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."