

152. *Maxwell*, 56 M.J. at 929 (quoting United States v. Collazo, 53 M.J. 721, 727 (Army Ct. Crim. App. 2000)).

153. *Id.*

154. *Id.*

155. *See* MCM, *supra* note 7, R.C.M. 1105(c)(1), 1106(f)(5).

authority in situations where unreasonable delay exists. In light of *Chisholm*, defense counsel should consider seeking relief from the military judge for delays associated with preparation of the record of trial.

Simply stated, *Tardif* holds that appellate courts need not find actual prejudice to grant relief based on post-trial processing delay. *Chisholm* is a wake-up call for military judges, emphasizing their duty and responsibility to direct the preparation of the record of trial. The opinion reminds military judges that they are not powerless to compel timely completion of trial records. They have multiple options, including (according to the ACCA) dismissal of the findings and sentence. Lastly, *Maxwell* tells defense counsel that they bear some responsibility for the post-trial processing of cases. The service courts will not hold the defense's post-trial time against the government when they evaluate whether post-trial delay is unreasonable or excessive. The government must carefully document any defense delays.

Part II—*Army Regulation (AR) 27-10*[156] and TJAG's Initiatives to Improve Post-Trial Processing[157]

The New AR 27-10[158]

On 6 September 2002, the Army revised *AR 27-10*. The amendments became effective on 14 October 2002.[159] This section summarizes the changes that impact the post-trial process, either directly or indirectly.

The most significant change to *AR 27-10* is that special court-martial convening authorities (SPCMCAs) can now convene courts empowered to adjudge bad-conduct discharges (BCD SPCM). The new regulation deletes the previous regulatory language that effectively prevented them from referring cases to BCD SPCMs.[160] Most general court-martial convening authorities (GCMCA), however, have reserved BCD SPCM convening authority at their level. Assuming that superior commanders do not withhold the authority to convene BCD SPCMs, the court may not adjudge a BCD, greater than six months of confinement, or forfeiture of pay for more than six months without a verbatim record of trial[161]

If the approved sentence includes a punitive discharge or any confinement, the automatic reduction of an enlisted service member to the grade of E-1 under Article 58a, UCMJ, is now limited to those circumstances where the approved sentence includes either a punitive discharge or confinement for more than 180 days (or six months).[162]

Home addresses and social security numbers will no longer be used to identify witnesses. Social security numbers, other than the accused's, will only be used to verify that the members actually detailed by the convening authority are present. Thereafter, no documents that include social security numbers, other than documents related to the accused, will be maintained in the record.[163]

Materials related to pretrial confinement (such as copies of the commander's checklist and the military magistrate's memorandum) must now be inserted into the record of trial.[164] Staff

156. AR 27-10, *supra* note 10.

157. E-mail from The Judge Advocate General, United States Army, to senior JAG Corps Leaders and Staff Judge Advocates, subject: TJAG's Directives in Post-Trial Study (Jan. 6, 2003) (reprinted *infra* app. A) [hereinafter E-mail Message].

158. Information Paper, Criminal Law Division, Office of the Judge Advocate General, subject: New Provisions in Army Regulation (AR) 27-10, Military Justice (24 Sept. 2002) (summarizing TJAG's proposed changes). The author extends his thanks to Major Michelle Crawford, the author of the information paper, and Colonel William Condron, Chief of Criminal Law, Office of The Judge Advocate General.

159. AR 27-10, *supra* note 10.

160. Article 23, UCMJ, empowers "the commanding officer of a brigade, regiment, detached battalion, or corresponding unit of the Army" to convene SPCMs. UCMJ art. 23. Before the promulgation of the new *AR 27-10* on 6 September 2002, however, the authority to convene a BCD SPCM was generally reserved to the GCMCA.

> A GCMCA may authorize an assigned or attached SPCM convening authority to convene a SPCM empowered to adjudge a BCD if the command of the SPCM convening authority is substantially located within an area in which hostile fire or imminent danger pay is authorized. If practicable, the authorization should be coordinated with Criminal Law Division, [Office of] The Judge Advocate General . . . . Such authorization will be written, and the authorization will be included in the record of each BCD SPCM convened under this provision. Termination of hostile fire pay status will terminate authority to convene SPCM empowered to adjudge a BCD under this provision.

U.S. DEP'T OF ARMY, REG. 27-10, LEGAL SERVICES: MILITARY JUSTICE para. 5-25b (20 Aug. 1999). The new regulation removed the "hostile fire or imminent danger pay" restriction and replaced paragraph 5-25 with paragraph 5-27. AR 27-10, *supra* note 10, para. 5-27. Paragraph 5-27 does have some strictly procedural limitations. To adjudge a BCD, confinement greater than six months, or forfeiture of pay for more than six months, the court will require a military judge, absent military exigencies; a qualified defense counsel under Article 27(b), UCMJ; a verbatim record of trial; and a pretrial advice by the SJA. *Id*. Many GCMCAs have nonetheless reserved BCD-SPCM convening authority at their own level.

161. Additionally, a special court-martial may not adjudge a BCD, confinement greater than six months, or forfeiture of more than six months' pay without: a detailed military judge, unless military exigencies or physical conditions prohibit such detailing; counsel qualified under Article 27(b) detailed to represent the accused; and a pretrial advice by his servicing SJA under RCM 406(b). AR 27-10, *supra* note 10, para. 5-27.

162. *Id.* para. 5-28e; *see also* UCMJ art. 58a (2002).

judge advocate offices are required to annotate the time from initiation of investigation of the most serious arraigned offense to the date of arraignment for that offense on Department of Defense Forms 490 (Record of Trial) and Form 491 (Summarized Record of Trial Chronology Sheet).[165] Records of trial for summary courts-martial and special courts-martial that do not involve a bad conduct discharge or confinement for more than of six months will be maintained in accordance with *AR 25-400-2* for a period of ten years after final action.[166]

By direction of Headquarters, Department of the Army, the Report of Result of Trial, Department of the Army Form 4430, must indicate (1) whether the convicted service member must submit to DNA processing in accordance with 10 U.S.C. § 1565;[167] and (2) whether the conviction requires sex offender registration in accordance with 42 U.S.C. § 14071.[168]

The Judge Advocate General's Post-Trial Processing Initiatives[169]

On 30 December 2002, The Judge Advocate General (TJAG), Major General Thomas J. Romig, approved the recommendations of an Army-wide post-trial study. The Judge Advocate General approved sixteen recommendations, which are reproduced at Appendix A.

A review of all sixteen recommendations leads to one conclusion—the Army Judge Advocate General's Corps takes post-trial processing seriously and will no longer tolerate unreasonable post-trial delay. Recommendations 1-7 are clear; The Judge Advocate General's Corps leadership now has visibility over post-trial processing.[170] For example, the Office of The Judge Advocate General (OTJAG) is developing "metric" standards, whereby all SJAs will have a processing timeline for how long each stage of the court-martial process should take, from the preferral of charges through dispatch of the record of trial to the appropriate appellate authority.[171] At 150 days after trial, if the appellate court has not yet received the record of trial, the Clerk of Court will correspond with the SJA and supervisory SJA.[172] At 210 days, the Clerk will again notify the SJA and supervisory SJA, along with the major Army command (MACOM) SJA.[173] At 300 days after trial, The Assistant Judge Advocate General for Military Law and Operations is "directed" to communicate with the SJA and the supervisory SJA.[174]

Recommendations 8 through 16 specifically address management of court reporters. The most significant recommendation for SJAs and Chiefs of Justice is the directive that the Sergeant Major of the Judge Advocate General's Corps "ensure that the busiest GCMCAs are fully staffed with [court reporters]."[175] This directive provides busy jurisdictions with the ammunition previously unavailable to bring their court reporter

163. AR 27-10, *supra* note 10, paras. 5-26, 12-5b(2).

164. *Id.* para. 5-40.

165. *Id.* para. 5-40b.

166. *Id.* para. 5-46a; *see* U.S. Dep't of Army, Reg. 25-400-2, The Army Records Information Management System (ARIM) (18 Mar. 2003).

167. The statute requires DNA processing for all service members convicted of "qualifying military offenses." *See* 10 U.S.C. § 1565 (LEXIS 2003); Memorandum, Undersecretary of Defense for Personnel and Readiness, subject: Policy for Implementing the DNA Analysis Backlog Elimination Act of 2001 (16 May 2001), *available at* http://afsf.lackland.af.mil/Organization/AFSFC/SFC/offenses-final.PDF (implementing the statue and listing "qualifying millitary offenses:). Conviction of a service member of a qualifying military offense requires the U.S. Army Criminal Investigtions Command to collect a DNA sample for analysis and forwarding to the FBI. Qualifying military offenses include murder, manslaughter, aggravated assaulst, property crimes such as housebreaking, robbery, arson, and burglary, and the full range of sex offenses. *Id.* A separate Department of Defense instruction implements the federal sex offender registration statute at 42 U.S.C. §§ 14071. Conviction of a listed offense requires notification to state and local law enforcement agencies. U.S. Dep't of Defense, Instr. 1325.7 Administration of Military Correction Facilities and Clemency and Parole Authority (17 July 2001), *available at* http://www.dtic.mil/whs/directives/corres/pdf/i13257_071701p.pdf. Listed sex offenses include rape, sodomy, indecent assault, assault with intent to commit another sex offense, kidnapping of a minor (other that by a parent), pornography involving aminor, and conspiracy, attempt, or solicitation to commit a listed offense. *Id.* app. C.

168. *See* U.S. Dep't of Army, DA Form 4430, Department of the Army Report of Result of Trial ll. 11-12 (Sept. 2002), *available at* ftp://pubs.army.mil/pub/eforms/pdf/a4430.pdf. This requirement is *not* mandated by *AR 27-10*.

169. *See* E-mail Message, *supra* note 157.

170. *Id*. paras. 1-7.

171. *See id.* para. 2; *see also* MCM, *supra* note 7, R.C.M. 1111-1112, 1201, 1203-1204; AR 27-10, *supra* note 10, para. 5-45.

172. *See* E-mail Message, *supra* note 157, para. 5.

173. *Id.*

174. *Id.* para. 6.

175. *Id.* para. 12.

sections up to full strength, provided the workload justifies the numbers.

The days of not worrying about transcription rates and post-trial processing times appear to have passed. The current leadership is focused on reducing post-trial processing delay, and has taken significant measures to achieve this objective. Staff Judge Advocates and Chiefs of Justice should take note of TJAG's directives, not only because justice is better served by timely post-trial processing, but also because those in the field may now be judged by how well they do in this area.

Conclusion

Although the past year was not a year of earth-shattering post-trial decisions, several decisions sent tremors through the post-trial community. *United States v. Emminizer*[176] modified the way the Air Force processes requests for deferment and waiver of forfeitures. *United States v. Tardif*[177] affirmed the ACCA's *Collazo*[178] approach to post-trial delay. *Tardif* dashed the hopes of those holding out for the day the CAAF would end the post-trial windfalls awarded appellants who suffered no actual prejudice from post-trial delay in their cases.

Just as the CAAF raised some post-trial eyebrows, so did the ACCA. Perhaps the greatest eye-opener for all post-trial practitioners—including military judges—is *United States v. Chisholm*.[179] Only time will tell whether the CAAF will agree with the ACCA's view of a military judge's authority to "direct" preparation of the record of trial. In the interim, careful and quiet listeners can hear counsel for both the government and the defense frantically striking their keyboards. The former are trying to complete records of trial as quickly as possible, and the latter are drafting requests for post-trial Article 39a, UCMJ, sessions, motions to dismiss, bold demands for clemency, and motions for other appropriate relief based on unreasonable post-trial delay. One thing is certain: the ACCA continues to lead the way concerning innovative changes or modifications to the post-trial process.

176. 56 M.J. 441 (2002).

177. 57 M.J. 219 (2002).

178. 53 M.J. 721 (Army Ct. Crim. App. 2000).

179. No. 9900240, 2003 CCA LEXIS 7 (Army Ct. Crim. App. Jan. 24, 2003).

Appendix A

E-Mail Excerpt—The Judge Advocate General's Post-Trial Directives

Subject: TJAG's Directives in Post-Trial Study

To: [Senior JAGC Leaders and Staff Judge Advocates]:

On 30 December 2002, MG Romig approved the recommendations of the Post-Trial study. The Post-Trial Study, chaired by COL Mark Harvey, had recommended refining the current post-trial process and measuring the effectiveness of these steps in [eighteen] months.

Great thanks to the Senior JAG leaders and Staff Judge Advocates who provided written recommendations and comments on the post-trial study. TJAG had read them all when we briefed him.

TJAG approved the following recommendations on 30 December 2002:

1. Field a JAG Corps, web-based, military justice case management automation program, including digital filing of records of trial, as soon as possible. Such a system should track each step in courts-martial processing in real time, and be able to provide reports with a click on a web site so that JA supervisors are fully aware of current status of their cases. Set a goal of having such a system in place by next WWCLE.

2. Direct CLD to draft metric standards (similar to the Air Force's standards), on what equals success in pretrial and post-trial processing and staff such standards for MACOM SJA and other senior JA review and comments. The AJAG for ML & O will then present such metrics for TJAG approval.

3. Publish statistical overviews of pre and post-trial processing by GCMCA on the ACCA Website as recommended by Clerk of Court. (The Clerk of Court will continue to provide quarterly Army-wide statistics to the *Army Lawyer.* The Clerk of Court will also continue to support TJAGSA courses with facts and analyses that may assist the students.)

4. Direct the Clerk of Court to provide a statistical overview of pre and post-trial processing by GCMCA for all Article 6 packets.

5. Direct the Clerk of Court to continue the recent initiative of sending electronic messages to SJAs and supervisory SJAs, identifying cases not yet received by the Clerk 150 days after trial end date and requesting their status. Further assist SJAs by sending a follow-up message at 210 days after trial end date with a copy furnished at that time to the MACOM SJA.

6. Direct the AJAG for ML & O (with assist from CLD) to correspond with the SJAs and their supervisory SJA at 300 days after trial end date. See Study pgs. 40-43 and Tab 1 for more details.

7. Direct the Clerk of Court to provide monthly statistics through 30 June 2003, regarding all cases over 120 days, 180 days, and over one year after trial that the Clerk of Court has not yet received. See, e.g., TAB D. This statistical summary will be e-mailed to SJAs with copy furnished AJAG for ML & O, TAJAG, and TJAG.

Reference Management of Court-Reporters [CR]:

8. Direct that the Chief, PPTO, with assistance from the Regimental SGM, provide proposals to the senior JAG leadership within 120 days on how the JAG Corps should manage CRs to include providing incentives for talented soldiers of any MOS to attend CR training, excel as a CR, and to stay a CR in the JAGC. The Chief, PPTO, should examine MOS reclassifications, incentive pay, E-8 authorizations for CRs, enlistment options for CR training after AIT, reenlistment bonuses, etc. Further study Warrant Officer status for CRs.

9. Direct the Commandant, TJAGSA to take measures deemed necessary, including identifying qualified potential AIT graduate attendees and requesting that MACOMs submit nominees, so that at least 24 new court reporters are trained by TJAGSA each year starting calendar year 2003.

10. Direct TJAGSA to gather and maintain information on qualified civilian[s] (on a contractual basis) and reserve CRs who are available and can help with surges in courts-martial.

11. Direct that newly trained CRs be assigned to CR duties for a minimum of six consecutive years.

12. Direct that the JAGC SGM ensure that the busiest GCMCAs are fully staffed with CRs and that new CRs graduating from the CR Course at TJAGSA are assigned under a talented supervisor at a busy jurisdiction in the field.

13. Direct that all military CRs be trained on the CAVRT [voice recognition technology] system as JAG Corps standard for military CRs. Direct those not yet trained to attend the [two]-week course at TJAGSA. Encourage civilian CRs to use the CAVRT system, but leave that decision with the local SJA.

14. Submit as a FY 2003 UFR [unit funding request] at OTJAG level the purchase of enough additional CAVRT systems so all military CR authorizations are provided a system (about 12 more systems @ $84K). Direct Chief, CLD [Criminal Law Division] to survey SJAs with civilian CR authorizations for requirements to purchase CAVRT systems for civilian CRs.

15. Direct TJAGSA study and make appropriate recommendations regarding what training is required for Legal Administrators relevant to the CAVRT systems; whether to issue the CAVRT to individuals or to units/installations; who should purchase CAVRT equipment (OSJA or OTJAG); and whether the CAVRT system currently fielded is meeting current and future needs and is actually being used by CRs in the field.

16. Direct SJAs with 27Ds in their organization with an ASI C5 designation to make a written recommendation to the Senior Instructor, CR Training at TJAGSA (MSG Wagner) on their proficiency as a CR and whether they should retain their ASI C5 designation by 30 June 2003.

The following Leaders are responsible for execution of the various recommendations:

Chief, Criminal Law Division, OTJAG: Recommendations 1, 2, assist AJAG for ML & O with number 6, 14 (identify number).

Clerk of Court: Recommendations 3, 4, 5, 7.

Chief, PPTO: Recommendation 8.

Commandant, TJAGSA: Recommendations 9, 10, assist with 13, 15 (with help from Criminal Law Division, CW3 Bertotti, as directed by BG Black).

SGM JAGC: Recommendations 11, 12, Assist with 13.

Installation SJAs: Assist with 13 and 14, and do 16 by 30 June 2003.

New Developments in the Law of Discovery

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Military appellate court decisions during the past year focused on several different aspects of military discovery practice. The decisions addressed witness production, destruction of evidence, government failure to disclose specifically requested favorable evidence, and defense failure to disclose evidence pursuant to reciprocal discovery. While none of the opinions constitute earth-shattering new developments, they do shed light on often-ignored—yet important—subtleties of military discovery practice. To focus practitioners on the practicalities of discovery, this article first touches on the witness production issues addressed in *United States v. Baretto*[1] and *United States v. Montgomery*.[2] Building on the discussion in last year's *Criminal Law Symposium*, the article then revisits the issue of government failure to disclose evidence favorable to the defense and the most recent case in this area, *United States v. Brozzo*.[3] Next, the article addresses evidence destruction and *United States v. Ellis*.[4] Finally, the article discusses *United States v. Pomarleau*,[5] focusing on appropriate sanctions for a defense counsel's failure to provide timely discovery.

I. Witness Production

A. Unavailability and Abatement

Article 46, Uniform Code of Military Justice (UCMJ), mandates that the trial counsel, the defense counsel, and the court-martial shall each have an equal opportunity to obtain witnesses and evidence.[6] Rule for Courts-Martial (RCM) 703 implements this requirement, specifying each party's rights and burdens with regard to witness production.[7] While the parties are generally entitled to witness production, they are not entitled to the presence of witnesses who are unavailable within the meaning of Military Rule of Evidence (MRE) 804(a).[8] If an unavailable witness is so centrally important as to be essential to a fair trial, however, and if there is no adequate substitute for the witness's testimony, the military judge shall grant a continuance or other appropriate relief to attempt to secure the witness's presence, or abate the proceedings. The law creates an exception for when the requesting party causes the witness to be unavailable or could have prevented the problem.[9] In *United States v.*

1. 57 M.J. 127 (2002).

2. 56 M.J. 660 (Army Ct. Crim. App. 2001).

3. 57 M.J. 564 (A.F. Ct. Crim. App. 2002).

4. 57 M.J. 375 (2002).

5. 57 M.J. 352 (2002).

6. UCMJ art. 46 (2002).

7. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 703 (2002) [hereinafter MCM].

8. This rule states as follows:

> *Definitions of unavailability.* "Unavailability as a witness" includes situations in which the declarant—
> (1) is exempted by ruling of the military judge on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or
> (2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the military judge to do so; or
> (3) testifies to a lack of memory of the subject matter of the declarant's statement; or
> (4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
> (5) is absent from the hearing and the proponent of the declarant's statement has been unable to procure the declarant's attendance . . . by process or other reasonable means; or
> (6) is unavailable within the meaning of Article 49(d)(2).
> A declarant is not unavailable as a witness if the declarant's exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of the declarant's statement for the purpose of preventing the witness from attending or testifying.

Id. MIL. R. EVID. 804(a).

9. *Id*. R.C.M. 703(b)(3).

Baretto,[10] the Court of Appeals of the Armed Forces (CAAF) specifically addressed this aspect of witness production.

The appellant in *Baretto* was convicted, pursuant to his pleas, of reckless driving and negligent homicide, and was sentenced to a bad-conduct discharge (BCD), confinement for seven months, reduction in rank, and forfeitures.[11] The case resulted from a fatal multi-car accident in which the appellant, who was speeding while trying to pass several cars on a winding, hilly, two-lane road, lost control of his car. Despite losing control, the appellant managed to avoid the first two oncoming cars before hitting the third.[12]

Before trial, the defense counsel asked the government to produce the first oncoming driver the appellant managed to avoid, as well as the last car he passed before the accident. The defense counsel was unable to provide any specific information about the drivers' identities, but wanted them for the Article 32 investigation. The trial counsel likewise did not know the drivers' identities. In an effort to produce the witnesses, the trial counsel placed ads in several local area papers, requesting that the two drivers and anyone else who had witnessed the accident contact the Staff Judge Advocate's office. Four eyewitnesses responded to the ads, but not the two drivers whom the defense counsel had requested. Before trial, the defense counsel argued unsuccessfully that the two missing witnesses were necessary to a fair trial because they each had an unobstructed view of the accident.[13]

While the trial counsel did not produce the two specifically requested witnesses, he produced fourteen others, three of whom allegedly had unobstructed views of the accident. Additionally, the trial counsel provided the defense counsel with the findings of two accident reconstruction experts, physical evidence from the crash site, a computer simulation of the crash, and a defense accident reconstruction expert.[14] Upon hearing that the government would be unable to produce the two requested witnesses and before entering appellant's plea, the defense counsel moved to abate the proceedings.[15] The military judge denied the motion, finding (1) that the government had done all that was required to produce the witnesses, and (2) that the available evidence was more than an adequate substitute for the unknown witnesses.[16]

According to the CAAF, the primary issue under RCM 703[17] is whether a witness remains unavailable, despite the government's good faith efforts before trial to locate and produce the person. Then, according to the language of RCM 703, if a witness is unavailable, the court must decide how critical that witness is to a fair trial and whether there is any adequate substitute for that witness's testimony.[18]

In this case, although the government may have waited too long before acting on the defense request, the defense did not allege bad faith. The government only had sketchy information as it tried to locate the witnesses. The defense did not suggest any other means the government should have employed to find the witnesses and did not suggest the trial counsel lacked due diligence. Most importantly, the defense counsel provided no evidence that the witnesses were "critical and vital" to a fair trial. It was unclear whether one of the drivers even saw the accident. Also critical to the CAAF's decision was the number of other adequate substitutes for the requested witnesses' testimony. Based on these facts, the CAAF held the military judge did not abuse his discretion in denying the defense motion.[19]

Although this case is not a new or surprising development in discovery law, it does provide some valuable reminders for both trial and defense counsel. From a trial counsel's perspective, it is very important to begin looking for requested witnesses early on, to prevent problems such as those encountered in *Baretto*. On the positive side, trial counsel are well advised to take aggressive and innovative measures as they search for elusive witnesses, and to document these steps as the trial counsel did in this case. This will enable the military judge and the appellate courts to reconstruct what happened if they are faced with a witness production issue. On the other hand, defense counsel will be in a much stronger position to argue that abatement is

10. 57 M.J. 127 (2002).

11. *Baretto*, 57 M.J. at 128.

12. *Id*. at 128-29.

13. *Id*. at 132.

14. *Id*. at 129.

15. *Id*. The appellant also sought to abate the proceedings because he suffered from post-accident amnesia, which he claimed kept him from competently assisting his defense counsel. The competence issue is beyond the scope if this article. *Id*.

16. *Id*. at 132.

17. MCM, *supra* note 7, R.C.M. 703(b). In relevant part, RCM 703(b)(1) provides that "[e]ach party is entitled to the production of any witness whose testimony on a matter in issue on the merits or on an interlocutory question would be relevant and necessary." *Id.*

18. *Baretto*, 57 M.J. at 132.

19. *Id*. at 133.

necessary to remedy witness unavailability if they can show the court some evidence of the witness's expected testimony. This poses a difficult, sometimes insurmountable, problem for the defense counsel who is unable to locate a witness from the very beginning of a case. Finally, *Baretto* discusses the requirements of RCM 703, clearly articulating the facts a defense counsel must establish to support a motion to abate proceedings because of witness unavailability.[20]

B. Contents of Defense Witness Requests

Another aspect of witness production RCM 703(c)(2) addresses is the amount of information the defense must provide to the government to trigger the government's witness production burden. Generally, the defense witness request must be written and must contain the witness's name, address, and telephone number, if known, or other information that will enable the government to locate the witness with due diligence. The defense counsel must also provide a brief synopsis of the witness's expected testimony that demonstrates the witness's relevance and necessity to a fair trial.[21] The military judge must resolve any disputes involving witness production.[22] If the defense counsel has not provided the required information in a timely manner, the military judge may deny a motion to compel witness production. In the alternative, if the failure was for good cause, the military judge may grant relief.[23] The CAAF grappled with this very issue in *United States v. Montgomery.*[24]

The appellant in *Montgomery* was convicted of willfully disobeying a superior commissioned officer, assault consummated by battery, and adultery; he was sentenced to a BCD, confinement for ninety days, forfeitures, and a reduction in grade.[25] The principal government witness was a woman who claimed she had sex with the appellant for money and then ended the "relationship" because the appellant was married. She also alleged the appellant assaulted her after she ended the relationship. To the astonishment of no one, the defense theory relied heavily on impeaching the victim's credibility.[26]

The night before the members were impaneled, the trial counsel notified the defense counsel that two government witnesses, whom the government intended to call to prove the violation of the no-contact order, were missing and would not testify at trial. At that time, the trial counsel also gave the defense counsel copies of two notes the victim had delivered to the trial counsel that same day. Until this point, the two missing government witnesses were the only evidence of appellant's no-contact order violation. According to the victim, the appellant left the notes at her home after the officer issued the no-contact order. The victim also claimed she clearly recognized the handwriting as the appellant's.[27]

Before voir dire the next morning, the defense counsel requested a continuance based on the new government evidence.[28] The military judge denied the request, giving the defense counsel from 0956 until after lunch to solve the problem and interview the victim.[29] At the next Article 39(a) session, the defense counsel again requested a continuance, this time to obtain handwriting analysis on some checks made out to the appellant that the victim allegedly forged on a dead person's closed bank account. The defense theory was that the woman was biased under MRE 608(c).[30] The military judge denied the request without explanation and shortly thereafter, voir dire commenced.[31]

The main issue, however, had its genesis much earlier in the trial process. More than two months before the scheduled trial date, the military judge denied a defense motion to compel production of the woman's social work services (SWS) records. The military judge did not conduct an in camera review of the records in question.[32] During voir dire, the Trial Defense Service legal specialist handed the SWS records to the defense counsel.[33] The defense counsel immediately requested a con-

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20. *See id.* at 132-33.

21. MCM, *supra* note 7, R.C.M. 703(c)(2).

22. *Id.* R.C.M. 703(c)(2)(D).

23. *Id.* R.C.M. 703(c)(2)(C).

24. 56 M.J. 660 (Army Ct. Crim. App. 2001).

25. *Id*. at 660.

26. *Id*. at 662-63.

27. *Id*. at 663.

28. *Id*.

29. *Id*. at 663-64. The woman had previously refused to speak with defense counsel. *Id.*

30. *Id*. The defense was attempting to establish that the woman was biased because she owed the appellant money. *Id*.

31. *Id*. at 664.

tinuance to review the records, interview newly identified witnesses, and investigate new leads, explaining that the records might lead to witnesses who could testify about the woman's character for peacefulness. Again, the military judge denied the defense counsel's request without stating any reason on the record. As a final resort, the defense counsel requested a one-hour delay, which the military judge also denied.[34]

Scanning the thirty pages of SWS records, the defense counsel identified two witnesses who could potentially testify about the woman's character for both violence and untruthfulness.[35] Because of the time constraints, however, there were a number of deficiencies in the defense request, which clearly did not comply with the requirements of RCM 703(c)(2).[36] The defense counsel did not interview the witnesses, did not request their production before trial, and did not provide the government with sufficient information to allow the trial counsel to find them; the proffer was weak at best. The military judge denied the request for the production of the witnesses outright, again without explanation.[37]

Addressing this denial, the Army Court of Criminal Appeals (ACCA) first discussed military judges' authority to grant continuances and circumstances rendering continuances appropriate. These circumstances include insufficient opportunity for counsel to prepare for trial.[38] Noting that a military judge's decision to deny a continuance is tested for an abuse of discretion, the court applied the factors set out in *United States v. Weisbeck*.[39] Based on the sequence of events, a reasonable continuance would have been appropriate to allow the defense to investigate, based on the newly discovered SWS records and the allegedly forged checks. The ACCA found that the military judge abused his discretion. In his effort to "hold the defense's feet to the fire" and to move the trial along, the military judge violated the appellant's right to present a defense.[40] The military judge's repeated refusal to grant continuances hamstrung the defense's efforts to obtain the two potential witnesses to the victim's character for peacefulness and truthfulness. Because the weaknesses in the defense proffers in support of its witness requests were directly attributable to the earlier continuance request denials, the ACCA held that the military judge also abused his discretion in denying the defense requests for the two witnesses.[41]

Montgomery does not change the law; rather, it illustrates the relationship between witness production and other aspects of trial practice. The rules governing the contents of defense witness requests are not rigid and unyielding, and they do not apply in a vacuum; they must be considered within the context of the proceedings. A more open discovery policy from the government prevents problems such as this. If the government opposes a defense request for evidence, the parties should bring the issue to the military judge's attention, and the trial counsel should join the defense counsel in requesting an in camera review of the records in question. This can solve many problems before they even begin to surface. Moreover, if the defense justifiably requests a continuance, the trial counsel can avoid problems by not opposing the request. In other words, the government should not automatically oppose all defense-requested continuances.

Defense counsel should carefully document all requests for evidence and witnesses, be persistent, and discuss any problems on the record. Counsel for both sides must know the rules**.** Finally, while the military judge must focus on moving cases forward, this can never be at the expense of the accused's right to present a defense. The military judge must resolve disputes over evidence and witness production. If the solution involves any sort of in camera review, the military judge must seal and append the reviewed documents to the record unless he orders the trial counsel to produce them. The judge must also account for this action on the record, as well as his reasons for denying requested continuances on the record.[42]

32. *Id*. at 664 n.5.

33. *Id*. It is unclear from the opinion how the legal specialist obtained the records from SWS. *Id*.

34. *Id*. at 664. The military judge gave the defense counsel the option of delaying the opening statement until the start of the defense case, if necessary. *Id.* Of course, RCM 913 expressly gives the defense counsel this option. *See* MCM, *supra* note 7, R.C.M. 913(b).

35. *Montgomery*, 56 M.J. at 664 n.6.

36. *Id*. at 665.

37. *Id*. at 666.

38. *Id*.; *see* MCM, *supra* note 7, R.C.M. 906(b)(1).

39. 50 M.J. 461 (1999).

40. *Montgomery*, 56 M.J. at 665 (quoting United States v. McAllister, 55 M.J. 270, 276 (2001)).

41. *Id*. at 666.

42. *See* United States v. Briggs, 48 M.J. 143 (1998).

II. The Controversy Continues: Does Article 46, UCMJ, Have Teeth? Not in the Air Force!

The article on discovery in last year's *Criminal Law Symposium*[43] focused on the split that developed between the ACCA and Air Force Court of Criminal Appeals (AFCCA) following their decisions in *United States v. Adens*[44] and *United States v. Figueroa*.[45] This portion of the article continues that discussion in light of the recent AFCCA decision in *United States v. Brozzo*.[46] To address the issue properly, however, it will first be necessary to revisit the earlier discussion of this subject.

In *Brady v. Maryland*,[47] the Supreme Court held that the government's failure to disclose favorable evidence that is material either to guilt or innocence violates a defendant's constitutional due process rights. In *United States v. Bagley*,[48] the Court identified a two-pronged test to determine the materiality of such undisclosed evidence. If a court finds that there is prosecutorial misconduct, undisclosed favorable evidence will be deemed material to the defense, unless the failure to disclose the evidence is harmless beyond a reasonable doubt.[49] In all other cases, regardless of the specificity or existence of a defense discovery request, the undisclosed favorable evidence will be deemed material to the defense if there is a reasonable probability that the result of trial would have been different if the evidence had been disclosed. A reasonable probability is a probability sufficient to undermine confidence in the result of the trial.[50] The Supreme Court specifically rejected holding the government to a higher "harmless beyond a reasonable doubt" standard in the event of an ignored specific defense discovery request.[51]

While *Brady* and its progeny clearly apply to military courts-martial, they do not encompass the entire body of law applicable to military discovery practice. Article 46, UCMJ, the provisions in the Rules for Courts-Martial implementing Article 46, and the corresponding body of military case law are interrelated with *Brady*, but they are also distinct. In military practice, it is possible for the government to violate RCM 701 and Article 46, UCMJ, without violating *Brady* and committing a constitutional due process violation. This was the case in *United States v. Trimper*,[52] and more recently, in *United States v. Adens*.[53]

In *United States v. Hart*, [54] the Court of Military Appeals (COMA) addressed this distinction and gave it meaning, suggesting that in the military, both a constitutional and statutory analysis were required when the government failed to disclose evidence. In the years since *Hart*, confusion developed regarding both the necessity for a separate statutory analysis in discovery cases, and the appropriate standard of review in such cases.[55] This confusion culminated in an ACCA case, *Adens*,[56] and the AFCCA cases *Figueroa*[57] and *Brozzo*.[58] In *Figueroa*, the AFCCA rejected the notion that a higher standard of review

43. Major Christina Ekman, *New Developments in the Law of Discovery: When Is Late Too Late, and Does Article 46, UCMJ, Have Teeth?* ARMY LAW., May 2002, at 21-29.

44. 56 M.J. 724 (Army Ct. Crim. App. 2002).

45. 55 M.J. 525 (A.F. Ct. Crim. App. 2001).

46. 57 M.J. 564 (A.F. Ct. Crim. App. 2003).

47. 373 U.S. 83 (1963).

48. 473 U.S. 667 (1985).

49. *Id.* at 677-80. If the government can meet this burden of proof, then the improper withholding of evidence did not violate the defendant's due process rights. *Id.*

50. *Id*. at 682. If there is no reasonable probability that the result at trial would have been different, then the improper withholding of evidence did not violate the defendant's due process rights. *Id*.; *see also* Strickland v. Washington, 466 U.S. 668, 694 (1984).

51. *Bagley*, 473 U.S. at 682. The Court reasoned that a higher standard of materiality was unnecessary when the defense made a specific request for the undisclosed evidence because under *Strickland*, the reviewing court could directly consider any adverse effect that resulted from the suppression, in light of the totality of the circumstances. *Id*. at 682-83.

52. 28 M.J. 460 (C.M.A. 1989), *cert. denied*, 493 U.S. 965 (1989). The evidence in issue in *Trimper* included an incriminating statement the appellant made to a co-worker regarding his drug use and a positive urinalysis that the appellant had done on his own at a local civilian hospital. None of this was disclosed to the defense counsel. Because the undisclosed evidence was not favorable to the appellant, there was no *Brady* violation, but there were Article 46, UCMJ, issues. *See id*.

53. 56 M.J. 724 (Army Ct. Crim. App. 2002). As in *Trimper*, the evidence at issue in *Adens* was not favorable to the appellant, but the government violated Article 46, UCMJ, by failing to disclose it. *See id*.

54. 29 M.J. 407 (C.M.A. 1990). In *Hart*, the government failed to disclose DNA test results that were favorable to the accused, as well as the fact that the assault victim could not identify his assailant in a photographic lineup. There was no specific defense request for discovery. The primary issue at trial was the attacker's identity. The court specifically agreed with Judge Gilley and the court below that under Article 46, a military accused has much broader discovery rights than most civilian defendants. The court went on to say that "where the Government fails to disclose information pursuant to a specific request, the evidence will be considered 'material unless failure to disclose' can be demonstrated to 'be harmless beyond a reasonable doubt.'" *Id*. at 410 (quoting United States v. Hart, 27 M.J. 839, 842 (A.C.M.R. 1989)).

applies when the government, in violation of Article 46, UCMJ, and the applicable Rules for Courts-Martial, does not disclose evidence that is the subject of a specific defense discovery request.[59] The AFCCA seems to have concluded that Article 46 is effectively indistinguishable from the constitutional due process standard articulated in *Brady.* In *Adens*, the ACCA took the opposite approach, holding that

> [e]qual opportunity to obtain evidence under Article 46, UCMJ, as implemented [in the RCMs] is a "substantial right" of a military accused within the meaning of Article 59(a), UCMJ, independent of due process discovery rights provided by the Constitution. Accordingly, violations of a soldier's Article 46, UCMJ, rights that do not amount to constitutional error under *Brady* and its progeny must still be tested under the material prejudice standard of Article 59(a), UCMJ. . . . [W]hen a trial counsel fails to disclose information pursuant to a specific request or when prosecutorial misconduct is present, the evidence is considered material unless the government can show that failure to disclose was harmless beyond a reasonable doubt.[60]

In *Brozzo*, an opinion that further complicated the already confusing case law in this area, the AFCCA once again examined the government's duty to disclose favorable information following a specific RCM 701 discovery request from the defense. The appellant in *Brozzo* was convicted of wrongful use of cocaine and was sentenced to a BCD, forfeitures, and reduction to the lowest enlisted grade. The appellant asserted that the government violated his due process rights by failing to disclose exculpatory evidence before trial.[61] In its formal discovery request, the defense requested all documentation relating to false positive and false negative drug test results, copies of documents relating to laboratory inspections, the quality control program, mishandling of samples, and other administrative errors in testing for the three months before the laboratory tested the appellant's sample, the month of the test, and the month after the test.[62]

After trial, appellant's counsel discovered that there was an internal blind quality control sample that should have been negative, but falsely tested positive for the metabolite of cocaine.[63] In its appellate brief, the government did not deny that this result was a false positive,[64] but argued that the evidence was not so material that non-disclosure constituted a due process violation under *Brady v. Maryland*.[65]

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55. *Id.*; *see also* United States v. Green, 37 M.J. 88, 90-91 (C.M.A. 1993) (Wiss, J., concurring). In *Green*, the government failed to disclose evidence that the defense had specifically requested. The majority held that, "[I]f we have a 'reasonable doubt' as to whether the result of the proceeding would have been different, we grant relief . . . . If, however, we are satisfied that the outcome would not be affected by the new evidence, we would affirm." *Id.* at 90. In his concurring opinion, Judge Wiss noted that the burden is actually the reverse of what the majority articulated. According to Judge Wiss, the court had already recognized the broader discovery rights available to a military accused in *Hart*, when the majority said that

> [w]here prosecutorial misconduct is present or where the Government fails to disclose information pursuant to a specific request, *the evidence will be considered "material unless failure to disclose" can be demonstrated to "be harmless beyond a reasonable doubt."* Where there is no request or only a general request, the failure will be "material only if there is a reasonable probability that" a different verdict would result from a disclosure of the evidence.

Id. at 91 (Wiss, J., concurring) (quoting *Hart*, 29 M.J. at 410) (citations omitted). *See also* United States v. Morris, 52 M.J. 193 (1999); United States v. Williams, 50 M.J. 436 (1999); United States v. Stone, 40 M.J. 420 (C.M.A. 1994).

56. 56 M.J. 724 (Army Ct. Crim. App. 2002).

57. 55 M.J. 525 (A.F. Ct. Crim. App. 2001).

58. 57 M.J. 564 (A.F. Ct. Crim. App. 2002).

59. United States v. Figueroa, 55 M.J. 525 (A.F. Ct. Crim. App. 2001).

60. *Adens*, 56 M.J. at 732-33.

61. *Brozzo*, 57 M.J. at 564. The accused was selected at random to provide a urine sample, as part of the regular drug-testing program on his base. The Air Force Drug Testing Laboratory at Brooks Air Force Base tested the urine sample and reported finding the metabolite of cocaine in his urine. *Id*. at 564-65.

62. *Id*. at 565.

63. *Id*.

64. *Id*. at 566. The AFCCA disagreed that this was a false positive because it was never reported as a positive, but rather was noticed on the first review and marked "redo." *Id*.

65. *Id*. at 565.

The AFCCA began its analysis by citing Article 46, UCMJ,[66] and discussing the impact of RCM 701 on discovery.[67] Citing the CAAF's interlocutory order in *United States v. Kinney*,[68] the AFCCA acknowledged that "the military justice system provides an accused with broader discovery rights than required by the Constitution."[69] The court went on to say that a government failure to disclose required evidence rises to the level of a due process violation only when the undisclosed evidence is "material either to guilt or to punishment."[70] Consistent with its opinion in *Figueroa*, the AFCCA ignored the "harmless beyond a reasonable doubt" standard of review that applies if the government fails to disclose evidence specifically requested by the defense.[71] Instead, the AFCCA chose the "reasonable probability" standard the Supreme Court articulated in *Stricker v. Green*[72] and *Bagley*.[73] This approach effectively ignored the separate statutory analysis required under Article 46, UCMJ.

After finding that the government had a duty to disclose the false positive, the court examined whether this error was a *Brady* violation; in the process, the court created further confusion. First, the AFCCA pointed out that "federal courts consistently hold that evidence is not suppressed if the defendant knew, or in the exercise of reasonable diligence should have known, of the essential facts that would have permitted him to take advantage of the evidence in question."[74] The AFCCA then argued that the CAAF "also found no *Brady* violation where reasonably diligent defense counsel would have discovered the evidence."[75] To support this position, the AFCCA cited *United States v. Lucas*[76] and *United States v. Simmons*.[77] On this authority, the court found that because the government disclosed information that would have led a diligent defense counsel to the falsely positive urinalysis, there was no *Brady* violation. The court did not conduct any statutory analysis.[78]

There are three interesting aspects to this line of reasoning. First, while many federal courts have undoubtedly reached the same conclusion the AFCCA articulates, it is important to remember that the federal system has no equivalent to Article 46, UCMJ, or RCM 701. Second, *Lucas* pre-dates the Rules for Courts-Martial, and its facts are easily distinguishable.[79] Finally, and most disturbing, although Judge Crawford's dissent supports the AFCCA's conclusion, the majority in *Simmons*, a case decided after the enactment of the Rules for Courts-Martial, reached precisely the opposite conclusion, on similar facts.[80] This third point requires a closer examination of *Simmons*.

In *Simmons*, one of two alleged rape victims failed a polygraph examination and then made a post-polygraph statement in which she admitted that she did not believe she had been raped because she could have stopped it at any time, and because she had enjoyed the sex.[81] She later testified consistently with her post-polygraph statement in a co-accused's Arti-

66. *See* UCMJ art. 46 (2002). Article 46, UCMJ, reads "[T]he trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe." Rule for Courts-Martial 701 implements Article 46 with the purpose of promoting "full discovery to the maximum extent possible consistent with legitimate needs for non-disclosure and to eliminate 'gamesmanship' from the discovery process." MCM, *supra* note 7, R.C.M. 701 analysis, at A21-32.

67. *Brozzo*, 57 M.J. at 566.

68. 56 M.J. 156 (2001) (interlocutory order). The Air Force Court also cited a number of older cases on this point. *Brozzo*, 57 M.J at 566 (citing United States v. Simmons, 38 M.J. 376, 380 (C.M.A. 1993); United States v. Dancy, 38 M.J. 1, 5 (C.M.A. 1993); United States v. Green, 37 M.J. 88, 90 (C.M.A. 1993); United States v. Eshalomi, 23 M.J. 12, 24 (C.M.A. 1986)).

69. *Brozzo*, 57 M.J. at 565.

70. *Id*. at 566 (quoting Brady v. Maryland, 373 U.S. 83, 87 (1963)).

71. *Id*.

72. 527 U.S. 263, 280 (1999). Evidence is material "if there is a reasonable probability that had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.* (quoting United States v. Bagley, 473 U.S. 667, 682 (1985)).

73. 473 U.S. 667, 682 (1985) ("A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome.").

74. *Brozzo*, 57 M.J. at 566.

75. *Id*. at 567.

76. 5 M.J. 167 (C.M.A. 1978).

77. 38 M.J. 376, 385 (C.M.A. 1993) (Crawford, J., dissenting).

78. *Brozzo*, 57 M.J. at 567.

79. United States v. Lucas, 5 M.J. 67 (C.M.A. 1978); *see also* MCM, *supra* note 7, R.C.M. analysis, at A21-1.

80. United States v. Simmons, 38 M.J. 376, 382-86 (C.M.A. 1993).

cle 32 hearing. The defense knew of the substance of this testimony before trial.[82] The government gave the defense pretrial notice of the failed polygraphs, but the defense asserted that the government did not give the defense notice of the post-polygraph statement. Although the defense counsel was aware of the polygraph result, he did not talk to the polygrapher or learn of the post-polygraph statement until after trial.[83] Apparently, the trial counsel knew about the failed polygraph but was unaware of the victim's statement.[84] The majority initially considered whether the prosecutor had a duty under *Brady* to disclose evidence that could be discovered by a reasonably diligent defense counsel.[85] Because of the affirmative duty RCM 701(a)(2) placed on the trial counsel, however, the court held that it was unnecessary to determine whether a reasonably diligent defense counsel could have discovered the post-polygraph statement.[86] The trial counsel, likely with the best of intentions, simply failed to perform as required.[87]

Although the initial facts underlying *Simmons* and *Brozzo* are very different, the facts surrounding the discovery issues are similar. As in *Simmons*, the trial counsel in *Brozzo* provided the defense counsel with information that could have led him to the evidence in question. As in *Simmons*, the defense counsel in *Brozzo* neither looked for nor discovered the evidence in question until after trial. There was likely no *Brady* violation in either *Simmons* or *Brozzo* because a reasonably diligent defense counsel could have found the evidence in either case with some effort, given the disclosures that the government made. More importantly, RCM 701 required more from the trial counsel in both cases than *Brady* required. Because of RCM 701, the trial counsel had an affirmative duty to turn over the evidence in question, whether it was a post-polygraph statement, as in *Simmons*, or a "false positive" from the drug testing laboratory. As in *Simmons*, the trial counsel did not do what was required. That should end the inquiry, shifting the focus to whether the appellant was prejudiced by the trial counsel's failure.

Brozzo highlights the confusion regarding the appropriate standard of review in cases involving government failure to disclose specifically requested evidence to the defense. The issue is important because it strikes at the very heart of Article 46, UCMJ, and what it means for a military accused. *Brozzo*, a decision supported by dubious authority, dilutes the government's burden to disclose exculpatory evidence to an accused and permits government counsel to ignore the requirements of RCM 701(a)(2). As the ACCA said in *Adens*, Article 46, UCMJ, confers a substantial right upon a military accused, and places a greater burden on the government to ensure the defense has equal access to evidence.[88] In this instance, the statutory burden holds the government to a higher standard than the constitutional due process requirements in *Brady.* Now that this confusion is clearly in the forefront, the CAAF should clarify the matter in an appropriate case. This is important, not just for trial practitioners and military judges, but also for military service members facing trial by court-martial.

III. Destruction or Loss of Key Evidence

Rule for Courts-Martial 703(f)(2) deals with evidence that is either destroyed, lost, or otherwise rendered unavailable. The rule mirrors that for witnesses—if the unavailable evidence is

> of such central importance to an issue that it is essential to a fair trial, and there is no adequate substitute . . . the military judge shall grant a continuance . . . or shall abate the proceedings, unless the unavailability is the fault of or could have been prevented by the requesting party.[89]

81. *Id*. at 377.

82. *Id*. at 378.

83. *Id*. at 379.

84. *Id*. at 378-79.

85. *Id*. at 382.

86. *Id*. It is also noteworthy that the concurring opinion specifically agrees with the majority regarding RCM 701's impact on the issue. *Id.* at 383.

87. *Id*. at 382. In a footnote, the majority noted that the defense counsel's conduct raised "substantial questions" about ineffective assistance of counsel. *Id*. at 383 n.3. In another footnote, the majority answered concerns raised in one of the dissenting opinions, saying that this decision did not require trial counsel to search for the "proverbial needle in the haystack," but rather merely required the trial counsel to search in his own files and readily available police files. *Id*. at 383 n.4. Because of the close association between the drug testing laboratory and law enforcement in drug cases, it is entirely appropriate to require the trial counsel to disclose documents maintained at the laboratory. *See* United States v. Sebring, 44 M.J. 805, 808 (N-M. Ct. Crim. App. 1996).

88. United States v. Adens, 56 M.J. 724, 732 (Army Ct. Crim. App. 2002).

89. MCM, *supra* note 7, R.C.M. 703(f)(2)).

In *United States v. Ellis,*[90] the CAAF dealt with the issue of inadvertently destroyed physical evidence that the defense argued was critical to both the government and the defense cases.

In June 1995, a state court dismissed proceedings against the appellant in *Ellis* after the trial judge granted a pretrial motion to suppress the appellant's confession.[91] The Navy assumed jurisdiction, and a court-martial ultimately convicted Ellis of assaulting and murdering his two-and-a-half-year-old son, Timmy. He was sentenced to a BCD, confinement for six years, total forfeitures, and reduction to the lowest enlisted grade. One of the appellant's assignments of error on appeal focused on the military judge's failure to dismiss the charges or order other appropriate relief based on the government's inadvertent destruction of key evidence.[92]

The autopsy findings led the medical examiner to conclude that Timmy was killed by non-accidental blunt force trauma to his head.[93] The autopsy revealed not only a 9.5-centimeter skull fracture, but also injuries around both of Timmy's eyes, his right cheek, left jaw, upper neck, chest, left hip, back, right forearm, both knees, and both lower legs.[94] These injuries were well documented.[95] After completing the autopsy, the medical examiner arranged for the brain and its meninges to be stored, in accordance with a laboratory regulation, for at least one year. Unfortunately, the laboratory moved several months later, and the specimen container was accidentally thrown away during the move.[96] The appellant had confessed to beating Timmy severely on several occasions in the days before Timmy's death.[97]

Because of the loss of the specimens, a defense expert was never able to examine them as part of his own investigation. At trial, the defense counsel moved to dismiss the charges against the appellant, citing the right to present a defense under the Fifth Amendment,[98] the right to cross-examine witnesses under the Sixth Amendment,[99] the right to obtain witnesses under Article 46, UCMJ, and RCM 703(f)(2).[100] The defense theory was either that the appellant's daughter caused the fatal injuries several weeks earlier when she hit Timmy in the head with a baseball bat, or that Timmy caused it himself by banging his head against the wall. The appellant contended that the missing evidence was central to both parties' cases.[101]

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90. 57 M.J. 375 (2002).

91. United States v. Ellis, 54 M.J. 958, 960 n.1 (N-M. Ct. Crim. App. 2001).

92. *Ellis*, 57 M.J. at 376.

93. *Ellis*, 54 M.J. at 969. The medical examiner removed the brain from the cranium and sliced it at various depths to check for the presence of infarcts, or dead tissue caused by prolonged blood deprivation. She did not do a microscopic examination because there were no obvious signs of infarcts. Her assistant took photographs during the autopsy; however, none of the photographs showed the brain as it was being examined for infarcts. *Id.*

94. *Ellis*, 57 M.J. at 376.

95. *Id*. at 379-80.

96. *Id*. at 379.

97. *Id*. at 378. This confession was the subject of the appellant's other assignment of error. *Id*.

98. The Fifth Amendment to the Constitution states,

> No person shall be held to answer for a capital, or otherwise infamous, crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service, in time of War, or public danger; nor shall any person be subject, for the same offence, to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. V.

99. The Sixth Amendment to the Constitution states, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor . . . ." *Id.* amend. VI.

100. This provision states,

> *Unavailable Evidence*. Notwithstanding subsection (f)(1) of this rule, a party is not entitled to the production of evidence which is destroyed, lost, or otherwise not subject to compulsory process. However, if such evidence is of such central importance to an issue that it is essential to a fair trial, and if there is no adequate substitute for such evidence, the military judge shall grant a continuance or other relief in order to attempt to produce the evidence or shall abate the proceedings, unless the unavailability of the evidence is the fault of or could have been prevented by the requesting partly.

MCM, *supra* note 7, R.C.M. 703(f)(2).

The military judge denied the motion to dismiss because the defense did not show that the missing evidence was apparently exculpatory when lost, and that comparable evidence was not available. The defense counsel next requested an adverse inference instruction to remedy the harm caused by the missing evidence.[102] This instruction would have allowed the members to draw an inference against the government's theory that Timmy's death resulted from the appellant beating him two days earlier. Although the military judge declined to give the instruction, he did caution the trial counsel not to use the missing evidence to impeach the defense expert.[103] The trial counsel disregarded the military judge's warning, and during cross-examination of the defense expert, emphasized that the witness had not examined the lost brain and meninges. The defense counsel, however, did not object. Likewise, the defense counsel did not object when the trial counsel bolstered the government expert's testimony during the findings argument, pointing out that she—unlike the defense expert—had based her testimony on an actual examination of the physical evidence.[104] After the arguments, the military judge gave a limiting instruction to the panel members.[105]

The evidence against the appellant consisted of the physical evidence, expert testimony, and the appellant's controversial confession.[106] In support of the defense theory, several witnesses testified that Timmy's sister hit him in the head with a baseball bat several weeks before his death, and that Timmy frequently engaged in self-abusive, head-banging behavior. Additionally, the defense expert testified that the baseball bat injury caused Timmy's death.[107]

The majority opinion held that even if the military judge erred by refusing to give the requested instruction, the error was rendered harmless by the confession and also by the weight of the evidence against the appellant.[108] According to the majority, even with the requested instruction and without the trial counsel's improper questions and argument, "by focusing on Timmy's other injuries, in addition to his brain injury, the members could not help but find appellant's confession voluntary and reliable as a matter of law."[109]

As with the cases already discussed, *Ellis* is not an important new development, but it does focus practitioners' attention on the relationship between the discovery rules and other aspects of court-martial practice, particularly the importance of preserving physical evidence. While the loss of evidence was unavoidable from the trial counsel's perspective, trial counsel must work closely with evidence custodians and carefully track matters like the impact of testing on evidence, giving defense counsel notice if evidence is likely to be consumed. From a defense counsel's perspective, it is important to see the evidence early, particularly if it may be exculpatory. As this case illustrates, it may be difficult for a defense counsel to establish that evidence was apparently exculpatory at the time it was lost or destroyed, as the rule requires. One final point, unrelated to discovery practice, is that trial counsel must scrupulously follow judges' instructions regarding impermissible lines of questioning and comments on the evidence. Likewise, defense counsel must ensure they object when trial counsel violate these instructions, to preserve such issues clearly for the appellate record.

IV. Defense Failure to Provide Reciprocal Discovery: What is Good for the Goose Is Good for the Gander

Rules for Courts-Martial 701(b)(3) and (4) contain the military's reciprocal discovery rules. Simply stated, if the defense counsel requests discovery under RCM 701(a)(2)(A) or (B), and if the government complies with the request and makes its own subsequent request of the defense counsel, the defense must disclose documents, tangible objects, and reports of examinations or tests.[110] Rule for Courts-Martial 701(e) says that "[e]ach party shall have adequate opportunity to prepare its

101. *Ellis*, 57 M.J. at 380. The evidence was important to the government's case because testimony about the brain tissue would establish the time of Timmy's death. On the other hand, the defense would rely on the scientific examination of the brain to impeach the government witnesses and also to establish time of death and cause of injury consistent with the defense theory. *See id.*

102. *Ellis*, 54 M.J. at 970.

103. *Id*. at 380.

104. *Id*. at 381.

105. *Id.* at 380. The judge instructed the panel members that they could not give less weight to the defense expert's testimony because he had been unable to examine the lost evidence, and also that they could consider the defense expert's testimony about what he would have expected a microscopic examination of the evidence to show. *Id*. at 380-81.

106. *Id*. at 381-82.

107. *Id*. at 380.

108. *Id*. at 382.

109. *Id*. at 380-82.

110. MCM, *supra* note 7, R.C.M. 701.

case and equal opportunity to interview witnesses and inspect evidence. No party may unreasonably impede the access of another party to a witness or evidence."[111] The military judge regulates the time, place, and manner of discovery, and has the power to remedy the situation when a party fails to comply with discovery requirements.[112] Possible remedies include ordering discovery, granting a continuance, or prohibiting the offending party from introducing evidence, calling a witness, or raising an undisclosed defense, along with any other appropriate order.[113]

The exclusion of defense evidence is a drastic remedy with possible Sixth Amendment implications. In *Taylor v. Illinois*,[114] the Supreme Court said that in deciding whether the exclusion of evidence is an appropriate remedy when defense counsel or defendants fail to comply with discovery rules, trial judges must balance "the fundamental character of the defendant's right to offer the testimony of witnesses in his favor" against "countervailing public interests."[115] The court further defined these interests as the presentation of reliable evidence, the rejection of unreliable evidence, the fair and efficient administration of justice, and the potential prejudice to the truth-seeking process.[116] The Supreme Court cited a case from the U.S. Court of Appeals for the Ninth Circuit, *Fendler v. Goldsmith*,[117] as an example of this balancing test. The court in *Fendler* considered factors including the importance of the witness or evidence to the defense case, the degree of surprise or prejudice to the prosecution, the effectiveness of less restrictive measures, and the willfulness of the violation.[118]

The holding of *Taylor v. Illinois*[119] was incorporated into the discussion following RCM 701(g), which specifies factors to be considered in determining whether to grant an exception to exclusion. These factors include the extent of the disadvantage that resulted from the failure to disclose, the reason for the failure, the extent to which later events mitigated the disadvantage caused by the failure, and any other relevant factors. These factors apply whenever the military judge is considering excluding evidence as a sanction. If the military judge is considering implementing this extreme sanction against the defense, however, the rule goes on to specify additional factors the judge must consider, including: (1) whether the defense counsel's failure to comply with discovery rules or orders was willful and motivated by a desire to obtain a tactical advantage, or to conceal a plan to present fabricated testimony; (2) whether alternative sanctions could minimize the prejudice to the government; and (3) whether the defendant's right to compulsory process outweighs the countervailing public interest, including the integrity of the process, the interest in fair and efficient administration of military justice, and the potential prejudice to the truth-finding function of the trial process.[120] In *United States v. Pomarleau*,[121] the CAAF dealt with these rules and the unusual circumstance in which the defense failed to disclose requested information to the government, and in which the military judge thus precluded the defense from introducing that evidence.[122]

Pomarleau involved an alcohol-related, single-car rollover accident that left two civilian passengers dead and the two military occupants seriously injured after they were thrown from the jeep in which they were riding.[123] The primary fact question was the driver's identity. Within this broader question were several related corollary questions, including the number of times the jeep rolled, and the trajectory of each occupant thrown from one of the vehicles.[124] The appellant had no memory of the accident or the events leading up to it, and the other

111. *Id.* R.C.M. 701(e).

112. *Id*. R.C.M. 701(g).

113. *Id*. R.C.M. 701(g)(3).

114. 484 U.S. 400, 409 (1988). Under Illinois rules, the defense was required to provide the state with a witness list before trial. At trial, the defense attempted to call a witness who was not on the witness list it had previously provided. The trial judge conducted a hearing on the issue and determined that the defense had willfully violated the applicable rule. In light of this finding, the trial judge precluded the witness from testifying. *Id*.

115. United States v. Pomarleau, 57 M.J. 351, 361 (2003).

116. *Id*.

117. 728 F.2d 1181 (9th Cir. 1983).

118. *Id*. at 1188-90.

119. 484 U.S. 400 (1988).

120. MCM, *supra* note 7, R.C.M. 701(g)(3)(D) discussion; *see also id*. R.C.M. 701(g) analysis, at A21-34.

121. 57 M.J. 351 (2002).

122. *Id*.

123. *Id*.

124. *Id*. at 357.

surviving soldier made several inconsistent statements about who was driving.[125] Other eyewitnesses reported seeing the jeep roll between one and five times.[126] Both the government and the defense cases largely hinged on expert testimony.[127]

The defense counsel initially requested discovery during the Article 32 investigation. The government later submitted its own discovery request to the defense under RCM 701(b)(3). At a subsequent Article 39(a) session, held to consider a defense motion to compel funding for an expert witness, the trial counsel first complained that the defense had provided insufficient synopses of the expected testimony of the defense experts, and that the defense had not yet provided a final witness list. The military judge ordered the defense counsel to provide the requested information. About a month later, the government moved to compel discovery, claiming that the defense had still not provided copies of the charts and diagrams that their experts would use at trial, and that they had been unable to interview the defense experts.[128]

The government did not receive the defense expert's diagram until the second day of trial, and did not receive a copy of the study until just before the defense called its expert to the stand for direct examination. Moreover, the trial counsel said he never received a copy of the computer simulation and other related materials. The trial counsel moved to exclude the exhibits and the study from evidence as a sanction against the defense, claiming that the defense was engaging in "trial by ambush." [129] The military judge asked the government how long it would take to review the materials. After the government gave a vague answer, the military judge sustained the objection, excluding the diagram and the study, and also precluding the defense expert from referring to them in his testimony. The military judge did not indicate the basis for this ruling or for the later ruling regarding the computer simulation and related calculations. During closing arguments, the trial counsel argued that the defense tried the case by ambush.[130]

The military judge never conducted a fact-finding hearing to determine whether the factors in the RCM 701(g) discussion militated in favor of excluding the evidence or toward less drastic sanctions. Although such discussion is not binding on military judges, the judge's failure to discuss the defense's reasons for the untimely disclosures made it impossible for the CAAF to determine from the record whether the failure was willful and designed to give the defense a tactical advantage.[131] Likewise, the military judge failed to explain whether he considered other, less damaging alternatives to exclusion of the evidence. Finally, the trial counsel's argument aggravated the damage. In the CAAF's opinion, all of these facts together resulted in prejudice under Article 59(a) and required reversal.[132]

Pomarleau is instructive for several reasons. Perhaps one of the main lessons from a trial practitioner's perspective is the importance of dealing professionally with opposing counsel, even in hotly-contested discovery battles. It also is important for defense counsel to remember that once a discovery requirement is triggered, they must disclose the requested evidence. If there is a dispute, the parties should bring it before the military judge for a ruling. It does not benefit either side to withhold evidence that must be disclosed. Defense counsel are on notice that if they attempt to subvert discovery rules to gain a tactical advantage, they could be endangering their own ability to use and benefit from that evidence. Both trial and defense counsel must understand the remedies military judges can impose for discovery violations, and the requisite findings of fact that military judges must make before excluding evidence—particularly defense evidence—at trial. This understanding is important for trial counsel because they must always protect the record, and for defense counsel because they must preserve issues for appeal.

V. Conclusion

This year's discovery cases demonstrate that practitioners cannot apply the discovery rules in a vacuum; they must consider them in the context of the circumstances of each individual case. The military's broad discovery rules were designed "to promote full discovery to the maximum extent possible consistent with legitimate needs for non-disclosure and to eliminate 'gamesmanship' from the discovery process."[133] Article 46, UCMJ, holds military counsel to a higher standard than their civilian counterparts. As *Pomarleau* makes clear, this

125. *Id*. at 353-54.

126. *Id*. at 357.

127. *Id*. at 363.

128. *Id*. at 355.

129. *Id*. at 356. The documents in question were a diagram simulating the motion of an unrestrained passenger in a rollover accident; a computer simulation of the ejection pattern of one of the victims from the vehicle, and the underlying calculations; and the study the defense expert relied on in preparing the computer simulation, and to which his testimony would refer. *Id*.

130. *Id*.

131. *Id*. at 363-65.

132. *Id*. at 365.

applies to defense counsel as well as trial counsel, although defense counsel arguably have more room for strategy in discovery practice. The most important lesson of this new crop of cases is that discovery practice, while not a particularly exciting part of trial practice, affects all aspects of a court-martial. It is important that all counsel understand the rules and how they interrelate. Doing so will avoid messy mistakes, promote understanding of opposing counsel's responsibilities, guide practitioners toward finding solutions to problems, and clarify what remedies the military judge can impose. Each of these cases sheds valuable light on often-overlooked aspects of military discovery practice.

133. MCM, *supra* note 7, R.C.M. 701 analysis, app. 21, at A21-32.

Bless Me Father For I Have Sinned: A Year in Self-Incrimination Law

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Introduction

Mark Twain once said, "Supposing is good, but finding out is better."[1] While this maxim may be true regarding most aspects of life, it falls short when applied to the law. Regarding the law of self-incrimination, finding out is not only better than supposing, it is essential because of the adverse consequences that can occur when law enforcement officials and trial participants do not learn and heed the rules. These adverse consequences can destroy a government's carefully crafted case and have conclusive effects on a trial's outcome. For a defense counsel, failure to identify and address self-incrimination issues can result in injustice for their clients, followed by claims of ineffective assistance of counsel. Finally, military judges who either miss such issues or misapply the law run the risk of reversal on appeal.

To understand and apply this year's court opinions, the practitioner must first have a rudimentary knowledge of the complex area of self-incrimination law. This complexity stems from the fact that self-incrimination encompasses four separate sources of law. Each source of law requires distinct triggering events before its protections apply. Each source offers different procedural safeguards and remedies for non-compliance. Failure to understand these basic distinctions will cause a practitioner to miss the significance of—or misapply—a case's holding.

This article first overviews self-incrimination law to give the reader a basic mental framework, and to give the new judicial opinions their proper context. The article then proceeds to review five of the more significant cases the Court of Appeals for the Armed Forces (CAAF) decided during the past year. Of these five cases, one case addresses the voluntariness doctrine, two cases address the issue of who must read Article 31(b) rights warnings, one case addresses both of these previously mentioned sources of law, and the last case centers around mentioning the accused's silence at trial. Of the three cases that address Article 31, two of them cover new ground regarding who must read these warnings; one case deals with a chaplain, and the other deals with a legal assistance attorney. Although these cases differ as to the source of law applied, as well as when the issue arose during the interrogation process, all of them contain important lessons for practitioners.

Self-Incrimination Law

The body of law known as self-incrimination law encompasses the Fifth Amendment,[2] the Sixth Amendment,[3] and the voluntariness doctrine.[4] These protections are common to both the civilian and military communities. The statutory protections of Article 31, Uniform Code of Military Justice (UCMJ), however, are unique to the military.[5]

Fifth Amendment & Miranda

Of these four sources of self-incrimination law, the Fifth Amendment probably enjoys the greatest name recognition. Although the Fifth Amendment has been in existence since the inception of the Constitution, its familiar procedural protections did not come into existence until 1966, with the release of the landmark case of *Miranda v. Arizona*.[6] The goal of *Miranda* was to establish procedural safeguards to protect individuals from the compulsion to confess in the inherently coercive environment of a police-dominated, incommunicado interrogation. Therefore, the triggering event for the application of *Miranda*'s protections is the onset of a "custodial interrogation."[7] Once *Miranda* is triggered, police must inform the subject of his rights (1) to remain silent, (2) to be informed that any statement he makes may be used as evidence against him, and (3) to the

1. Mark Twain, in MARK TWAIN IN ERUPTION (Bernard DeVoto ed., 1940).

2. U.S. CONST. amend. V. The Fifth Amendment states, in part, that "no person . . . shall be compelled in any criminal case to be a witness against himself." *Id.*

3. *Id*. amend VI. The Sixth Amendment states, in part, that "in all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." *Id.*

4. The concept of voluntariness entails elements of the voluntariness doctrine, due process, and compliance with Article 31(d), UCMJ. *See* Captain Frederic I. Lederer, *The Law of Confessions: The Voluntariness Doctrine*, 74 MIL. L. REV. 67 (1976) [hereinafter Lederer, *Voluntariness Doctrine*].

5. UCMJ art. 31 (2002).

6. 384 U.S. 436 (1966).

7. *Id*. at 444.

presence of an attorney during the questioning.[8] In 1967, the Court of Military Appeals (COMA) ruled that *Miranda*'s protections also apply to military interrogations.[9]

Sixth Amendment

Like *Miranda*, the Sixth Amendment provides the right to the assistance of counsel. Although *Miranda* provides counsel to assist an individual during exposure to the coercive environment of a custodial interrogation, the Sixth Amendment provides a defendant with the assistance of counsel for his defense in a criminal prosecution. The right to counsel under the Sixth Amendment, therefore, is triggered by the initiation of the adversarial criminal justice process. In the civilian sector, indictment triggers this right.[10] In the military, the preferral of charges triggers this right.[11]

Article 31

Long before civilians enjoyed the protections of *Miranda*, members of the armed forces benefited from the procedural safeguards of Article 31(b).[12] Congress enacted Article 31 with the hope that it would work to dispel service members' inherent compulsion to respond to questioning from superiors in rank or position.[13] Throughout the years, the triggering requirements for Article 31(b) rights have been influenced not only by the plain text of the statute and legislative intent, but also by evolving judicial interpretations.[14] What has emerged is that when a suspect or an accused is questioned by a person subject to the UCMJ who is acting in an official capacity for law enforcement or disciplinary purposes—and is perceived as such by the suspect or accused—the questioner must read the suspect his Article 31(b) rights. These warnings include the right (1) to be informed of the nature of the accusation, (2) to remain silent, and (3) to be informed that any statement made may be used as evidence against the declarant.[15] While the rights of Article 31(b) and *Miranda* are similar, a quick comparison between the two highlights key differences. First, *Miranda* gives an individual the right to counsel, whereas Article 31(b) does not. Conversely, Article 31(b) requires that the individual be informed of the accusation against him, whereas there is no similar requirement under *Miranda*.[16]

Voluntariness Doctrine

The oldest source of self-incrimination law is the voluntariness doctrine. Its adoption and application predates procedural safeguards against involuntary confessions by well over two hundred years.[17] The goal of the voluntariness doctrine is to prevent the use of coerced confessions at trial because such confessions are considered so fundamentally unreliable that their underlying truthfulness is called into question. The concept of voluntariness encompasses elements of the common law voluntariness doctrine, due process, and compliance with Article 31(d).[18] Under this doctrine, even a confession that was secured in compliance with required procedural safeguards might still be suppressed if it is deemed to be involuntary. In determining whether a confession is voluntary, a court will examine the "totality of the circumstances" surrounding the confession to determine whether the accused's "will was overborne" and his "capacity for self-determination critically

8. *Id*. at 465.

9. United States v. Tempia, 37 C.M.R. 249 (C.M.A. 1967).

10. *See* McNeil v. Wisconsin, 501 U.S. 171, 175 (1991) ("The Sixth Amendment right . . . does not attach until a prosecution is commenced, that is, 'at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.'") (quoting United States v. Gouveia, 467 U.S. 180, 188 (1984); Kirby v. Illinois, 406 U.S. 682, 689 (1972)).

11. MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 305(d)(1)(B) (2002) [hereinafter MCM].

12. The UCMJ was enacted in 1950, whereas the Supreme Court did not decide *Miranda* until 1966. *See generally* Captain Frederic I. Lederer, *Rights Warnings in the Armed Services*, 72 MIL. L. REV. 1 (1976).

13. *See* Major Howard O. McGillin, Jr., *Article 31(b) Triggers: Re-examining the "Officiality Doctrine,"* 150 MIL. L. REV. 1 (1995).

14. *Id*.

15. UCMJ art 31(b) (2002). Article 31(b) states:

> No person subject to this chapter may interrogate, or request any statement from an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.

Id.

16. *See id*.; *cf.* Miranda v. Arizona, 384 U.S. 436 (1966).

17. *See* Lederer, *Voluntariness Doctrine*, *supra* note 4, at 72.

impaired," or instead, whether the confession was the "product of an essentially free and unconstrained choice by its maker."[19]

Voluntariness Doctrine Cases

The CAAF applied the voluntariness doctrine in two cases during the past year, reaching different results in each. In *United States v. Benner*,[20] the appellant was convicted of sodomy and indecent acts with his four-year-old stepdaughter while his wife was in the hospital. The daughter told both her grandmother and her mother about the incident. When confronted by his wife, the appellant admitted to the incident. Thereafter, both his stepdaughter and wife left the appellant's quarters and moved in with the grandmother. At the urging of the grandmother and his wife, the appellant eventually sought counseling from a chaplain.[21]

During the initial counseling session, the appellant admitted to an inappropriate relationship with his stepdaughter. At the conclusion of this session, the chaplain informed the appellant that he might have an obligation to report the incident to the authorities. The next day, the chaplain contacted the Army Family Advocacy office, which erroneously informed him that he was required to report the child abuse. The chaplain relayed this information to the appellant, after which the appellant admitted even more details of the incident to him. The chaplain encouraged the appellant to turn himself in instead of having the chaplain do it. To make the decision easier, the chaplain agreed to accompany the appellant to the military police (MP) station. The chaplain testified that the appellant was initially hesitant to go, and had he not agreed to escort the appellant, he doubted if the appellant would have turned himself in.[22] The chaplain then escorted the appellant to the MP station and informed the MPs that the appellant was there to make a statement regarding his "improper relationship with his stepdaughter."[23] Two Criminal Investigation Division (CID) agents arrived about an hour later, advised the appellant of his right against self-incrimination,[24] obtained a waiver, and interviewed him. The CID agents, however, did not provide him any "cleansing" warnings regarding his earlier admissions to the chaplain. The appellant eventually gave the CID agents a six-page handwritten confession.[25]

After reviewing the applicable law in the area of confidentiality between a chaplain and a penitent, including case law,[26] statutory law,[27] and relevant service regulations,[28] the CAAF concluded that the chaplain had violated his obligation of confidentiality when he informed the MP office of appellant's misconduct.[29] The CAAF also held that when the chaplain informed the appellant that he was obligated to report the misconduct to the authorities, he effectively abandoned his role as a chaplain and was instead "act[ing] solely as an Army officer."[30] Having abandoned his clerical role, he was then obligated to read the appellant his Article 31(b) warnings before questioning him further.[31]

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18. *See id*. Article 31(d), UCMJ, provides that "[n]o statement obtained from any person in violation of this article, or through the use of coercion, unlawful influence, or unlawful inducement may be received in evidence against him in a trial by court-martial." UCMJ art. 31. The analysis to Military Rule of Evidence (MRE) 304(c)(2) lists examples of involuntary statements as those resulting from coercion, unlawful influence, and unlawful inducement, including infliction of bodily harm; deprivation of food, sleep, or adequate clothing; threats of bodily harm; confinement or deprivation of privileges for refusing to make a statement, or threats thereof; promises of immunity or clemency; promises of reward or benefit; or threats of disadvantage. MCM, *supra* note 11, MIL. R. EVID. 304(c)(2) analysis, at A22-10.

19. Culombe v. Connecticut, 367 U.S. 568, 602 (1961).

20. 57 M.J. 210 (2002).

21. *Id*. at 211.

22. *Id*.

23. *Id*. at 212.

24. *Id*. These rights included those under the Fifth Amendment, Article 31(b), UCMJ, and MRE 305(d). *Id.*

25. *Id*. at 212.

26. *See* Trammel v. United States, 445 U.S. 40, 51 (1980) ("[I]t recognizes the human need to disclose to a spiritual counselor, in total and absolute confidence, what are believed to be flawed acts or thoughts and to receive priestly consolation and guidance in return.").

27. *See* MCM, *supra* note 11, MIL. R. EVID. 503 ("A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a clergyman or to a clergyman's assistant, if such communication is made either as a formal act of religion or as a matter of conscience.").

28. *See* U.S. DEP'T OF ARMY, REG. 165-1, CHAPLAIN ACTIVITIES IN THE UNITED STATES ARMY para. 4-4 (26 May 2000); U.S. DEP'T OF ARMY, REG. 608-18, THE FAMILY ADVOCACY PROGRAM para. 3-8 (1 Sept. 1995).

29. *Benner*, 57 M.J. at 212.

30. *Id*. at 214.

31. *Id*.

The CAAF then focused its attention on the issue of whether the appellant's subsequent confession to CID was voluntary. The court noted that as part of the rights warnings given to the appellant, the CID informed him that he was suspected of "indecent assault."[32] At this point, the appellant would have known that the chaplain betrayed his confidences and that he would have faced a "Hobson's choice"[33] of either confessing or having the chaplain reveal his earlier disclosures. Unfortunately for the appellant, the CID agents did not alleviate his predicament by providing him a cleansing warning before taking his statement. If the CID agents had informed the appellant the confession he made to the chaplain could not be used against him, he would have had the opportunity to consider whether his secrets were still protected, and whether he truly wanted to speak with the CID agents.[34]

The CAAF determined that the appellant was never truly given the choice of not testifying against himself. The court was unwilling to rule that the appellant had made his confession voluntarily. Instead, the court found the appellant's "will [had been] overborne and his capacity for self-determination [had been] critically impaired."[35] As such, it felt that allowing the appellant's confession to be used against him would offend due process.[36]

In a lone dissent, Chief Judge Crawford argued that the appellant's motivation for confessing to the CID agents had little to do with the chaplain's threatened disclosure and more to do with the urgings of his wife and his desire to reunite with his family.[37] Her opinion argued that, absent improper coercion, duress, or inducement, such moral and psychological pressures do not render the confession involuntary.[38] Regarding the chaplain's disclosure to the CID agents, Chief Judge Crawford felt that there was no evidence in the record that the interrogators used it as leverage to secure a statement from the appellant. Chief Judge Crawford concluded her dissent with a passionate attack on the majority, citing the detrimental psychological impact a retrial would have on the victims.[39]

The other case in which the CAAF applied the voluntariness doctrine during the past year was *United States v. Ellis*.[40] The victim in *Ellis* was Timmy, the appellant's two-and-a-half-year-old son. The appellant had recently gained custody of Timmy and his older sister from their mother, the appellant's ex-wife. Both children moved in with the appellant, his current wife, and their five other children. Timmy and his sister's transition into the appellant's family was a difficult one, so much so that the appellant asked the state to take custody of them both. A couple of months after this request, but before the state made a decision, the appellant's wife brought Timmy to the hospital emergency room unconscious. Four days later, Timmy died from blunt force trauma to the head.[41]

After reviewing the results of the autopsy, civilian investigators suspected that Timmy's death resulted from child abuse. The appellant and his wife voluntarily agreed to be questioned by state medical and law enforcement officials at the local sheriff's office. Based on these interviews, detectives determined that Timmy was in the sole care of the appellant and his wife before his death, and that their explanation for the cause of the injury was inconsistent with the autopsy's findings. At this point, detectives decided to conduct separate accusatory interviews of the appellant and his wife. The detectives read both of them their *Miranda* rights, which they waived. During their separate interrogations, detectives told both the appellant and his wife that there was enough evidence to arrest each of them. They were also told if they were both arrested, the state would take away their other six children and put them in foster care.[42] Upon their request, the appellant and his wife were allowed to meet together in private for fifteen minutes. After this meeting, the appellant talked with detectives about the stress Timmy and his sister's behavioral problems had caused the family. The appellant stated that dealing with Timmy was particularly diffi-

32. *Id*. at 213.

33. RANDOM HOUSE COLLEGE DICTIONARY 630 (rev. ed. 1982) ("The choice of taking either that which is offered or nothing; the absence of a real choice."). The expression is derived from Thomas Hobson (1544-1631) of Cambridge, England, who rented horses and gave his customers only one choice, that of the horse nearest the stable door. *Id*.

34. *Benner*, 57 M.J. at 213.

35. *Id*. (quoting Culombe v. Connecticut, 367 U.S. 568, 602 (1961)).

36. *Id*.

37. *Id*. at 214-18.

38. *Id*. at 217.

39. *Id*. at 218.

40. 57 M.J. 357 (2002).

41. *Id*. at 376-77.

42. *Id*. at 377.

cult. He then confessed to slamming his son's head on the ground on two successive days, once for defecating in his pants and another for not eating his meal.[43]

In examining the voluntariness of the appellant's confession, the CAAF first cited Congress's implementation of the Fifth Amendment in the military, specifically Article 31(d).[44] The court then looked at the totality of the circumstances surrounding the confession, including the characteristics of the appellant and the details of the interrogation.[45] In examining the characteristics of the appellant, the CAAF noted that he was a twenty-seven year-old Petty Officer Second Class (E-5), a high school graduate, and in the "upper mental group" of Navy classifications.[46] Additionally, there was no evidence that he suffered from a psychological handicap at the time of questioning that would have impaired his decision-making process.[47]

In scrutinizing the conditions of the appellant's interrogation, the CAAF pointed to the fact that the detectives did not use threats or physical abuse. Additionally, the questioning did not continue for an excessive amount of time, and did not involve incommunicado detention or prolonged isolation. The court also noted that the detectives did not use the appellant's wife as a government tool to induce him to confess.[48]

Finally, the court concluded that although the detective's statement regarding the possible removal of the appellant's children may have contributed to his motivation to confess, "the mere existence of a causal connection [did] not transform appellant's otherwise voluntary confession into an involuntary one."[49] Examining all of these facts together, the court felt that the circumstances of the appellant's confession were not "so inherently coercive as to overcome the appellant's will to resist."[50]

In a concurring opinion, Judge Baker agreed with the majority's conclusion that under the totality of the circumstances, the appellant's confession was voluntary. He expressed concern, however, over the inherently coercive effect of threatening parents with the deprivation of their children to secure a confession. Judge Baker cautioned both law enforcement officials and courts to view confessions secured under such circumstances with "heightened sensitivity" to insure their validity.[51]

In a lone dissent, Judge Effron noted that the appellant's criminal case was originally brought in state court, where his confession was suppressed at trial, and that a state appellate court affirmed this decision on appeal.[52] After examining all of the circumstances surrounding the appellant's confession, Judge Effron felt that it was a very close call whether the appellant confessed because he was guilty, or because he wanted to exonerate his wife so that his children could remain with their mother.[53] Ultimately, however, the fact that this questionable confession had an interlocking connection with critical physical evidence lost by the government,[54] and the fact that the prosecution argued the importance of this connection in their case, led Judge Effron to conclude that the military judge's failure to take corrective action was not harmless beyond a reasonable doubt.[55]

After examining *Ellis* and *Benner* together, counsel will better understand the breadth of the voluntariness doctrine. The CAAF, in determining whether the appellant in *Ellis* had made a voluntary confession, applied the "totality of the circumstances" test in a traditional manner—by looking at the individual characteristics of the accused along with the circumstances of the interrogation.[56] *Benner*, however, presented the CAAF with a unique set of facts with which to apply the voluntariness doctrine. The majority spent little time examining the individ-

43. *Id*. at 378.

44. *See* UCMJ art. 31(d) (2002); *supra* note 18 and accompanying text.

45. *Ellis*, 57 M.J. at 378.

46. *Id*. at 379.

47. *Id*.; *see also* United States v. Bubonics, 45 M.J. 93 (1996); United States v. Martinez, 38 M.J. 82, 84 (C.M.A. 1993).

48. *Ellis*, 57 M.J. at 379.

49. *Id*.

50. *Id*.

51. *Id*. at 384.

52. *Id*. at 387.

53. *Id*. at 391.

54. *Id*. at 389. The state medical examiner's office lost the victim's brain and its meninges when the laboratory moved to a new location. *Id*.

55. *Id*. at 393.

56. *See* United States v. Bubonics, 45 M.J. 93 (1996).

ual characteristics of Sergeant Benner or the circumstances of his actual interrogation. Instead, the court focused primarily on the Hobson's choice that confronted him before his confession. These two cases, when read together, should encourage defense counsel to examine *all* of the circumstances surrounding their clients' confessions carefully, including those leading up to the actual taking of the confession, to determine if a particular client's "will [was] overborne and his capacity for self-determination [was] critically impaired" at any stage of the interrogation process.[57]

Article 31(b) Cases

Legal Assistance Attorney

While *Benner* addressed the circumstances under which a chaplain must read a penitent his rights, in *United States v. Guyton-Bhatt*,[58] the CAAF examined the circumstances under which a legal assistance attorney must read an individual his rights when pursuing a matter for a client. In *Guyton-Bhatt*, the appellant, a captain and psychologist, agreed to buy a 1986 Jaguar from Sergeant First Class R. The appellant took possession of the vehicle after she made an initial payment of $500, with an agreement to pay the balance in installments. After the appellant missed several payments, Sergeant First Class R asked her to sign a promissory note. The appellant agreed, but unilaterally amended the document to indicate that payments would not begin until two months later.[59]

When the appellant again failed to make the scheduled payments, Sergeant First Class R requested and received a copy of the executed promissory note from the appellant. Before giving Sergeant First Class R a copy of the promissory note, however, the appellant once again unilaterally changed the payment due date, pushing it back another three months. The appellant again failed to make any payments on the vehicle, including on the newly amended due date.[60] After receiving none of the promised payments and learning that the vehicle had been abandoned on the side of the road, Sergeant First Class R took the promissory note to a legal assistance officer for advice. After examining the altered payment date on the promissory note, the legal assistance officer consulted the *Manual for Courts-Martial* (*MCM*) and determined that the appellant had committed the crime of forgery. He contacted the appellant in an attempt to resolve the dispute between her and his client, Sergeant First Class R. During the conversation, the appellant admitted buying the car and owing Sergeant First Class R money for nearly a year. She stated, however, that she was not going to make any payments because "you couldn't get blood from a stone."[61] At some point during the conversation, the legal assistance officer determined that the best way to help his client was to pursue criminal action, rather than civil action, against the appellant. To initiate a criminal action, the legal assistance attorney contacted the trial counsel for the appellant's unit and informed him of the matter. Additionally, he had Sergeant First Class R follow up on the progress of the criminal action once it had begun. At no time did the legal assistance officer read the appellant her rights against self-incrimination under Article 31(b).[62]

In a cursory discussion, the majority opinion sought to distinguish this case from the litany of cases the service court cited that held that certain individuals are exempt from the requirement to read Article 31(b) rights.[63] The CAAF focused on the fact that before calling the appellant, the legal assistance attorney had concluded that the appellant had committed the crime of forgery based on his examination of the promissory note and his research of the *MCM*. Additionally, the legal assistance attorney decided that the best way to help his client was to pursue a criminal action rather than a civil action. Finally, when the legal assistance attorney contacted the appellant, he used the authority of his position when he questioned her. As such, the CAAF concluded that the legal assistance attorney was

57. *Id*. at 94.

58. 56 M.J. 484 (2002).

59. *Id*. at 485.

60. *Id*.

61. *Id*. at 486.

62. *Id*.

63. *Id.* (citing United States v. Guyton-Bhatt, 54 M.J. 796, 802 (Army Ct. Crim. App. 2001)). Certain persons are exempt from the Article 31, UCMJ, warning requirement, when they ask questions for specific purposes:

> (1) a military doctor, psychiatric social worker, or nurse prior to asking questions of a patient for medical diagnosis or treatment; (2) an in-flight aircraft crew chief prior to questioning, for operational reasons, an irrational crewman about possible drug use; (3) military pay officials questioning a servicemember about a pay or allowance entitlement; or (4) a negotiator trying to end an armed standoff, provided the discussion was truly designed to end the standoff, rather than to obtain incriminating statements to be used against the suspect at trial. However, military appellate courts have also held that military defense counsel may not deliberately seek incriminating answers from a suspect unrepresented by counsel without first giving Article 31, UCMJ, rights warnings.

Id.

"acting as an investigator in pursuing this criminal action" and was therefore required to give the appellant Article 31(b) warnings before questioning her.[64] Although the court found error, it determined that the error was harmless because nearly all the information about which the legal assistance attorney testified was also admitted into evidence through independent sources.[65]

Senior Judge Sullivan, who concurred in the result, disagreed with the majority on its conclusion that the legal assistance attorney should have read the appellant her Article 31(b) rights. In applying the analysis established under *United States v. Loukas*,[66] Judge Sullivan concluded that the legal assistance attorney's primary motivation for calling the appellant was to try and get her to pay his client, not for law enforcement or disciplinary purposes.[67]

The CAAF's opinion in *Guyton-Bhatt* is significant, not because of what standard the court applied—or how it applied it—but to whom the CAAF applied it. In *Guyton-Bhatt*, the CAAF applied its traditional standard for determining who must give Article 31(b) warnings, but applied it in a unique situation. Traditionally, the courts have scrutinized the conduct of law enforcement officials and those in the suspect's chain of command to determine whether Article 31(b) warnings were required. Although the courts have occasionally ventured beyond this core group in their analysis, *Guyton-Bhatt* represents the first case in which a court scrutinized the conduct and motives of a legal assistance attorney. With the release of *Guyton-Bhatt* and *Benner*, legal assistance attorneys and chaplains now join the long list of professions to which the court has applied the Article 31(b) warning requirement.[68] Reading these two cases together, it should be clear that no profession is too sacrosanct to be immune from the CAAF's scrutiny. Although an individual's duty position may give counsel insight into his motives for questioning someone, it is only one of the factors courts will consider. When faced with a rights warnings issue, counsel should not be lured into focusing primarily on the questioner's duty position, but should instead look to the underlying motives of the questioner.

Although the CAAF remained true to stare decisis in *Guyton-Bhatt* and *Benner*, these opinions further entrench a faulty paradigm of legal analysis the court began adopting years ago.[69] The application of this flawed analysis has led the court to decide cases in a manner that often conflicts with the underlying goal of Article 31. Much like its successor, *Miranda*, the original goal of Article 31(b) was to create a procedural mechanism that would serve to dispel service members' inherent compulsion to respond to questioning from superiors in rank or position.[70] The genesis for this inherent compulsion to respond arises from the unique nature of military service, which trains service members to respond instinctively to all questions and commands of their superiors without considering their constitutional rights against self-incrimination.[71] While the Supreme Court has successfully kept the focus on the suspect's perspective when determining the existence and level of coercion in an interrogation setting, over the years, the CAAF and its predecessor, the Court of Military Appeals (COMA), have gradually shifted the focus to the motives of the questioner, and have examined the perceptions of the suspect only sporadically.[72]

The analysis in *Guyton-Bhatt* and *Benner* continues the court's trend toward focusing on the motives of the questioner to the exclusion of examining the suspect's perspective. Although the legal assistance attorney in *Guyton-Bhatt* may have been motivated by a law enforcement or disciplinary purpose during his questioning of the appellant, it is difficult to support the position that the legal assistance attorney's rank or duty position caused the appellant to feel a "presumptive coercion" from the former's telephonic questioning.[73] The appellant in *Guyton-Bhatt* was a captain; the legal assistance attorney was only a first lieutenant. Additionally, the legal assistance

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64. *Id*. at 487.

65. *Id*.

66. 29 M.J. 385 (C.M.A. 1990). The Court of Military Appeals (COMA) adopted both an "official questioning" test and a "position of authority" test in *United States v. Duga* to narrow the broad "person subject to this chapter" language of Article 31, UCMJ. United States v. Duga, 10 M.J. 206 (C.M.A. 1981). The second part of the test focused on whether the person being questioned perceived the questioning as official in nature, as opposed to being motivated by personal curiosity. In *Loukas*, the court further narrowed the "official questioning" prong of the two-part test in *Duga* to include only those situations "when questioning is done during an official law-enforcement investigation or disciplinary inquiry." *Loukas*, 29 M.J. at 387. Courts have continued to apply the *Duga-Loukas* test over the years, but have often placed more emphasis on the "law enforcement or disciplinary purpose" of the questions than to the perceptions of the suspect. *See* Major Ralph H. Kohlmann, *Are You Ready for Some Changes? Five Fresh Views of the Fifth Amendment*, ARMY LAW., Mar. 1996; Major Ralph H. Kohlmann, *Tales from the CAAF: The Continuing Burial of Article 31(b) and the Brooding Omnipresence of the Voluntariness Doctrine*, ARMY LAW., May 1997.

67. *Guyton-Bhatt*, 56 M.J. at 488.

68. *See generally supra* note 63 and accompanying text.

69. *See generally* McGillin, *supra* note 13.

70. The *Miranda* decision sought to put a procedural safeguard in place that would counter the inherently coercive environment of a police-dominated, incommunicado interrogation. In determining whether an interrogation environment is inherently coercive, courts must look at the circumstances from the perspective of the suspect. *See* Illinois v. Perkins, 496 U.S. 292, 296 (1990).

71. United States v. Franklin, 8 C.M.R. 513, 517 (C.M.A. 1952); *see also* United States v. Gibson, 14 C.M.R. 164 (C.M.A. 1954).

attorney, who worked at the Office of the Staff Judge Advocate, did not hold a position of command or supervisory authority over the appellant, a psychologist working at the installation's hospital.[74]

Likewise, the court in *Benner* never addressed the appellant's perception as the chaplain was questioning him. Although the chaplain in *Benner* outranked the accused, he did not hold a command or supervisory position over him. Additionally, it was the appellant who approached the chaplain for counseling, not the chaplain who approached the appellant to interrogate him as part of a criminal investigation. Finally, there is nothing in the record that indicates that the chaplain's manner of questioning or the content of his questions would have led the appellant to believe the chaplain was motivated by an official law enforcement or disciplinary purpose. On the contrary, after the appellant made his admissions of misconduct, the chaplain talked to the appellant about "the issue of forgiveness, of forgiving himself, [and] that [confessing] may be a step in helping him deal with that."[75] Given these facts, it is most likely that the appellant perceived the chaplain's questions as motivated solely by a Christian-based desire to help him with his personal situation. It is difficult to conclude that the appellant felt any sense of compulsion to answer the chaplain's questions, or that he needed the chaplain to read him his Article 31(b) rights to dispel any such compulsion.

Interrogations

In *United States v. Pinson*,[76] the CAAF addressed the issue of when foreign police are required to give military suspects Article 31(b) warnings. At the appellant's first trial, the victim, an Icelandic national named Helga, testified that her earlier accusations against the appellant for assault and property damage were false. About two months later, Helga told the Icelandic police that the appellant had beaten and threatened her into recanting her allegations in court. Based on Helga's disclosure, the Icelandic police and the Naval Criminal Investigative Service (NCIS) opened separate investigations.[77]

As part of their investigation, the Icelandic police wanted to interrogate the appellant. They gave the appellant's name to NCIS agents and asked them to produce him for questioning. When the appellant arrived at the Naval Security building, the Icelandic authorities arrested him. Before they questioned him, the Icelandic authorities advised the appellant of his right to an attorney and his right to remain silent under Icelandic law, but they did not advise him of his rights under Article 31(b). The appellant asked to speak to an attorney, and the Icelandic authorities ceased questioning him at that time. When the appellant eventually conferred with an Icelandic attorney, the attorney informed him that under Icelandic law, a court could draw a negative inference if he chose to invoke his right to remain silent. Subsequently, the appellant decided to submit to questioning by Icelandic police, during which he made several incriminating admissions.[78]

Although a treaty between the United States and Iceland called for mutual cooperation in criminal investigations, the CAAF held that the Icelandic police were not required to read the appellant his Article 31(b) rights, since at no time were they "acting under the control or at the direction of the Naval investigators."[79] In support of its holding, the court noted that the Icelandic police did not speak with any NCIS agents before questioning the appellant, nor did they ask NCIS for any information or leads when conducting their investigation. The only assistance NCIS gave Icelandic authorities was in producing

72. United States v. Pittman, 36 M.J. 404 (C.M.A. 1993) (holding that accused's section leader and friend, motivated by personal curiosity, did not need to give Article 31, UCMJ, warnings); United States v. Bowerman, 39 M.J. 219 (C.M.A. 1994) (holding that an Army doctor was not required to inform the accused of his Article 31(b), UCMJ, rights when questioning him about a child's injuries; the purpose of the questions was for medical treatment of the patient); United States v. Moses, 45 M.J. 132 (1996) (holding that Naval Criminal Investigative Service (NCIS) agents engaged in an armed standoff with the accused were not engaged in a law enforcement or disciplinary inquiry when they asked the accused what weapons he had inside the house; the questions were considered negotiations designed to bring criminal conduct to a peaceful end); United States v. Payne, 47 M.J. 37 (1997) (holding that Defense Investigative Service (DIS) agents conducting a background investigation were not engaged in law enforcement activities); United States v. Bradley, 51 M.J. 437 (1999) (holding that a commander was not required to give Article 31(b), UCMJ, warnings before questioning his soldier about whether the soldier had been charged with criminal conduct; his "administrative and operational" purpose was to determine whether the accused's security clearance should be terminated rather than for a law enforcement or disciplinary purpose); United States v. Smith, 56 M.J. 653 (Army Ct. Crim. App. 2001) (holding that the president of a prison's Unscheduled Reclassification Board was not required to read Article 31(b), UCMJ, rights to an inmate before asking him if he would like to make a statement about his recent escape; the purpose of the board was to determine whether to tighten the inmate's custody classification).

73. United States v. Gibson, 14 C.M.R. 164, 173 (C.M.A. 1954) (Brossman, J., concurring) (reasoning that Article 31(b) warnings were implemented "to provide a counteragent for possible intangible 'presumptive coercion,' implicit in military rank and discipline").

74. United States v. Guyton-Bhatt, 56 M.J. 484, 486 (2002).

75. United States v. Benner, 57 M.J. 210, 211 (2002).

76. 56 M.J. 489 (2002).

77. *Id*. at 490.

78. *Id*.

79. *Id*. at 494.

the appellant and help in locating another American witness. Likewise, NCIS agents never asked the Icelandic authorities to gather specific evidence or to ask the appellant specific questions to assist in the military investigation. Based on these facts, the court held the NCIS agents had not "participated" in the Icelandic investigation within the meaning of Military Rule of Evidence (MRE) 305(h)(2),[80] and affirmed the lower court's decision.[81]

The result of this case is not surprising in light of other cases in which the CAAF has considered foreign interrogations of military personnel.[82] Although *Pinson* does not expand the circumstances under which foreign police may question military personnel without reading them their Article 31(b) rights, it can serve as another authoritative arrow in the quiver of a trial counsel who faces a motion to suppress an accused's statement taken by foreign investigators.

Mentioning the Accused's Silence at Trial

In *United States v. Alameda*,[83] the CAAF considered the admissibility of testimony addressing the appellant's silence during his apprehension by law enforcement officials and the appropriateness of the trial counsel's comments on this silence in his closing argument.[84] The charges in *Alameda* stemmed from two separate incidents between the appellant and his wife. The appellant had a long history of verbally and physically abusing his wife. During one of these incidents, the appellant got angry with his wife after discovering an E-mail from one of her male high school friends, who wanted to visit her. In an angry tirade, the appellant knocked the computer off the table, smashed the telephone as his wife attempted to call for help, shoved and punched her, and threatened to kill her. She was eventually able to report the incident to the base security forces. When the appellant's commander learned of the incident, he ordered the appellant to move out of the family quarters and to have no contact with his family unless it was pre-arranged.[85]

Despite this no-contact order, the appellant went to his quarters and confronted his wife. Upon seeing her husband, Mrs. Alameda became hysterical and tried to move away from him. The appellant continued to follow her around the quarters and tried to prevent her from screaming for help by covering her mouth and pinching her nose with his hands. The appellant then attempted to suffocate his wife by placing a plastic garbage bag over her head. During the struggle, she was able to break free and fled into the bedroom. As the appellant followed his wife, she stated she would do whatever he wanted her to do and asked that they go back to the living room to talk things out.[86] When he turned to go into the living room, Mrs. Alameda closed and locked the bedroom door behind him. She then crawled out of the window and ran across the street to the neighbor's house, where she called for help.[87]

Technical Sergeant (TSgt.) Moody of the Base Security Force responded to the scene and spoke with Mrs. Alameda about the incident. He had responded to a previous domestic incident involving the Alamedas and could recognize the appellant. Based on a description of the appellant's van, TSgt. Moody began searching the base for the appellant. He eventually located the appellant's van in the base's dormitory area and saw the appellant sitting on the dormitory stairs talking with another individual. TSgt. Moody approached the appellant and asked him if he was Airman Alameda. When the appellant responded that he was, TSgt. Moody asked the other individual to move away and asked the appellant for his identification card. After the appellant produced his card as requested, TSgt. Moody confirmed his identification and informed the appellant that he was being apprehended for an "alleged assault."[88]

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80. MCM, *supra* note 11, MIL. R. EVID. 305(h)(2). This rule states:

> *Foreign interrogations*. Neither warnings under subdivisions (c) or (d), nor notice to counsel under subdivision (e) are required during an interrogation conducted abroad by officials of a foreign government or their agents unless such interrogation is conducted, instigated, or participated in by military personnel or their agents or by those officials or agents listed in subdivision (h)(1).

Id.

81. *Pinson*, 56 M.J. at 490.

82. United States v. French, 38 M.J. 420 (C.M.A. 1993). The accused was questioned by British police in the presence of his first sergeant and an Air Force Office of Special Investigations (AFOSI) agent. Despite the AFOSI agent's knowledge of the investigation, his presence during the interview, his comment during the interview that it would be better for the accused to remain silent than to continue lying, and a British policeman's brief use of AFOSI agent's handcuffs during the arrest, the "participation" of U.S. military officials did not reach the level which would require Article 31, UCMJ, and *Miranda* warnings by British officials. *Id.*

83. 57 M.J. 190 (2002).

84. *Id*. at 192 n.1.

85. *Id*. at 192.

86. *Id*. at 193.

87. *Id*. at 193-94.

At trial, the prosecution elicited testimony from TSgt. Moody that during the apprehension, the appellant never asked any questions about why he was being apprehended and that he showed little emotion, but instead just stared straight ahead. The military judge repeatedly overruled the defense counsel's objections to this testimony. In his closing argument, the trial counsel directed the panel's attention to TSgt. Moody's testimony about the appellant's lack of reaction when questioned during his arrest. The trial counsel argued that this silence showed the appellant's consciousness of guilt. In response to the defense counsel's timely objections to this line of argument, the military judge merely reiterated his earlier instructions to the members that they could not hold the accused's *failure to testify* against him.[89]

In its analysis of this case, the CAAF first addressed the issue of defense waiver. On this issue, the court found the defense's objections to the relevance of TSgt. Moody's testimony were enough to preserve the issue. Furthermore, any confusion over the basis for the defense's objections was the fault of the military judge, who summarily overruled these objections without requiring either side to articulate a theory for exclusion or admissibility of this testimony. Additionally, the defense's objections to the trial counsel's closing argument were also enough to preserve that issue.[90]

The court next turned its attention to the relevance of TSgt. Moody's testimony. The CAAF noted that because the appellant had a history of domestic violence, including an assault incident two weeks before the attempted murder incident, his failure to deny one or more of these alleged assaults to TSgt. Moody did not support an inference of guilt and was therefore not relevant. Additionally, even if it did constitute some sort of admission, it would only be an admission to an alleged assault and not to attempted premeditated murder.[91]

Having decided that the military judge erred by admitting evidence of the appellant's silence, the CAAF then addressed the trial counsel's use of it in his closing argument as evidence of the appellant's guilt. The court identified this case as one involving post-apprehension, pre-*Miranda* silence. They noted that the federal circuit courts make a distinction between pre-arrest versus post-arrest silence, and that the majority of courts considering pre-arrest silence cases have concluded that its use as substantive evidence of guilt violates the Fifth Amendment.[92] Additionally, MRE 304(h)(3) makes no distinction between pre-arrest and post-arrest silence, but applies any time a person is either under official investigation or is in confinement, arrest, or custody.[93]

Based on MRE 304(h)(3) and the weight of federal circuit court authority, the CAAF found that the military judge committed "constitutional error" when he admitted evidence of the appellant's post-apprehension silence as evidence of guilt and then allowed the trial counsel to use it in his closing argument. Having found error, the CAAF then focused on the military judge's attempt at crafting a curative instruction for the members.[94]

The court found that each time the defense objected to the trial counsel's closing argument, the military judge's instructions merely reemphasized that the accused was not obligated to take the stand in his defense *at trial*. The military judge never gave the panel members an instruction warning them not to draw any adverse inference from the appellant's silence *during apprehension*. The CAAF felt that these instructions were not only "off the mark," but may have actually exacerbated the problem by suggesting by omission that the members *could* draw an adverse inference from appellant's silence during apprehension.[95]

In deciding whether the military judge's error was harmless, the court looked at the cumulative effect of the admission of the pre-arrest silence evidence, the trial counsel's improper argument, the military judge's erroneous instructions, and the physical evidence suppressed by the service court.[96] The CAAF ultimately could not be satisfied beyond a reasonable doubt that the panel would have convicted the appellant of attempted pre-

88. *Id*. at 194.

89. *Id*. at 194-95.

90. *Id*. at 197-98.

91. *Id*. at 198.

92. *Id*. at 198-99 (citing United States v. Velarde-Gomez, 269 F.3d 1023, 1028 (9th Cir. 2001); Combs v. Coyle, 205 F.3d 269, 282-83 (6th Cir. 2000); United States v. Burson, 952 F.2d 1196, 1201 (10th Cir. 1991); Coppola v. Powell, 878 F.2d 1562, 1565 (1st Cir. 1989); United States *ex rel*. Savory v. Lane, 832 F.2d 1011, 1017 (7th Cir. 1987).

93. MCM, *supra* note 11, MIL. R. EVID. 304(h)(3) ("A person's failure to deny an accusation of wrongdoing concerning an offense for which at the time of the alleged failure the person was under official investigation or was in confinement, arrest, or custody does not support an inference of an admission of the truth of the accusation."). Furthermore, the military justice system differs from the civilian justice system in that the *Miranda* right is triggered by custodial interrogation, whereas the Article 31, UCMJ, right is triggered by questioning by a person subject to the code. *See generally* Miranda v. Arizona, 384 U.S. 436 (1966); *cf*. UCMJ art. 31 (2002).

94. *Alameda*, 57 M.J. at 199.

95. *Id*. The military judge informed the members that the appellant had "no obligation to make any statement *during the trial in his defense*" and that "nothing will be held against this accused because he did not say anything in his defense." *Id*.

meditated murder or its lesser-included offenses absent this improper evidence. The court reversed the case on the charge of attempted premeditated murder and remanded it to the service court to consider, in light of the CAAF's ruling, whether these errors were harmless beyond a reasonable doubt as to the lesser-included offenses that did not contain the element of premeditation or intent to kill.[97]

In a separate opinion, Judge Effron agreed with the majority's reversal of the attempted premeditated murder charge, but felt that the majority's opinion did not go far enough. He was not satisfied that the cumulative effect of the errors was harmless with respect to the lesser-included offenses as well.[98]

In the lone dissent, Judge Crawford felt the defense waived the issue at trial because its objections were "off the mark."[99] She also felt that the appellant's pre-arrest, pre-*Miranda* warning silence was not protected by either Article 31(b) or the Fifth Amendment because the appellant's act of staring ahead silently when confronted by TSgt. Moody was neither testimonial nor communicative in nature.[100] Finally, Judge Crawford argued that even if there was error that had not been waived, the error was harmless because the other evidence was overwhelming that the appellant intended to kill his wife.[101]

All parties to a court-martial should heed the lessons of *Alameda* and its predecessors in the area of mentioning the accused's silence at trial.[102] Trial counsel should not only avoid any mention of the accused's silence at trial, they should also prepare their witnesses not to mention it. Defense counsel must remember that they carry the burden to object to this type of testimony at trial.[103] When they object, defense counsel should articulate the basis for their objections with specificity to insure that they do not waive issues for appeal.[104] Defense counsel should never rely on appellate courts to find plain error to preserve their clients' legal issues. Finally, military judges should be ready to provide curative or limiting instructions sua sponte when necessary. Military judges must craft such instructions in a manner that fits the needs of the individual situation. Merely reading instructions from the *Military Judges' Benchbook*[105] without an intellectual evaluation of those instructions' appropriateness may lead to other instructions that fail to save a case from reversal on appeal.[106]

Conclusion

The CAAF's decisions during the past year give practitioners a good sense of the critical need to understand the law of self-incrimination. Trial counsel should not only commit the lessons of these cases to memory; they should also teach them to the law enforcement officials with whom they work, to protect the validity of confessions during the investigation stage. Defense counsel should gain a better understanding of the various sources of law that protect their clients' rights against self-incrimination. This understanding should not only assist defense counsel in identifying potential violations of these rights, but will help them articulate reasons to suppress their clients' statements, and to preserve their objections for appellate review. Finally, military judges must understand these issues so that they can rule correctly on motions and objections, or intervene sua sponte, if necessary. The failure of counsel and military judges to understand these lessons may result in reversal on

96. *Id*. The Air Force Court of Criminal Appeals had ruled that the trial court erred when it admitted masking tape, latex gloves, and a utility knife as evidence to show "some sort of a plan or premeditation" by the appellant. *Id*. at 195.

97. *Id*. at 201.

98. *Id*. at 202.

99. *Id*. at 205-06. The defense objections during TSgt. Moody's testimony included relevance, speculation, and "asked-and-answered." The defense counsel never objected to the evidence based on the protections of Article 31, UCMJ, the Fifth Amendment, or MRE 304(h)(3). *Id*.

100. *Id*. at 208.

101. *Id*. at 208-09.

102. *See, e.g.*, United States v. Cook, 48 M.J. 236 (1998). After being apprehended and questioned by AFOSI investigators about a rape allegation, the accused went to a friend's house. The friend asked the accused if he committed the rape. The accused did not respond. At trial, the prosecution introduced this evidence and argued that the accused's failure to deny the allegation indicated guilt. *Id*. at 238-39. The CAAF held that this evidence was irrelevant under MRE 304(h)(3), even when the one asking the questions was a friend who was inquiring out of personal curiosity. The court also held that the start of the AFOSI investigation was the triggering event for the MRE 304(h)(3) protections. *Id*. at 240. In *United States v. Riley*, 47 M.J. 276 (1997), the CAAF reversed for plain error in a case in which an investigator testified regarding the accused's invocation of his privilege against self-incrimination during questioning, the defense counsel did not object, and the military judge failed to give a limiting instruction. *Id*.

103. MCM, *supra* note 11, MIL. R. EVID. 304(d)(2)(a).

104. *Id.* MIL. R. EVID. 304(d)(3).

105. U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK (1 Apr. 2001).

106. *See generally* Major Martin H. Sitler, *Silence Is Golden: Recent Developments in Self-Incrimination Law,* ARMY LAW., May 1999, at 40.

appeal. Worse yet, it could result in injustice to the accused, and to the military justice system.

Fourth Amendment and Urinalysis Update: "A Powerful Agent Is the Right Word"[1]

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Introduction

> *A word is not a crystal, transparent and unchanging, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and time in which it is used.*
>
> —Oliver Wendell Holmes, Jr.[2]

In the last year, the law of search and seizure remained mostly unchanged. There were no cases from the Supreme Court or military appellate courts that made headlines. The year consisted of cases that merely reiterated existing law applied to different facts, a few opinions that broadened the scope of some well-established standards, and a handful of decisions that brought other legal tests into clearer focus. This fine-tuning of Fourth Amendment law covered a wide variety of search and seizure issues.

On the other hand, significant legislative changes and executive branch initiatives in the wake of 11 September 2001 have reshaped legal practice and procedure under the Fourth Amendment. The search and seizure landscape continued to transform this year, fueled by the War on Terrorism. Only time will tell when or even if this transformation will end. As the transformation continued over the last year, a groundswell of criticism gathered strength. Concerned voices arose from the entire political spectrum.[3]

At least for military practitioners, few of the changes and subsequent criticism have had much impact on courts-martial. Furthermore, the changes and fallout are overshadowed by more immediate challenges posed by the war in Iraq and the increase in operational tempo worldwide. Military practitioners must still remain aware of the potential impact of certain provisions of this post-11 September legislation and the new initiatives sponsored by a variety of government agencies.[4]

The Internet provides the most readily accessible resource for current information on changes that have occurred or have been proposed. Specifically, the Department of Justice released a field guide that covers changes made by the USA PATRIOT Act of 2001.[5] The Department of Justice also updated its *Search and Seizure Manual* in July 2002.[6] The manual is a valuable tool for practitioners confronted with search and seizure questions dealing with computers and electronic communications. Finally, the Library of Congress Web site has current information on legislative and executive materials related to the War on Terrorism.[7]

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1. Mark Twain, *William Dean Howells*, *available at* http://www.twainquotes.com/Word.html. (last visited Apr. 1, 2003).

2. Towne v. Eisner, 245 U.S. 418, 425 (1918). Although they were spoken over eighty-five years ago, the words of Justice Holmes have not lost any of their luster or importance. This quote reflects the challenge facing lawmakers today. All branches of the government are involved in the War on Terrorism and the direction they take in shaping the law will have lasting effects for many years to come.

3. John D. Hutson, President and Dean of the Franklin Pierce Law Center, Twenty-Fourth Edward H. Young Lecture, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia (Feb. 19, 2003). Dean Hutson's lecture was in two parts. He spoke briefly about leadership and then discussed his concerns about the erosion of privacy rights since 11 September 2001. Although he did not believe there was an immediate threat to privacy, he stressed that there were certainly some "yellow lights" flashing. "Big brother" was a prominent reference during his lecture, as was the challenge facing lawmakers tasked with drafting laws that adequately protect our society from terrorism. Dean Hutson is a retired U.S. Navy Rear Admiral. He served as The Judge Advocate General of the Navy from 1997 to 2000. He admitted during the lecture that he considered himself a political "conservative." *Id. See also* Courtney Dashiell, *Thermal Imaging: Creating a "Virtual" Space*, 34 U. TOL. L. REV. 351 (2003) (commenting on the rapid passage of the wiretap amendment to the Foreign Intelligence Surveillance Act (FISA), 50 U.S.C. §§ 1801-1829, and the Supreme Court's role in diminishing privacy rights); John W. Whitehead & Steven H. Aden, *Forfeiting "Enduring Freedom" for "Homeland Security:" A Constitutional Analysis of the USA PATRIOT Act and the Justice Department's Anti-Terrorism Initiatives*, 51 AM. U. L. REV. 1081 (2002) (commenting on the unintended consequences of the new tools to combat terrorism, and the danger that they may trample individual privacy).

4. *See, e.g.*, The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272; Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135.

5. U.S. Dep't of Justice, Computer Crime and Intellectual Property Section (CCIPS), *Field Guidance on New Authorities That Relate to Computer Crime and Electronic Evidence Enacted in the USA Patriot Act of 2001* (Nov. 5, 2001), *at* http://www.cybercrime.gov/PatriotAct.htm.

6. U.S. DEP'T OF JUSTICE, CRIMINAL DIVISION, COMPUTER CRIME AND INTELLECTUAL PROPERTY DIVISION, SEARCH AND SEIZURE MANUAL, SEARCHING AND SEIZING COMPUTERS AND OBTAINING ELECTRONIC EVIDENCE IN CRIMINAL INVESTIGATIONS (July 2002), *available at* http://www.usdoj.gov/criminal/cybercrime/s&smanual2002.pdf.

> A man can still control a small part of his environment, his house; he can retreat thence from outsiders, secure in the knowledge that they cannot get at him without disobeying the Constitution. That is still a sizable hunk of liberty—worth protecting from encroachment. A sane, decent, civilized society must provide some such oasis, some shelter from public scrutiny, some insulated enclosure, some enclave, some inviolate place which is a man's castle.[8]

The home is one place the Supreme Court has consistently protected from government intrusions. No other zone of privacy is "more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home—a zone that finds its roots in clear and specific constitutional terms: 'The right of the people to be secure in their . . . houses . . . shall not be violated.'"[9] Even in recent years, the Court has not wavered from its firm commitment to protect individual privacy in the home.[10] Furthermore, the Court does not alter its perspective when the purpose of an entry into a home is for the seizure of property. "In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant."[11] This year, the Court reaffirmed its commitment to protecting the sanctity of the home. The Court of Appeals for the Armed Forces (CAAF) did the same, at least to an extent.

Kirk v. Louisiana[12]

In *Kirk*, the Court sent a clear message. The Court's per curiam opinion left no doubt about where it draws the line in terms of government intrusions into the home. Police officers entered Kirk's home to arrest him, without an arrest or search warrant.[13] The arrest followed an anonymous tip and police observation of several drug sales taking place at the home. After police stopped one of the buyers leaving Kirk's apartment, they were concerned evidence would be destroyed. Based on this concern, officers knocked on the door, entered the apartment, arrested Kirk, and searched him. They found a vial of cocaine on him and other contraband in plain view.[14]

At trial, Kirk moved to suppress the evidence obtained during the warrantless entry of his apartment. The Louisiana trial court denied the motion, and Kirk was convicted of possession of cocaine with the intent to distribute.[15] He was sentenced to fifteen years' confinement. The Louisiana Court of Appeal affirmed the conviction, concluding that the officer's entry into Kirk's home was lawful because there was probable cause to arrest him. The Louisiana Supreme Court denied review, but the U.S. Supreme Court granted Kirk's petition for a writ of certiorari and reversed the Court of Appeal's decision.[16]

Emphasizing the lack of an arrest warrant for Kirk or a search warrant for his home, the Supreme Court criticized the Court of Appeal's conclusion that the entry was lawful based solely on the existence of probable cause to arrest Kirk.[17] Despite the officers' concern about the possible destruction of evidence, the Court of Appeal did not consider whether exigent circumstances existed to enter the home. Noting this critical flaw in the Court of Appeal's analysis, the Supreme Court stated, "As *Payton* makes plain, police officers need either a warrant or probable cause plus exigent circumstances in order to make a lawful entry into a home. The Court of Appeal's ruling to the contrary, and consequent failure to assess whether

7. U.S. Library of Congress, *Thomas, Legislation Related to the Attack of September 11, 2001* (Oct. 30, 2002), *at* http://thomas.loc.gov/home/terrorleg.htm.

8. United States v. On Lee, 193 F.2d 306, 315-16 (2d Cir. 1951) (Frank, J., dissenting), *aff'd*, 343 U.S. 747 (1952).

9. Payton v. New York, 445 U.S. 573, 589 (1980) (quoting U.S. CONST. amend. IV).

10. *See, e.g.*, Kyllo v. United States, 533 U.S. 27 (2001) (finding that the warrantless use of a thermal imaging device by law enforcement officials to scan the defendant's home was unreasonable); Illinois v. McArthur, 531 U.S. 326 (2001) (holding that police officers acted reasonably by briefly detaining the defendant while they sought a warrant to search his home).

11. *Payton*, 445 U.S. at 590.

12. 536 U.S. 635 (2002).

13. *Id*. at 636.

14. *Id*.

15. *Id*.

16. *Id*. at 637.

17. *Id*.

exigent circumstances were present in this case, violated *Payton*."[18]

The bright line established by *Payton* and the Court's clear and unanimous decision in *Kirk* leave little room for interpretation. For the military, this line is made even clearer for apprehensions in private dwellings. Rule for Courts-Martial (RCM) 302(e)(2)[19] gives specific guidance for military practitioners. Had Kirk been a service member who lived in a private dwelling off of a military installation, military authorities would have needed an arrest warrant issued by competent civilian authority to apprehend him in his apartment.[20] Had he not been a resident in the home, military authorities would have needed both an arrest warrant *and* a search warrant, *each* issued by competent civilian authority.[21] The importance of understanding the requirements of RCM 302(e)(2) is highlighted in the next case.

United States v. Khamsouk[22]

Agents from the Naval Criminal Investigative Service (NCIS) began an investigation into several fraudulent checks. Seaman Apprentice Khamsouk, U.S. Navy, soon became a suspect.[23] The agents learned that Khamsouk had been absent without authority from his unit for several days, and his commander later issued a Department of Defense (DD) Form 553, listing him as a deserter.[24] An informant told the agents that the appellant was staying at Hospital Corpsman Second Class (HM2) Guest's home off the installation. The informant also said the appellant was leaving the residence at a particular time. The agents knew from other witnesses that Khamsouk carried around a black knapsack with stolen credit cards and receipts. The agents went to HM2 Guest's house for surveillance and to wait for the appellant to leave. Although they had a copy of the appellant's DD Form 553, the agents believed they needed a search warrant to enter HM2 Guest's home. The agents waited until HM2 Guest and another man left the house. The agents asked HM2 Guest for consent to enter the home, but HM2 Guest declined. He did offer to try to get the appellant out of his home.[25]

One agent stood outside the entrance while HM2 Guest entered the house and called for the appellant.[26] Although there was a dispute as to precisely what happened next, it was clear that the agent at the front door entered the house when he saw the appellant. The agents apprehended the appellant and read him his Article 31, Uniform Code of Military Justice (UCMJ), rights. The appellant consented to a search of his "personal bags, knapsack(s), and other luggage."[27] Eventually, the agents obtained a confession from the appellant that he used the stolen credit cards and credit card numbers found during the consensual search. At trial, the appellant moved to suppress all evidence the agents found following their entry into HM2 Guest's home. The appellant claimed that the agent's entry violated the Fourth Amendment and RCM 302. The military judge determined that the DD Form 553 was the equivalent of an arrest warrant, that the appellant was not a "resident" under RCM

18. *Id*.

19. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 302(e)(2) (2002) [hereinafter MCM].

20. *Id*. R.C.M. 302(e)(2)(D)(i).

21. *Id*. R.C.M. 302(e)(2)(D)(ii) (emphasis added).

22. 57 M.J. 282 (2002); *see* Major Michael R. Stahlman, *New Developments in Search and Seizure: A Little Bit of Everything*, ARMY LAW., May 2001, at 29 [hereinafter Stahlman 2001] (discussing the lower court's published decision). The CAAF's subsequent review of—and disagreement with—the service court's opinion illustrates the drawbacks of discussing service court decisions before CAAF review.

23. *Khamsouk*, 57 M.J. at 284.

24. U.S. Dep't of Defense, DD Form 553, Deserter/Absentee Wanted by the Armed Forces (Sept. 1989) [hereinafter DD Form 553]. The current edition of DD Form 553 is dated November 2002. The "information" page of the form describing the authority to apprehend in the appellant's case is the same as the current form. The paragraph reads:

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

U.S. Dep't of Defense, DD Form 553, Deserter/Absentee Wanted by the Armed Forces (Nov. 2002).

25. *Khamsouk*, 57 M.J. at 284.

26. *Id*. at 285.

27. *Id*. Hospital Corpsman Second Class (HM2) Guest also consented to a search of his home, but only after the NCIS agent had entered the home without HM2 Guest's permission. *Id*.

302, and that the appellant's consent to the search following his apprehension was valid.[28]

The Navy-Marine Corps Court of Criminal Appeals (NMCCA) agreed with the military judge that the DD Form 553 was the equivalent of a civilian arrest warrant.[29] The court limited this determination to cases involving apprehension for desertion only. This determination, however, was short-lived. In a deeply fractured opinion, the CAAF found that the form was not the equivalent of a civilian arrest warrant.[30]

Unfortunately for military practitioners, the lack of consensus in *Khamsouk* dilutes its value as precedent.[31] An in-depth analysis of all five separate opinions would not be helpful. On the other hand, one aspect of the opinion worth discussion is the majority outcome on the question of the DD Form 553 as an arrest warrant and its practical implications. First, military authorities clearly cannot use the form to enter private off-post dwellings to apprehend service members, regardless of whether the member sought is a "resident" of the dwelling under RCM 302(e)(2).[32] Second, the court's holding that the "DD Form 553 is not the functional equivalent of a civilian arrest warrant in the context of entering a civilian home" goes beyond limiting just military officials.[33] The holding applies with the same force to civilian officials using the DD Form 553 as the sole basis for apprehension or arrest. As the NMCCA noted, deserters and absentees are routinely apprehended with just the DD Form 553, commonly referred to as a "military warrant," in private homes.[34] Accordingly, judge advocates in all the services must ensure that both military and civilian officials executing "military warrants" are aware that they do not authorize entry into private homes. At the very least, they must still obtain arrest warrants from competent civilian authorities. If the service member is not a resident of the private dwelling, they will also have to obtain a search warrant in addition to the arrest warrant, both from a competent civilian authority.[35] In addition, although the CAAF limited its holding to "off-base civilian homes," a strong argument can be made that *Khamsouk* applies with equal weight to housing under military control, on or off an installation.[36]

The last significant implication of *Khamsouk* that deserves attention relates to what the court did not say. What should the NCIS agents have done to enter HM2 Guest's home to apprehend the appellant? Four agents were involved in the surveillance of the home.[37] After they intercepted HM2 Guest and his companion, they had more than enough agents to prevent the appellant from escaping. They also had more than enough information about the appellant's illegal activities to seek both search and arrest warrants from the civilian authorities. With these warrants, they could have lawfully entered HM2 Guest's home to search for the appellant and evidence of his crimes, depending on the scope of the warrant issued. They could also have lawfully apprehended the appellant in HM2 Guest's home. Although coordinating this would have taken time and some effort, the agents would have saved themselves from having to account for their actions in court later.[38] At the very least, their efforts to go the extra yard would have enhanced the govern-

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28. *Id*. at 286.

29. United States v. Khamsouk, 54 M.J. 742, 747 (N-M. Ct. Crim. App. 2001).

30. *Khamsouk*, 57 M.J. at 289-90. On the issue of whether the DD Form 553 was the equivalent of a civilian arrest warrant, three judges said "no" (Judges Baker, Geirke, and Effron) and two judges said "yes" (Chief Judge Crawford and Senior Judge Sullivan). Judge Baker wrote the court's opinion and the remaining judges all filed separate opinions, concurring in part and dissenting in part. The case was remanded for analysis of post-trial processing delay in light of *United States v. Tardif*, 57 M.J. 219 (2002).

31. The CAAF did cite *Louisiana v. Kirk*, 536 U.S. 635 (2002). In *Kirk*, the Supreme Court reversed the Louisiana Court of Appeal because the lower court concluded "that *exigent circumstances* were not required to justify the officer's conduct." *Id*. at 637 (emphasis added). In *Khamsouk*, the CAAF seemed to brush aside the possibility that the NCIS agent's entry into HM2 Guest's home was justified by exigent circumstances. Chief Judge Crawford, however, did not have to address the DD Form 553 issue because she concluded that exigent circumstances were present. *Khamsouk*, 57 M.J. at 295. Despite Chief Judge Crawford's convincing analysis, it appears that Judge Baker, writing for the court, did not want to disturb the military judge's ruling that exigent circumstances did not exist at the time of the agent's entry into HM2 Guest's home. *Id*. at 293.

32. *Khamsouk*, 57 M.J. at 289-90.

33. *Id*.

34. *Khamsouk*, 54 M.J. at 747 n.2. To a limited extent, the CAAF concurred, commenting that "[t]he DD Form 553, or its predecessor, has long been used to authorize civilian law enforcement to apprehend the named individual as a deserter under Article 8, UCMJ," but the court emphasized that there is no authority that "stands for the proposition that either military or civilian officials acting pursuant to a request to apprehend a military absentee, may do so by entering a civilian residence without a civilian warrant." *Khamsouk*, 57 M.J. at 289 (citations omitted).

35. *Khamsouk*, at 289. The CAAF noted that its opinion does not disturb the authority of military and civilian officials to apprehend a service member in a *public* place using just a DD Form 553. *Id.* at 290 n.11.

36. *Id*. at 289-90. This argument becomes even stronger when one considers the language in RCM 302(e)(2) defining "private dwellings." The definition does not make a distinction between dwellings on or off an installation. *See* MCM, *supra* note 19, R.C.M. 302(e)(2).

37. *Khamsouk*, 57 M.J. at 284.

ment's position regarding the appellant's consent following the agents' unlawful entry of the home.

Khamsouk's main lesson for military practitioners is simple to state, but much harder to implement. Law enforcement officials must understand and strictly follow the requirements of *Payton* and RCM 302(e)(2) involving entry into private homes. The difficult part of this lesson lies with its implementation. Judge advocates providing legal advice to military investigators and military police must incorporate *Khamsouk*, *Kirk*, and RCM 302(e)(2) into their training for law enforcement personnel. More importantly, when an investigation has the potential to reach into a civilian home, a legal advisor must take affirmative steps to highlight the need for coordination with civilian authorities, even if surveillance is all that is contemplated.[39]

Suspicionless Searches and Seizures

Buses: United States v. Drayton[40]

In *Drayton*, the Supreme Court confronted the question of whether bus passengers were "seized" under the Fourth Amendment during a routine drug interdiction by police officers. In particular, the Court addressed whether there was a "*per se* rule that evidence obtained during suspicionless drug interdiction efforts aboard buses must be suppressed unless the officers advise passengers of their right not to cooperate and to refuse consent to search."[41]

The defendants, Brown and Drayton, were on a Greyhound bus traveling from Florida to Detroit, Michigan.[42] During a scheduled stop, three Tallahassee police officers boarded the bus as part of a routine interdiction effort. The officers were armed but in plain clothes with their badges displayed. One officer went to the back of the bus and remained facing to the front, a second sat kneeling and facing passengers on the driver's seat, while the third went to the back of the bus. The third officer began asking passengers questions about their travels and whether they had luggage in the overhead compartment above their seats. He continued from the back of the bus toward the front. He avoided blocking the aisle while he spoke with passengers. While he had informed passengers of their right to refuse to cooperate on several earlier occasions, he did not do so on this occasion.[43]

The third officer approached Drayton, who was seated on the aisle with Brown in the window seat next to him. Standing behind them and about a foot away, the officer informed them who he was and that the officers were there to attempt to deter the illegal trafficking of drugs and weapons.[44] He also asked if they had any bags on the bus. Both responded by pointing to a single green bag in the overhead compartment. They allowed the officer to check the bag. The officer searched the bag, but did not find any contraband. The officer noticed that both Drayton and Brown were wearing heavy, baggy clothing that was unusual for the warm weather. Brown agreed to allow the officer to "check" his person. The officer felt several hard objects on the inside of Brown's thighs that he believed were drug packages based on his prior experience. The officers then handcuffed Brown and escorted him off the bus. The officer then asked Drayton for permission to "check" his person also. Drayton also consented, and the officer felt similar hard objects along his inner thighs. The packages on both Drayton and Brown turned out to be bundles of cocaine taped to their boxer shorts.[45]

The government charged Brown and Drayton with conspiracy to distribute and possession with the intent to distribute cocaine. At trial, both defendants moved to suppress the cocaine, claiming that their consent to search was invalid.[46] The United States District Court for the Northern District of Florida (District Court) denied both motions. The court found nothing coercive about the officers' actions and held that the defendants' consent was voluntary. The United States Court of Appeals for the Eleventh Circuit (Eleventh Circuit) disagreed; it reversed and remanded the cases to the District Court with directions to grant the motions. The Eleventh Circuit felt bound

38. In *Illinois v. McArthur*, 531 U.S. 326 (2001), two police officers were faced with circumstances similar to the facts in *Khamsouk*. The difference was that the police officers in *McArthur* obtained a search warrant before they entered a private home to search for evidence. *See* Stahlman 2001, *supra* note 22, at 27 (discussing *McArthur* and its practical implications).

39. The CAAF stressed the important limitations imposed on military law enforcement by noting the long-standing congressionally mandated restrictions under the Posse Comitatus Act (PCA), 18 U.S.C. § 1385 (2000). *Khamsouk*, 57 M.J. at 289 n.10.

40. 536 U.S. 194 (2002).

41. *Id*. at 251-52.

42. *Id*. at 197.

43. *Id*. at 198.

44. *Id*.

45. *Id*. at 199.

46. *Id*. at 199-200.

by precedent "that bus passengers do not feel free to disregard police officers' requests to search absent 'some positive indication that consent could have been refused.'"[47] The Supreme Court granted certiorari and reversed the Eleventh Circuit, concluding that the defendants "were not seized and [that] their consent to the search was voluntary."[48]

The Supreme Court found that the lower court misapplied *Florida v. Bostick*.[49] In *Bostick*, the Court established a framework for analyzing seizures in bus cases: (1) whether the officer removed his weapon and used it in a threatening way; and (2) whether the officer advised passengers that they could refuse to consent.[50] By relying as it did on this second factor, the Eleventh Circuit created a *per se* rule that officers must inform passengers of their right to refuse to cooperate. The Court, applying *Bostick*, concluded that "the police did not seize [Drayton and Brown] when they boarded the bus and began questioning passengers."[51]

The Court then turned to the question of whether the defendants' consent to the suspicionless search was voluntary.[52] Relying on most of the same facts it applied to the seizure issue, the Court again determined that the lower court erred by focusing on the officers' failure to advise passengers that they could refuse to cooperate or consent to be searched. Looking to its own well-established precedent, the Court "rejected in specific terms the suggestion that police officers must always inform citizens of their right to refuse when seeking permission to conduct a warrantless consent search."[53] The notification of this right to refuse is just one factor to consider. The proper test is whether the consent to search is voluntary under the totality of the circumstances; courts should not give extra weight to whether officers advised the suspect about his right to refuse consent. The Court held that "[a]lthough [the officers] did not inform [the defendants] of their right to refuse the search, [they] did request permission to search, and the totality of the circumstances indicates that their consent was voluntary, so the searches were reasonable."[54]

Although few military practitioners will ever encounter a bus case, *Drayton* is still important because it offers valuable insight into the Court's perspective on suspicionless interactions between police and the public. Police officers routinely encounter citizens for a wide variety of reasons. Whether they are keeping the peace, conducting routine street patrols, or just curious, police officers "do not violate the Fourth Amendment's prohibition of unreasonable seizures merely by approaching individuals on the street or in other public places and putting questions to them if they are willing to listen."[55] These routine encounters are a necessary tool for police to be able to protect the public. To hold otherwise would severely limit police from performing their vital function of protecting the public.

As the Court made clear, the proper measure for determining when an encounter becomes an unlawful seizure is whether the defendant's cooperation is induced by police coercion. Did the police officer draw his weapon? Was the citizen's freedom of movement restricted by force or the threat of force? How long was the encounter and where did it occur? The essential test is, "If a reasonable person would feel free to terminate the encounter, then he or she has not been seized."[56] Here, the Court's

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47. *Id*. at 200 (quoting United States v. Washington, 151 F.3d 1354, 1357 (11th Cir. 1998)).

48. *Id*.

49. 501 U.S. 429 (1991).

50. *Drayton*, 536 U.S. at 203-04.

51. *Id*. The Court noted:

> The officers gave the passengers no reason to believe that they were required to answer the officers' questions. When [the third officer] approached [the defendants], he did not brandish a weapon or make any intimidating movements. He left the aisle free so that [the defendants] could exit. He spoke to passengers one by one and in a polite, quiet voice. Nothing he said would suggest to a reasonable person that he or she was barred from leaving the bus or otherwise terminating the encounter.

Id.

52. *Id*. at 206.

53. *Id*. (citing Ohio v. Robinette, 519 U.S. 33, 39-40 (1996); Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973)).

54. *Id*. at 207.

55. *Id*. at 200.

56. *Id*. Although *Drayton* was not a unanimous decision, six justices formed the majority (Chief Justice Rehnquist, and Justices Kennedy, O'Connor, Scalia, Thomas, and Breyer). There were no separate concurring opinions. The three dissenting justices (Justices Souter, Stevens, and Ginsburg) believed that this encounter amounted to a seizure. Had the officers been performing their "interdiction" effort in an airport, the dissenting justices suggested that they would have joined the majority. Distinguishing this case from suspicionless police activity in airports, the dissent states, "The commonplace precautions of air travel have not, thus far, been justified for ground transportation, however, and no such conditions have been placed on passengers getting on trains or buses." *Id*. at 208.

determination was that a reasonable person would not have felt that his freedom was restricted to the extent that he was "seized" under the Fourth Amendment.[57]

Inspections: United States v. Green[58]

Gate inspections and roadblocks inside military installations are rarely the central focus of published opinions from military appellate courts. Commanders have broad inherent authority to protect government personnel and property. Military Rule of Evidence (MRE) 313(b) codifies this broad authority.[59] Whenever a commander's authority to conduct any type of administrative inspection is questioned, particularly by federal or state courts, judge advocates pay attention. In *Green*, the United States Court of Appeals for the Fifth Circuit scrutinized Fort Sam Houston's checkpoint program.[60]

Emma Lucille Green (Green) was stopped by military police operating a "Force Protection Vehicle Checkpoint," at Fort Sam Houston in San Antonio, Texas.[61] The general purpose of the checkpoint was for security of the installation and traffic safety.[62] The military police followed standard operating procedures and stopped Green's vehicle because it was the sixth vehicle to pass the checkpoint. They asked for her driver's license and proof of insurance; she could not produce either, in violation of Texas law. When the military police checked her license plate number and name, the military police found that Green was not the registered owner of the car and had no driver's license. The military police asked Green to get out of the car, but she attempted to flee instead. The military police then apprehended her, impounded the car, and conducted a standard inventory search of the car. The inventory search yielded rocks of crack cocaine on the front seat of the car. The government charged Green with possession of cocaine with intent to distribute. At trial, she moved to suppress the cocaine, but the court denied the motion. Green was convicted and sentenced to twenty-four months' confinement.[63]

On appeal to the Fifth Circuit, Green claimed the checkpoint seizure was unreasonable and tainted the subsequent inventory search by military police.[64] The court initially stressed that it was only addressing whether the purpose of the checkpoint was lawful. Following the Supreme Court's latest guidance on

57. *Id*. The Court added:

> There was no application of force, no intimidating movement, no overwhelming show of force, no brandishing of weapons, no blocking of exits, no threat, no command, not even an authoritative tone of voice. It is beyond question that had this encounter occurred on the street, it would be constitutional.

Id. at 204.

58. 293 F.3d 855 (5th Cir. 2002), *cert. denied*, 123 S. Ct. 403 (2002).

59. MCM, *supra* note 19, MIL. R. EVID. 313(b). Under the rule, "inspection" is defined as:

> [A]n examination of the whole or part of a unit, organization, installation, vessel, aircraft, or vehicle, including an examination conducted at entrance and exit points, conducted as an incident of command the primary purpose of which is to determine and to ensure the security, military fitness, or good order and discipline of the unit, organization, installation, vessel, aircraft, or vehicle.

Id. In *United States v. Gudmundson*, 57 M.J. 492 (2002), the CAAF did not grant review of an inspection issue considered by the Air Force Court of Criminal Appeals (AFCCA). In its unpublished opinion, the AFCCA looked at a urinalysis inspection program at Little Rock Air Force Base. United States v. Gudmundson, No. S29944, 2001 CCA LEXIS 349 (A.F. Ct. Crim. App. Dec. 6, 2001) (unpublished). Dubbed "Operation Nighthawk 2000," the inspection program required the first one hundred service members entering the base from 0300 to 0600 on a Saturday morning to submit to urinalysis testing. The commander ordering the inspection was concerned about the increase in the use of illegal drugs at off-base "rave" parties during weekends. The AFCCA ultimately determined that the inspection's primary purpose, "to ensure the security, military fitness, or good order and discipline of the Little Rock AFB and personnel assigned there," was proper under MRE 313(b). *Id.* at *4. Considering the rise in popularity of ecstasy and other illegal drugs at "rave" parties, the Air Force commander's novel approach is commendable. Many new illegal drugs like ecstasy have a very short detection window. Conducting such short-notice inspections, particularly over weekends, is a lawful and effective means to curb the current rise in certain illegal drugs like ecstasy. *See* Miguel Navrot, *Kirtland Adding Drug Tests*, ALBUQUERQUE J., Aug. 28, 2002, at 1, *available at* http://ebird.dtic.mil/Aug2002/s20020830kirtland.htm.

60. *Green*, 293 F.3d at 856.

61. *Id*. When Ms. Green was stopped, the post was an "open base." Although this was a consideration weighing on its decision, the court commented that "while we might agree that on an open military base the range of law enforcement activity that does not violate the Fourth Amendment is *narrowed* as compared to a closed base, that does not mean that the security of the installation and its personnel are not a substantial government interest." *Id.* at 861 (emphasis added). Fort Sam Houston is now a "closed base." *Id.*

62. *Id.* at 859. Specifically, the "goals" of the checkpoint program were to: "1. protect national security by deterring domestic and foreign acts of terrorism; 2. maintain readiness and effectiveness; 3. deter the entrance of persons carrying explosives; 4. protect federal property; and 5. ensure the safety of soldiers, civilian employees, retirees and family members on the installation." *Id.* at 858.

63. *Id*. at 856-57.

64. *Id*. at 857 n.5.

roadblocks in *Indianapolis v. Edmond*,[65] the court stated, "To be valid a checkpoint, then, must reach beyond general crime control—either targeting a special problem such as border security or a problem peculiar to the dangers presented by vehicles."[66] Distinguishing the purpose of the checkpoint in *Green* from the improper purpose of the roadblock in *Edmond*, the court determined there were two substantial differences between them:

> First, the protection of the nation's military installations from acts of domestic or international terrorism is a unique endeavor, akin to policing our borders, and one in which a greater degree of intrusiveness may be allowed. Second, those cases focusing not on unique, national challenges, but instead on road safety, are concerned with dangers specifically associated with vehicles and therefore justify suspicionless checkpoint procedures. Since we know from painful experience that vehicles are often used by terrorists to transport and deliver explosives in the form of "car bombs," and that military installations have historically faced greater risk than civilian communities of such a bombing, vehicles pose a special risk.[67]

After determining that the checkpoint's purpose was proper and distinct from general law enforcement, the court turned to the question of whether the procedures used were reasonable under the Fourth Amendment.[68] Whether or not the checkpoint procedures complied with Fourth Amendment requirements, the court looked "to balance the objective and subjective intrusion on the individual against the Government interest and the extent to which the program can reasonably be said to advance that interest."[69] Specifically, the court found that the initial stop by military police met the objective prong in that it lasted only three to five minutes, and that the police only asked for Green's license and proof of insurance. The subjective prong was likewise met in that there was little potential for the checkpoint procedure to generate "fear and surprise."[70] The checkpoint was clearly marked, everyone entering the post was warned, and Green was not singled out or otherwise treated differently from other individuals who were stopped by the military police.

The court balanced the level of the intrusion with the military's interest in conducting the checkpoint inspections and then measured the "reasonable effectiveness" of the checkpoint procedure.[71] First, the minimal intrusion on Ms. Green was no more intrusive than many routine roadway license checkpoints that other federal circuits have held to be constitutional.[72] Second, the court found a substantial government interest to balance against the minimal intrusion, finding the "additional reasons the military may wish to conduct such suspicionless stops [weighed] even more strongly in favor of the reasonableness of the search [as compared to other state license checkpoints]."[73] Finally, after finding that the balancing test favored the military's significant interests, the court considered whether the checkpoint procedure reasonably advanced the purpose for the program. Noting the deference courts traditionally give the military, the court found that the checkpoint's procedure "reasonably advance[d] the purposes of the checkpoint because it deter[red] individuals from driving while unlicensed and or transporting weapons and thereby endangering base personnel."[74]

Green provides military practitioners with a strong, well-reasoned opinion that reviews an existing checkpoint program. The court's clear and methodical reasoning left no stone unturned. When the Supreme Court decided *Indianapolis v. Edmond*, there was some concern in military circles that current installation inspection programs might not pass muster. *Green*'s application of *Edmond* put most, if not all, of those concerns to rest. Still, judge advocates in a position to review installation inspection or roadblock procedures should ensure

65. 531 U.S. 32 (2000). *See* Lieutenant Colonel Michael R. Stahlman, *New Developments in Search and Seizure: More than Just a Matter of Semantics*, ARMY LAW., May 2002, at 40; Stahlman 2001, *supra* note 22, at 25.

66. *Green*, 293 F.3d at 858.

67. *Id.* at 859 (citations omitted).

68. *Id*. at 860.

69. *Id*. (citing Michigan Dep't of State Police v. Sitz, 496 U.S. 444 (1990)).

70. *Id*. (citing *Sitz*, 496 U.S. at 452).

71. *Id.* at 860.

72. *Id.* at 861 (citing United States v. Davis, 270 F.3d 977, 980 (D.C. Cir. 2001); United States v. Brugal, 209 F.3d 353, 357 (4th Cir. 2000); United States v. Galindo-Gonzales, 142 F.3d 1217, 1222 (10th Cir. 1998); United States v. Trevino, 60 F.3d 333, 335-36 (7th Cir. 1995); Merrett v. Moore, 58 F.3d 1547, 1551 (11th Cir. 1995)).

73. *Id*. Regarding the military's interest, Ms. Green attempted to claim there was a constitutional difference between inspections conducted at entry points to a military installation and similar inspections or roadblocks inside an installation. The court dismissed her position, showing that the cases she raised made no such distinction. *Id*.

74. *Id*. at 862.

that the underlying purpose for such programs is distinguishable from the general interest in controlling crime. As *Green* shows, installation security is an administrative purpose that can pass constitutional scrutiny. This is particularly significant today because of the increased threat of terrorist activity within our borders.[75]

Consent

Scope of Consent: United States v. Greene[76]

Greene was the subject of a government interlocutory appeal to the NMCCA. In a pretrial motion hearing, the defense moved to suppress images of child pornography found on the accused's laptop computer and storage discs. Agents from the NCIS seized the computer after the accused signed a consent form giving NCIS agents permission to search his property. Although the agents never viewed any images of child pornography during the search, they seized the computer and numerous discs. Government experts took nearly three months to review the evidence and make their report. The accused never requested that the government return his property. The military judge determined that the government "greatly and unreasonably exceeded the consent to search given them by the accused," and granted the defense motion to suppress.[77]

After adopting the military judge's detailed findings of fact, the NMCCA focused on the consent form the accused signed. The form stated, "I hereby give [the agents] my permission to remove and retain any property or papers found during the search which are desired for investigative purposes."[78] The court found that the military judge erred by focusing on the language of the form that gave the agents permission to search his property on the date the form was signed. The court concluded the accused's consent was voluntary and the search and subsequent seizure were reasonable.[79]

Although *Greene* provides no "new developments" in terms of search and seizure law, it does have important practical implications. The court declined to draw a bright line, but warned that "an excessively long period of retention, following a lawful seizure, could be unreasonable."[80] The court recognized the problem posed in this case, where assets available to conduct forensic analysis on the computer and related evidence were limited. A significant backlog in computer cases requiring forensic analysis compounded the problem.[81] This problem is nothing new in any of the services. Accordingly, military practitioners need to be watchful in cases needing computer forensic analysis, particularly when seized evidence is retained beyond three months. At the very least, government counsel should keep track of reasons for excessive delay well before it becomes a problem.

Location of the Consenting Party: United States v. Garcia[82]

In a case of first impression, the NMCCA held that "an accused's presence and explicit refusal to consent is 'constitutionally insignificant,' so long as the consenting co-tenant has equal access or control over the premises to be searched."[83] Naval Criminal Investigative Service agents apprehended Staff Sergeant Garcia (Sgt.) outside his home based on information that he was involved in several armed robberies at or near Camp Lejeune, North Carolina. The agents took him inside the house with his consent because they were attracting too much attention outside. The agents did a brief security sweep of the home and then asked the accused for permission to conduct a thorough search. He declined. Later that day, the agents obtained consent to search the home from the accused's wife, whom city police arrested at her work place. She consented to another search about a week after the initial search. Evidence found during the searches led to the discovery of stolen property and weapons used in the armed robberies. Staff Sergeant Garcia moved to suppress the evidence from the searches; the court

75. Another, more subtle, message lies with the court's deference to the military. Although military deference has a strong tradition in federal and state courts, *Green* adds one more stone to its foundation. *See id.* at 862 n.2 (citing Dep't of the Navy v. Egan, 484 U.S. 518, 530 (1988)).

76. 56 M.J. 817 (N-M. Ct. Crim. App. 2002), *petition for rev. denied*, 57 M.J. 463.

77. *Id*. at 822.

78. *Id*.

79. *Id*. at 824. In a very similar case, a federal district court came to the same conclusion regarding the scope of consent following seizure of a computer and related evidence. United States v. Al-Marri, 230 F. Supp. 2d 535 (S.D.N.Y. 2002).

80. *Greene*, 56 M.J. at 823 n.4.

81. *Id*. at 823-24. Based on the testimony of two NCIS agents, the court noted that there were only two forensic experts covering a twenty-two state area and that "[s]tandard procedure in such investigations calls for shutting the computer down, transporting it to the forensic analysis site, copying the hard drive, and then conducting careful forensic analysis. All of this must be done by, or under the supervision of, a trained computer forensic analyst." *Id.* The court also looked at federal cases where the same technical problems and backlog exist. *See* Guest v. Leis, 255 F.3d 325 (6th Cir. 2001); United States v. Upham, 168 F.3d 532 (1st Cir. 1999); United States v. Scott-Emuakpor, No. 1:99-CR-138, 2000 U.S. Dist. LEXIS 3118, slip op. at 19 (W.D. Mich. Jan. 25, 2000)).

82. 57 M.J. 716 (N-M. Ct. Crim. App. 2002).

83. *Id*. at 719-20.

denied the motion, convicted him, and sentenced him to 125 years' confinement, a dishonorable discharge, forfeiture of all pay and allowances, a $60,000 fine, and reduction to E-1. On appeal, SSgt. Garcia claimed the evidence found during the searches should have been suppressed. He claimed that because he was present at the home at the time of the search, his refusal to give consent nullified his wife's consent.[84]

The NMCCA tested for "plain error" because the trial defense counsel did not raise this particular objection at trial.[85] Finding no error, the court said, "There is no reasonable expectation of privacy to be protected under [these] circumstances. We cannot see how the additional fact of Appellant's initial refusal to consent in any way lessened the risk assumed that his co-occupant would consent."[86] Specifically, SSgt. Garcia claimed his on-premises denial of permission to search controlled over his wife's off-premises consent, but conceded she had the same authority over the home. He cited *United States v. Matlock*,[87] in which the Supreme Court found "that the consent of one who possesses common authority over premises or effects is valid as against the absent, nonconsenting person with whom that authority is shared."[88] Unfortunately for Staff Sergeant Garcia, the NMCCA did not agree that the converse of *Matlock* was the law[89] and affirmed the findings and sentence.[90]

It would be difficult to overstate the impact of *Garcia* for judge advocates and military criminal investigators. Although the CAAF has yet to grant review, *Garcia* sends a clear signal that at least one service court believes government agents may seek permission to search from an off-premises co-tenant after an on-premises co-tenant refuses. Based on the considerable support the NMCCA used to fortify its decision, the CAAF will likely agree with the lower court.[91]

Military Drug Testing[92]

> *To be clearly erroneous, "it must be 'more than just maybe or probably wrong; it must . . . strike us as wrong with the force of a five-week-old, unrefrigerated dead fish.'"*[93]

All was relatively quiet in the area of military drug testing this year. Certainly, there were no new cases that had the impact of *Campbell*[94] or *Green*.[95] Except for the discussion on permissive inferences in urinalysis cases below, the rest of the section touches on military drug testing through the Military Rules of Evidence.

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84. *Id.* at 718-19. At trial, the appellant argued that the agents entered his home without his permission, that neither he nor his wife consented, and that even if she did, the agents exceeded the scope of her consent. The military judge found that Staff Sergeant Garcia's wife consented to the searches, that the agents did not exceed the scope of the consent, and that the evidence would have been inevitably discovered absent the consent. *Id.*

85. *Id*. at 719.

86. *Id*. at 720 (quoting United States v. Sumlin, 567 F.2d 684, 687 (6th Cir. 1977)).

87. 415 U.S. 164 (1974).

88. *Garcia*, 57 M.J. at 719 (quoting *Matlock*, 415 U.S. at 170).

89. *Id*. at 720.

90. *Id*. at 732.

91. This, of course, assumes that the CAAF grants review. The NMCCA found that a majority of appellate cases directly or indirectly supported its opinion, citing fifteen different cases from the same number of state and federal jurisdictions. *Id*. at 720 (citing United States v. Morning, 64 F.3d 531, 536 (9th Cir. 1995); United States v. Donlin, 982 F.2d 31, 33 (1st Cir. 1992); United States v. Baldwin, 644 F.2d 381, 383 (5th Cir. 1981); United States v. Hendrix, 595 F.2d 883, 885 (D.C. Cir. 1979); United States v. Sumlin, 567 F.2d 684, 687 (6th Cir. 1977); Charles v. Odum, 664 F. Supp. 747, 751-52 (S.D.N.Y. 1987); People v. Sanders, 904 P.2d 1311 (Colo. 1995); Cranwell v. Mesec, 890 P.2d 491, 501 n.16 (Wash. Ct. App. 1995); State v. Ramold, 511 N.W.2d 789, 792-93 (Neb. Ct. App. 1994); Laramie v. Hysong, 808 P.2d 199 (Wyo. 1991); State v. Douglas, 498 A.2d 364, 370 (N.J. Super. Ct. App. Div. 1985); People v. Haskett, 640 P.2d 776, 786 (Cal. 1982); *In re* Anthony F., 442 A.2d 975, 978-79 (Md. 1982); State v. Frame, 609 P.2d 830, 833 (Or. Ct. App. 1980); People v. Cosme, 397 N.E.2d 1319, 1322 (N.Y. 1979)).

92. The Supreme Court decided one drug testing case last year. In *Board of Education v. Earls*, 536 U.S. 822 (2002), the Court broadened the scope of authority for public schools to require drug testing of students. Previously, the Court had only allowed drug testing of athletes. *See* Veronia School Dist. 47J v. Acton, 515 U.S. 646 (1995). In *Earls*, the Court held that it was reasonable to require all students participating in competitive extracurricular activities to submit to drug testing. Although this article does not discuss *Earls* at length, the decision is still significant in that it gives military practitioners another example of the Court's willingness to approve testing programs that fall under the "special needs" category of cases. Like drug testing in public schools, administrative inspections in the military have been characterized under "special needs." *See, e.g.*, United States v. Taylor, 41 M.J. 168, 171 (C.M.A. 1994).

93. United States v. Brinton, No. 200001971, 2002 CCA LEXIS 307, at *4 (N-M. Ct. Crim. App. Dec. 19, 2002) (quoting Parts and Elec. Motors Inc. v. Sterling Elec., Inc., 866 F.2d 228, 233 (7th Cir. 1993)). In *Brinton*, the NMCCA held that "[a] command's pre-existing policy to conduct a urinalysis on all returning unauthorized absentees is a valid inspection under [MRE] 313." *Id.* at *6.

94. United States v. Campbell, 50 M.J. 154 (1999) [hereinafter *Campbell I*], *supplemented on reconsideration*, 52 M.J. 386 (2000) [hereinafter *Campbell II*]; *see* Lieutenant Commander David A. Berger & Captain John E. Deaton, Campbell *and its Progeny: The Death of the Urinalysis Case*, 47 NAV. L. REV. 1 (2000); Major Walter M. Hudson & Major Patricia A. Ham, United States v. Campbell*: A Major Change for Urinalysis Prosecutions?*, ARMY LAW., May 2000, at 38.

For the Army, there were some changes concerning administrative separations and urinalysis testing procedures. The most important of these changes involved clarification of a conflict between *AR 600-85, The Army Substance Abuse Program* (ASAP),[96] and both *AR 635-200, Enlisted Separations*,[97] and *AR 135-178, Enlisted Administrative Separations*.[98] The current *AR 600-85* requires that all Active and Reserve Component soldiers who test positive for illegal drug use be processed for administrative separation, without exception.[99] No such requirement currently exists in the two separation regulations.[100] The clarification came from a Department of the Army message stating that "commanders will follow the guidance in *AR 600-85*. In this regard, it is emphasized that *AR 600-85* requires initiation of separation proceedings, but does not mandate discharge."[101] The other significant change was to the *Commander's Guide and Unit Prevention Leader (UPL) Urinalysis Collection Handbook*, dated 1 June 2002.[102] Many of the changes were made based on *AR 600-85*, which was updated on 1 October 2001.[103] The new handbook can be downloaded at the Army's Center for Substance Abuse Programs (ACSAP) Web site.[104]

Corroboration: United States v. Grant[105]

Staff Sergeant Grant was found unconscious at Incirlik Air Base, Turkey. He was taken to the military hospital, where urine was drawn from him to determine whether any intoxicating substance had caused his condition. Such tests were standard protocol in similar situations. The attending physician observed the collection of the urine and ordered hospital lab personnel to test it. The physician believed he would receive the results within hours; he was unaware that the urine had to be sent to the United States for testing. Eventually, the physician determined that SSgt. Grant was suffering from acute alcohol intoxication. The hospital treated him and released him the next day. After several weeks, the results of SSgt. Grant's urine sample arrived at the hospital. His urine tested positive for cannabinoids. He later confessed to military investigators that he used marijuana on several occasions. At trial, he objected to the government's offer of the positive urinalysis report as a business record under MRE 803(6).[106] Over defense objection, the military judge admitted the report for corroboration of the confession. Staff Sergeant Grant was convicted of wrongful use of a controlled substance in violation of Article 112a, UCMJ. The AFCCA affirmed, and the CAAF granted review. On appeal, SSgt. Grant claimed "that the drug screen report from the Armstrong lab was not admissible as a business record, and that the military judge should have treated the report in the same fashion as urinalysis reports admitted in the 'standard urinalysis case.'"[107]

The court first addressed whether there was a proper foundation for the report under MRE 803(6). The CAAF noted that it "has yet to address the foundation necessary to admit under [MRE 803(6)] a business record created by a third party not before the trial court, that is incorporated into the business records of the testifying party."[108] After reviewing authority from other federal jurisdictions, the CAAF concluded that "a record incorporated by a second entity may be admitted under [MRE 803(6)] on the testimony of a 'qualified witness' of the incorporating entity alone if certain criteria are met."[109]

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95. United States v. Green, 55 M.J. 76 (2001); *see* Lieutenant Colonel Michael R. Stahlman, *New Developments on the Urinalysis Front: A* Green *Light in Naked Urinalysis Prosecutions?*, ARMY LAW., Apr. 2002, at 14.

96. U.S. DEP'T OF ARMY, REG. 600-85, ARMY SUBSTANCE ABUSE PROGRAM (ASAP) (1 Oct. 2001) [hereinafter AR 600-85].

97. U.S. DEP'T OF ARMY, REG. 635-200, ENLISTED PERSONNEL (1 Nov. 2000) [hereinafter AR 635-200].

98. U.S. DEP'T OF ARMY, REG. 135-178, ENLISTED ADMINISTRATIVE SEPARATIONS (3 Dec. 2001) [hereinafter AR 135-178].

99. AR 600-85, *supra* note 96, para. 5-5a.

100. AR 635-200, *supra* note 97, para. 14-12c(2); AR 135-178, *supra* note 98, para. 12-1d.

101. Message, 161152Z Sep 2002, U.S. Dep't of Army (DAPE-MPE), subject: Clarifying Enlisted Separation Policy for Illegal Drug Abuse.

102. U.S. DEP'T OF ARMY, ARMY CENTER FOR SUBSTANCE ABUSE PROGRAMS, COMMANDER'S GUIDE AND Unit Prevention Leader (UPL) URINALYSIS COLLECTION HANDBOOK (1 June 2002).

103. *See* AR 600-85, *supra* note 96.

104. Army Center for Substance Abuse Programs Web site, *at* http://www.acsap.org (last visited Apr. 29, 2003).

105. 56 M.J. 410 (2002).

106. *Id.* at 413 (citing MCM, *supra* note 19, MIL. R. EVID. 803(6)).

107. *Id*.

108. *Id*. at 413-14.

Next, the court determined the relevance of the drug report. The appellant claimed that the government should have presented expert testimony to interpret the results of the report.[110] The CAAF disagreed, finding that the report was not offered or admitted for substantive proof. The government merely offered the report to corroborate SSgt. Grant's confession. To ensure the members understood this, the military judge instructed them that they should consider the report only for the limited purpose of corroborating the confession and not as substantive evidence. A related concern was the limited chain-of-custody evidence the government presented. The only witness who testified about the sample's chain of custody was the attending physician in Turkey. The court found that the "members were free to either accept or reject this evidence in determining the weight to be given the confession."[111]

Finally, the CAAF looked at SSgt. Grant's claim that the report was insufficient evidence to corroborate his confession under MRE 304(g).[112] Finding no error in admitting the report, the court held "that the independent evidence of recent marijuana ingestion contained in the Armstrong lab report raised a sufficient inference of truth so as to corroborate appellant's confessed use of marijuana."[113]

For trial counsel, *Grant* is a gold mine. Most trial counsel have encountered a urinalysis case where there were problems with the chain of custody or other evidentiary "issues" with the urinalysis report. *Grant* will help trial counsel plug evidentiary holes in urinalysis cases that no one else would have touched previously, at least when the accused admits to using a controlled substance.

Hair Analysis: United States v. Cravens[114]

In another "evidence" case, the CAAF confirmed its holding in an earlier decision that scientific analysis of hair is admissible.[115] Air Force SSgt. Cravens was pulled over by police in Whittier, California, for a minor traffic violation. As one officer approached the driver's side window, he noticed what he believed was a weapon bulging out of SSgt. Cravens' shirt. As he asked SSgt. Cravens some questions, the officer noticed that SSgt. Cravens was extremely nervous. The officer's training and experience led him to believe that SSgt. Cravens was under the influence of a stimulant. As the officer began to administer a field test based on his suspicion, SSgt. blurted out that he "did a line earlier."[116] Based on his observations and SSgt. Cravens's admission, the officer arrested him and took him to the sheriff's station for booking. At the station, SSgt. Cravens refused to provide a urine sample. Several days later, the sheriff's office informed agents from the Air Force Office of Special Investigations (AFOSI) of the arrest. The agents believed they did not have probable cause to obtain authorization for a urinalysis because of the passage of time. Instead, they sought a search authorization for a sample of SSgt. Cravens's hair. A military magistrate granted the search authorization. The sample tested positive for methamphetamine.[117]

On appeal to the CAAF, SSgt. Cravens claimed the AFOSI agents seized his hair without probable cause, and the government had not shown at trial that the hair analysis was relevant or reliable.[118] He also claimed the AFOSI agents provided false and misleading information to the magistrate about the accuracy of hair analysis. The court quickly dismissed this claim, relying on the military judge's determination, which was supported by the evidence.[119] Next, the court addressed the defense

109. *Id.* at 414 (quoting MCM, *supra* note 19, MIL. R. EVID. 803(6)). As to this criterion, the court explained, "First, the incorporating entity must obviously procure and keep the record in the normal course of its business. Second, the entity must show that it relies on the accuracy of the incorporated record in its business. Finally, there must be 'other circumstances indicating the trustworthiness of the document.'" *Id*. (quoting Air Land Forwarders, Inc. v. United States, 172 F.3d 1338, 1343 (Fed. Cir. 1999)).

110. *Id*. at 415.

111. *Id.* at 416.

112. *Id.*

113. *Id*. at 417.

114. 56 M.J. 370 (2002). There was another hair analysis case decided this year by a military appellate court, *United States v. Will*, No. 9802134, 2002 CCA LEXIS 218 (N-M. Ct. Crim. App. Sept. 27, 2002) (unpublished). In *Will*, the court held the military judge erred by not allowing the defense to present exculpatory evidence in the form of a negative hair analysis. *Id*. at *23.

115. *See* United States v. Bush, 47 M.J. 305 (1997).

116. *Cravens*, 56 M.J. at 372.

117. *Id*. at 371.

118. *Id*. at 374.

119. *Id*. at 375. The court refused to re-litigate whether the agent "knowingly and intentionally, or with reckless disregard for the truth, misled the military magistrate that a single use of drugs could be detected by hair analysis and that scientific and legal authorities supported the admission of such evidence." *Id*. (citing MCM, *supra* note 19, MIL. R. EVID. 311(g)(2)).

claim that there was no "substantial basis" for the magistrate's probable cause determination. Again, the court took little time to conclude that this claim lacked merit. The magistrate had been informed of SSgt. Cravens's admission, his behavior during the traffic stop that was consistent with stimulant use, and the scientific evidence that drug metabolites were detectable in hair.[120]

The court then turned to SSgt. Cravens's assertion that the hair analysis was not admissible under MRE 401 and 403.[121] His hair sample was taken four weeks after he allegedly used methamphetamine, and it was not properly segmented. Segmentation of hair for analysis allows a rough estimation of the date of ingestion. Staff Sergeant Cravens argued, therefore, that the analysis only determined that the alleged wrongful use occurred sometime during the previous four to five months. Accordingly, SSgt. Cravens argued that the hair analysis result was not relevant to the allegation he used the drug on or about the date charged in the specification. The court disagreed, finding the hair analysis provided sufficient proof which was proximate in time and was, "at the very least, relevant to corroborate his confession."[122]

Finally, SSgt. Cravens argued under MRE 403 that the science of hair analysis was too "nebulous" because the laboratory did not use a cutoff value. He claimed this allowed the forensic toxicologist analyzing his hair sample to guess whether it tested positive. Unfortunately, he did not have any legal authority to support his viewpoint. The court pointed to evidence in the record showing there was a "reporting limit set by the National Medical Services which undermines the key factual component of his scientific validity argument."[123]

Read together, *Cravens* and *Grant* provide a treasure trove of useful tools and ideas for trial counsel. Although in each case the accused confessed, most trial counsel understand that confessions alone are often not enough to guarantee convictions. Even if there is enough evidence to corroborate a confession under MRE 304(g), panel members may not necessarily give much weight to confessions, especially when the defense provides a plausible explanation for the accused to give a false confession. When, as in *Cravens*, the passage of time prevents investigators from showing sufficient probable cause to obtain a urine sample, hair analysis may provide the solution. At the very least, a positive hair analysis test result will buttress a weak confession. For defense counsel, *Cravens* is confirmation that hair testing is admissible in courts-martial and—assuming the result is negative—can be enough to plant the "reasonable doubt" seed in the minds of the fact finders.

The Permissive Inference Is Still Alive: United States v. Barnes[124]

On its fourth visit to the NMCCA, *Barnes* was finally affirmed.[125] The third visit resulted in the court setting the conviction aside.[126] After the CAAF decided *United States v. Green*,[127] however, the court returned the case to the NMCCA for another look.[128]

At trial, the government's only evidence was SSgt. Barnes's positive urinalysis result. The government laid a foundation for the report with a forensic chemist, the command's urinalysis coordinator, and the observer for the appellant's urinalysis. There was no other evidence of wrongfulness or knowledge during the government's case-in-chief. Staff Sergeant Barnes testified in his own defense. On cross-examination, he denied asking his neighbor for marijuana. The defense then offered the testimony of two officers and a non-commissioned officer to establish SSgt. Barnes's good military character and character for truthfulness. In rebuttal, SSgt. Barnes's neighbor testified that he smoked marijuana in SSgt. Barnes's presence, and that SSgt. Barnes had asked him for marijuana on two occasions. Staff Sergeant Barnes was convicted of wrongful use of marijuana and sentenced to receive a bad-conduct discharge.[129]

On this latest visit to the NMCCA, the court followed the CAAF's directive to apply *Green*, and held that the evidence

120. *Id*. at 375-76 ("This information constituted a legally sufficient basis for finding probable cause, as defined by [MRE] 315(f)(2) and our case law.").

121. *See* MCM, *supra* note 19, MIL. R. EVID. 401, 403.

122. *Cravens*, 56 M.J. at 376.

123. *Id*.

124. 57 M.J. 626 (N-M. Ct. Crim. App. 2002).

125. *Id*. at 628. In its lengthy and tortured history, *Barnes* lingered in the post-trial process for almost nine years. *See id*.

126. United States v. Barnes, 53 M.J. 624 (N-M. Ct. Crim. App. 2000). The NMCCA set aside the conviction based on the CAAF's holding in *Campbell I*, 50 M.J. 154 (1999).

127. 55 M.J. 76 (2001).

128. United States v. Barnes, 55 M.J. 236 (2001) (summary disposition).

129. *Barnes*, 57 M.J. at 628.

was both legally and factually sufficient to affirm the conviction.[130] The importance of the opinion lies in the court's interpretation of *Green*. The NMCCA emphasized three significant points from *Green*. First, the court noted the key role of the military judge as the gatekeeper. In this regard, the NMCCA quoted the CAAF's determination that "[a] urinalysis properly admitted under the standards applicable to scientific evidence, when accompanied by expert testimony providing the interpretation required . . . , provides a legally sufficient basis upon which to draw the permissive inference of knowing, wrongful use, *without testimony on the merits concerning the physiological effects*."[131] The importance of this point cannot be overstated. When the two *Campbell* decisions came out, all of the service courts interpreted them to mean that the permissive inference could not be based solely on a positive urinalysis report. There had to be some other evidence, which would include expert testimony on the physiological effects of the controlled substance used in the particular case. Despite this unanimity among the service courts, the CAAF said in *Green*, as quoted above, that the fact-finder could rely solely on a positive urinalysis to draw the permissive inference.[132]

Second, the testing procedure used in *Barnes* has been the Department of Defense (DOD) standard procedure for well over a decade. The NMCCA stated the test "did not involve a novel scientific procedure. Rather, the evidence introduced was produced from a set of testing procedures well-established within the scientific and legal communities as reliable when properly employed."[133] This second point is significant in the sense that it highlights that the CAAF did not expressly reverse its decision in *Campbell*. If and when the DOD begins using new testing procedures, *Campbell* will apply. What this means for practitioners is that they need to stay abreast of changes in DOD testing procedures. Trial counsel must be prepared to do more than just rely on a positive urinalysis report when the laboratory uses a new procedure. This is significant because the NMCCA is saying that the government may not get the benefit of the permissive inference when the testing procedure is novel and there is no "other" evidence to prove wrongfulness.

Third, the NMCCA pointed to the fact that Staff Sergeant Barnes did not object to the result of the urinalysis or the testimony of the government's expert.[134] In *Green*, the appellant likewise did not move to exclude either at trial.[135] For defense counsel, the message is clear; absent a properly preserved objection to expert testimony or the urinalysis report, military appellate courts will consider the issue to be forfeited on appeal, unless there is plain error. If the government employs a novel testing procedure, the failure of the defense counsel to object becomes even more significant. The defense counsel in *Campbell* did move to exclude the urinalysis report and the expert's testimony, which involved a novel testing procedure.[136] In *Campbell*, the CAAF found error and reversed.[137]

Conclusion

> *A powerful agent is the right word . . . . Whenever we come upon one of those intensely right words in a book or a newspaper the resulting effect is physical as well as spiritual, and electrically prompt: it tingles exquisitely around through the walls of the mouth and tastes as tart and crisp and good as the autumn-butter that creams the sumac-berry.*
>
> —Mark Twain[138]

New developments in Fourth Amendment law last year represented a smorgasbord of search and seizure topics. Although there were only a few changes—and these were minor adjustments to existing case law—they covered a wide variety of issues. On the other hand, legislative changes and executive branch initiatives spurred by the War on Terrorism continued the transformation of Fourth Amendment jurisprudence. To many, this transformation threatens basic rights at the heart of the Constitution.

The challenge for the government in this time of conflict is tremendous. The right of every citizen to be protected from

130. *Id.* at 633.

131. *Id.* at 630 (quoting *Green*, 55 M.J. at 81; United States v. Bond, 46 M.J. 86, 89 (1997); citing United States v. Murphy, 23 M.J. 31 (C.M.A. 1987)) (emphasis added).

132. *Id.*

133. *Id.* at 631.

134. *Id.*

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

136. *Id.* at 79.

137. *Campbell I*, 50 M.J. 154, 162 (1999).

138. Mark Twain, *William Dean Howells*, *at* http://www.twainquotes.com (last visited Apr. 1, 2003).

unwarranted government intrusions must be zealously protected. On the other hand, terrorism threatens the very existence of the nation. Without new and effective tools to fight the War on Terrorism, government officials tasked with protecting our vast society will be powerless. These tools, in the form of carefully crafted legislation and directives or initiatives from the executive branch, must maintain a delicate balance between individual liberty and national security.[139] A powerful agent in this war is law that strikes the right balance.

139. Senator Jack Reed, Address at the U.S. Naval Justice School, Newport, Rhode Island (Dec. 13, 2002), *available at* http://www.jag.navy.mil/html/whats_new.htm (restricted access). In part, Senator Reed stated:

> We are living in tumultuous times. September 11th left no doubt about that. The fight against terrorism and its role in the larger context of protecting American security should be foremost in our minds . . . . Not surprisingly, we find ourselves wrestling with and redefining the balance between respect for individual liberties and the need to protect our country from threats to our peace and our security. We must continue to seek a delicate balance between the need for security and respect for individual rights; the right to privacy versus the need to gather intelligence to prevent and deter terrorist acts; the right to equal protection versus identifying legitimate terrorist suspects. This is a daunting task, and the decisions we make today will have historical repercussions for decades to come.

Id. The challenge facing our courts is just as pivotal. The United States District Court for the Southern District of New York recently assessed the challenge as follows:

> In another case arising from the tragic events of September 11, 2001, this Court acknowledged the monumental challenges the courts will confront as the United States grapples to formulate an appropriate domestic response to the unique threats the nation has encountered in the wake of the terrorist attacks perpetrated on American soil. This task . . . will test our ability to balance national security interests with the nation's profound reverence for order and freedom and its enduring defense of individual liberties. Thus, the Court is mindful that special times call for special vigilance, and bid us all to summon our best to function at higher grades of performance in the face of ever greater risks and larger stakes. Insofar as we do not exhaust our stores of courage and continue to pay unremitting respect to America's founding values, we honor the task, serve our traditions, and leave undiminished the legacy under which our nation has flourished over the years: that of freedom guaranteed and guarded by the rule of law.

United States v. Al-Marri, 230 F. Supp. 2d 535, 536 (S.D.N.Y. 2002).

Annual Review of Developments on Instructions—2002[1]

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This article is the annual installment of developments on instructions and covers cases decided during the 2002 term of the Court of Appeals for the Armed Forces (CAAF).[2] Those involved in military justice may find this article helpful, but the primary resource for instructions issues remains the *Military Judges' Benchbook* (*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

Insanity: United States v. Martin[4]

Major (MAJ) Martin was an Army judge advocate assigned to Fort Sam Houston, Texas. During a period of twenty-eight months, he fraudulently obtained over $100,000 from his clients. At trial, MAJ Martin's defense was lack of mental responsibility, commonly referred to as the insanity defense. Article 50a of the Uniform Code of Military Justice (UCMJ) states that "[i]t is an affirmative defense in a trial by court-martial that, at the time of the commission of the acts constituting the offense, the accused, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or wrongfulness of his acts."[5]

Affirming the seemingly clear language in Article 50a, the CAAF held that the insanity defense is disjunctive—an accused lacks mental responsibility if he *either* (1) fails to appreciate the nature and quality of his actions *or* (2) fails to appreciate the wrongfulness of his actions.[6]

Both sides agreed that MAJ Martin was suffering from a severe mental disease or defect. The dispute was whether MAJ Martin satisfied the second element of the insanity defense at the time he committed the alleged offenses. Because of the factual difficulty of establishing the accused's mental state on the stated date of each charged offense, the defense tried to show that the accused was not mentally responsible during the entire twenty-eight month period.[7]

On appeal, the defense argued that if it provided evidence that the accused was not mentally responsible during the entire period covering the dates of the charged offenses, it would have established lack of mental responsibility "at the time of the commission of the acts."[8] While the CAAF agreed that such a strategy "can be legally and logically relevant in proving that an accused did not appreciate the nature and quality or wrongfulness of his actions at the time of an offense,"[9] the government may also rebut it.[10] Finding that the government had submitted evidence that the accused was mentally responsible at times during the twenty-eight month period—thus rebutting the defense contention that the accused lacked mental responsibility during the entire period—the CAAF held that the members could have found that the defense failed to carry its burden to show lack of mental responsibility "at the time of each offense."[11] Stated another way, the members must decide whether the defense of lack of mental responsibility existed at

1. This article discusses cases for fiscal year (FY) 2002 (1 October 2001 through 30 September 2002), but occasionally steals material from the next fiscal year, such as cases in which the Court of Appeals for the Armed Forces (CAAF) acted on service court cases from FY 2002.

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 author considers 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. 56 M.J. 97 (2001).

5. UCMJ art. 50a (2002).

6. *Martin*, 56 M.J. at 99, 108.

7. *Id.* at 111. The accused's treating psychiatrist, Dr. Bowden, said that there was "there was simply no way" to establish the accused's exact mental state on the exact date of each of the charged offenses. *Id*.

8. *Id.*

9. *Id.* at 99, 111.

10. *Id.*

the time of *each* offense charged. The issue of mental responsibility is not "all or nothing," although both sides may characterize it that way.

In MAJ Martin's case, the military judge gave specific instructions from the current *Benchbook*[12] that the members must first vote on whether the government has proven guilt beyond a reasonable doubt for each offense. If the members vote in the affirmative, they must then vote on whether the defense has proven insanity "at the time of the offense(s),"[13] by clear and convincing evidence. The military judge also instructed the members to consider each offense separately. The CAAF considered these instructions sufficient to tell the members to apply the defense of lack of mental responsibility to each offense, and not merely to the time period encompassing the offenses.[14] *Martin* provides both counsel and the bench clear guidance on how to apply the insanity defense, from both a proof and an instructions perspective.

Statute of Limitations: United States v. Sills[15]

During a nominee-screening interview for a secret compartmentalized information (SCI) security clearance, Colonel Sills was asked whether he had ever engaged in deviant sexual behavior; Colonel Sills answered, "No."[16] Unfortunately, Colonel Sills had engaged in such behavior with two girls under the age of sixteen,[17] but because that behavior happened more than five years earlier, prosecution for the conduct itself was barred by the statute of limitations.[18]

The government charged Colonel Sills with making a false official statement for this denial, even though the conduct he denied was time-barred. Colonel Sills argued that prosecuting him for a false statement about an offense for which he could not be prosecuted was a due process violation. The Air Force Court of Criminal Appeals (AFCCA) disagreed.

Finding that the statute of limitations is a purely legislative creation, the AFCCA concluded that it was "powerless to extend the statute of limitations in the UCMJ beyond the scope granted by Congress," as the accused requested.[19] Accordingly, the AFCCA found that Colonel Sills's prosecution for the false official statement was not time-barred or contrary to due process.[20]

Although *Sills* did not arise in the context of a traditional law enforcement interrogation, creative investigators might seize

11. *Id.* at 112.

12. *See* BENCHBOOK, *supra* note 3, para. 6-4.

13. *Id.*

14. *Id.* at 111-12. This is not to imply that the "all or nothing" approach is inappropriate. The defense—for reasons such as existed in this case—may have no choice but to try to prove lack of mental responsibility over a time period, rather than on specific dates. The members are not required to accept it, however, and must vote on the application of that defense to each offense individually.

15. 56 M.J. 556 (A.F. Ct. Crim. App. 2001). In this case, the CAAF and the Air Force Court of Criminal Appeals (AFCCA) have been involved in a running duel over sentence reconsideration and sentence rehearing. The CAAF set aside the original AFCCA opinion and remanded the case to the AFCCA. United States v. Sills, 56 M.J. 239 (2002). After the AFCCA's reconsideration on remand, 57 M.J. 606 (A.F. Ct. Crim. App. 2002), the CAAF granted review and ultimately ordered a sentence rehearing. United States v. Sills, 58 M.J. 23 (2002). None of these machinations in the CAAF or the AFCCA impacted the AFCCA's decision regarding the statute of limitations. As the CAAF said in a recent opinion,

> When this Court [the CAAF] sets aside the decision of a Court of Criminal Appeals and remands for further consideration, we do not question the correctness of all that was done in the earlier opinion announcing that decision. All that is to be done on remand is for the court below to consider the matter which is the basis for the remand and then to add whatever discussion is deemed appropriate to dispose of that matter in the original opinion.

United States v. Ginn, 47 M.J. 236, 238 n.2 (1997).

16. *Sills*, 56 M.J. at 559.

17. *Id.* At trial, the accused denied that he had engaged in the conduct the government alleged was "deviant sexual behavior." *Id*. Thus, the government had to prove the accused committed the underlying conduct to prove that the accused's denial was false. The members must have found the government's evidence compelling, as they convicted the accused of making a false official statement. *Id.* at 559, 563.

18. *Id*. at 559. At trial, the military judge denied a motion to dismiss for violation of the statute of limitations, even though the facts showed the conduct occurred more than five years before receipt by the summary court-martial convening authority. The military judge relied on *United States v. McElhaney*, 50 M.J. 819 (A.F. Ct. Crim. App. 1999), which held that the longer statute of limitations in 18 U.S.C. § 3283 applied. *Sills*, 56 M.J. at 561. After trial, but before the convening authority's action, the CAAF reversed the AFCCA, holding that the five-year statute of limitations in Article 43, UCMJ, applied. *Id.*; United States v. McElhaney, 54 M.J. 120 (2000).

19. *Sills*, 56 M.J. at 561.

20. *Id*. "The plain language of [Article 107, UCMJ] defines the offense [of false official statement] as occurring when the false statement is made." *Id.*

upon this case to circumvent the statute of limitations. While the statute of limitations does not, in the AFCCA's view, provide sanctuary for the subject of such questioning, such a subject can easily insulate himself by invoking his right to remain silent.[21]

Fraudulent Enlistment: United States v. Nazario[22]

Airman Nazario was less than candid with his recruiter when he enlisted in the Air Force; he failed to disclose his previous felony conviction. On appeal, Airman Nazario argued that he could not be convicted of fraudulent enlistment because his felony conviction would not prevent his enlistment; it would only prevent his enlistment *without a waiver* from the Air Force. Finding no support for Airman Nazario's position, the AFCCA held that a person commits the offense of fraudulent enlistment when he "provides false information about a matter that would preclude him from entry without the service waiving the disqualification."[23]

The *Benchbook* does not define when an enlistment is "obtained or procured" under Article 83, UCMJ.[24] According to the AFCCA, that can be done by representation or concealment of a fact that need not be an absolute bar to enlistment.[25]

Child Neglect: United States v. Vaughan[26]

Under a conditional plea,[27] Airman Sonya Vaughan pled guilty to child neglect under Article 134, by leaving her infant unsupervised for an unreasonable period of time.[28] After her conviction, Airman Vaughan continued her challenge on appeal, arguing that she did not have sufficient notice that her acts were criminal, particularly when—as here—the neglect did not cause the child any physical harm.[29] The AFCCA looked at the Supreme Court's determination that Article 134 provides sufficient notice of criminality to survive a constitutional challenge.[30] The AFCCA affirmed the accused's conviction, finding that the accused had notice based on the very facts of the case,[31] and on the plethora of state statutes proscribing child neglect.[32] The AFCCA's decision is consistent with precedent from those jurisdictions.[33]

The AFCCA's opinion in *Vaughan* highlights a split between the Army Court of Criminal Appeals (ACCA) and the AFCCA on the issue of whether child neglect is an offense under Article 134. As the AFCCA noted in *Vaughan*, the ACCA's published position was that child neglect is not an offense under Article 134.[34] The CAAF resolved this split of authority by affirming *Vaughan* in 2003.[35] Relying on military case law, state law, and custom of the service as evidenced by regulation, the CAAF held that the accused was on fair notice that her conduct—even absent physical harm to the child—was criminal.[36]

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21. This response is not without its own risks; the least of these may be—as in Colonel Sills's situation—denial of a security clearance. *See* U.S. DEP'T OF DEFENSE, DIR. 5200.2, DOD PERSONNEL SECURITY PROGRAM (9 Apr. 1999).

22. 56 M.J. 572 (A.F. Ct. Crim. App. 2001). Likewise, the CAAF set aside this case and remanded it to the AFCCA because the CAAF believed the AFCCA applied the wrong standard—"preponderance" rather than "reasonable doubt"—when considering the sufficiency of the evidence. United States v. Nazario, No. 02-0056/AF, 2002 CAAF LEXIS 1683 (Dec. 16, 2002); *see supra* note 15. The AFCCA also discussed the sufficiency of the evidence regarding fraudulent enlistment, stating, "The evidence was sufficient in this case for court-members to conclude beyond a reasonable doubt that the appellant knowingly misrepresented the felony nature of the offense of which he had been convicted and the sentence imposed by the court." *Nazario*, 56 M.J. at 579.

23. *Nazario*, 56 M.J. at 579.

24. BENCHBOOK, *supra* note 3, para. 3-7-1.

25. *Nazario*, 56 M.J. at 579.

26. 56 M.J. 706 (A.F. Ct. Crim. App. 2001).

27. At trial, the defense argued that child neglect is not an offense under the UCMJ. *Id*. at 707.

28. *Id*. at 706. After hearing the motion, the military judge modified the specification to only charge an overnight, six-hour period of time during which the accused left her six-month old infant alone at home while she drove to a club ninety minutes away. *Id*. at 707.

29. *Id*. at 707-08.

30. *See* Parker v. Levy, 417 U.S. 733 (1974).

31. *Vaughan*, 56 M.J. at 709. "It is beyond cavil that a parent leaving an infant child unsupervised overnight for six hours constitutes service-discrediting conduct." *Id*. The CAAF did not reach this issue, but implied it may not have agreed that the conduct itself provided fair notice of criminality: "[A]n important distinction exists between the common sense understanding that a baby left unattended in a crib for six hours is bad parenting and fair notice that such conduct is criminally punishable." United States v. Vaughan, 58 M.J. 29 (2003).

32. *Vaughan*, 58 M.J. at 29.

33. *See, e.g.*, United States v. Foreman, No. 28008, 1990 CMR LEXIS 622 (A.F.C.M.R. May 25, 1990) (unpublished).

From an instructional perspective, the CAAF said that the elements of the Article 134 offense of child neglect are "culpably negligent conduct [toward a child], unreasonable under the totality of the circumstances, that caused a risk of harm to the child" which, under the circumstances, was service-discrediting.[37]

Conflict-Free Counsel: United States v. Dorman[38]

Both Airman (A1C) Dorman and his wife, Airman (A1C) Ferranti, were charged with various offenses involving controlled substances, which arose from the same incidents. Airman Ferranti was tried first; she was represented by a Circuit Defense Counsel (CDC) and an Area Defense Counsel (ADC).

At his trial, A1C Dorman chose to be represented by another ADC and the same CDC that represented his wife. The military judge followed the *Benchbook* instruction on conflict-free counsel and asked A1C Dorman the required questions. The military judge concluded that A1C Dorman had knowingly and voluntarily waived his right to conflict-free counsel.[39]

On appeal, A1C Dorman characterized his discussion with the military judge as "brief [and] unspecific," and described it as "insufficient evidence of a knowing, intelligent, and voluntary waiver of the conflict."[40] The AFCCA flatly rejected this interpretation, finding that the military judge's discussion with the accused was a "textbook example of a judge knowing and following the law."[41] Finding that Instruction 2-7-3 complies with precedent specifying the areas of inquiry in a conflict situation, the AFCCA affirmed the accused's conviction.[42] *Dorman* illustrates the wisdom of the new military judges' mantra—"follow the *Benchbook*."

General Findings: United States v. Walters[43]

Airman Basic Walters was charged with several offenses, including use of a controlled substance "on divers occasions" between two named dates.[44] At trial, the government presented evidence that the accused had used a controlled substance on three separate occasions within the time period alleged. Upon returning with findings, the members convicted the accused of drug use, except the words, "on divers occasions," and substituting the words, "on one occasion."[45]

On appeal, Airman Walters argued that the findings were ambiguous because no one could determine which of the three charged drug uses the members relied upon to convict him. According to Airman Walters, no one could be sure whether the

34. United States v. Wallace, 33 M.J. 561, 563 (A.C.M.R. 1991) ("We doubt that appellant was on notice that his conduct was a criminal offense."); United States v. Valdez, 35 M.J. 555 (A.C.M.R. 1992); *see also* United States v. Martinez, 48 M.J. 689, 690 (accepting as "appropriate" a government concession that child neglect charged under Article 134 should be dismissed).

35. *Vaughan*, 58 M.J. at 29.

36. *Id.* at 31-33. The CAAF specifically tied this case to the recent trend of imposing criminal liability absent physical harm. *Id.* at 35 (citing United States v. Carson, 57 M.J. 410 (2002) (regarding the offense of maltreatment).

37. *Id.* at 36. Chief Judge Young provided Air Force practitioners with sample elements and instructions for child neglect charged under Article 134. United States v. Vaughan, 56 M.J. 706, 710-11 (A.F. Ct. Crim. App. 2001). Those elements and instructions are consistent with the CAAF's opinion in *Vaughan*. *See Vaughan*, 58 M.J. at 35. Now that the CAAF has affirmed the AFCCA, those sample elements and instructions are no longer service-specific.

38. 57 M.J. 539 (A.F. Ct. Crim. App. 2002), *rev. granted on other issue*, 57 M.J. 489.

39. BENCHBOOK, *supra* note 3, para. 2-7-3.

40. *Dorman*, 57 M.J. at 543.

41. *Id*.

42. *Id.* (citing United States v. Garcia, 517 F.2d 272, 278 (5th Cir. 1975); United States v. Breese, 11 M.J. 17, 20 (C.M.A. 1981); United States v. Davis, 3 M.J. 430, 434 (C.M.A. 1977)). In *Breese*, the Court of Military Appeals said that when faced with a conflict situation, the military judge should ask the accused whether:

(1) He has been advised of his right to effective representation;
(2) He understands the reasons for his attorney's possible conflict of interest and the dangers of the conflict;
(3) He has discussed the matter with his attorney or if he wishes, with outside counsel; and
(4) He voluntarily waives his Sixth Amendment protection.

Breese, 11 M.J. at 22.

43. 57 M.J. 554 (A.F. Ct. Crim. App. 2002), *rev. granted*, 58 M.J. 23 (2002).

44. *Id*. at 555.

45. *Id*.

required number of members voted for conviction on any single specific alleged use.[46]

The AFCCA affirmed the conviction, concluding that precedent clearly established that the members did not need to agree on the same specific set of acts to find the accused guilty of the offense charged, as long as the required majority finds the accused guilty under one of the required set of facts. In the AFCCA's view, when the accused is charged with "divers" acts during a time period, but the members find only one act, the members need not agree on a single discreet act, so long as the required majority agrees that the accused is guilty of at least *one* alleged act during the alleged time period[47]. The precedent cited by the AFCCA held that the accused can be convicted of the charged offense even if fewer than the required number of members agree on the specific means by which the accused committed the charged offense. Clearly, the members are not required to all agree that the offense was committed by the same means, as long as the required majority agrees that the accused committed the offense by some means sufficient to constitute guilt.[48] The CAAF granted review on the issue of whether this principle requires the members to distinguish and identify the specific substantive offense for which they convicted the accused.[49] Until the CAAF resolves this issue, military judges faced with similar facts would be wise to advise the members specifically that if they find the accused guilty of only one of the divers acts, and that the required number of members must all agree to convict on the *same* single act beyond a reasonable doubt.

Obstruction of Justice: United States v. Barner[50]

The accused, Sergeant First Class (SFC) Stanley Barner, was a drill sergeant. One night after duty hours, he followed a female trainee into the female sleeping area and groped her. The victim immediately reported the incident to another trainee, and also told her mother the following day. Both the victim and the other trainee reported the accused's actions to their own drill sergeant the day after the alleged assault. As the two trainees were making their report, the accused walked into the room. The victim's drill sergeant excused the trainees, then told the accused what the trainees had reported to him. Sergeant First Class Barner then persuaded the victim's drill sergeant to let him talk to the two trainees alone. When doing so, the accused apologized and begged the victim "not to tell."[51] Several days later, the accused also told the victim, "I'll do anything, if you don't tell."[52]

On appeal, the accused argued that a mere request not to tell was not obstruction, citing *United States v. Asfeld*[53] and *United States v. Gray*.[54] In *Asfeld*, the ACCA held that an accused's request not to report his conduct, made immediately after other misconduct *and before the victim had reported it to any authority*, did not amount to obstruction. Specifically, the ACCA held that such conduct was not "an interference with or obstruction of the due administration of justice."[55] In *Gray*, the ACCA held that a similar request was merely an attempt to limit the number of persons who knew of the underlying offense, rather than obstruction.[56]

The CAAF distinguished *Asfeld* and held that SFC Barner was on notice that the trainees had already made a report. Accordingly, and unlike the situation in *Asfeld*, his request did amount to a request to the victim to retract or recant her initial report, and therefore was an affirmative act that constituted obstruction.[57] This case resulted in an approved change to the *Benchbook*, in which the drafters added a citation to *Barner* to the instruction on obstruction.[58]

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46. *Id.*

47. *Id*. at 558-59.

48. *See id*. at 556 (citing Griffin v. United States, 502 U.S. 46, 49 (1991); Turner v. United States, 396 U.S. 398, 420 (1970)).

49. 58 M.J. 23 (2002). Before the CAAF granted review, the AFCCA followed its own opinion in *Walters* in an unpublished opinion, *United States v. Mason*, No. 03-0141/AF 2002 CCA LEXIS 268 (A.F. Ct. Crim. App. May 21, 2002).

50. 56 M.J. 131 (2001).

51. *Id.* at 133.

52. *Id.*

53. 30 M.J. 917 (A.C.M.R. 1990).

54. 28 M.J. 858 (A.C.M.R. 1989).

55. *Asfeld*, 30 M.J. at 928.

56. *Gray*, 28 M.J. at 861.

57. *Barner*, 56 M.J. at 134-36.

Conspiracy and Larceny: United States v. Whitten[59]

Two of Staff Sergeant (SSG) Whitten's "friends," Specialist (SPC) Rodbourn and Private First Class (PFC) McCarus, took a duffel bag from behind the victim's car and placed it into the trunk of PFC McCarus's car. Almost immediately, the victim, PFC Campbell, identified the location of his belongings and called the police. Before the police could apprehend them, SPC Rodbourn and PFC McCarus, who had told SSG Whitten what they had done by this time, drove to another location with the accused and the duffel bag. There, all three dumped the bag's contents on the ground and divided them among themselves. To prevent the police from finding the duffel bag, SSG Whitten agreed to keep it at his off-post quarters.[60]

The government charged SSG Whitten with larceny of the duffel bag and its contents, and conspiracy to commit larceny. At trial, the defense argued that the accused could not be guilty of these offenses because the other participants in the crime had committed both offenses by the time they told the accused about them.[61]

On appeal, the CAAF framed the issues as follows:

> With respect to the conspiracy, the specific issue before this Court is whether any rational factfinder could have found beyond a reasonable doubt:
>
> (1) That Rodbourn and McCarus formed a conspiracy to steal Campbell's duffel bag and its contents;
> (2) That they took the duffel bag;
> (3) That appellant joined the conspiracy before Rodbourn and McCarus were "satisfied with the location of the goods" and while the movement of the goods continued "relatively uninterrupted;" and
>
> (4) That an overt act in furtherance of the agreement to steal the duffel bag was committed after appellant joined the conspiracy.[62]

Similarly, with respect to the larceny, the CAAF found the issue to be whether SSG Whitten "joined an ongoing conspiracy to commit larceny or aided and abetted the larceny before Rodbourn and McCarus were 'satisfied with the location of the goods' and while the movement of the goods continued 'relatively uninterrupted.'"[63]

The CAAF found that SPC Rodbourn and PFC McCarus were not satisfied with the location of the duffel bag and its contents before the accused joined the conspiracy; they were concerned immediately that they would be caught, and therefore moved the goods to another location where they divided them. After the accused joined the conspiracy, SPC Rodbourn and PFC McCarus gave the duffel bag to the accused to make sure that it would not be found where they had originally placed it. Because the larceny was still ongoing, the accused joined an active conspiracy. The subsequent overt act was moving the duffel bag and dividing the spoils. Accordingly, the accused was guilty of both conspiracy and larceny.[64]

The *Benchbook* instructions on conspiracy and larceny do not specifically state when either the underlying offense or a larceny is complete.[65] This case provides the bench and bar some solid guidance when the pivotal issue in the case is when the underlying offense was complete.

Indecent Exposure: United States v. Graham[66]

Corporal (Cpl.) Graham was charged with indecent exposure when, after inviting his child's teenage babysitter into his bedroom, he allowed a towel wrapped around his waist to drop to the floor, exposing his penis.[67] On appeal, Cpl. Graham argued that he could not be convicted of that offense because his bedroom was not a place where his body was exposed "to

58. U.S. Army Trial Judiciary, Instr. 3-96-1 (15 Oct. 2002) (to be published in BENCHBOOK, *supra* note 3, Change 2). That change—as with all other approved changes mentioned in this article—will be published in *Change 2* this summer.

59. 56 M.J. 234 (2001).

60. *Id*. at 234.

61. *Id*.

62. *Id*. at 237 (citing United States v. Barlow, 470 F.2d 1245, 1253 (D.C. Cir. 1972) (holding that a larceny is not complete "as long as the perpetrator is not satisfied with the location of the goods and causes the flow of their movement to continue relatively uninterrupted")).

63. *Id*.

64. *Id*.

65. BENCHBOOK, *supra* note 3, paras. 3-5-1, 3-46-1.

66. 56 M.J. 266 (2002).

67. *Id*. at 267.

public view," and thus his exposure did not violate Article 134, UCMJ.[68] The CAAF disagreed, stating,

> 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.[69]

Thus, because a member of the public, the accused's babysitter, saw the accused, the exposure was "to public view" and the location of the exposure was irrelevant. *Graham* now explicitly articulates a definition of "in public view" that the existing *Benchbook* instruction only suggests: in view of any member of the public, regardless of the location.

Aiding and Abetting: United States v. Richards[70]

Private First Class Richards was one of four people with whom the victim, PFC Waters, had a long-standing animosity. On the evening of 21 November 1996, PFC Richards and his three friends beat PFC Waters with their fists and repeatedly kicked him with their shod feet. This beating lasted anywhere from two to ten minutes, and stopped only with the intervention of the staff duty NCO. Unknown to the accused, one of his three friends—one Wilson—had stabbed PFC Waters repeatedly with a knife during the beating.[71] Medical personnel established that PFC Waters died as a result of the stabbing, and not as a result of the beating.[72]

The accused, although charged with unpremeditated murder, was convicted of voluntary manslaughter as an aider and abettor. At the CAAF, PFC Richards argued that he could not be an aider and abetter to Wilson's voluntary manslaughter of the victim because he did not know that Wilson even had a knife, let alone that Wilson had stabbed or intended to stab the victim.[73]

The CAAF disagreed. Looking at the elements of voluntary manslaughter, the CAAF determined that Wilson needed to have the intent to kill or to cause great bodily harm to the person killed. As an aider and abetter, the accused needed to have not only aided and abetted Wilson's actions, but he must also have shared Wilson's "criminal purpose [or] design;"[74] that is, the accused shared Wilson's intent to kill or to cause great bodily harm. In the CAAF's view, *how* Wilson intended to carry out his intent, and the accused's knowledge thereof, was immaterial. According to the CAAF, Wilson and the accused only had to share the same intent to kill or cause great bodily harm; they did not have to agree on the means of bringing about that intent for the accused to be guilty as an aider and abettor. The CAAF affirmed PFC Richards's conviction, finding that the accused assisted and encouraged Wilson's actions and that the accused shared Wilson's intent to kill or cause great bodily harm.[75]

Although the CAAF did not discuss this point, the *Benchbook*'s then-current instruction on aiding and abetting did not specifically discuss the requirement of shared intent.[76] Likewise, that instruction did not address *Richards*'s holding that the accused does not need to agree with or even be aware of the method by which the perpetrator carries out their shared intent. The U.S. Army Trial Judiciary has since approved a change to this instruction specifically addressing these issues.[77]

Damage to Government Property: United States v. Daniels[78]

Staff Sergeant (SSgt.) Daniels was a crewmember on a C-141 Starlifter on its flight between Japan and Hawaii. After takeoff, when the aircraft failed to pressurize properly, the air-

68. *Id*. at 266-67. Under the facts in *Graham*, the elements of indecent exposure under Article 134, UCMJ, in this case would be:

> (1) That the accused exposed his penis to public view in an indecent manner;
> (2) That the exposure was willful and wrongful; and
> (3) That, under the circumstances, the accused's conduct was to the prejudice of good order and discipline in the armed forces or of a nature to bring discredit upon the armed forces.

BENCHBOOK, *supra* note 3, para. 3-88-1. While the *Benchbook* does not define "public view," it does indicate that the accused's exposure must be done with the intent that it be observed "by *one* or more members of the public." *Id.* (emphasis added).

69. *Graham*, 56 M.J. at 269-70.

70. 56 M.J. 282 (2002).

71. *Id.* at 283-84.

72. *Id.* at 286.

73. *Id*. at 282.

74. MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 1b(2)(b) (2002) [hereinafter MCM].

75. *Richards*, 56 M.J. at 286.

craft commander ordered a return to base. After landing, SSgt. Daniels produced several screws (which he said he found in the crew latrine) that secured a landing gear inspection window. This unsecured window was later identified as the cause of the pressurization problem, and suspicion quickly turned toward SSgt. Daniels.[79] The accused was charged with and convicted of willfully damaging government property for removing the screws. On appeal, he argued that removing the screws did not "damage" any government property because merely reinserting the screws fixed the problem.[80]

The CAAF, quoting *United States v. Peacock*,[81] held that the accused's actions in removing the screws did "damage" the aircraft because it caused the pressurization problem, and caused the crew to abort the mission.[82] Although the current *Benchbook* instruction covers this issue,[83] *Daniels* serves to remind all that even removal of a minor component—even one that can be replaced easily to return the military property to operational readiness—is still "damage" under Article 108.

Lawfulness of the Order (Again): United States v. Jeffers[84]

The accused was having an adulterous relationship with Private (PVT) P. When their company commander discovered that relationship, he gave both the accused and PVT P a "no-contact" order. When the charge-of-quarters (CQ) subsequently found PVT P in the accused's room, the accused was charged with violating his commander's order. The accused pled not guilty.[85]

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76. BENCHBOOK, *supra* note 3, para. 7-1-1. Although the *MCM* is clear on this issue, the then-current *Benchbook* instruction could have been clearer. That instruction did make tangential reference to shared intent, noting that the accused may be found guilty, even when he is not the actual perpetrator, if he aided and abetted the commission of the offense and "specifically intended" the same shared purpose. *Id.* The explanation of vicarious liability which precedes that then-current instruction, however, specifically stated the requirement for shared intent:

> When the offense charged requires proof of a specific intent or particular state of mind as an element, the evidence must ordinarily establish that the aider or abettor had the requisite intent or state of mind or that the accused knew that the perpetrator had the requisite intent or state of mind.

Id. para. 7-1.

77. *See* U.S. Army Trial Judiciary, Instr. 7-1 (17 Mar. 2003) (to be published in BENCHBOOK, *supra* note 3, Change 2). The approved change makes the following changes to the current instruction:

> Insert the following before the last complete sentence of Instruction 7-1 (p. 836) (that is, before the words "It is possible that . . . ."):
>
> > There is no requirement, however, that the accused agree with, or even have knowledge of, the means by which the perpetrator is to carry out that criminal intent.
>
> Insert the following new paragraph between the second paragraph and third paragraph in Instruction 7-1-1 (p. 838):
>
> > (Although the accused must consciously share in the actual perpetrator's criminal intent to be an aider and abettor, there is no requirement that the accused agree with, or even have knowledge of, the means by which the perpetrator is to carry out that criminal intent.)

78. 56 M.J. 365 (2002).

79. *Id.* at 365-67.

80. *Id*. at 367.

81. 24 M.J. 410, 411 (C.M.A. 1987) ("In light of the purpose of this statute, the word 'damage' must be reasonably construed to mean *any change in the condition of the property which impairs its operational readiness.*").

82. *Id.*

83. BENCHBOOK, *supra* note 3, para. 3-32-2, note 5 ("'Damage' also includes any change in the condition of the property which impairs, temporarily or permanently, its operational readiness . . . . 'Damage' may include disassembly . . . or removing a component . . . .").

84. 57 M.J. 13 (2002).

85. *Id*. at 13-15. The accused also pled guilty to a separate specification of violating the same order. During the providence inquiry for this other violation, the accused admitted that his commander's order was lawful, after the military judge defined that term for him. Even as to the contested specification, the defense offered to stipulate to the lawfulness of the order. *Id*. at 14-15 & n.1. Accordingly, the facts of this case are not the best for a clear and unambiguous resolution of the lawfulness issue.

At trial, the military judge advised counsel that he intended to instruct the members that the order, if such order was in fact given, was lawful as a matter of law. The accused's defense counsel did not object, and the military judge so advised the members. On appeal, the accused claimed that this instruction was error; the accused argued that the lawfulness of the order depended on a preliminary determination of factual questions, and that it was for the members to find those predicate facts.[86]

Without specifically analyzing the accused's appellate claim, the CAAF summarily disagreed with the accused and upheld his conviction. Unfortunately, *Jeffers* gives little guidance as to whether the fractured interpretations of *United States v. New*[87] have solidified into a single view on whether the issue of lawfulness is *always* for the military judge. On the one hand, the majority seems to accept that there are situations in which lawfulness could have a factual component. Were that not the case, the majority could have clearly answered the accused's assertion—that "this is one of those rare instances where the legality of an act is not a question of law but is one of fact"—with a terse response that no such situations exist.[88] Paradoxically, however, the majority ends with a seemingly emphatic statement to just that effect: "'Lawfulness' is a question of law."[89] *Jeffers* does ensure that there will be more appellate litigation and uncertainty on this issue, absent a clear pronouncement from the CAAF.[90]

Mistake of Fact: United States v. McDonald[91]

Staff Sergeant McDonald was convicted of buying and attempting to buy stolen retail merchandise, as well as soliciting two others to steal the retail merchandise. One of the individuals involved, Mitchell, testified that he sold stolen items to the accused, and that the accused told him what to steal and from where. The accused admitted he bought items from Mitchell, but said that he did not know they were stolen.[92]

The military judge failed to give the mistake of fact instruction as to knowledge. The majority (Chief Judge Crawford, joined by Judges Effron and Gierke), however, held the the error was harmless because the military judge's instructions adequately advised the panel that the accused had to have actual knowledge that the property was stolen.[93]

This case reiterates the military judge's sua sponte obligation to instruct on defenses reasonably raised by the evidence.[94] Last year's case of *United States v. Binegar*[95] provided a good framework for determining which mistake of fact instruction the military judge should give: "(1) What is the specific fact about which the [accused] claims to have been mistaken [or ignorant]? (2) To what element or elements does that specific fact relate?"[96]

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86. *Id*. at 15.

87. 55 M.J. 95 (2000).

88. *Jeffers*, 57 M.J. at 16. Instead, the majority said, "We disagree and hold that the military judge did not err." *Id.*

89. *Id*. (quoting *New*, 55 M.J. at 105). *Id*. Judge Sullivan refers to this comment as a "broad pronouncement." *Id*. Consistent with his concurring opinion in *New*, Judge Sullivan says that lawfulness is an element of the offense and should have been submitted to the members. Judge Sullivan also recognizes that the majority's opinion implies that the issue of lawfulness is not one for the members: "[T]he majority's [opinion] . . . suggests that the element of lawfulness . . . should also be removed from the military jury." *Id.*

90. The U.S. Army Trial Judiciary is currently staffing a change to the *Benchbook* on this issue. Colonel Theodore Dixon, Chief Circuit Judge, Fourth Judicial Circuit, Address to the Inter-Service Military Judges' Seminar, Maxwell Air Force Base, Alabama (Apr. 25, 2003) [hereinafter Dixon Address].

91. 57 M.J. 18 (2002).

92. *Id*. at 21. The other person involved, Moore, testified in a similar manner. The accused testified he did not know Moore and had never purchased anything from Moore. This evidence does not, as the majority clearly points out, raise the issue of mistake because "there was nothing to be mistaken about." *Id*. at 21 n.3.

93. *Id.* at 20. Although Judge Sullivan says that the majority "suggests" that there was no error, the majority opinion clearly states, "Appellant was entitled to a mistake-of-fact instruction regarding his dealings with Mitchell." *Id*. This is another instance in which the CAAF found the error harmless, but where the military judge could have avoided this appellate litigation by giving the standard *Benchbook* instruction. Military judges (the author certainly included) are not perfect, however, and do occasionally omit instructions.

94. *See generally* United States v. Davis, 53 M.J. 202 (2000). In *Davis*, the court stated,

> [A defense is] . . . reasonably raised [when] . . . the record contains some evidence to which the court members may attach credit if they so desire. The defense theory at trial is not dispositive in determining whether [an issue] . . . has been reasonably raised. Any doubt whether an instruction should be given should be resolved in favor of the accused.

Id. at 205 (citations omitted).

95. 55 M.J. 1 (2001).

96. *Id*. at 7.

In this case, SSgt. McDonald testified he did not know that the items from Mitchell were stolen. That ignorance relates to the element of his actual knowledge that they were stolen. Accordingly, the evidence reasonably raised the *Benchbook* instruction, "Ignorance or Mistake—Where Specific Intent or Actual Knowledge Is In Issue."[97]

Innocent Possession: United States v. Angone[98]

In 2001, the ACCA confronted the defense of innocent possesion in *Angone*.[99] Since that opinion was published, the CAAF affirmed the ACCA's decision and elaborated on the defense of innocent possession.[100]

While being escorted from pre-trial confinement to arraignment on unrelated charges, the accused's escorts took him to his quarters to recover some personal items. While getting something from his medicine cabinet, the accused noticed a marijuana cigarette. Believing it to be his roommate's, but convinced that if his escorts saw it they would think it was his, he took it and tried to hide it. Unfortunately for the accused, his escort did see it and immediately seized it from him. As a result, the accused was charged with possession of a controlled substance, and later pled guilty to the specification. On appeal, the accused argued that his intent to immediately destroy the marijuana made his possession innocent and not "wrongful."

In reviewing precedent, the CAAF determined that the defense of innocent possession requires: (1) inadvertent possession; and (2) "certain subsequent actions taken with an intent to [either] immediately destroy the contraband[,] deliver it to law enforcement agents,"[101] or return it to its previous possessor if the accused reasonably believes that a failure to do so would "expose him[ ] to immediate physical danger."[102]

In *Angone*, the accused had not inadvertently come into possession of the marijuana; he affirmatively took it from the medicine cabinet. Likewise, his avowed intent was to hide it from those in authority—his escorts—rather than to deliver it to them. Accordingly, the CAAF found that the accused did not raise the defense of innocent possession.[103] In the event that an accused raises the defense of innocent possession, *Angone* gives the bench and bar a blueprint for appropriate instructions for the members.

Indecent Acts With a Child: United States v. Baker[104]

Airman Baker was an eighteen-year-old single male stationed in England. After making friends with a fifteen-year-old female Air Force family member, KAS, the two began dating. Eventually, this dating led to physical contact, and the accused was charged with indecent acts with a child.[105]

At trial, the military judge gave the members the standard *Benchbook* instructions for the offense of indecent acts with a child.[106] The trial counsel argued that the closeness in age between the accused and KAS was irrelevant because consent is not a defense. The defense argued that the members should consider that same closeness in age as a factor when reaching their decision. During the deliberations, the members asked the military judge whether they should consider the proximity in age regarding the offense of indecent acts with a child. The military judge told the members that they should "consider all the evidence you have, and you've heard on the issue of what's indecent."[107]

What this opinion does not hold is as important as what it does hold. The majority does *not* hold that the standard *Benchbook* instructions for indecent acts with a child are inadequate

97. BENCHBOOK, *supra* note 3, para. 5-11-1.

98. 57 M.J. 70 (2002).

99. *Angone*, 54 M.J. 945 (Army Ct. Crim. App. 2001).

100. *See Angone*, 57 M.J. at 72-73.

101. *Id*. at 72 (citing United States v. Kunkle, 23 M.J. 213 (C.M.A. 1987)).

102. *Id.* (quoting *Kunkle*, 23 M.J. at 218).

103. *Id*. at 71-72.

104. 57 M.J. 330 (2002).

105. *Id*. at 330-31. This contact did not include sexual intercourse, but did include the accused fondling and kissing KAS's breasts, as well as giving her "hickies" on her chest, stomach, and back. *Id*. at 331.

106. BENCHBOOK, *supra* note 3, para. 3-87-1. The *Benchbook* anticipates that the judge will give substantive instructions before counsel argue, followed by procedural instructions after argument. *Id.* para. 2-5. Before the adoption of this method in the *Benchbook*, the standard method required the military judge to give all instructions following arguments by counsel, so that the "last word" on the law comes from the judge. In appropriate cases, military judges might consider whether this former method would help to reduce questions from members during deliberations.

107. *Baker*, 57 M.J. at 331.

per se. The majority's holding is based on the perceived inadequacy of the military judge's instruction responding to the member's specific question.[108]

Judge Sullivan, writing for himself, Judge Effron, and Judge Gierke, found plain error in the military judge's instruction in response to this question.[109] Taking pains to avoid even the appearance of holding that the standard instructions are inadequate,[110] Judge Sullivan said that the member's specific question on how to consider the difference in age, along with the discrepancy on this issue between the counsels' arguments, called for a more specific instruction.[111]

Judge Sullivan found that the CAAF has never held that sexual contact between a service member and a child under sixteen is indecent per se, or that a person under sixteen is legally incapable of consenting to sexual contact.[112] Additionally, CAAF precedent has held that the fact finder should consider all facts and circumstances while deciding whether sexual contact is indecent.[113] For Judge Sullivan, considering all the circumstances included considering whether the victim consented to the conduct and the proximity in ages between the victim and the accused.[114]

Baker reminds military judges that they cannot always rely on the standard instructions alone. When the members ask specific questions or when counsel misstate the law, the military judge has an obligation, through appropriately tailored instructions, to answer the members' questions and to explain the law correctly.[115]

Duress and Necessity: United States v. Washington[116]

The potential use of anthrax as a biological weapon threatens the safety of U.S. service members. As a result, the Department of Defense began a program to vaccinate service members against anthrax. The accused took five of the six injections required in the anthrax vaccination series, but refused to take the sixth injection on several occasions. The government charged him with violating a lawful order.[117]

At trial, the accused conceded that the order was lawful, but planned to offer evidence questioning the safety and effectiveness of the vaccine in support of the defenses of duress and necessity. In response to a prosecution motion, the military judge held that these defenses did not apply and excluded the defense evidence.[118] The military judge reasoned that the defense of duress requires the threat of an unlawful act against the accused. The accused argued that a clear reading of Rule for Courts-Martial (RCM) 916(h)[119] says otherwise. According to the accused's reading of RCM 916(h), if he reasonably believed that taking the anthrax vaccination would result in his immediate death or serious bodily injury, duress applied to excuse his disobedience.[120]

The CAAF agreed with the military judge and held that the defense of duress requires an *unlawful* threat against the accused. The CAAF held that to apply the accused's narrow interpretation of duress would gut military discipline.[121] The CAAF recognized that accepting the accused's interpretation would allow soldiers to claim duress when disobeying a combat order to perform a hazardous mission. An effective military could not long survive such a situation.

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108. *See id*. at 334-35.

109. *Id*. at 334, 337. Chief Judge Crawford and Judge Baker dissented, finding no plain error. *Id*. at 337.

110. *See id.* at 334 ("The specified issue in this case asks whether the military judge plainly erred by failing to give *tailored* instructions to the members regarding how to determine whether appellant's conduct was indecent for purposes of the charged offense.").

111. *Id.* at 333. The government counsel implied that sexual activity with a person under sixteen is a strict liability offense and that the victim's consent was not relevant. The defense urged the members to consider the relative closeness in age between the accused (eighteen) and the victim (fifteen), rather than find a per se violation. *Id*.

112. *Id.* at 335.

113. United States v. Strode, 43 M.J. 29 (1995).

114. *See Baker*, 57 M.J. at 334-36.

115. When crafting their responses to questions from the members, judges should follow the military judge's wise example in this case and ask for input from counsel. The military judge, however, must be prepared to go beyond the input from counsel when responding to questions. Likewise, if counsel plan to argue specific legal positions that are not adequately covered by the standard *Benchbook* instructions, they should submit proposed instructions, complete with authority, to the military judge before trial. *See* United States v. Brown, 55 M.J. 575 (2001) (discussing when the military judge must give non-standard instructions requested by counsel). Had counsel submitted a pre-trial request that the military judge instruct the members that sexual contact with a child under sixteen is per se indecent, all parties could have thoroughly researched and reviewed the issue without the stress of an ongoing trial, potentially avoiding this issue. Judges might consider including a deadline for such non-standard instructions in any written pre-trial docketing orders they publish.

116. 57 M.J. 394 (2002).

117. *Id.* at 396.

The CAAF, however, did not completely shut the door on the accused's position, which potentially allows for an exception that swallows the rule. Although the CAAF recognized that the cost-benefit analysis clearly disfavored the accused in this case, that might not always be the case: "As we noted in *Rockwood* . . . , 'There may indeed be unusual situations in which an assigned military duty is so mundane, and the threat of death or grievous bodily harm . . . is so clearly defined and immediate, that consideration might be given to a duress or necessity defense.'"[122]

Turning to the defense of necessity, the CAAF again did not affirmatively recognize its application to military jurisprudence. The CAAF strongly implied, however, that if it accepted this defense, it would accept it only on the terms the military judge applied: the "choice of evils" must be brought about by natural, physical force, and not human action.[123]

Notwithstanding the reference to *Rockwood*'s "unusual situations," military judges should instruct members on the defense of duress only when the threat to the accused comes from the unlawful actions of another person. To do otherwise would be anathema to military discipline.

Maltreatment and Sexual Harassment: United States v. Carson[124]

This year, the CAAF affirmed the ACCA's decision in *Carson*, resolving a split in service court opinions on this issue.[125]

118. *Id*. The military judge ruled that duress requires an unlawful act against the accused, and that necessity requires the actions of an other-than-human agency. By conceding that the order to take the vaccine was lawful, the accused ensured that the military judge would rule that the defense of duress did not apply. Because the accused's commander ordered him to take the vaccine, a human agency was involved and the defense of necessity likewise did not apply. As Air Force trial judge Lieutenant Colonel Rodger Drew astutely noted, the effect of the holdings of *Washington* and *New*—that the military judge will probably decide the issue of lawfulness in these situations—makes the chance of a successful challenge to command-ordered vaccinations seem remote. Telephone Interview with Lieutenant Colonel Rodger Drew, Military Judge, U.S. Air Force Trial Judiciary (Jan. 2003).

119. This rule states,

> It is a defense to any offense except killing an innocent person that the accused's participation in the offense was caused by a reasonable apprehension that the accused or another innocent person would be immediately killed or would immediately suffer serious bodily injury if the accused did not commit the act. The apprehension must reasonably continue throughout the commission of the act. If the accused has any reasonable opportunity to avoid committing the act without subjecting the accused or another innocent person to the harm threatened, this defense shall not apply.

MCM, *supra* note 74, R.C.M. 916(h).

120. *Id*. at 396-97 (citing United States v. Rockwood, 52 M.J. 98, 112 (1999)).

121. *Washington*, 57 M.J. at 398 ("[I]t would be inappropriate to read the President's guidance on the duress defense in [RCM] 916(h) in isolation. Instead, it must be read in conjunction with the guidance on disobedience of lawful orders and the essential purposes of military law."). Judge Effron wrote for the majority, joined by Judges Gierke and Baker. *Id.* Judge Baker, however, wrote separately to say he believed it unnecessary to "redefine" the defenses of duress or necessity, as neither had been reasonably raised by the evidence here. *Id*. at 401. Chief Judge Crawford, writing separately, agreed with Judges Effron and Gierke on the applicability of duress and necessity. *Id*. at 404. Accordingly, only three judges clearly subscribe to the CAAF's position discussed herein.

122. *Id.* at 398 (quoting *Rockwood*, 52 M.J. at 114). By holding that duress requires an unlawful threat, the CAAF seemingly ensured that duress would not arise in disobedience cases. If the order was lawful, the defense of duress does not apply; if the order was unlawful, it is not enforceable, duress notwithstanding. By referring to *Rockwood*'s "unusual situations," however, the CAAF undercut the clarity of its holding. *See id*. Armed with this comment, counsel could argue that even though an order is lawful, its cost-benefit analysis makes it so unwise that duress applies. Likewise, the comment seems to extend the defense of necessity—if it even exists in military law—to human activity as well as the results of natural, physical forces, directly contrary to the CAAF's otherwise clear position. These comments in the opinion are clearly dicta and thus should not be considered controlling authority. A more interesting question is how the CAAF would treat ordered smallpox vaccinations, when accepted medical literature indicates that the smallpox vaccine causes the death of about one in every million of those vaccinated. U.S. Ctr. for Disease Control Web Site, *Vaccinia (Smallpox) Vaccine Recommendations of the Advisory Committee on Immunization Practices (ACIP), 2001* (June 22, 2001), *available at* http://www.cdc.gov/mmwr/preview/mmwrhtml/rr5010a1.htm ("Fatal complications caused by vaccinia [smallpox] vaccination are rare, with approximately 1 death/million primary vaccinations and 0.25 deaths/million revaccinations.").

123. *Washington*, 57 M.J. at 398. Specifically, the CAAF said that for the defense to exist:

> (1) The "pressure of the circumstances" which arguably compelled the accused's actions must not be the result of human action;
> (2) The accused [must believe] his actions were necessary in response to that pressure;
> (3) The accused's belief [must be] reasonable; and
> (4) There [must be] "no alternative that would have caused lesser harm" than the actions taken by the accused.

Id. (quoting *Rockwood*, 52 M.J. at 98). In the movie *John Q*, Denzel Washington plays the father of a young boy facing imminent death without a heart transplant. Without sufficient insurance coverage and unable to raise the money for the transplant on his own or through others, he kidnaps a heart surgeon and takes over an emergency room to force medical personnel to do his son's transplant. JOHN Q. (New Line Productions 2002). Given the CAAF's discussion of duress and necessity, would this Washington have fared any better than Airman Washington if he had faced a court-martial for his actions?

124. 57 M.J. 410 (2002).

Sergeant (SGT) Claude Carson was the supervising desk sergeant in a military police (MP) station. While supervising female subordinates, SGT Carson repeatedly exposed himself to them without their consent. As a result, he was convicted of maltreatment under Article 93, UCMJ. On appeal to the ACCA, 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."[126] 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.[127]

In an opinion that reversed its own precedent,[128] the ACCA said, "After 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."[129]

The CAAF affirmed the ACCA's decision, holding that maltreatment does not require a showing of subjective physical or mental pain or suffering: "It is only necessary to show, as measured from an objective viewpoint in light of the totality of the circumstances, that the accused's actions reasonably could have caused physical or mental harm or suffering."[130] According to the CAAF, while the victim's subjective feelings of physical or mental pain or suffering may be helpful in determining whether the objective standard has been met, such a showing is not required for conviction.[131]

This clarifies the split between service courts on this issue. The U.S. Army Trial Judiciary recently approved a change to the *Benchbook* based on the CAAF's opinion in *Carson*. Military judges should modify their instructions on this offense to delete the requirement for actual physical or mental pain or suffering, as it currently exists in the *Benchbook*.[132]

Indecent Acts: United States v. Sims[133]

Staff Sergeant Sims was deployed to Saudi Arabia. While hosting a party, the accused found himself alone in his bedroom with PFC AB. The bedroom door was shut but unlocked. At the accused's request, but with her consent, PFC AB lifted her shirt to reveal her breasts, which the accused began to fondle. At trial, the accused pled guilty to indecent acts with another. During the providence inquiry, the accused admitted that other partygoers in rooms adjacent to his bedroom could have entered his bedroom unannounced at any time.[134]

Sexual activity that would otherwise be lawful may violate Article 134, UCMJ, if it is done "openly and notoriously."[135] At the time of the accused's trial, COMA precedent held that sexual intercourse was open and notorious when the actors knew that a third party was present.[136] The military judge in *Sims* used a broader definition of open and notorious, however, when he discussed this plea with the accused. He asked the accused whether there was "a substantial risk that your conduct—your activities could be viewed by another or it's reasonably likely that your conduct could be viewed by another."[137] After the accused's trial, the CAAF addressed this issue in a separate case and approved a Navy instruction that it "was not necessary to prove that a third person actually observed the act, but only that it was reasonably likely that a third person would observe it."[138]

Applying this *Izquierdo* standard in *Sims*, the CAAF reversed, finding that neither the stipulation of fact nor the providence inquiry provided a sufficient factual basis to meet this standard. The majority in *Izquierdo* only "tacitly approved" the broader definition of "open and notorious" in that case.[139] *Sims* clearly adopts this broader definition for "open and notorious" conduct, as it relates to indecent acts.[140]

Counsel and military judges who face similar issues of otherwise lawful sexual activity committed in the presence of others should apply the broader definition of "open and notorious" adopted in *Sims*.[141]

Evidence

Rule of Completeness: United States v. Rodriguez[142]

Angela Rodriguez died of asphyxiation on 3 January 1998. Sergeant (SGT) Rodriguez called his mother-in-law from a public telephone on 5 January 1998, claiming he and his wife had

125. *Id.* at 415.

126. United States v. Carson, 55 M.J. 656, 657 (Army Ct. Crim. App. 2001) (quoting BENCHBOOK, *supra* note 3, para. 3-17-1).

127. *Id.*

128. The ACCA's precedent, *United States v. Rutko*, 36 M.J. 798 (A.C.M.R. 1993), required proof of physical or mental pain or suffering. *Id.* at 801-02. Other service court opinions were split on this issue, and CAAF precedent did not clearly resolve the split. *See* 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) (requiring proof of physical or mental pain or suffering); United States v. Goddard, 47 M.J. 581, 584-85 (N-M. Ct. Crim. App. 1997) (holding that proof of physical or mental pain or suffering is not required)).

129. *Carson*, 55 M.J. at 657.

130. United States v. Carson, 57 M.J. 410, 415 (2002).

131. *Id.*

been kidnapped, but that he had escaped. During the investigation that ensued, the accused made a total of seven statements to law enforcement officers over a two-day period. Initially, the accused stuck with the kidnapping story. Eventually, however, the accused admitted to both killing his wife and lying in previous statements to cover it up. In his sixth and seventh statements to the police, the accused claimed that the killing was

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132. *See* BENCHBOOK, *supra* note 3, para. 3-17-1. Based on the approved change to the *Benchbook* addressing this issue, paragraphs d and e of Instruction 3-17-1 now say:

> d. DEFINITIONS AND OTHER INSTRUCTIONS
> ("Subject to the orders of" includes persons under the direct or immediate command of the accused and all persons who by reason of some duty are required to obey the lawful orders of the accused, even if those persons are not in the accused's direct chain of command).
>
> The (cruelty) (oppression) (or) (maltreatment) must be real, although it does not have to be physical. The imposition of necessary or proper duties on a soldier and the requirement that those duties be performed does not establish this offense even though the duties are hard, difficult, or hazardous.
>
> ("Cruel") ("oppressed") (and) ("maltreated") refer(s) to treatment that, when viewed objectively under all the circumstances, is abusive or otherwise unwarranted, unjustified, and unnecessary for any lawful purpose and that results in physical or mental harm or suffering, or reasonably could have caused, physical or mental harm or suffering.
>
> ((Assault) (Improper punishment) (Sexual harassment) may constitute this offense.)
>
> (Sexual harassment includes influencing, offering to influence, or threatening the career, pay, or job of another person in exchange for sexual favors.) (Sexual harassment also includes deliberate or repeated offensive comments or gestures of a sexual nature.) (For sexual harassment to also constitute maltreatment, the accused's conduct must, under all of the circumstances, constitute ("cruelty") ("oppression") (and) ("maltreatment") as I have defined those terms for you.)
>
> (Along with all other circumstances, you must consider, evidence of the consent (or acquiescence) of (state the name (and rank) of the alleged victim), or lack thereof, to the accused's actions. The fact that (state the name (and rank) of the alleged victim) may have consented (or acquiesced), does not alone prove that (she) (he) was not maltreated, but it is one factor to consider in determining whether the accused maltreated, oppressed, or acted cruelly toward, (state the name (and rank) of the alleged victim.))
>
> e. REFERENCES: U.S. v. Carson, 57 M.J. 410 (2002) and U.S. v. Fuller, 54 M.J. 107 (2001).

U.S. Army Trial Judiciary, Instr. 3-17-1 (17 Mar. 2003) (to be published in BENCHBOOK, *supra* note 3, change 2). *Carson* opens an interesting avenue for counsel. The instruction now states that the victim's subjective perceptions are relevant in deciding whether the accused's actions objectively constitute maltreatment. This potentially leads to a sideshow on the issue of whether the victim is unduly sensitive. The military judge must resolve this issue under MRE 403. Judge Sullivan apparently foresaw this issue when he said in a footnote that "[c]ommon sense dictates that these terms not be defined in terms of the particular sensitivities of the victim." *Carson*, 57 M.J. at 418 n.5.

133. 57 M.J. 419 (2002).

134. *Id.* at 420.

135. United States v. Berry, 20 C.M.R. 325, 330 (C.M.A. 1956).

136. *Id.*

137. *Sims*, 57 M.J. at 421.

138. United States v. Izquierdo, 51 M.J. 421 (1999).

139. *Sims*, 57 M.J. at 421.

140. *See id*. at 422. Judge Sullivan concurred in the result, but continues to argue that the *Berry* standard is more appropriate. *Id*. at 422-23 (citing *Izquierdo*, 51 M.J. at 423-24) (Sullivan, J., concurring). The trial judge, the COMA in *Berry*, and the CAAF in *Sims* all seem to use the terms "in public" and "open and notorious" interchangeably when dealing with the nature of the otherwise lawful sexual conduct. *See id*. at 420-422; United States v. Berry, 20 C.M.R. 325, 330 (C.M.A. 1956). In *Berry*, the COMA never held that a third party had to observe the act, only that a third party must actually be present. *Id*. Although the CAAF in *Izquierdo* seemed to interpret the presence requirement as one also involving observation of the sexual conduct, it implied that merely placing a barrier to visual observation between the sexual conduct and the third party present (in that case, a sheet) does not prevent the sexual conduct from being "open and notorious." *Izquierdo*, 51 M.J. at 423. There is a similar focus in the *Benchbook* instruction on indecent exposure; an exposure is indecent when it "occurs at such time and place that a person reasonably knows or should know that (his)(her) act will be open to the observation of (another)(others)." BENCHBOOK, *supra* note 3, para 3-88-1.

141. The U.S. Army Trial Judiciary is currently staffing a change to the current instruction on indecent acts. Dixon Address, *supra* note 90; *see* BENCHBOOK, *supra* note 3, para 3-90-1.

142. 56 M.J. 336 (2002), *cert. denied*, No. 01-1820, 2002 U.S. LEXIS 6028 (Oct. 7, 2002).

accidental, occurring during the course of a domestic dispute in which Angela was the aggressor.[143]

At trial, the government offered only the first four of the accused's statements, in which he recounted the fabricated kidnapping. Significantly, the government did not offer any statement in which the accused admitted to the killing. During its case in chief, the accused did not testify, but the defense offered the accused's sixth and seventh statements under the rules of completeness—Military Rules of Evidence (MRE) 106 and 304(h)(2).[144] In an exhaustive comparison of these two rules, the CAAF described each of them, including their similarities and differences. The court first noted that MRE 106: (1) may be used by any party; (2) covers only written statements or recorded statements, but does not cover oral statements; (3) can include separate statements or documents—not just those made by the accused; (4) appears (by strong implication rather than the CAAF's explicit holding) to be a rule of timing only, rather than a rule of admissibility; and (5) provides the military judge with the discretion to determine whether the additional material ought in fairness be considered with the original matter to avoid creating a false impression.[145]

Military Rule of Evidence 304(h)(2), by contrast: (1) may be invoked only by an accused, and only after the prosecution has introduced an alleged admission or confession; (2) is limited to situations where only a part of a confession or admission by the accused has been introduced; (3) applies to oral as well as written statements; (4) governs the timing under which the defense may introduce applicable evidence; (5) is a rule of admissibility that permits the defense to introduce the remainder of a confession, admission, or a statement by the accused explaining a confession or admission, even if the additional statement (or portion of a statement) would otherwise constitute inadmissible hearsay; (6) requires a case-by-case determination as to whether a *series of statements* should be treated as part of the original confession or admission, or as a separate course of action for purposes of the rule; and (7) requires the admission of the "remaining portions of the statement" if such material falls within the criteria set forth under this rule and applicable case law.[146]

The CAAF ultimately concluded that the accused's different statements were not part of the same statement and should not be admitted under MRE 304(h)(2). Although the statements related to the same alleged misconduct, the accused made them at different times to different people.[147] As a possible indication of the CAAF's continuing displeasure with gamesmanship over the accused taking the stand, the CAAF noted that MRE 304(h)(2) is not designed to allow the accused to avoid taking the stand to tell his side of the story.[148]

Hearsay—Statements Against Interest: United States v. Benton[149]

In the spring of 1998, SPC Anson Benton found himself on trial for the kidnapping and forcible sodomy of CH, a woman that SPC Benton and a co-accused, Private First Class (PFC) Ransom, had abducted from a local street near Fort Lewis, Washington. The defense was duress; to bolster this defense, the accused wanted to present PFC Ransom's statement that PFC Ransom had pointed a gun at SPC Benton during the course of the events in question. The military judge sustained

143. *Id*. at 338-39.

144. MCM, *supra* note 74, MIL. R. EVID. 106 ("When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require that party at that time to introduce any other part or any other writing or recorded statement which ought in fairness . . . be considered contemporaneously with it."); *id*. MIL. R. EVID. 304(h)(2) ("If only part of an alleged admission or confession is introduced against the accused, the defense, by cross-examination or otherwise, may introduce the remaining portions of the statement.").

145. *Id*. MIL. R. EVID. 106.

146. *Id*. MIL. R. EVID. 304(h)(2). The CAAF delineated the "outer limit" of the series of statements under MRE 304(h)(2): "[A] separate statement or utterance of an accused, which is totally disconnected or unrelated to the statement containing the confession is not admissible as part of such statement." *Rodriguez*, 56 M.J. at 341 (quoting United States v. Harvey, 25 C.M.R. 42 (C.M.A. 1957)).

147. *Rodriguez*, 56 M.J. at 338-39, 342. Compare the result in *Rodriguez* to that in *United States v. Gilbride*, 56 M.J. 428 (2002). In *Gilbride*, the CAAF followed the factors discussed in *Rodriguez* and *Harvey* and found that a written statement containing exculpatory statements by the accused was part of the same transaction or course of action as a prior oral statement. The written statement involved the same misconduct, was given to the same investigators, was a routine part of taking the oral statement, and followed immediately on the heels of the oral statement without a significant break in time. *Id.* at 429.

148. *Rodriguez*, 56 M.J. at 342-43. A time-honored defense strategy is to place the accused's theory of the case in front of the fact-finder through the use of hearsay statements without having the accused take the stand. Consider also the CAAF's opinions in *United States v. Goldwire*, 55 M.J. 139 (2001), and *United States v. Hart*, 55 M.J. 395 (2001). In both cases, the CAAF held that the accused could place his character for truthfulness at issue through the admission of such statements. *Rodriguez* is another example of how the CAAF has severely restricted this option for the defense.

149. 57 M.J. 24 (2002). This case could also be entitled "Rule of Completeness, Part Two." In the ACCA's opinion in *Benton*, the Army court also made clear that MRE 304(h)(2) is a rule of admissibility, not just timing. The remaining portions of an alleged admission or confession which was initially offered by the government "may [be] introduce[d]" by the defense, other evidentiary objections notwithstanding. United States v. Benton, 54 M.J. 717, 723 (Army Ct. Crim. App. 2001). The ACCA opinion, however, implies that MRE 106, which says that a party can require the opposing party to introduce other written or recorded statements (or other parts of a statement), is a rule of timing, not admissibility. *Id*. at 723 & n.9 (citing United States v. Cannon, 33 M.J. 376, 383 (C.M.A. 1991)). Both rules, however, "share the same policy basis." *Id*. at 722-23 (citing United States v. Morgan, 15 M.J. 128, 131-32 (C.M.A. 1983)).

a hearsay objection, disagreeing with the defense that the proffered statement was a statement against penal interest under MRE 804(b)(3).[150]

For evidence to be admissible under MRE 804(b)(3), the accused needed to show: (1) that PFC Ransom was unavailable to testify; (2) that the statement was against PFC Ransom's penal interest; and (3) that corroborating circumstances clearly indicate the trustworthiness of the statement. The CAAF upheld the military judge, concentrating on the second and third parts of this test.[151]

A statement is against a declarant's penal interest if it "so far tend[s] to subject the declarant to . . . criminal liability . . . that a reasonable person in the position of the declarant would not make the statement unless the person believe[s] it to be true."[152] According to the CAAF, PFC Ransom's statement "fell far short of an unambiguous admission" of liability for aggravated assault by pointing a gun at the accused.[153] Private First Class Ransom did not make a clear and direct statement that he pointed a gun at the accused; he merely failed to disagree with the questioner's premise that he did so. Additionally, he tried to undercut any acceptance of responsibility, claiming intoxication, a potential defense.[154]

Because SPC Benton offered PFC Ransom's statement to exculpate himself, the statement also had to be accompanied by corroborating circumstances clearly indicating its trustworthiness. The CAAF said that trustworthiness has two aspects—the trustworthiness of the declarant making the statement, and the trustworthiness of the witness relating the statement in court.[155] In deciding that PFC Ransom's statement was untrustworthy, the CAAF listed several factors for practitioners to consider when evaluating prong three above, including: (1) whether there is an apparent motive for the declarant to misrepresent the matter; (2) the testifying witness's general character, or character for truthfulness; (3) whether anyone else hear the alleged statement; (4) whether the statement was made spontaneously or under questioning; (5) the timing of the declaration; and (6) the relationship between the declarant and the testifying witness.[156] Military judges who are confronted with similar issues should consider entering essential findings on these factors.

Hearsay—Medical Treatment: United States v. Hollis[157]

Journalist First Class Hollis was separated from his wife, the mother of his two daughters. Eventually, his daughters came to live with him at his duty station in Italy, accompanied by a live-in nanny. While in Italy, the accused's older daughter, J.H., reported what the nanny suspected to be sexual abuse. The nanny took J.H. to Lieutenant (Lt.) Novek, a pediatrician she had seen before, for evaluation. Even though he had treated J.H. before, Lt. Novek explained to J.H. that he was a doctor and that he was there to "help her if she needed help."[158] His evaluation showed signs consistent with sexual abuse.[159]

The accused's defense counsel later requested that another pediatrician, Captain (Capt.) Craig, evaluate J.H., hoping to find an alternate explanation for the sexual abuse.[160] Captain Craig likewise explained to J.H. that she was a "kid's doctor," that she "helps kids," and that "it's always important to tell the truth to the doctor when children come in for a checkup."[161] During this examination, J.H. became hysterical when Capt.

150. *See Benton*, 57 M.J. at 27.

151. *Id.* at 30.

152. MCM, *supra* note 74, MIL. R. EVID. 804(b)(3).

153. *Benton*, 57 M.J. at 30. When asked why he pointed a gun at the accused (a question that assumes the truth of the fact asserted), PFC Ransom first said that he did not know, then continued by saying that he may have been "drunk or something." *Id*.

154. *Id*. A devil's advocate might argue that such an attempt to avoid liability makes the prior acceptance of responsibility all that more credible. Logically, one would not try to avoid what one does not believe exists.

155. *Id.* at 31. Military Rule of Evidence 804(b)(3) requires the declarant to be unavailable; thus, someone other than the declarant will be testifying about that statement. *See* MCM, *supra* note 74, MIL. R. EVID. 804(b)(3).

156. *Benton*, 57 M.J. at 30-31. The requirements for essential findings are beyond the scope of this article, but when the military judge enters findings of fact on the record, the appellate courts give those findings great deference and will only disturb them if they are clearly erroneous. Absent these findings, the military judge's factual determinations receive no deference. *See, e.g.*, United States v. Sullivan, 42 M.J. 360, 363 (1995); United States v. Benton, 54 M.J. 717 (Army Ct. Crim. App. 2001).

157. 57 M.J. 74 (2002), *cert. denied*, No. 02-631, 2002 U.S. LEXIS 8746 (Dec. 2, 2002).

158. *Id.* at 76.

159. *Id*. at 77.

160. *Id*. In a critical oversight, the defense counsel apparently failed to have Capt. Craig appointed as a member of the defense team before her evaluation of J.H. and R.H. *See id*.; United States v. Toledo, 25 M.J. 270 (C.M.A. 1987). Such action would have shielded the results of Capt. Craig's examinations under the attorney-client privilege.

Craig asked about what happened in Italy, making incriminating comments about the accused. At a second examination, Capt. Craig found physical evidence consistent with sexual abuse. Before a third examination, J.H. said, "Hello, Dr. Craig."[162] During that examination, J.H. recounted a "zillion" instances of rape by the accused.[163]

Captain Craig also interviewed the accused's younger sister, R.H. Captain Craig likewise explained to R.H. that she was a doctor that helps children and emphasized the importance of telling the truth; R.H. told Capt. Craig she understood and recounted that she had seen the accused sexually abuse her sister, J.H.[164]

At trial, the government sought to admit the results of the examinations of J.H. and R.H. by both doctors under MRE 803(4). The defense objected, saying there was no evidence that the girls made their statements "with some expectation of receiving medical benefit for the medical diagnosis or treatment that is being sought."[165] Neither J.H. nor R.H. testified about their expectations from either Lt. Novek or Capt. Craig, but both doctors gave testimony supporting each child's expectations from them. From that testimony, the military judge found the girls' statements to the doctors admissible under MRE 803(4).[166]

On appeal, the CAAF upheld the ruling of the military judge, clearly stating that the "child victim's expectation of receiving medical treatment need not be established by the child-victim's testimony. It can be established by the testimony of the treating medical professionals."[167] Child victims and those responsible for them can be very reluctant to testify, making these cases difficult to prove. The CAAF's decision here loosens the restrictions on admitting evidence to support these cases.

Corroboration of Confessions: United States v. Grant[168]

Staff Sergeant (SSgt.) Grant was charged with one specification of wrongful use of marijuana on divers occasions. In a contested case before officer members, the government offered a laboratory report showing that the accused had tested positive for marijuana, to corroborate the accused's confession to marijuana use. The government, however, offered no expert testimony to explain the results of the test to the members. Despite defense objections, the military judge admitted the laboratory report.[169]

On appeal, the accused cited *United States v. Murphy*,[170] contending, in essence, that the laboratory report was not relevant without the expert testimony.[171] The CAAF found that the defense's reliance on *Murphy* "misses the point."[172] To the CAAF,

> The purpose for which evidence is offered governs its admissibility. The fact that [*Murphy* requires] . . . additional foundational requirements for [use of a lab report as] . . . substantive [evidence] . . . of wrongful use

161. *Id.* at 77.

162. *Id*. at 78.

163. *Id*.

164. *Id*. at 77-78.

165. *Id.* at 79 (quoting United States v. Edens, 31 M.J. 267, 269 (C.M.A. 1990)).

166. *Id*. at 78.

167. *Id.* at 79-80.

168. 56 M.J. 410 (2001).

169. *Id.* at 413, 415.

170. 23 M.J. 310, 312 (C.M.A. 1987) (holding that "[e]xpert testimony interpreting . . . [urinalysis] tests . . . is required to provide a rational basis upon which the fact finder may draw an inference that [the controlled substance] was used").

171. *Grant*, 56 M.J. at 415. At trial, the defense would have argued that to corroborate the accused's confession, the laboratory report had to "corroborate . . . the essential facts admitted [in the confession] to justify sufficiently an inference of the . . . truth [of the facts admitted in the confession]." MCM, *supra* note 74, MIL. R. EVID. 304(g). As the accused had already confessed to using marijuana, the only way the laboratory report could corroborate it is if the laboratory report showed that the accused used marijuana. According to *Murphy*, however, the laboratory report could not show that the accused had used marijuana without expert interpretation. Thus, without expert interpretation, the laboratory report is nothing more than a piece of paper, unable to corroborate anything. Unfortunately for the accused, the CAAF disagreed. The defense's view was arguably supported by *United States v. Graham*, 50 M.J. 56 (1999), in which the CAAF held that the requirements of *Murphy* applied to the result of a urinalysis test, even when the government offered the test result for impeachment only, and not as substantive evidence of drug use. In a footnote, however, the CAAF said that *Grant* "does not limit or otherwise affect the holding in . . . *Graham*." *Grant*, 56 M.J. at 416 n.6.

172. *Grant*, 56 M.J. at 416.

does not change the law of evidence pertaining to . . . corroborat[ion of] a confession."[173]

From an instructional perspective, the "instructional nugget"[174] here is that the military judge must be conscious of the basis for admission, advising the members of the appropriate use of the evidence.[175]

Comment on Rights—Right to Counsel: United States v. Gilley[176]

Technical Sergeant (TSgt.) Gilley was suspected of indecent acts with his natural children and stepchildren. When local civilian police advised TSgt. Gilley of his Fifth Amendment rights, he waived those rights and agreed to discuss the allegations.[177] In the course of those discussions, he admitted several of the allegations. The next day, after civilian authorities deferred jurisdiction to the military, two Air Force Office of Special Investigations (AFOSI) agents interviewed TSgt. Gilley. Again, the accused verbally admitted to the indecent acts. When the AFOSI agents prepared a written statement, TSgt. Gilley refused to sign it and requested counsel.[178]

In his opening statement at trial, the defense counsel said the accused refused to sign the statement because it was untrue. During questioning by the defense, and then by the government, the law enforcement officers testified that the accused refused to sign the statement because he requested counsel.[179] The defense did not object to any of this testimony. In argument, the government referred to the accused's request for counsel, again without objection. Although the military judge gave the standard instruction on the accused's right to remain silent, he did not instruct on the accused's request for counsel.[180]

On appeal, the accused complained that the government had violated MRE 301(f)(3), which prevents the accused's request for counsel from being used against him.[181] Referring to Supreme Court precedent regarding comments on the accused's right to silence,[182] the CAAF determined that comments regarding the right to counsel should be treated similarly, as both rights flow from the Fifth Amendment.[183] The CAAF recognized that even a comment on a constitutional right is permissible, if the accused invites it.[184] The CAAF, however, framed the issue as one of plain error, premised on a waiver by the defense for failure to object or request an instruction. The CAAF affirmed, finding no plain error in the military judge's failure to give an instruction sua sponte on the accused's request for counsel.[185]

Clearly, the CAAF was not enthusiastic about what happened at trial; it would have been much happier had the military judge instructed the members on the limited use to which they could put the comments on the accused's request for counsel.[186] Given facts such as those in *Gilley*, the safer practice would be

173. *Id.*

174. This term is used courtesy of Lieutenant Colonel Martin H. Sitler, United States Navy-Marine Corps Trial Judiciary.

175. In *Grant*, the lab report was admitted for the limited purpose of corroborating the confession, not to show that the accused used marijuana as charged. The military judge "instructed the members accordingly." *Id*. at 416.

176. 56 M.J. 113 (2001).

177. *Id.* at 115. An Air Force Office of Special Investigations (AFOSI) agent was also present at this interview, but the opinion does not state whether the agent participated in this round of questioning. *Id.*

178. *Id*. at 116.

179. *Id*. at 122. The CAAF found it significant that the defense initially raised this issue. When discussing whether the military judge erred in even admitting the testimony, the CAAF said, "Had the Government first introduced this evidence, this would be a different case." *Id.*

180. *Id.* at 118; *see* BENCHBOOK, *supra* note 3, para. 7-12.

181. *Gilley*, 56 M.J. at 120 (citing MCM, *supra* note 74, MIL. R. EVID. 301(f)(3) ("The fact that the accused during official questioning and in exercise of rights under the Fifth Amendment to the Constitution of the United States or Article 31 . . . requested counsel . . . is inadmissible against the accused.")).

182. Doyle v. Ohio, 426 U.S. 610 (1976); United States v. Hale, 422 U.S. 171 (1975); Griffin v. California, 380 U.S. 609 (1965).

183. *Gilley*, 56 M.J. at 120.

184. *Id*. ("The Government is permitted to make 'a fair response' to claims made by the defense, even when a Fifth Amendment right is at stake."). The CAAF referred to this as the "invited reply" or "invited response" rule, based on *United States v. Young*, 470 U.S. 1 (1985), *Lawn v. United States*, 355 U.S. 339 (1958), and *United States v. Robinson*, 485 U.S. 25 (1988). The CAAF discussed this rule, but did not apply it to this case. The defense theory was that the accused did not sign the written statement because it was false. Testimony that the accused did not read the statement before refusing to sign it would have been fair response. As the CAAF pointed out, however, the accused may also have wanted a lawyer's advice on the written statement before signing it, regardless of the truth of its contents. *Gilley*, 56 M.J. at 122.

185. *Gilley*, 56 M.J. at 122-23.

for the defense counsel to request a limiting instruction, and absent such a request, for the military judge to give one.[187]

Comment on Rights—Right to Silence:
United States v. Alameda[188]

Senior Airman Alameda was suspected of, among other things, attempted murder and assault. When he was apprehended and confronted with the allegations against him, he said nothing. At trial, the government introduced evidence, over defense objection, of the accused's silence when he was informed of the reason he was being apprehended. The government later argued, again over defense objection, that such silence demonstrated the accused's consciousness of guilt. During the government's argument, the military judge told the members that "the accused is under absolutely no obligation to make any statement during the trial in his defense," and that "nothing will be held against this accused because he did not say anything in his defense."[189]

Military Rule of Evidence 304(h)(3) says that a person's silence in the face of an accusation is not admissible as evidence of the truth of the accusation when the person is "under official investigation" for the offense of which he is accused.[190] Based on this provision, the CAAF found that the evidence and argument about the accused's silence was an error of constitutional dimension.[191]

Discussing the military judge's instructions to the members, the CAAF found the instructions could have made matters worse. In the CAAF's view, the military judge's instructions highlighted only the accused's right to remain silent *at trial*, leaving the members to speculate that he did not have such a right *before* trial, and that the accused's silence was indeed evidence of his guilt.[192]

There are times during a trial when such evidence and argument appear without warning. In *Alameda*, the CAAF implied that had the military judge's instructions advised the members to disregard the improper evidence and argument, those instructions may have cured the error.[193] Military judges who face similar unforeseen situations should follow the advice in paragraph 2-7-20 of the *Benchbook* and instruct the members to disregard such improper evidence or argument.[194]

Military Rule of Evidence 404(b) and the Doctrine of Chances:
United States v. Tyndale[195]

Staff Sergeant Tyndale was an experienced guitar player, playing at parties and other locations near his duty station. In 1994, the accused's urine tested positive for methamphetamine, but a court-martial acquitted him when he testified that someone slipped the drug into his drink without his knowledge while he was playing the guitar at a party. When the accused tested positive for methamphetamine again in 1996, he told his commander the same story—that he did not know how he had tested positive, and that someone must have slipped the drug into his drink without his knowledge while he was playing the guitar at the party.[196]

The government offered evidence from the accused's 1994 urinalysis in its case-in-chief, including the accused's explanation for that prior urinalysis. The military judge ruled that the evidence was inadmissible except in response to a defense of innocent ingestion. During its case-in-chief, the defense offered evidence of innocent ingestion—that the accused believed that someone at the party had surreptitiously slipped methamphetamine into his drink. After the admission of this evidence, the military judge allowed the government to admit the evidence from the 1994 urinalysis.[197]

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186. *Id.* ("[W]e are troubled by trial counsel's repeated references to appellant invoking his right to counsel without objection and without instruction . . . .").

187. Under the facts of this case, giving the instruction at paragraph 2-7-20 of the *Benchbook* may have avoided considerable appellate litigation.

> MJ: During argument, both counsel made reference to the accused requesting counsel. Such references to the accused invoking his right to counsel can only be used by you for their tendency, if any, to rebut the assertion that the accused did not sign the statement because it was false. Such references must be completely disregarded for all other purposes and specifically cannot be used as any evidence of the accused's guilt.

BENCHBOOK, *supra* note 3, para. 2-7-20.

188. 57 M.J. 190 (2002).

189. *Id.* at 196.

190. MCM, *supra* note 74, MIL. R. EVID. 304(h)(3) ("A person's failure to deny an accusation of wrongdoing concerning an offense for which at the time of the alleged failure the person was under official investigation or was in confinement, arrest, or custody does not support an inference of an admission of the truth of the accusation.").

191. *Alameda*, 57 M.J. at 200-01.

192. *Id.* at 199.

193. *Id.*

On appeal, the CAAF discussed whether admitting this evidence was error under MRE 404(b).[198] Recognizing that MRE 404(b) is not a complete ban on character evidence, and that the rule is one of inclusion when the proffered use of the evidence is for something other than propensity, the CAAF examined whether the facts of this case met the three *United States v. Reynolds* factors.[199] The CAAF focused its attention on the second *Reyonlds* factor—whether the evidence makes a fact of consequence more or less probable.[200]

The CAAF relied on the "doctrine of chances" to answer that question affirmatively: "This doctrine posits that it is unlikely a defendant would be repeatedly, innocently involved in similar, suspicious circumstances."[201] Because the circumstances surrounding the accused's prior ingestion of methamphetamine were sufficiently similar to those alleged, the CAAF found that the evidence had the required probative value.[202]

Finally, the CAAF noted that, particularly when this doctrine is applied, the military judge must be careful, lest the members use the evidence of prior conduct for prohibited propensity purposes. Here, the CAAF stressed the importance of a complete MRE 403 analysis on the record.[203] Additionally, the CAAF found that carefully tailored limiting instructions were essential to keep the members from using this evidence inappropriately.[204]

Accomplice Instructions: United States v. Bigelow[205]

Senior Airman Bigelow became involved in distributing LSD. At trial, several other airmen who were also allegedly involved in the accused's criminal enterprise testified against him. The defense counsel had requested the then-standard *Benchbook* accomplice instruction,[206] but the military judge

194. This instruction states,

> 2-7-20. Comment On Rights To Silence or Counsel
> NOTE: *Comment on or question about an accused's exercise of a right to remain silent, to counsel, or both.* Except in extraordinary cases, a question concerning, evidence of, or argument about an accused's right to remain silent or to counsel is improper and inadmissible. If such information is presented before the fact finder, even absent objection, the military judge should: determine whether or not this evidence is admissible and, if inadmissible, evaluate any potential prejudice, make any appropriate findings, and fashion an appropriate remedy. In trials with members, this should be done in an Article 39(a) session. Cautions to counsel and witnesses are usually appropriate. If the matter was improperly raised before members, the military judge must ordinarily give a curative instruction like the following, unless the defense affirmatively requests one not be given to avoid highlighting the matter. Other remedies, including mistrial, might be necessary. *See United States v. Garrett*, 24 M.J. 413 (C.M.A. 1987) and *United States v. Sidwell*, 51 M.J. 262 (1999).
>
> MJ: (You heard)(A question by counsel may have implied) that the accused may have exercised (his)(her) (right to remain silent)(and)(or)(right to request counsel). It is improper for this particular (question)(testimony)(statement) to have been brought before you. Under our military justice system, servicemembers have certain constitutional and legal rights that must be honored. When suspected or accused of a criminal offense, a servicemember has (an absolute right to remain silent)(and)(or) (certain rights to counsel). That the accused may have exercised (his)(her) right(s) in this case must not be held against (him)(her) in any way. You must not draw any inference adverse to the accused because (he)(she) may have exercised such right(s), and the exercise of such right(s) must not enter into your deliberations in any way. You must disregard the (question)(testimony)(statement) that the accused may have invoked his right(s). Will each of you follow this instruction?

BENCHBOOK, *supra* note 3, para. 2-7-20.

195. 56 M.J. 209 (2001). For another example of the CAAF's application of MRE 404(b) this term, see *United States v. Humpherys*, 57 M.J. 83 (2002), in which the CAAF applied the factors listed in *United States v. Reynolds*, 29 M.J. 105, 109 (C.M.A. 1989), to affirm the admission of evidence of prior acts to show a non-innocent motive for a comment charged as nonprofessional social behavior, in violation of a lawful general regulation. *Tyndale*, 56 M.J. at 212.

196. *Tyndale*, 56 M.J. at 211.

197. *Id*. at 212.

198. *Id*. (citing MCM, *supra* note 74, MIL. R. EVID. 404(b)). This rule "prohibits admission of evidence of a person's character for the purpose of proving that the person acted in conformity therewith on a particular occasion." MCM, *supra* note 74, MIL. R. EVID. 404(b).

199. *Tyndale*, 56 M.J. at 212-13 (citing *Reynolds*, 29 M.J. at 109). As the court explained,

> First, the evidence must reasonably support a finding by the court members that [the accused] committed the prior crimes, wrongs, or acts. Second, the evidence must make a fact of consequence more or less probable. Third, the probative value of the evidence must not be substantially outweighed by the danger of unfair prejudice.

Id.

200. *See id*. at 213-14.

201. *Id.* at 213. Precedent from the CAAF holds that proof of mere prior drug use is not admissible to rebut a defense of innocent ingestion to a second drug use. *See, e.g.*, United States v. Graham, 50 M.J. 56 (1999). In this case, however, it was not merely the fact the accused tested positive previously that the government sought to admit. The government sought to admit the accused's explanation for the prior positive test result (which of necessity required admission of the prior positive test result) to say, in effect, that no accused could be that unlucky twice. *See Tyndale*, 56 M.J. at 215-16.

gave an abbreviated accomplice instruction, despite defense objections.[207] The military judge's abbreviated instruction essentially removed the corroboration language and only referred to considering the accomplices' testimony with "caution" once, whereas the standard instruction refers to considering an accomplice's testimony with "great caution" twice.[208]

On appeal to the CAAF, Airman Bigelow alleged that the instruction was error, and that it failed to comply with the court's opinion in *United States v. Gillette*.[209] The CAAF considered the purpose behind the instruction and reviewed federal cases holding that no accomplice instruction is required.[210] The court then reiterated that the better practice, as set out in *Gillette*, is to advise the members: (1) how to determine whether a person is an accomplice; and (2) about the "suspect credibility" of accomplice testimony.[211] Discussing its own precedent, the CAAF said, "The essential holding of *Gillette* is that the critical principles of the standard accomplice instruction . .

202. *Tyndale*, 56 M.J. at 216. The CAAF listed the following similarities:

> In both instances, the appellant:
> (1) performed at a party frequented by "druggies," or where drug use was reported and he accepted open beverages;
> (2) was unable to either identify or locate the apartment occupants because they moved out;
> (3) was unable to locate the apartment;
> (4) did not ask civilian or government authorities for assistance in locating the individuals he argued had secretly placed methamphetamine in his drinks; and
> (5) testified in both instances that his brother was the only witness available to testify on his behalf as to the events at the residences.

Id. at 214. Although the CAAF did not require a perfect alignment between the facts of two situations to apply this doctrine of chances, it did require more than "the crudest sort" of similarities, lest the general prohibition of propensity evidence be swallowed by this doctrine. *Id*. at 213 (quoting United States v. Mayans, 17 F.3d 1174 (9th Cir. 1994)).

203. *Id*. at 215. ("Where the military judge properly weighs the evidence under [MRE] 403 and articulates the reasons for admitting the evidence, this Court will reverse only for a clear abuse of discretion.").

204. *Id*. In this case, the military judge told the members that they could only use the 1994 evidence for its tendency, if any, to show knowledge of the presence of the substance, knowledge of the substance's identity, and to rebut the defense of innocent ingestion. Specifically, the military judge told the members that they could not use it for any other purpose, to include propensity. *Id*.

205. 57 M.J. 64 (2002).

206. *Id.* at 66 & n.1. The instruction read as follows:

> You are advised that a witness is an accomplice if he/she was criminally involved in an offense with which the accused is charged. The purpose of this advice is to call to your attention a factor specifically affecting the witness' believability, that is, a motive to falsify (his)(her) testimony in whole or in part, because of an obvious self-interest under the circumstances.
>
> (For example, an accomplice may be motivated to falsify testimony in whole or in part because of his/her own self-interest in receiving (immunity from prosecution) (leniency in a forthcoming prosecution) (_____).)
>
> The testimony of an accomplice, even though it may be ((apparently) (corroborated) and) apparently credible is of questionable integrity and should be considered by you with great caution.
>
> In deciding the believability of (state the name of the witness), you should consider all the relevant evidence (including but not limited to (here the military judge may specify significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides)).
>
> Whether (state the name of the witness), who testified as a witness in this case, was an accomplice is a question for you to decide. If (state the name of the witness) shared the criminal intent or purpose of the accused, if any, or aided, encouraged, or in any other way criminally associated or involved himself/herself with the offense with which the accused is charged, he/she would be an accomplice whose testimony must be considered with great caution.
>
> (Additionally, the accused cannot be convicted on the uncorroborated testimony of a purported accomplice if that testimony is self-contradictory, uncertain, or improbable.)
>
> (In deciding whether the testimony of (state the name of the witness) is self-contradictory, uncertain, or improbable, you must consider it in the light of all the instructions concerning the factors bearing on a witness' credibility.)
>
> (In deciding whether or not the testimony of (state the name of the witness) has been corroborated, you must examine all the evidence in this case and determine if there is independent evidence which tends to support the testimony of this witness. If there is such independent evidence, then the testimony of this witness is corroborated; if not, then there is no corroboration.)
>
> (You are instructed as a matter of law that the testimony of (state the name of the witness) is uncorroborated.)

BENCHBOOK, *supra* note 3, para. 7-10.

. shall be given, not necessarily the standard instruction itself, word for word."[212] After finding that the judge's instruction satisfied the two *Gillette* requirements, the CAAF affirmed.[213] Based on *Bigelow*, the U.S. Army Trial Judiciary approved a change to the current accomplice instruction.[214]

Sentencing

Unfulfilled Bargains: United States v. Smith[215]

In *Smith*, the CAAF followed *United States v. Williams*[216] and *United States v. Hardcastle*[217] by holding that when there is a mistake in a pretrial agreement that results in failure to fulfill a portion of that pretrial agreement, the pleas under that agreement are improvident. The CAAF expressed a way to fix this problem post-trial:

> We note that where there has been a mutual misunderstanding as to a material term, the convening authority and an accused may enter into a written post-trial agreement under which the accused, with the assistance of counsel, makes a knowing, voluntary, and intelligent waiver of his right to contest the providence of his pleas in exchange for an alternative form of relief. The record in the present case, however, reflects no such agreement, nor does it otherwise demonstrate that appellant made an informed waiver of his rights.[218]

While the military judge should continue to be vigilant for any issues or misunderstandings of the parties regarding the terms of pretrial agreements, the CAAF has provided a way out of these situations, provided the parties recognize them before sending the record forward for appeal.

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207. *Bigelow*, 57 M.J. at 66. The abbreviated instruction read as follows:

> You are advised that a witness is an accomplice if he was criminally involved in an offense with which the accused is charged. The purpose of this advice is to call to your attention a factor bearing upon the witness's believability. An accomplice may have a motive to falsify his testimony in whole or in part, because of his self-interest in the matter, that is, a motive to falsify his testimony in whole or in part, because of an obvious self-interest.
>
> For example, an accomplice may be motivated to falsify testimony in whole or in part because of his own self-interest in receiving immunity from prosecution or some sort of clemency in the disposition of his case.
>
> Whether or not Airman Basic Beene, [Airman First Class] Herpin, or Senior Airman Bradley[,] who each testified as a witness, was an accomplice is a question for you to decide. If Airman Basic Beene, [Airman First Class] Herpin, or Senior Airman Bradley shared the criminal intent or purpose of the accused, if any, or aided, encouraged, or in any other way criminally associated or criminally involved himself in the offense with which the accused is charged, then he would be an accomplice.
>
> As I indicated previously, it is your function to determine the credibility of all the witnesses, and the weight, if any, you will accord the testimony of each witness.
>
> Although you should consider the testimony of an accomplice with caution, you may convict the accused based solely upon the testimony of an accomplice, as long as that testimony wasn't self contradictory, uncertain, or improbable.

Id. at 66 & n.2.

208. *See infra* notes 206-07.

209. 35 M.J. 468 (C.M.A. 1992).

210. *See, e.g.*, Caminetti v. United States, 242 U.S. 470 (1917); United States v. Shriver, 838 F.2d 980 (8th Cir. 1988); United States v. McGinnis, 783 F.2d 755 (8th Cir. 1986); United States v. Gonzalez, 491 F.2d 1202 (5th Cir. 1974). *But see* United States v. Kinnard, 465 F.2d 566, 573 (D.C. Cir. 1972); United States v. Becker, 62 F.2d 1007 (2d Cir. 1933) (supporting an accomplice instruction). Note that in *United States v. Gibson*, 58 M.J. 1 (2003), the CAAF found error when a military judge failed to give an accomplice instruction, apparently adopting the position that an accomplice instruction is required:

> The military judge's refusal to give the accomplice instruction "seriously impaired" the defense by depriving it of a powerful instruction that would have required the members to consider the Government's evidence with caution, because of the potential for false testimony motivated by self-interest in obtaining leniency or immunity from prosecution.

Id. at 7.

211. *Bigelow*, 57 M.J. at 67 (quoting *Gillette*, 35 M.J. at 470); *see Gibson*, 58 M.J. at 1 (holding that failure to give accomplice instruction was error).

212. *Bigelow*, 57 M.J. at 67.

213. *Id.* at 69.

Sentencing Instructions: United States v. Blough[219] *and* United States v. Hopkins[220]

During the sentencing portion of A1C Blough's trial, his defense counsel specifically requested that the military judge give a detailed recitation of the background, character, duty performance, and other extenuating and mitigating matters he had presented for his client. The military judge declined this request, but did instruct the members that they should consider all matters presented before and after findings, including all matters in extenuation and mitigation, such as the accused's character and background, as well as those matters in aggravation.[221]

In an extensive review of the issue of sentencing instructions, the AFCCA looked at *Wheeler*, as well as the case law on this issue before and since. Based on that thorough review of the law, the AFCCA found no error in the military judge's instructions, saying:

> [Current and prior law] require that the military judge give general guidelines to the court members about the matters they should consider in sentencing. The "tailoring" envisioned by *Wheeler* is in selecting the general categories of mitigating or extenuating evidence which are appropriate for instruction, such as evidence of good character, a good service record, pretrial restraint, or mental impairment. However, it is not necessary to detail each piece of evidence that may dem-

214. *See* U.S. Army Trial Judiciary, Instr. 7-10 (5 May 2003) (to be published in BENCHBOOK, *supra* note 3, Change 2). The new accomplice instruction, with the approved change, is as follows:

> You are advised that a witness is an accomplice if he/she was criminally involved in an offense with which the accused is charged. The purpose of this advice is to call to your attention a factor specifically affecting the witness's believability, that is, a motive to falsify (his)(her) testimony in whole or in part, because of an obvious self-interest under the circumstances.
>
> (For example, an accomplice may be motivated to falsify testimony in whole or in part because of his/her own self-interest in receiving (immunity from prosecution) (leniency in a forthcoming prosecution) (_____).)
>
> In deciding the believability of (state the name of the witness), you should consider all the relevant evidence (including but not limited to (here the military judge may specify significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides)).
>
> Whether (state the name of the witness), who testified as a witness in this case, was an accomplice is a question for you to decide. If (state the name of the witness) shared the criminal intent or purpose of the accused, if any, or aided, encouraged, or in any other way criminally associated or involved himself/herself with the offense with which the accused is charged, he/she would be an accomplice.
>
> As I indicated previously, it is your function to determine the credibility of all the witnesses, and the weight, if any, you will accord the testimony of each witness. Although you should consider the testimony of an accomplice with caution, you may convict the accused based solely upon the testimony of an accomplice, as long as that testimony was not self contradictory, uncertain, or improbable.
>
> *REFERENCES:* RCM 918(c), MCM; United States v. Bigelow, 57 M.J. 64 (2002); United States v. Williams, 52 M.J. 218 (2000); United States v. Gittens, 39 M.J. 328 (C.M.A. 1994); United States v. Gillette, 35 M.J. 468 (C.M.A. 1992); United States v. McKinnie, 32 M.J. 141 (C.M.A. 1991).

Id.

215. 56 M.J. 271 (2002).

216. 53 M.J. 293 (2000).

217. 53 M.J. 299 (2000).

218. *Smith*, 56 M.J. at 279.

219. 57 M.J. 528 (A.F. Ct. Crim. App. 2002).

220. 56 M.J. 393 (2002).

221. *Blough*, 57 M.J. at 530. The defense counsel relied on *United States v. Wheeler*, 38 C.M.R. 72 (C.M.A. 1967), in making this request. In *Wheeler*, the COMA said that the law officer (now the military judge) must "tailor his instructions on the sentence" to tell the court members of the evidentiary matters they should consider. *Id.* at 75. The court in *Wheeler* mentioned that *DA Pam 27-9*—then known as the *Military Justice Handbook*—delineated specific categories of evidence, but the court did not require the military judge to detail the evidence in exhaustive specificity. *Id.* at 76. In *Wheeler*, the court cited its prior opinion in *United States v. Rake*, 28 C.M.R. 383 (C.M.A. 1960) with approval, an opinion in which the court directly said, "[The military judge] is not required to detail each and every matter that the court-martial might possibly consider in mitigation." *Id.* at 384.

onstrate such matters, although a military judge certainly has the discretion to do so.[222]

Under the similar facts of *United States v. Hopkins*,[223] the CAAF held that it was not error for the military judge to deny a defense request to refer to the accused's statement of remorse specifically, instead referring to the accused's unsworn statement (in which the accused expressed remorse) as a matter for the member's consideration.[224]

The *Benchbook* specifically lists general categories of matters in extenuation and mitigation that the members should consider on sentencing.[225] Based on *Hopkins* and *Blough*, these instructions are sound and no more specificity is required.

Providence Inquiries: United States v. Jordan[226]

Assume that a hypothetical accused is charged with a violation of Article 134, that the military judge has asked the accused about the factual basis for the offense, and that the accused has explained these essential facts. The military judge then moves to the final portion of the inquiry and asks the accused whether his actions were service-discrediting or prejudicial conduct. Is it sufficient that the accused merely answer "yes" to the military judge's question, "Do you agree that your conduct was service discrediting, as I have defined that term for you?"[227]

Private Jordan pled guilty to unlawful entry by leaning over the railing of a boat without permission. During the providence inquiry, the military judge asked the accused if he admitted that his conduct was of a nature to bring discredit upon the armed forces; the accused replied, "Yes, sir."[228] The military judge did not inquire further on his own initiative about why the accused believed this to be the case.[229]

In a three-to-two decision, the CAAF held that this inquiry was insufficient, and held that the accused's guilty plea was improvident. Referring to Article 45 and RCM 910(e), Judge Baker said, "It is not enough to elicit legal conclusions. The military judge must elicit facts to support the plea of guilty."[230]

Rule for Courts-Martial 910(e) requires the military judge to satisfy himself that there is a factual basis for each element of the offense to which the accused is pleading guilty. Those facts routinely come from the accused's lips during providence,[231] but also could come from a stipulation of fact signed by the accused as part of a pretrial agreement. *Jordan* should put trial counsel on notice to ensure their stipulations of fact alone sup-

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222. *Blough*, 57 M.J. at 533.

223. 56 M.J. 393, 395 (2002).

224. *Id*. at 395.

225. *See, e.g.*, BENCHBOOK, *supra* note 3, para. 2-5-23.

226. 57 M.J. 236 (2002).

227. *See* BENCHBOOK, *supra* note 3, para. 3-60-2A.

228. *Jordan*, 57 M.J. at 242.

229. *Id*.

230. *Id.* The trial counsel apparently realized that the factual predicate for the plea was missing, as he asked the military judge to inquire further about the boat owner's displeasure with the accused's actions. The military judge also realized the reason for the question, as he overruled a defense objection to ask the question "in terms of bringing the service reputation into disrepute." *Id*. Unfortunately, the accused's answers, rather than supporting his assertion that his actions were service-discrediting, negated it:

> MJ: Did she [the boat owner] seem to be upset [by your conduct]?
> ACC: No, sir.
> MJ: Did she seem to be agitated?
> ACC: No, sir.

Faced with this inconsistency, the trial counsel did not request further inquiry, nor did the military judge do so on his own. Likewise, the CAAF noted that "there was no stipulation of fact associated with appellant's pre-trial agreement" from which it might glean the necessary factual predicate for the accused's conclusory statement. *Id.* at 237. The results might have been entirely different had the accused's factual statements not contradicted his assertion of service discrediting conduct, or had a stipulation of fact existed which would have provided the required factual predicate for guilt. Note that had such a stipulation existed when the accused made his inconsistent assertions, the military judge would have been required to resolve the inconsistency. *See* United States v. Epps, 25 M.J. 319 (C.M.A. 1987).

231. *See* MCM, *supra* note 74, R.C.M. 910(e). There is no requirement that the facts supporting a particular element come from the providence inquiry on that particular element. The majority recognizes that on appeal, the court will examine the "entire record to determine" if the providence inquiry provides the required factual support, to include reviewing any stipulation of fact "which could provide a factual basis" for the providence of the accused's plea. *Jordan*, 57 M.J. at 239. In his dissenting opinion, Judge Sullivan contends that "the entire plea inquiry must be considered on [the providence] question." *Id.* at 244. Finding sufficient facts in other portions of the providence inquiry (that the accused broke restriction by being at the marina; that a roving Marine patrol had to "smooth civilian and military relations" after the accused's conduct), Judge Sullivan would have affirmed. *Id.*

ply the factual predicate necessary for providence. Military judges will no doubt be asking the "why" questions; defense counsel should prepare their clients to answer these questions, rather than just robotically answering, "Yes, sir," or, "No, sir."

Graduation Address—Ninth Court Reporters' Course

Colonel Denise K. Vowell
Chief Trial Judge, U.S. Army Trial Judiciary

I was very pleased when Colonel Rosen and Master Sergeant Wagner invited me to be the graduation speaker for this Ninth Court Reporters' Course. It's particularly gratifying for me to be here because judges and court reporters are a team. I can't tell you how many times an astute court reporter has kept me from error in the courtroom.

This is an exciting and challenging time to be court reporters. You are acquiring an additional skill identifier with your graduation today, one which is vital to the preservation of good order and discipline in our armed forces, for without reporters, most courts-martial would be exercises in futility. You should be very proud of your achievement, and you should never doubt the value you add to the commands to which you are assigned, the Judge Advocate General's Corps, and the Army.

Why is this an exciting time to be a court reporter? Well, you will rarely be underemployed. After several years of declining caseloads, courts-martial numbers across the Army have increased steadily over the last two years, and in spite of—or perhaps because of—the deployment of many military units, the trend seems to be continuing in the first quarter of 2003. We had our busiest January and February in five years.

There are a number of reasons for the increase in trials: club drug usage, the change in the Army's AWOL/DFR policy, increased Internet misuse, BAH fraud, and many more soldiers called to active duty. These have all led to more trials Army-wide. I think there's another reason for that increase: a realization that Chapter 10s and admin[istrative] discharges are not really a deterrent to misconduct, but confinement is.

It's also an exciting time to be involved in military justice because after some years of being relegated to lesser importance, military justice is clearly high on The Judge Advocate General's radar screen. In some measure, we have judges to thank for this.

Two years or so ago, the Army Court of Criminal Appeals [ACCA] took a long, hard look at the number of cases that had been tried more than six months earlier, but for which no record of trial had yet been received by the Clerk of Court's office. As a judge on that court then, I can tell you we were concerned. We were also concerned about the number of cases we were seeing where it took a very long time—years in some cases—between the end of trial and receipt of the record at our court.

Most of us old colonels on that court had tried cases back in the days when the *Dunlap*[1] decision was in effect. In *Dunlap*, the Court of Military Appeals set a standard for post-trial processing: if the convening authority did not take action within ninety days of the court adjourning, prejudice was presumed, and the accused walked; the findings and sentence were set aside. Talk about pressure on court reporters!

I practiced under the *Dunlap* rule. In fact, I recall serving a post-trial recommendation on a defense counsel in the produce section of the Piggly Wiggly grocery store in Killeen, Texas, on day eighty-five, when I was working in the 1st Cavalry Division's legal office during my funded legal education summers. Day eighty-five was important because the accused had only five days back then to submit his post-trial matters—unlike the month or more he may get today. If he wasn't served by day eighty-five, the convening authority couldn't take action by day ninety. The defense counsel was probably none too happy with his wife at the time because when I couldn't locate him at his office, I'd called her, and she told me he was stopping on the way home for lettuce.

None of us on ACCA wanted to go back to the *Dunlap* rule, but what we were seeing told us that military justice was not most staff judge advocates' highest priority. Although they were dealing with soldiers' lives and liberty, there was no pressure on them to do so expeditiously. As one of my military judges put it, "Somewhere the JAG Corps mission in military justice got lost. Counsel were more impressed by the number of their deployments than by cases well-tried. They did not understand that by standing in front of members and looking foolish, they were harming the reputation of their SJA and the JAG Corps in general."

And so, the *Collazo*[2] and *Bauerbach*[3] opinions were issued. Both stand for the proposition that unexplained post-trial delay may prejudice an accused, and the court may grant sentence relief to mitigate the prejudice. ACCA has granted sentence relief for unexplained post-trial delay in a number of cases since the *Collazo* opinion was issued.

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1. Dunlap v. Convening Authority, 48 C.M.R. 751, 754 (C.M.A. 1974) (citing United States v. Burton, 44 C.M.R. 166, 172 (C.M.A. 1971)) ("[A] presumption of a denial of speedy disposition of the case will arise when the accused is continuously under restraint after trial and the convening authority does not promulgate his formal and final action within [ninety] days of the date of such restraint after completion of trial.").

2. United States v. Collazo, 53 M.J. 721 (Army Ct. Crim. App. 2000).

3. United States v. Bauerbach, 55 M.J. 501 (Army Ct. Crim. App. 2001).

While the time off their sentences was no doubt important to the individual soldiers concerned, the real importance of these two opinions was to refocus attention in the JAG Corps on our statutory mission, our core competency, and the real value we add to the Army—military justice. I don't disparage the work that Judge Advocates do in TOCs [tactical operations centers] across the Army, certainly not in view of world events and the role legal personnel are playing now. And, I've been there in a TOC giving advice on targeting, rules of engagement, and law of war, but throughout our history as a corps, our role in military justice is what justifies our existence.

Speaking of history, I'd like to digress for a minute and share with you something I found in the 1908 *Manual for Courts-Martial*[4] about court reporters. That *Manual* states: "The commanding officer will detail, when necessary, a suitable enlisted man as clerk to assist the judge advocate of a general court-martial, or military commission, or the recorder of a court of inquiry."[5] The *1908 Manual* went on to say that civilian stenographic reporters could be employed at the rate of one dollar an hour for time actually spent in court, but would be paid no less than three dollars per day. They would also receive fifteen cents for each one hundred words of transcript, ten cents for each one hundred words for copying papers, and two cents for each one hundred words of carbon copy.[6] Those probably weren't bad rates of pay for those days. But there's a kicker: the court reporter was required to furnish the typewritten record of the proceedings of each session of the court or commission with one carbon copy not later than twenty-four hours after the adjournment of that session. The complete record was required to be finished, indexed, bound, and ready for authentication not later than forty-eight hours after the completion of the court or commission.[7] Don't worry, I promise not to bring the *1908 Manual* to the attention of anyone for whom you will work.

Be prepared, though, when you get to your duty installations for a lot of attention on your work output because everyone, from The Judge Advocate General on down to the Trial Counsel and Chief Legal NCO, is paying a great deal of attention to military justice these days. What you do, in and out of court, is absolutely crucial to the efficient operation of our system of justice.

Ideally, court reporters and military judges are a team. We judges often joke that the reporter, and sometimes the bailiff, are the only people in the courtroom we can talk to without getting into trouble. Think about it—who is the one person who does not have to rise when the military judge walks into the courtroom? The reporter. As judges, we insist upon the respect due our office—not us personally, but that office symbolized by the robes we wear—but we do not want anything to interfere with your ability to faithfully record the testimony. Hence, in most cases, you will stay seated.

The oath you'll take in a few minutes says that you will "faithfully" perform your duties. The oath I took as a judge uses the same word—"faithfully." Although most of you will work, directly or indirectly, for the Trial Counsel and Chief of Justice, your duty is not to the Chief of Justice, but to Lady Justice herself. I don't know if the Court of Appeals for the Armed Forces has ever said directly that court reporters are officers of the court, just like the attorneys, but that's the clear implication from several of the court's decisions. In *United States v. Moeller*,[8] the detailed court reporter had signed the charges as the accuser and prepared the record of trial. The court reversed the conviction without testing the error for prejudice, saying that accusers have been cast into a role that is hostile to that of being a reporter. While other officials have the duty of seeing that a record contains all the testimony developed in the trial of a case, it is impossible for anyone but the reporter to record accurately all of the testimony. The court concluded, "[I]t is contrary to the concept of a fair trial and an adequate review to have an actual . . . accuser assigned as reporter."[9] Twenty years later, in a similar case,[10] the Court of Military Appeals commented that such carelessness displayed a lack of concern for the importance of courts-martial and did not promote respect for military justice.[11]

I know Sergeant Wagner and the other faculty members here at TJAGSA have emphasized the great responsibility that rests on your shoulders as reporters. I will add to that only the statement that you must, without fear or favor, report exactly what happens. If that means the case must be retried, so be it.

But there are things that you may do in the course of a trial that can save a case before it is too late. If you do not understand or cannot hear what is being said, stop the proceedings. If

4. MANUAL FOR COURTS-MARTIAL, UNITED STATES (rev. ed. 1908).

5. *Id*. at 26.

6. *Id*. at 26-27.

7. EDGAR S. DUDLEY, MILITARY LAW AND THE PROCEDURE OF THE COURT-MARTIAL 84 n.3 (1908) (citing U.S. DEP'T OF WAR, ARMY REG. 995 (1908)).

8. 24 C.M.R. 85 (C.M.A. 1957).

9. *Id*. at 86-87.

10. United States v. Yarbrough, 22 M.J. 138 (C.M.A. 1986).

11. *Id*. at 140.

you have to stand up to get the judge's attention, then do so. What is being said doesn't matter if it can't be recorded.

If you are having problems with recording equipment, alert the judge ahead of time. If you find that you need a break more often than the judge regularly takes one, say so. Pass the judge a note, if necessary.

It's a rule in my courtroom that once an exhibit is marked and referred to on the record, it belongs to the court reporter. If you are having problems controlling exhibits because counsel walk off with them, let the judge know. He or she will bring counsel into line. I sometimes tell counsel that the court reporter has my permission to break the fingers of counsel who walk off with exhibits. Fortunately, no reporter has had to resort to physical violence; the threats are enough.

Learn your judge's quirks, and let counsel know what they are. Colonel White, the Chief Circuit Judge in the First Circuit, often uses a court reporter to help him teach the *Gateway to Practice* sessions required before each new trial or defense counsel appears in court. As court reporters, you will see far more trials than any individual attorney does. You will see what works—and doesn't—in the courtroom. Feel free to pass your observations on to the attorneys. While some may not listen, the wise attorney will take the opportunity to learn from you.

Most importantly, do your job well. Faithfully record what is said and done. Yours is an extraordinarily difficult job. Interspersed with the tedium of typing records and xeroxing exhibits, you will have a window into human foibles, misery, greed, and horror. You will be required to mark and maintain photographs of the autopsies of children murdered by their parents and of young people whose sexual abuse was electronically captured and published. *Maintain your objectivity.* If you or the judge begin taking sides, you risk being less than faithful to your oath.

What does the future hold for court reporters? I don't know if we will see regionalization, warrant officer ranks for reporters restored—I note that in the trial of the Japanese general Yamashita by military commission, the lead reporter was a warrant officer—or giving control of court reporters to judges, or something else. I do know that we will continue to harness technology to make your lives easier, but that no machine will replace you, at least not in my lifetime.

It is truly an exciting time to be a court reporter. Whether you find yourselves in a tiny courtroom in Taegu; in a tent in the desert; recording the military commission proceedings in Guantanamo, Cuba; or reporting a case in a media circus like that of the Aberdeen rape trials, recognize that you are fulfilling the JAG Corps's true statutory responsibility to assist commanders in maintaining discipline, law, and order throughout the Army.

I salute you and the job you have trained to do. On behalf of all the judges throughout the Army, I thank you in advance for your service. I look forward to seeing each and every one of you in my courtroom in the coming years. Good luck and good reporting!

CLE News

1. Resident Course Quotas

Attendance at resident continuing legal education (CLE) courses at The Judge Advocate General's School, United States Army (TJAGSA), is restricted to students who have confirmed reservations. Reservations for TJAGSA CLE courses are managed by the Army Training Requirements and Resources System (ATRRS), the Army-wide automated training system. If you do not have a confirmed reservation in ATRRS, you do not have a reservation for a TJAGSA CLE course.

Active duty service members and civilian employees must obtain reservations through their directorates of training or through equivalent agencies. Reservists must obtain reservations through their unit training offices or, if they are non-unit reservists, through the United States Army Personnel Center (ARPERCEN), ATTN: ARPC-OPB, 1 Reserve Way, St. Louis, MO 63132-5200. Army National Guard personnel must request reservations through their unit training offices.

Questions regarding courses should be directed to the Deputy, Academic Department at 1-800-552-3978, extension 304.

When requesting a reservation, you should know the following:

TJAGSA School Code—181

Course Name—133d Contract Attorneys Course 5F-F10

Course Number—133d Contract Attorney's Course 5F-F10

Class Number—133d Contract Attorney's Course 5F-F10

To verify a confirmed reservation, ask your training office to provide a screen print of the ATRRS R1 screen, showing by-name reservations.

The Judge Advocate General's School is an approved sponsor of CLE courses in all states that require mandatory continuing legal education. These states include: AL, AR, AZ, CA, CO, CT, DE, FL, GA, ID, IN, IA, KS, KY, LA, ME, MN, MS, MO, MT, NV, NH, NM, NY, NC, ND, OH, OK, OR, PA, RI, SC, TN, TX, UT, VT, VA, WA, WV, WI, and WY.

2. TJAGSA CLE Course Schedule

2003

April 2003

7-11 April	9th Fiscal Law Comptroller Accreditation Course (Korea).
14-17 April	2003 Reserve Component Judge Advocate Workshop (5F-F56).
21-25 April	1st Ethics Counselors' Course (5F-F202).
21-25 April	14th Law for Paralegal NCOs Course (512-27D/20/30).
28 April - 9 May	150th Contract Attorneys' Course (5F-F10).
28 April - 16 May	46th Military Judges' Course (5F-F33).
28 April - 27 June	10th Court Reporter Course (512-27DC5).

May 2003

5-16 May	2003 PACOM Ethics Counselors' Workshop (5F-F202-P).
12-16 May	52d Legal Assistance Course (5F-F23).

June 2003

2-6 June	6th Intelligence Law Course (5F-F41).
2-6 June	177th Senior Officers' Legal Orientation Course (5F-F1).
2-27 June	10th JA Warrant Officer Basic Course (7A-550A0).
3-27 June	161st Officer Basic Course (Phase I, Fort Lee) (5-27-C20).
9-11 June	6th Team Leadership Seminar (5F-F52S).
9-13 June	10th Fiscal Law Comptroller Accreditation Course (Alaska) (5F-F14-A).
9-13 June	33d Staff Judge Advocate Course (5F-F52).
23-27 June	14th Legal Administrators' Course (7A-550A1).
27 June - 5 September	161st Officer Basic Course (Phase II, TJAGSA) (5-27-C20).

July 2003

7 July - 1 August	4th JA Warrant Officer Advanced Course (7A0550A2).
14-18 July	80th Law of War Course (5F-F42).
21-25 July	7th Chief Paralegal NCO Course (512-27D-CLNCO).
21-25 July	14th Senior Paralegal NCO Management Course (512-27D/40/50).
21-25 July	34th Methods of Instruction Course (5F-F70).
28 July - 8 August	151st Contract Attorneys Course (5F-F10).

August 2003

4-8 August	21st Federal Litigation Course (5F-F29).
4 August - 3 October	11th Court Reporter Course (512-27DC5).
11-22 August	40th Operational Law Course (5F-F47).
11 August 03 - 22 May 04	52d Graduate Course (5-27-C22).
25-29 August	9th Military Justice Managers' Course (5F-F31).

September 2003

8-12 September	178th Senior Officers' Legal Orientation Course (5F-F1).
8-12 September	2003 USAREUR Administrative Law CLE (5F-F24E).
15-26 September	20th Criminal Law Advocacy Course (5F-F34).
16 September - 9 October	162d Officer Basic Course (Phase I, Fort Lee) (5-27-C20).

October 2003

6-10 October	2003 JAG Worldwide CLE (5F-JAG).
10 October - 18 December	162d Officer Basic Course (Phase II, TJAGSA) (5-27-C20).
20-24 October	57th Federal Labor Relations Course (5F-F22).
20-24 October	2003 USAREUR Legal Assistance CLE (5F-F23E).
22-24 October	2d Advanced Labor Relations Course (5F-F21).
26-27 October	8th Speech Recognition Training (512-27DC4).
27-31 October	3d Domestic Operational Law Course (5F-F45).
27-31 October	67th Fiscal Law Course (5F-F12).
27 October - 7 November	6th Speech Recognition Course (512-27DC4).

November 2003

3-7 November	53d Legal Assistance Course (5F-F23).
12-15 November	27th Criminal Law New Developments Course (5F-F35).
17-21 November	3d Court Reporting Symposium (512-27DC6).
17-21 November	179th Senior Officers' Legal Orientation Course (5F-F1).
17-21 November	2003 USAREUR Operational Law CLE (5F-F47E).

December 2003

1-5 December	2003 USAREUR Criminal Law CLE (5F-F35E).
2-5 December	2003 Government Contract & Fiscal Law Symposium (5F-F11).
8-12 December	7th Income Tax Law Course (5F-F28).

January 2004

4-16 January	2004 JAOAC (Phase II) (5F-F55).

5-9 January	2004 USAREUR Contract & Fiscal Law CLE (5F-F15E).
5-9 January	2004 USAREUR Income Tax Law CLE (5F-F28E).
6-29 January	163d Officer Basic Course (Phase I, Fort Lee) (5-27-C20).
12-16 January	2004 PACOM Income Tax Law CLE (5F-F28P).
20-23 January	2004 Hawaii Income Tax Law CLE (5F-F28H).
21-23 January	10th Reserve Component General Officers Legal Orientation Course (5F-F3).
26-30 January	9th Fiscal Law Comptroller Accreditation Course (Hawaii) (5F-F14-H).
26-30 January	180th Senior Officers' Legal Orientation Course (5F-F1).
26 January - 26 March	12th Court Reporter Course (512-27DC5).
30 January - 9 April 04	163d Officer Basic Course (Phase II, TJAGSA) (5-27-C20).

February 2004

2-6 February	81st Law of War Course (5F-F42).
9-13 February	2004 Maxwell AFB Fiscal Law Course.
23-27 February	68th Fiscal Law Course (5F-F12).
23 February - 5 March	41st Operational Law Course (5F-F47).

March 2004

1-5 March	69th Fiscal Law Course (5F-F12).
8-12 March	28th Administrative Law for Military Installations Course (5F-F24).
15-19 March	5th Contract Litigation Course (5F-F102).
15-26 March	21st Criminal Law Advocacy Course (5F-F34).
22-26 March	181st Senior Officers' Legal Orientation Course (5F-F1).

April 2004

12-15 April	2004 Reserve Component Judge Advocate Workshop (5F-F56).
19-23 April	6th Ethics Counselors' Course (5F-F202).
19-23 April	15th Law for Paralegal NCOs Course (512-27D/20/30).
26 April - 7 May	152d Contract Attorneys' Course (5F-F10).
26 April - 14 May	47th Military Judges' Course (5F-F33).
26 April - 25 June	13th Court Reporter Course (512-27DC5).

May 2004

10-14 May	53d Legal Assistance Course (5F-F23).
24-28 May	182d Senior Officers Legal Orientation Course (5F-F1).

June 2004

1-3 June	6th Procurement Fraud Course (5F-F101).
1-25 June	11th JA Warrant Officer Basic Course (7A-550A0).
2-24 June	164th Officer Basic Course (Phase I, Fort Lee) (5-27-C20).
7-9 June	7th Team Leadership Seminar (5F-F52S).
7-11 June	34th Staff Judge Advocate Course (5F-F52).
12-16 June	82d Law of War Workshop (5F-F42).
14-18 June	8th Chief Paralegal NCO Course (512-27D-CLNCO).

14-18 June	15th Senior Paralegal NCO Management Course (512-27D/40/50).
21-25 June	15th Legal Administrators' Course (7A-550A1).
25 June - 2 September	164th Officer Basic Course (Phase II, TJAGSA) (5-27-C20).

July 2004

12 July - 6 August	5th JA Warrant Officer Advanced Course (7A-550A2).
19-23 July	35th Methods of Instruction Course (5F-F70).
27 July - 6 August	153d Contract Attorneys' Course (5F-F10).

August 2004

2-6 August	22d Federal Litigation Course (5F-F29).
2 August - 1 October	14th Court Reporter Course (512-27DC5).
9-20 August	42d Operational Law Course (5F-F47).
9 August - 22 May 05	53d Graduate Course (5-27-C22).
23-27 August	10th Military Justice Managers' Course (5F-F31).

September 2004

7-10 September	2004 USAREUR Administrative Law CLE (5F-F24E).
13-17 September	54th Legal Assistance Course (5F-F23).
13-24 September	22d Criminal Law Advocacy Course (5F-F34).

October 2004

4-8 October	2004 JAG Worldwide CLE (5F-JAG).

3. Civilian-Sponsored CLE Courses

For further information on civilian courses in your area, please contact one of the institutions listed below:

AAJE: American Academy of Judicial Education
P.O. Box 728
University, MS 38677-0728
(662) 915-1225

ABA: American Bar Association
750 North Lake Shore Drive
Chicago, IL 60611
(312) 988-6200

AGACL: Association of Government Attorneys in Capital Litigation
Arizona Attorney General's Office
ATTN: Jan Dyer
1275 West Washington
Phoenix, AZ 85007
(602) 542-8552

ALIABA: American Law Institute-American Bar Association
Committee on Continuing Professional Education
4025 Chestnut Street
Philadelphia, PA 19104-3099
(800) CLE-NEWS or (215) 243-1600

ASLM: American Society of Law and Medicine
Boston University School of Law
765 Commonwealth Avenue
Boston, MA 02215
(617) 262-4990

CCEB: Continuing Education of the Bar
University of California Extension
2300 Shattuck Avenue
Berkeley, CA 94704
(510) 642-3973

CLA: Computer Law Association, Inc.
3028 Javier Road, Suite 500E
Fairfax, VA 22031
(703) 560-7747

CLESN: CLE Satellite Network
920 Spring Street
Springfield, IL 62704
(217) 525-0744
(800) 521-8662

ESI: Educational Services Institute
5201 Leesburg Pike, Suite 600
Falls Church, VA 22041-3202
(703) 379-2900

FBA: Federal Bar Association
1815 H Street, NW, Suite 408
Washington, DC 20006-3697
(202) 638-0252

FB: Florida Bar
650 Apalachee Parkway
Tallahassee, FL 32399-2300

GICLE: The Institute of Continuing Legal Education
P.O. Box 1885
Athens, GA 30603
(706) 369-5664

GII: Government Institutes, Inc.
966 Hungerford Drive, Suite 24
Rockville, MD 20850
(301) 251-9250

GWU: Government Contracts Program
The George Washington University
National Law Center
2020 K Street, NW, Room 2107
Washington, DC 20052
(202) 994-5272

IICLE: Illinois Institute for CLE
2395 W. Jefferson Street
Springfield, IL 62702
(217) 787-2080

LRP: LRP Publications
1555 King Street, Suite 200
Alexandria, VA 22314
(703) 684-0510
(800) 727-1227

LSU: Louisiana State University
Center on Continuing Professional Development
Paul M. Herbert Law Center
Baton Rouge, LA 70803-1000
(504) 388-5837

MLI: Medi-Legal Institute
15301 Ventura Boulevard, Suite 300
Sherman Oaks, CA 91403
(800) 443-0100

NCDA: National College of District Attorneys
University of Houston Law Center
4800 Calhoun Street
Houston, TX 77204-6380
(713) 747-NCDA

NITA: National Institute for Trial Advocacy
1507 Energy Park Drive
St. Paul, MN 55108
(612) 644-0323 in (MN and AK)
(800) 225-6482

NJC: National Judicial College
Judicial College Building
University of Nevada
Reno, NV 89557

NMTLA: New Mexico Trial Lawyers' Association
P.O. Box 301
Albuquerque, NM 87103
(505) 243-6003

PBI: Pennsylvania Bar Institute
104 South Street
P.O. Box 1027
Harrisburg, PA 17108-1027
(717) 233-5774
(800) 932-4637

PLI: Practicing Law Institute
810 Seventh Avenue
New York, NY 10019
(212) 765-5700

TBA: Tennessee Bar Association
3622 West End Avenue
Nashville, TN 37205
(615) 383-7421

TLS: Tulane Law School
Tulane University CLE
8200 Hampson Avenue, Suite 300
New Orleans, LA 70118
(504) 865-5900

UMLC: University of Miami Law Center
P.O. Box 248087
Coral Gables, FL 33124
(305) 284-4762

UT: The University of Texas School of Law
Office of Continuing Legal Education
727 East 26th Street
Austin, TX 78705-9968

VCLE: University of Virginia School of Law
Trial Advocacy Institute
P.O. Box 4468
Charlottesville, VA 22905.

4. Mandatory Continuing Legal Education Jurisdiction and Reporting Dates

Jurisdiction	Reporting Month
Alabama**	31 December annually
Arizona	15 September annually
Arkansas	30 June annually
California*	1 February annually
Colorado	Anytime within three-year period
Delaware	Period ends 31 December; confirmation required by 1 February if compliance required; if attorney is admitted in even-numbered year, period ends in even-numbered year, etc.
Florida**	Assigned month triennially
Georgia	31 January annually
Idaho	31 December, admission date triennially
Indiana	31 December annually
Iowa	1 March annually
Kansas	30 days after program, hours must be completed in compliance period July 1 to June 30
Kentucky	10 August; 30 June is the end of the educational year
Louisiana**	31 January annually
Maine**	31 July annually
Minnesota	30 August
Mississippi**	1 August annually
Missouri	31 July annually
Montana	1 April annually
Nevada	1 March annually
New Hampshire**	1 August annually
New Mexico	prior to 30 April annually
New York*	Every two years within thirty days after the attorney's birthday
North Carolina**	28 February annually
North Dakota	31 July annually
Ohio*	31 January biennially
Oklahoma**	15 February annually
Oregon	Period end 31 December; due 31 January
Pennsylvania**	Group 1: 30 April Group 2: 31 August Group 3: 31 December
Rhode Island	30 June annually
South Carolina**	1 January annually
Tennessee*	1 March annually
	Minimum credits must be completed by last day of birth month each year
Texas	Minimum credits must be completed by last day of birth month each year
Utah	31 January
Vermont	2 July annually
Virginia	31 October annually
Washington	31 January triennially
West Virginia	31 July biennially
Wisconsin*	1 February biennially
Wyoming	30 January annually

* Military Exempt

** Military Must Declare Exemption

For addresses and detailed information, see the March 2003 issue of *The Army Lawyer.*

5. Phase I (Correspondence Phase), RC-JAOAC Deadline

The suspense for submission of all RC-JAOAC Phase I (Correspondence Phase) materials is ***NLT 2400, 1 November 2003***, for those judge advocates who desire to attend Phase II (Resident Phase) at The Judge Advocate General's School (TJAGSA) in the year 2004 ("2004 JAOAC"). This requirement includes submission of all JA 151, Fundamentals of Military Writing, exercises.

This requirement is particularly critical for some officers. The 2004 JAOAC will be held in January 2004, and is a prerequisite for most JA captains to be promoted to major.

A judge advocate who is required to retake any subcourse examinations or "re-do" any writing exercises must submit the examination or writing exercise to the Non-Resident Instruction Branch, TJAGSA, for grading by the same deadline (1 November 2003). If the student receives notice of the need to re-do any examination or exercise after 1 October 2003, the notice will contain a suspense date for completion of the work.

Judge advocates who fail to complete Phase I correspondence courses and writing exercises by these suspenses will not be cleared to attend the 2004 JAOAC. Put simply, if you have not received written notification of completion of Phase I of JAOAC, you are not eligible to attend the resident phase.

If you have any further questions, contact Lieutenant Colonel J. T. Parker, telephone (800) 552-3978, ext. 357, or e-mail JT.Parker@hqda.army.mil.

Current Materials of Interest

1. The Judge Advocate General's On-Site Continuing Legal Education Training and Workshop Schedule (2002-2003 Academic Year)

DATE	TRNG SITE/HOST UNIT	GENERAL OFFICER AC/RC	SUBJECT	ACTION OFFICER
26-27 Apr 03	Boston, MA 94th RSC	MG Marchand/ BG Arnold	Administrative Law; Contract Law	SSG Neoma Rothrock (978) 796-2143 neoma.rothrock@us.army.mil
16-18 May 03	Kansas City, MO 89th RSC	BG Carey/ BG Pietsch	Criminal Law; International Law	MAJ Anna Swallow (316) 781-1759, est. 1228 anna.swallow@usarc-emh2.army.mil SGM Mary Hayes (816) 836-0005, ext. 267 mary.hayes@usarc-emh2.army.mil
17-18 May 03	Birmingham, AL 81st RSC	BG Wright/ BG Arnold	Criminal Law; International Law	CPT Joseph Copeland (205) 795-1980 joseph.copeland@se.usar.army.mil
	Charlottesville, VA OTJAG	All General Officers scheduled to attend	Spring Worldwide CLE	

***** Prospective students may enroll for the on-sites through the Army Training Requirements and Resources System (ATRRS) using the designated Course and Class Number.

2. TJAGSA Materials Available through the Defense Technical Information Center (DTIC)

For Detailed information, see the March 2003 issue of *The Army Lawyer.*

3. Regulations and Pamphlets

For detailed information, see the March 2003 issue of *The Army Lawyer.*

4. The Legal Automation Army-Wide Systems XXI—JAGCNet

a. The Legal Automation Army-Wide Systems XXI (LAAWS XXI) operates a knowledge management and information service called JAGCNet primarily dedicated to servicing the Army legal community, but also provides for Department of Defense (DOD) access in some case. Whether you have Army access or DOD-wide access, all users will be able to download the TJAGSA publications that are available through the JAGCNet.

b. Access to the JAGCNet:

(1) Access to JAGCNet is restricted to registered users who have been approved by the LAAWS XXI Office and senior OTJAG staff:

(a) Active U.S. Army JAG Corps personnel;

(b) Reserve and National Guard U.S. Army JAG Corps personnel;

(c) Civilian employees (U.S. Army) JAG Corps personnel;

(d) FLEP students;

(e) Affiliated (that is, U.S. Navy, U.S. Marine Corps, U.S. Air Force, U.S. Coast Guard) DOD personnel assigned to a branch of the JAG Corps; and, other personnel within the DOD legal community.

(2) Requests for exceptions to the access policy should be e-mailed to:

LAAWSXXI@jagc-smtp.army.mil

c. How to log on to JAGCNet:

(a) Using a Web browser (Internet Explorer 4.0 or higher

recommended) go to the following site: http://jagcnet.army.mil.

(b) Follow the link that reads "Enter JAGCNet."

(c) If you already have a JAGCNet account, and know your user name and password, select "Enter" from the next menu, then enter your "User Name" and "password" in the appropriate fields.

(d) If you have a JAGCNet account, *but do not know your user name and/or Internet password*, contact your legal administrator or e-mail the LAAWS XXI HelpDesk at LAAWSXXI@jagc-smtp.army.mil.

(e) If you do not have a JAGCNet account, select "Register" from the JAGCNet Intranet menu.

(f) Follow the link "Request a New Account" at the bottom of the page, and fill out the registration form completely. Allow seventy-two hours for your request to process. Once your request is processed, you will receive an e-mail telling you that your request has been approved or denied.

(g) Once granted access to JAGCNet, follow step (c), above.

5. TJAGSA Publications Available Through the LAAWS XXI JAGCNet

For detailed information, see the March 2003 issue of *The Army Lawyer.*

6. TJAGSA Legal Technology Management Office (LTMO)

The Judge Advocate General's School, United States Army (TJAGSA), continues to improve capabilities for faculty and staff. We have installed new computers throughout the School, all of which are compatible with Microsoft Windows 2000 Professional and Microsoft Office 2000 Professional throughout the School.

The TJAGSA faculty and staff are available through the Internet. Addresses for TJAGSA personnel are available by e-mail at jagsch@hqda.army.mil or by calling the LTMO at (434) 972-6314. Phone numbers and e-mail addresses for TJAGSA personnel are available on TJAGSA Web page at http://www.jagcnet.army.mil/tjagsa. Click on "directory" for the listings.

For students who wish to access their office e-mail while attending TJAGSA classes, please ensure that your office e-mail is web browser accessible prior to departing your office. Please bring the address with you when attending classes at TJAGSA. If your office does not have web accessible e-mail, you may establish an account at the Army Portal, http://ako.us.army.mil, and then forward your office e-mail to this new account during your stay at the School. Dial-up internet access is available in the TJAGSA billets.

Personnel desiring to call TJAGSA can dial via DSN 934-7115 or, provided the telephone call is for official business only, use our toll free number, (800) 552-3978; the receptionist will connect you with the appropriate department or directorate. For additional information, please contact our Legal Technology Management Office at (434) 972-6264. CW4 Tommy Worthey.

7. The Army Law Library Service

Per *Army Regulation 27-1*, paragraph 12-11, the Army Law Library Service (ALLS) must be notified before any redistribution of ALLS-purchased law library materials. Posting such a notification in the ALLS FORUM of JAGCNet satisfies this regulatory requirement as well as alerting other librarians that excess materials are available.

Point of contact is Mr. Dan Lavering, The Judge Advocate General's School, United States Army, ATTN: JAGS-ADL-L, 600 Massie Road, Charlottesville, Virginia 22903-1781. Telephone DSN: 488-6306, commercial: (434) 972-6306, or e-mail at Daniel Lavering@hqda.army.mil.

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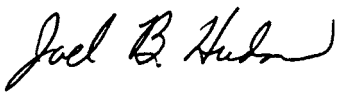

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