New Developments in Instructions: 2003 Term of Court

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This article surveys decisions, which impact instructions, issued by the Court of Appeals for the Armed Forces (CAAF) and the Army Court of Criminal Appeals (ACCA) during the 2003 term. These decisions are organized based on their influence in the following areas: (1) offenses; (2) defenses; (3) sentencing instructions; and (4) evidentiary instructions. This year's cases illustrate the difficult challenges that trial judges and practitioners face when drafting instructions. Several cases[2] remind practitioners of the wisdom of simply following the pattern instructions. Conversely, another case[3] shows that judges must be able to deviate from the model instructions when necessary. All of these cases, however, illustrate that preparing instructions requires thought and care.[4]

Offenses

Disobedience

In *United States v. Thompkins*,[5] the CAAF considered Airman First Class (A1C) Tomal R. Thompkins' conviction of disobedience of a superior commissioned officer.[6] In reviewing the legal sufficiency of the conviction, the CAAF gave important guidance about willfulness.[7]

The accused was involved in a heated dispute between Army and Air Force personnel. As a result of this altercation, a civilian bystander was wounded by gunfire. Following this incident, the accused's commander issued a no-contact order. The accused was prohibited from having direct or indirect contact with six named individuals. The purpose of the order was to prevent those under investigation from discussing the incident.[8]

Airman First Class Smallwood, one of the individuals named in the no-contact order, had a compact disc that belonged to the accused. After receiving the no-contact order, the accused contacted A1C Smallwood's girlfriend and told her that he wanted his compact disc from A1C Smallwood. Several days later, the accused met with A1C Smallwood who gave the accused a compact disc. Air Force Office of Special Investigations (OSI) personnel videotaped this meeting.[9]

The CAAF found that the conviction of disobedience was legally sufficient.[10] One of the essential elements of this offense is that the accused "*willfully* disobey[ed] a lawful command of his superior commissioned officer."[11] Addressing the order, the CAAF stated,

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2. *See, e.g., infra* notes 79-89 and accompanying text.

3. *See, e.g., infra* notes 58-78 and accompanying text.

4. *See, e.g., infra* notes 144-63 and accompanying text; note 209.

5. 58 M.J. 43 (2003).

6. *Id.* at 44.

7. "Appellant has not challenged the . . . [legality of the order] in the present appeal. The granted issue addresses the legal sufficiency of the evidence." The defense challenged the legality of the order at trial and the trial judge found the order lawful. *Id.* at 44-45.

8. *Id.* at 44.

9. *Id.*

10. The test for legal sufficiency is whether a reasonable fact finder could have found all the essential elements beyond a reasonable doubt. The appellate court views the evidence in the light most favorable to the prosecution. United States v. Turner, 25 M.J. 324 (C.M.A. 1987).

> Public policy supports a strict reading of this no-contact order. A military commander who has a legitimate interest in deterring contact between a service member and another person is not required to sort through every contact to determine, after the fact, whether there was a nefarious purpose. A service member, like Appellant, who initiates contact contrary to the terms of such an order, is subject to punishment . . . without the necessity of proof that the contact was undertaken for an improper purpose.[12]

This determination is consistent with the *Manual for Courts-Martial* (*MCM*)[13] and the *Military Judges' Benchbook* (*Benchbook*).[14] "'Willful disobedience' means an intentional defiance of authority."[15] *Thompkins* makes clear that the accused's purpose for violating the no-contact order is unimportant. What is important is the accused's intent to defy authority. Here, the court found sufficient evidence of intentional disobedience.[16]

In a similar case, an instruction based on the language quoted above may be appropriate to explain the relationship between the accused's intent and the accused's purpose.[17] The government has the burden to prove willful disobedience, that is, an intentional defiance of authority. The relevant intent is the intent to disobey the order. The government need not prove that the accused intended to engage in the conduct that gave rise to the no-contact order, in this case, to keep the suspects from talking during the investigation. Although negligence is a defense,[18] an innocent motive for violating the no-contact order is irrelevant if the order was intentionally disobeyed. The interaction between intent and motive may confuse the fact finder, and a tailored instruction based on *Thompkins* will clarify the issue.[19]

Child Endangerment

In *United States v. Vaughan*,[20] the CAAF considered whether child neglect that does not result in harm to the child is an offense under the Uniform Code of Military Justice (UCMJ). Airman First Class Sonya R. Vaughan left her forty-seven-day-old daughter unattended in her crib for six hours, from 2300 to 0500, while she went to a club. Airman First Class Vaughan arranged with the child's father to watch the baby, but she left for the club when he did not show up. The baby suffered no apparent physical or mental harm during her mother's absence. Airman First Class Vaughan was charged with child neglect under clause 2 of Article 134.[21]

On appeal, A1C Vaughan argued that she was not on notice that her conduct was criminal, that her conduct fell outside the definition of child neglect because her daughter suffered no harm from being left unattended, and that her conduct was not service discrediting.[22] The court rejected all three arguments.[23] The second issue is of particular interest to trial judges.

Airman First Class Vaughan argued that the specification and the military judge's providence inquiry[24] failed to define the elements of child endangerment. Since the *MCM* does not specifically list the elements of child endangerment, the military judge had to define them. The military judge told A1C

11. *Thompkins*, 58 M.J. at 45 (emphasis added).

12. *Id.*

13. MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. IV, ¶ 14c(2)(f) (2002) [hereinafter MCM].

14. U.S. DEP'T OF ARMY, PAM. 27-9, LEGAL SERVICES: MILITARY JUDGES' BENCHBOOK (15 Sept. 2002) [hereinafter BENCHBOOK].

15. *Id.* para. 3-14-2d.

16. *Thompkins*, 58 M.J. at 43.

17. *Cf.* United States v. Huet-Vaughn, 43 M.J. 105 (C.M.A. 1995) (explaining the difference between motive and intent).

18. "Failure to comply with an order through heedlessness, remissness, or forgetfulness is not [willful disobedience]." *Thompkins*, 58 M.J. at 45 (quoting MCM, *supra* note 13, pt. IV, ¶ 14c(2)(f)).

19. *Id.*

20. 58 M.J. 29 (2003).

21. MCM, *supra* note 13, pt. IV, ¶ 60c(3) (noting that clause 2 is conduct of a nature to bring discredit upon the armed forces).

22. *Vaughn*, 58 M.J. at 30-31.

23. *Id.*

24. Airman First Class Vaughan entered a conditional plea of guilty to the child endangerment offense. *Id.* at 30.

Vaughan that the offense of child endangerment had four elements:

> The first element of this specification is that between on or about 2 January 1999 and on or about 3 January 1999, at or near Pickliessem, Germany, you neglected your daughter[.] The second element is that you did so by leaving [your daughter] in your house without supervision or care for an unreasonable period of time, without regard for the mental or physical health, safety, or welfare of [your daughter]. The third element is that [your daughter] is a child under the age of one year. And the fourth element is that under the circumstances, your conduct was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.[25]

The court approved of the trial judge's determination that child neglect requires culpable negligence and that this offense does not require a showing of harm. Child neglect requires "an absence of due care measured by an absence of regard for the mental or physical health, safety or welfare of the child."[26] Approving the elements crafted by the trial judge, the CAAF noted "the elements she listed captured the essence of 'child neglect' as reflected in military custom and regulation as well as a majority of state statutes."[27]

This case is important but it is of limited help to trial judges and practitioners. The accused's offense was committed before 6 October 1999. An executive order, signed on 6 October 1999,[28] added reckless endangerment as an offense in violation of Article 134.[29] Although *Vaughan* provides an approved blueprint for defining the elements of child endangerment, judges will probably see this type of conduct charged as reckless endangerment.

Child Pornography

In *United States v. O'Connor*,[30] the CAAF considered the impact of *Ashcroft v. Free Speech Coalition*[31] on child pornography cases. The CAAF had affirmed the accused's conviction and sentence before *Free Speech Coalition*. On remand from the Supreme Court, the CAAF set aside the accused's findings of guilty to two specifications of wrongfully possessing child pornography.[32]

O'Connor was a standard pre-*Free Speech Coalition* child pornography case. The accused was suspected of possessing and receiving over 6,500 files of child pornography. The accused pled guilty to two "clause 3" offenses under Article 134, UCMJ[33] for violating the Child Pornography Prevention Act of 1996 (CPPA).[34] Fifty-nine images were admitted as part of the stipulation of fact. The military judge used 18 U.S.C. § 2256(8) to define child pornography.[35] In *Free Speech Coalition*, the Supreme Court held that any prosecution under the CPPA based on "virtual" child pornography violates the First Amendment.[36] Specifically, the Court found the "or appears to be" language of § 2256(8)(B) and all of the language of § 2256(8)(D) to be unconstitutional.[37]

The CAAF reviewed the providence inquiry to see if *Free Speech Coalition* created a basis for questioning the providence of the accused's plea. The court noted that the most prominent feature of the *Free Speech Coalition* decision is "the distinction between 'actual' and 'virtual' images."[38] The military judge used the pre-*Free Speech Coalition* definition of child pornography, and the accused stated to the judge that the images were child pornography because "the occupants in the pictures appeared to be under the age of [eighteen]."[39] Based on the

25. *Id*. at 33-34. The trial judge indicated the third element was that A1C Vaughan's daughter was a child under one-year old, no doubt because that was the way the offense was pled. The opinion has an appendix that summarizes thirty-four statutes that punish child neglect. These statutes vary in their definition of the upper age of a child, ranging from age ten to eighteen. *Id*. at 36-42. The court makes clear that gross negligence is contextual. Therefore, the age of the child will be important. While leaving a newborn unattended for six hours is grossly negligent, leaving a sleeping sixteen-year old unattended may not be. Judges should not be concerned that there does not seem to be a bright line age for child endangerment.

26. *Id.* at 35.

27. *Id.*

28. Exec. Order No. 13,140, 64 Fed. Reg. 55,115 (Oct. 6, 1999).

29. *See* MCM, *supra* note 13, ¶ 100a.

30. 58 M.J. 450 (2003).

31. 535 U.S. 234 (2002).

32. The Court granted certiorari and remanded for further consideration in light of the newly decided *Ashcroft v. Free Speech Coalition. Id.*

33. MCM, *supra* note 13, pt. IV, ¶ 60(c)(4) (Crimes and offenses not capital (clause 3)).

34. 18 U.S.C. §§ 2251-60 (2000).

record, the CAAF concluded that it was unclear whether the accused pled guilty to the possession of virtual or actual child pornography: "[I]n the absence of any discussion or focus in the record before us regarding the 'actual' character of the images, we cannot view Appellant's plea of guilty to violations of the CPPA as provident."[40]

The court also addressed whether the convictions could be sustained as a lesser-included clause 2 offense. The CAAF distinguished two prior cases, *United States v. Augustine* and *United States v. Sapp*, noting that in these cases the military judges had a discussion with each accused about the service discrediting nature of his conduct.[41] In *O'Connor*, there was no discussion between the judge and the accused about the service discrediting nature of the accused's conduct. Interestingly, the accused stipulated to the service discrediting nature of his conduct, but the court found that insufficient given the new constitutional dimension not involved in *Augustine* and *Sapp*.[42]

O'Connor contains several lessons for practitioners.[43] The most obvious is that judges should not include the constitutionally objectionable language when defining "child pornography" in instructions or during a providence inquiry.[44] Judges should make the record clear about which subsection of the definition is involved in the case. Most cases seem to involve 18 U.S.C. § 2256(8)(B),[45] and judges should make sure that the record clearly states that only images containing actual minors engaged in sexually explicit conduct are prohibited. Judges

35. *O'Connor*, 58 M.J. at 452-53. At the time, 18 U.S.C. § 2256(8) defined child pornography as:

> [A]ny visual depiction, including any photograph, film, video, picture, or computer or computer generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where --
>
> (A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct; or
>
> (B) such visual depiction is, *or appears to be*, of a minor engaging in sexually explicit conduct; or
>
> (C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct; or
>
> (D) such visual depiction is advertised, promoted, presented, described, or distributed in such a manner *that conveys the impression* that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct.

Id. (emphasis added).

Judges should note that the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act of 2003 redefined child pornography in light of *Free Speech Coalition. See Free Speech Coalition*, 535 U.S. at 234. The PROTECT Act redefined child pornography as follows:

> [A]ny visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where—
>
> (A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;
>
> (B) such visual depiction is a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct; or
>
> (C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct.

See Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, Pub. L. No 108-21, § 502, 117 Stat. 650, 678-79 (2003); *see also* 18 U.S.C. § 2256(8) (LEXIS 2004).

36. *Free Speech Coalition*, 535 U.S. at 234; *see* U.S. CONST. amend. I.

37. *O'Connor*, 58 M.J. at 452; *see also Free Speech Coalition*, 535 U.S. at 256-58.

38. *O'Connor*, 58 M.J. at 453.

39. *Id.*

40. *Id.* at 454.

41. The CAAF has upheld convictions for child pornography offenses as a lesser-included clause 2 offense. *See* United States v. Augustine, 53 M.J. 95 (2000); United States v. Sapp, 53 M.J. 90 (2000).

42. *O'Connor*, 58 M.J. at 454.

43. *Id.*

should be very careful about child pornography defined under 18 U.S.C. § 2256(8)(D).[46] Eliminating the words "that conveys the impression" may not correct the constitutional deficiency. In addition to the "actual" versus "virtual" distinction, the Court was concerned that § 2256(8)(D) prohibits a pornographic film that contains no children, just because someone incorrectly marketed, described or sold it as a visual depiction of children engaged in sexually explicit conduct.[47] Once § 2256(8)(D) is corrected for both problems, it is difficult to distinguish it from § 2256(8)(B).[48] Finally, judges should discuss the service discrediting nature of the conduct with the accused during the providence inquiry; a stipulation may be insufficient. In cases involving images with actual children, possession or receipt would be service discrediting because such conduct violates the law. It is not clear that possession or receipt of images with virtual children is service discrediting.[49]

In a similar case, *United States v. Tynes*,[50] the ACCA reviewed the child pornography instructions given to members before *Free Speech Coalition*.[51] As discussed above, the Supreme Court struck down portions of the federal child pornography statute that criminalized visual depictions that appeared to be minors or conveyed the impression of minors.[52] The Court held that the unconstitutional provisions were severable from the remaining provisions pertaining to images of actual minors or "morphed" images of actual minors.[53]

In *Tynes*, the trial judge included the unconstitutional subsections when he defined child pornography. He also instructed the members, however, that to find the accused guilty, the government must prove that the accused knew or believed the persons depicted were minors and that the persons depicted were minors.[54] The issue addressed by the ACCA was the effect of the erroneous instructions on the findings. The court explained the test for harmless error in such a situation—"[i]s it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?"[55] The court first observed that the defense did not object to the instructions at trial. To conclude that any error was harmless, the court then relied on the instruction on the accused's knowledge or belief described above, the "overwhelming" evidence that the depictions were of real minors, and the absence of any evidence presented by the defense that the images were not of real minors.[56] The ACCA upheld the conviction declaring that the instructions, taken as a whole, "negated the possibility that the members may have found that the minors depicted in the images were 'virtual' rather than real minors."[57]

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44. *See supra* note 35. At a minimum, the italicized language in footnote 35 should be omitted for offenses committed before 30 April 2003, the effective date of the PROTECT Act. For offenses committed after 30 April 2003, judges should use the new definition of child pornography contained in the PROTECT Act. *See* Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, Pub. L. No 108-21, § 502, 117 Stat. 650, 678-79 (2003).

45. 18 U.S.C. § 2256(8)(B) (2000).

46. *Id.* § 2256(8)(D).

47. *Id.* "Possession is a crime even when the possessor knows the movie was mislabeled. The First Amendment requires a more precise restriction. For this reason, section 2256(8)(D) is substantially overbroad and in violation of the First Amendment." Ashcroft v. Free Speech Coalition, 535 U.S. 234, 258 (2002); *see* U.S. CONST. amend. I; 18 U.S.C. § 2256(8)(D).

48. 18 U.S.C. § 2256(8)(B), (D).

49. *Compare* United States v. O'Connor, 58 M.J. 454-55 (2003), *with* United States v. Augustine, 53 M.J. 95 (2000), *and* United States v. Sapp, 53 M.J. 90 (2000).

> Essential to our holding in *Sapp* was the recognition that the providence inquiry there demonstrated that the accused "clearly understood the nature of the prohibited conduct." In the wake of *Free Speech Coalition*, the "virtual" or "actual" status of the images at issue has constitutional significance. That constitutional significance may, in turn, bear on "the nature of the prohibited conduct", i.e., its service-discrediting character . . . . Accordingly, we do not address the question of whether, in the wake of *Free Speech Coalition*, the possession, receipt or distribution of images of minors engaging in sexually explicit conduct (regardless of their status as "actual" or "virtual") can constitute conduct of a nature to bring discredit upon the armed forces for purposes of clause 2 of Article 134.

O'Connor, 58 M.J. at 454-55.

50. 58 M.J. 704 (Army Ct. Crim. App. 2003).

51. *Free Speech Coalition*, 535 U.S. at 258.

52. *See supra* notes 35-36.

53. *Free Speech Coalition*, 535 U.S. at 242.

54. The ACCA criticized this portion of the instructions, commenting that the judge should have explained that the accused must have known that the depictions showed sexually explicit conduct. *Tynes*, 58 M.J. at 708.

55. *Id.* at 709 (quoting United States v. Neder, 527 U.S. 1, 18 (1999)); *see also* United States v. Sanchez, 59 M.J. 566 (A.F. Ct. Crim. App. 2003) (finding that photographs admitted at judge-alone contested trial provided adequate evidence, without corroboration, that images were of real children).

Rape

This term, the CAAF decided a case familiar to criminal law practitioners, *United States v. Simpson*.[58] Staff Sergeant (SSG) Delmar Simpson, a drill sergeant, pled guilty to ten specifications of failure to obey a lawful general order based on engaging in sexual activity with trainees. The charges in this case arose in the Advanced Individual Training student-drill sergeant context.[59] Contrary to his pleas, the accused was convicted of three specifications of failure to obey a lawful general order, two specifications of cruelty and maltreatment of a subordinate, eighteen specifications of rape, one specification of forcible sodomy, two specifications of consensual sodomy, one specification of assault consummated by a battery, twelve specifications of indecent assault, one specification of committing an indecent act, and two specifications of communicating a threat.[60] The CAAF granted review on two issues; one issue was whether the trial judge's instructions on constructive force were erroneous.[61]

"[R]ape is a deceptively simple crime, with only two elements . . . . Practically speaking, however, rape is often a complex offense because of the interrelationships among the legal concepts of force, resistance, consent, and mistake of fact."[62] One element of rape requires proof the act of sexual intercourse was committed by force and without the consent of the victim. It is well settled that military law "recognizes that there may be circumstances in which [force and lack of consent] may be proved by the same evidence."[63] Force can be actual or constructive. Constructive force may be shown by proof of a coercive atmosphere, including the special environment where trainees and drill sergeants interact.[64]

Before the ACCA, the accused argued that the military judge should not have instructed on constructive force.[65] The ACCA rejected this claim stating,

> With respect to constructive force in the sexual assaults [of some of the victims], we note: (1) the appellant's physically imposing size; (2) his reputation in the unit for being tough and mean; (3) his position as a noncommissioned officer; (4) his actual and apparent authority over each of the victims in matters other than sexual contact; (5) the location and timing of the assaults, including his use of his official office and other areas within the barracks in which the trainees were required to live; (6) his refusal to accept verbal and physical indications that his victims were not willing participants; and (7) the relatively diminutive size and youth of his victims, and their lack of military experience.[66]

Before the CAAF, the issue was whether the constructive force instruction was correct.

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56. *Tynes*, 58 M.J. at 709-10. The ACCA also concluded that even if the error was not harmless, the remedy would not be to dismiss the specifications at issue but to affirm a conviction for an attempt under article 80 or for service discrediting conduct under article 134. *Id.* at 710; *see* UCMJ arts. 80, 134 (2002). As of the date of this article, the CAAF had not acted on the appellant's petition for review.

57. *Tynes*, 58 M.J. at 710. Judges should also note that the court suggests pattern instructions for the offense of receipt of child pornography and the offense of possession of child pornography. *Id.* at 710-13.

58. 58 M.J. 368 (2003). "Aberdeen Proving Grounds, Maryland (APG), became the focus of a nationwide media blitz [footnote omitted] on 7 November 1996, when military officials disclosed that two drill sergeants and one training company commander were under investigation for sexual misconduct with trainees." United States v. Simpson, 55 M.J. 674, 679 (Army Ct. Crim. App. 2001), *aff'd*, 58 M.J. 368 (2003).

59. *Simpson*, 58 M.J. at 377.

60. *Id.* at 370.

61. The CAAF specified this issue as:

> I. WHETHER THE MILITARY JUDGE GAVE AN ERRONEOUS INSTRUCTION REGARDING "CONSTRUCTIVE FORCE—ABUSE OF MILITARY POWER" WITH RESPECT TO THE RAPE AND FORCIBLE SODOMY SPECIFICATIONS WHICH SUBSTANTIALLY PREJUDICED APPELLANT'S CASE.

Id.

62. *Simpson*, 55 M.J. at 695.

63. *Simpson*, 58 M.J. at 377.

64. *Id.*

65. *Simpson*, 55 M.J. at 697.

66. *Id.* at 707.

There, the defense tried to exploit the differences between the constructive force instruction given by the trial judge and the model constructive force instruction contained in the *Benchbook*.[67] The defense complained that the given instructions created a "loophole" large enough to permit the members to find constructive force if they concluded only that the accused abused his position even if the victims had "no reasonable belief that death or great bodily harm would be inflicted upon them and had no reasonable belief that resistance would be futile."[68] This proposition is hard to maintain given the trial judge's actual instructions:

> In the law of rape, various types of conduct are sufficient to constitute force. The most obvious type is actual physical force, that is, the application of physical violence or power to compel the victim to submit against her will. Actual physical force, however, is not the only way force can be established. Where intimidation or threats of death or physical injury make resistance futile, it is said that constructive force has been applied, thus satisfying the requirement of force . . . .
>
> Hence, when the accused's actions and words or conduct, coupled with the surrounding circumstances, create a reasonable belief in the victim's mind that death or physical injury would be inflicted on her and that further resistance would be futile, the act of sexual intercourse has been accomplished by force. There is evidence which, if believed, may indicate that the accused used or abused his military position and/or rank and/or authority in order to coerce and/or force the alleged victim to have sexual intercourse. In deciding whether the accused possibly used or abused his position, rank or authority and whether the alleged victim had a reasonable belief that death or physical injury would be inflicted on her and that further resistance would be futile under the totality of the circumstances, you should consider all the evidence presented in this case that bears on those issues.[69]

The defense also complained about the degree of harm perceived by the victim in the judge's constructive force instruction. The judge instructed the members that the victim's reasonable belief that death or *physical injury* would be inflicted on her and that further resistance would be futile was sufficient for constructive force.[70] The defense pointed out that the *MCM* requires fear of death or *great bodily harm* to negate the permissive inference of consent that may arise when the victim does not physically resist.[71] The trial judge included this greater degree of perceived harm in the instructions on consent.[72] The CAAF concluded that the judge's instructions were adequate on both issues.

The *Simpson* opinion is important to trial judges and practitioners for three reasons. First, trial judges must recognize the importance of tailoring instructions based on the facts of the case. While the current *Benchbook* reflects a Herculean effort to anticipate the circumstances in which constructive force may be raised, new contexts will arise. Trial judges, like the judge in *Simpson*, must be willing and able to deviate from the standard *Benchbook* instructions and tailor the instructions to the facts of the case when warranted. The instructions must be an accurate statement of the law and sufficient to guide the deliberations of the court members. Second, trial judges must be aware of the subtle difference in the *Benchbook* instruction between the degree of perceived harm required for constructive force and that necessary to negate the permissive inference of consent. It may be appropriate to substitute "physical injury" for "great bodily harm" in the consent portion of "Constructive force—abuse of military power" section in Instruction 3-45-1.[73]

The third lesson is not discussed in the CAAF opinion but is implicit in the ACCA's discussion of the legal and factual sufficiency of the rape convictions.[74] In cases when the victim is repeatedly abused, once the victim has determined that resistance is futile, the reasonable measure of resistance to negate the permissive inference of consent may be lowered. The accused's abuse of Private First Class (PFC) PR is a good

67. BENCHBOOK, *supra* note 14, para. 3-45-1 n.6.

68. *Simpson*, 58 M.J. at 378. Recent CAAF cases make clear that rank disparity alone does *not* constitute constructive force. *See Simpson*, 55 M.J. at 697 n.40.

69. *Simpson*, 58 M.J. at 377-79.

70. *See id*. This degree of perceived harm is consistent with prior case law. *See* United States v. Cauley, 45 M.J. 353 (1996); United States v. Palmer, 33 M.J. 7 (C.M.A. 1991).

71. MCM, *supra* note 13, ¶ 45c(1)(b). The model instruction also includes this level of perceived harm. *See* BENCHBOOK, *supra* note 14, para. 3-45-1, n.4.

72. *Simpson*, 55 M.J. at 697 n.39. This footnote shows that the BENCHBOOK may require a greater degree of fear than the case law actually requires. *See* United States v. Bradley, 28 M.J. 197 (C.M.A. 1989); United States v. Hicks, 24 M.J. 3 (C.M.A. 1987).

73. *See* BENCHBOOK, *supra* note 14, para. 3-45-1 n.6.

74. *Simpson*, 55 M.J. at 699-709.

example. The accused was convicted of raping her eight times. Early on the day she was raped for the first time, PFC PR made her lack of consent clear when she held onto her PT shorts when the accused tried to pull them down.[75] Later that same day, when the accused was about to rape her for the first time, PFC PR protested verbally and physically. Private First Class PR tried to push the accused away and tried to prevent penetration by keeping her legs together while telling the accused that she did not want to have sex with him.[76]

The victim resisted a lot initially compared to the level of resistance she offered before he raped her the final two times. The last two rapes occurred in the accused's quarters. On these occasions, the victim was very compliant because her resistance was futile on the other occasions. Private First Class PR got into the accused's car, entered his quarters, and "[o]nce in the room, she just stood frozen when he told her to undress and did not resist when he undressed her himself."[77] The ACCA found all of these rape convictions legally and factually sufficient.[78] Therefore, when a witness alleges multiple episodes of abuse and describes some level of resistance initially but the resistance tapers off over time to little or no resistance, the accused may be convicted of rape for acts of sexual intercourse after the resistance has tapered off. This pattern may arise in child sexual abuse cases as well as improper superior-subordinate relations cases.

Attempts

In *United States v. Redlinski*,[79] the CAAF considered the providence of the accused's guilty plea to attempted distribution of marijuana. In his appeal, the accused claimed that the military judge did not sufficiently explain the elements of this offense. The court agreed that the accused did not have an adequate understanding of the elements of attempted distribution of marijuana and reversed his conviction for this offense.[80]

During the providence inquiry, the military judge listed the elements of attempted wrongful distribution of marijuana as:

> Essentially that at Long Island, New York, on or about 16 February 1999, you attempted to distribute some amount of marijuana, a controlled substance. Again, that you actually knew you attempted to distribute the substance, that you actually knew that the substance you attempted to distribute was marijuana or of a contraband nature, and that the distribution, if completed would have been wrongful.[81]

As to this offense, the accused admitted to the judge that he had accepted $300 from a fellow sailor to purchase the marijuana and had driven off in his car to execute the sale. Law enforcement officials, however, stopped the accused's car, and he never purchased the marijuana.[82]

The CAAF noted that a military judge must explain to the accused the elements of an offense for an accused's plea of guilty to that offense to be knowing and voluntary. The accused must know the elements and admit them freely.[83] "Rather than focusing on a technical listing of the elements of an offense, [the CAAF] looks at the context of the entire record to determine whether an accused is aware of the elements, either explicitly or inferentially."[84]

The court concluded that the appellant did not receive an adequate explanation of the element of attempted distribution. The military judge simply added the words "attempted to" to the elements of wrongful distribution, thereby missing the elements that are unique to an attempt.[85] "Although the appellant is not entitled to receive a hornbook review of this distinction, the record must objectively reflect that the appellant understood that his conduct, in order to be criminal, needed to go beyond

75. *Id.* at 700.

76. *Id.*

77. *Id.* at 702.

78. *Id.* at 699-700.

79. 58 M.J. 117 (2003).

80. *Id.* at 119. The court set aside the finding of guilty for attempted distribution of marijuana and the sentence, but the court affirmed other drug-related findings of guilty. *Id.*

81. *Id.* at 118.

82. *Id.* at 119.

83. *Id.*

84. *Id.*

85. *Id.* ("Unlike some simple military offenses, attempt is a more complex, inchoate offense that includes two specific elements designed to distinguish it from mere preparation.").

preparatory steps and be a direct movement toward the commission of the intended offense."[86] The court concluded that elements of attempted wrongful distribution, as given by the trial judge, did not provide the accused with a sufficient understanding of the elements of the offense, and, therefore, his guilty plea was not knowing and voluntary. As a result, the court reversed the conviction on this offense.[87]

This case is a reminder that an attempt is a separate crime with unique elements.[88] When preparing a providence inquiry or findings instructions for members, judges should describe the elements of the attempt using the format in *Benchbook* Instructions 3-4-1, 3-4-2, or 3-4-3.[89] Modifying the elements of the attempted offense is insufficient.

Absent Without Leave

In *United States v. Rogers*,[90] the ACCA recommended a new instruction when the issue of voluntary termination to an unauthorized absence is raised at trial. This case did not involve the instructions given at trial since it was a guilty plea. The case is covered here because the proposed instruction was significantly modified and adopted as a change to the *Benchbook*.[91]

In *Rogers*, the accused was charged, among other offenses, with multiple absences without leave (AWOL) from Fort Hood. She remained in the local area and sometimes visited her unit where she saw some of her noncommissioned officers, who knew she was AWOL. In upholding the providence of the accused's guilty pleas, the ACCA reviewed the law regarding voluntary termination of an unauthorized absence. The ACCA concluded that an AWOL is not terminated by the absentee's "casual presence for personal reasons."[92] The court then set forth the following test for determining whether an AWOL has been voluntarily terminated. The accused must do the following: (1) present herself with an intent to return to military duty—this may be accomplished by an overt act, in person, and cannot be done by telephone; (2) present herself to a military authority, someone with authority to apprehend the soldier;[93] (3) identify herself to the military authority and disclose her AWOL status, unless the authority is already aware of that status; and (4) submit to the actual or constructive control exercised by the military authority to which the absentee has presented herself.[94]

With the increasing number of AWOL cases being tried in the Army due to the current policy of returning absentees to their home installations, counsel and judges now have a new instruction to use.

Conspiracy

In *United States v. Mack*,[95] the CAAF addressed a scenario in which the accused was convicted of two specifications of conspiracy[96] even though the facts presented at trial proved only one agreement. Specialist Mack and her cohort in crime conspired to steal $3000 from the American Red Cross by stealing a check and forging it in that amount.[97]

On appeal, the government conceded error, and the CAAF resolved the issue by consolidating the two specifications into one. The court concluded the error had no impact on the findings or the sentence.[98]

86. *Id.*

87. *Id.*

88. *See* UCMJ art. 80 (2002).

89. *See* BENCHBOOK, *supra* note 14, paras. 3-4-1, 3-4-2, 3-4-3. These instructions incorporate the elements of the offense attempted in the discussion of the required specific intent. *Id.*

90. 59 M.J. 584 (Army Ct. Crim. App. 2003).

91. *See* BENCHBOOK, *supra* note 14.

92. *Rogers*, 59 M.J. at 586 (quoting United States v. Coglin, 120 M.J. 670, 673 (A.C.M.R. 1981)).

93. Such an authority can include a commissioned officer, a noncommissioned officer, or a military police officer. *Id*. at 587.

94. *Id*.

95. 58 M.J. 413 (2003).

96. UCMJ art. 81 (2002).

97. *Mack*, 58 M.J. at 418.

98. *Mack*, 58 M.J. at 418-19. As to the findings, the accused was convicted of several other charges, and no additional evidence was presented to prove the two conspiracy specifications. As to the sentence, the maximum confinement would have been thirty-five and one-half years instead of forty years had there been a single conspiracy conviction. Since the sentence included confinement for a period of only two years, the CAAF found no prejudicial impact there either. *Id.*

Practitioners should be alert to these issues. Frequently in a conspiracy, there is but a single agreement. Parties may join at different times and various crimes may be committed, but normally there is, as here, only one agreement. If not before, it may be appropriate to consolidate specifications before deliberations on the findings. Defense counsel should be especially vigilant to this issue, because reducing the accused's exposure to conviction of a greater number of offenses and a higher maximum punishment is certainly in the client's best interests.

Defenses

Mistake of Fact

In *United States v. Hibbard*,[99] the accused claimed that the military judge should have provided a mistake of fact instruction as a defense to a rape charge. The accused was charged with maltreatment, rape, indecent assault, making a false official statement, and dereliction of duty. The accused's defense at trial was that no act of sexual intercourse with the victim occurred and that she fabricated the rape allegations.[100] The CAAF stated that the mistake of fact instruction is required when reasonably raised by the evidence, but the court determined that the evidence in this case did not raise a reasonable belief that the victim consented. The CAAF affirmed the conviction.[101]

The accused was assigned to sponsor the victim, who had recently arrived in Saudi Arabia. On her third day in country, the accused took the victim to his apartment and then to a swimming pool. During the course of the day, the accused made several sexually suggestive statements and actions that were not accepted by the victim, yet the victim did not firmly reject some of them. According to the victim, she and the accused had sexual intercourse, and the accused did not stop until the second time she told him to stop.[102]

The defense's theory at trial was that the act of sexual intercourse never happened. In its opening statement, the defense claimed that the victim fabricated the rape charge to avoid serving in Saudi Arabia. The defense's cross-examination of the victim and the defense case in chief was consistent with this theory. Before closing argument, however, the defense counsel requested a mistake of fact instruction. The trial judge denied the request for the instruction, claiming the evidence did not raise the defense.[103]

Of course, a military judge has a *sua sponte* duty to instruct on defenses that are reasonably raised by the evidence.[104] The mistake of fact defense for rape, a general intent crime, requires both an honest and reasonable mistaken belief that the victim consented. A military judge has no reason to provide this instruction when "the evidence [does] not reasonably raise the issue of whether the appellant had a reasonable but mistaken belief as to consent."[105] The CAAF focused on whether the evidence raised the issue of whether the accused had a reasonable but mistaken belief as to consent. The CAAF noted:

> [W]e consider whether the record contains some evidence of a reasonable mistake to which the members could have attached credit if they had so desired. In doing so, we consider the totality of the circumstances at the time of the offense . . . . [We also] take into account the manner in which the issue was litigated as well as the material introduced into evidence at trial.[106]

Given both the defense's failure to present evidence of a reasonable mistake of fact and the defense's tactical choice to claim the victim fabricated her allegations, the CAAF determined that no mistake of fact instruction was required and affirmed the decision of the Air Force Court of Criminal Appeals (AFCCA).[107]

This case is an important reminder to practitioners that the manner in which the litigants chose to argue their cases is an appropriate factor in determining what instructions are appropriate. Although this is not a new development,[108] it is a subtle point that is often overlooked.

The ACCA also considered the mistake of fact defense, as it applies to larceny, in *United States v. Bankston*.[109] In this case,

99. 58 M.J. 71 (2003).

100. *Id.* at 73.

101. *Id.* at 75-77.

102. *Id.* at 73-74.

103. *Id.* at 73-75.

104. MCM, *supra* note 13, R.C.M. 920(e)(3).

105. *Hibbard*, 58 M.J. at 75.

106. *Id.* at 75-76.

107. *Id.* at 77.

SSG John L. Bankston was charged with larceny and conspiracy to commit larceny. At the Post Exchange, the accused and another individual, SSG Blount, loaded a shopping cart with approximately forty items worth about $1,200, merchandise they jointly selected. They approached a cash register, which SSG Blount's wife was operating. Staff Sergeant Blount went out to the parking lot while SSG Bankston paid the bill. Mrs. Blount scanned six items for which the accused paid. She scanned some of the other items but then deleted them from the cash register receipt. In the end, the accused paid $70.24 for merchandise worth $1,200. According to the accused, SSG Blount told him that his wife would later pay the balance with a credit card during her break.[110]

At trial, the judge gave an "honest and reasonable" mistake of fact instruction[111] as to the wrongfulness of the taking. The defense also requested an "honest" mistake of fact instruction[112] as to the specific intent element of permanently depriving the owner of the property, but the judge ruled that the evidence had not raised that defense.

On appeal, the defense argued that the honest mistake of fact instruction should have been given. The ACCA agreed, relying on *United States v. Binegar*,[113] which was decided after SSG Bankston's trial. In *Binegar*, the CAAF held that both the "intent permanently to deprive" element and the "wrongfulness" element of larceny are specific intent elements.[114] Consequently, the ACCA held that the judge should have instructed the members that SSG Bankston's mistake need only be honest.[115]

Using the *Binegar* standard, the accused's misunderstanding about the later payment by Mrs. Blount for the remaining items need only be honest. The ACCA set aside his conviction, because an honest mistake of fact instruction might have caused the members to interpret the accused's testimony differently.

Sentencing Instructions

Punitive Discharge

In *United States v. Rasnick*,[116] the CAAF considered the appeal of Airman Basic Daniel Rasnick. The accused was convicted of three specifications of disrespect toward a superior commissioned officer, insubordinate conduct toward a noncommissioned officer, and disobeying an order.[117] In his sentencing instructions, the military judge did not include the word "ineradicable" in characterizing the stigma of a bad-conduct discharge. The accused claimed that the judge's refusal to use the word ineradicable was an error.

The accused argued that the military judge should have described the stigma attached to a bad-conduct discharge as ineradicable because the *Benchbook* uses this term in its model instruction.[118] The CAAF determined that the military judge's instruction on a bad-conduct discharge sufficiently described the "enduring stigma of a punitive discharge" because the instruction "adequately advised the members that a punitive discharge was a 'severe' punishment, that it would entail specified adverse consequences, and that it would affect Appellant's 'future with regard to his legal rights, economic opportunities, and social acceptability.'"[119] Thus, for a punitive discharge, the military judge need not use this specific term provided the members of the court-martial are told about its negative effects.[120]

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108. *See, e.g.*, United States v. Peel, 29 M.J. 235 (C.M.A. 1989).

109. 57 M.J. 786 (Army Ct. Crim. App. 2002).

110. *Id*. at 786-87.

111. BENCHBOOK, *supra* note 14, para. 5-11-2 (Ignorance or Mistake-When Only General Intent is in Issue).

112. *Id.* para. 5-11-1 (Ignorance or Mistake-Where Specific Intent or Actual Knowledge is in Issue).

113. 55 M.J. 1 (2001).

114. *Id*. at 4-6.

115. *Bankston*, 57 M.J. at 788. The ACCA conducted a harmless error analysis and concluded that because the case was a close one and the trial counsel argued that SSG Bankston's actions were not reasonable, the erroneous instruction materially prejudiced the accused. *Id.*

116. 58 M.J. 9 (2003).

117. *Id.*

118. *Id.* at 10; *see* BENCHBOOK, *supra* note 14, para. 2-6-10 (Punitive Discharge).

119. *Rasnick*, 58 M.J. at 10.

120. In fact, this change was incorporated in Change 2 to the BENCHBOOK. *See* BENCHBOOK, *supra* note 14, para. 2-6-10 (C2, 1 July 2003).

Pretrial Confinement

In *United States v. Miller*,[121] the CAAF determined that a military judge must instruct court-martial members about pretrial confinement. The court explained that pretrial confinement is a mitigating factor for the members to consider in deciding an appropriate sentence for the accused.[122] The accused, Senior Airman Matthew J. Miller, was tried by general court-martial and, pursuant to his pleas, convicted of drunk-driving and wrongful possession and distribution of methamphetamines. Before the court- martial, he had served three days in pretrial confinement at a civilian facility. At trial, the military judge instructed the court-martial members to consider all evidence in extenuation and mitigation, but he did not specifically mention the three days of pretrial confinement, despite a request by the defense.[123] After instructions, the defense made no specific objection to the judge's instructions as given.[124] The members sentenced the accused to a bad-conduct discharge and reduction to the grade of A1C.[125]

On appeal, the issue was whether the failure to instruct the members about the accused's pretrial confinement as a mitigating factor was an error.[126] The CAAF ruled that, for fashioning an appropriate sentence, the military judge must inform court-martial members of an accused's pretrial confinement based on Rule for Courts-Martial (RCM) 1005 and its earlier decision in *United States v. Davidson*.[127] The accused's failure to object to the instructions during the court-martial was irrelevant because the instruction is mandatory.

> Although [the accused] did not object to the instructions as given, waiver is inapplicable . . . The military judge bears the primary responsibility for ensuring that mandatory instructions, including pretrial confinement instruction mandated by the President in [RCM] 1005(e) and by this Court's decision in *Davidson*, are given and given accurately.[128]

As a result, the military judge's instructions, without the pretrial confinement information, were "inadequate as a matter of law."[129]

Despite its warnings about the mandatory nature of a pretrial confinement instruction, the CAAF affirmed the lower court's decision using the standard for denials of non-mandatory requested instructions.[130]

> Denial of a requested instruction is error if: (1) the requested instruction is correct; (2) "it is not substantially covered in the main [instructions]"; and (3) "it is on such a vital point in the case that the failure to give it deprived [the] defendant of a defense or seriously impaired its effective presentation."[131]

The court found that the defense met the first two parts of the test, but failed the third. Given the *de minimis* nature of the three-day pretrial confinement, the court ruled that the military judge's error did not prejudice the accused.[132]

From this case, it is clear that the CAAF considers the pretrial confinement credit to be a mandatory sentencing instruction in cases when the accused has served pretrial confinement.[133] A majority of the court also will not find waiver of the issue based on a failure to object to the given instructions or a failure to request a tailored pretrial confinement instruction. Prudent judges should give the instruction *sua sponte*.

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121. 58 M.J. 266 (2003).

122. *Id.* at 269.

123. *Id.* at 267-68.

124. *Id.* at 270.

125. *Id.* at 267.

126. *Id.*

127. *Id.*. at 269-70 (citing United States v. Davidson, 14 M.J. 81 (C.M.A. 1982)); *see* MCM, *supra* note 13, R.C.M. 1005.

128. *Id.* at 270.

129. *Id.*

130. *Id.* at 270-71.

131. *Id.* at 270 (quoting United States v. Zamberlan, 45 M.J. 491 (1997) (involving an instruction concerning previous nonjudicial punishment)).

132. *Id.* at 271.

Unsworn Statements

In *United States v. Tschip*,[134] the CAAF reviewed the military judge's instruction regarding the accused's unsworn statement made during sentencing. The court determined that, given the particular facts of this case, the judge had properly placed in context for the members the accused's reference to the possibility of an administrative discharge during his unsworn statement.[135]

Airman First Class Steven Tschip pled guilty to dereliction of duty and dishonorably failing to maintain sufficient funds in his checking account. Before his sentencing by the members, he made an unsworn statement about his military career and future plans.[136] The accused's unsworn statement included: "As much as I would like the chance to redeem myself, I know that my commander can discharge me even if I do not receive a bad conduct discharge today."[137] The accused then told the members that he wanted to remain in the Air Force, finish his degree, and earn a commission.[138]

In response, the military judge instructed the members:

> In his unsworn statement, the accused made reference to the possibility of an administrative discharge. Although an unsworn statement is an authorized means to bring information to your attention, and must be given the consideration it is due, as a general evidentiary matter, information about administrative discharges and the procedures related thereto, are not admissible in trials by courts-martial. The issue concerning the possibility of the administrative discharge of the accused is not a matter before this court. This is what we call a collateral matter. You should not speculate about it. After due consideration of the accused's reference to this matter, you are free, in your discretion, to disregard the reference if you see fit. This same caution applies to any references made concerning this information by counsel during arguments.[139]

Neither side objected to the judge's instructions.[140]

On appeal, the accused asserted that the military judge provided "misleading instructions about the possibility of appellant being administratively discharged" and that "his right to give an unsworn statement was impermissibly impaired by the reference to administrative discharges in the military judge's instructions."[141] The CAAF rejected this argument:

> In view of Appellant's unfocused, incidental reference to an administrative discharge, the military judge did not err by providing instructions that placed Appellant's statement in the appropriate context for purposes of their decision-making process. We need not decide whether the instructions provided by the military judge would be appropriate in a case involving different references to an administrative discharge. Under the facts of this case, the instructions by the military judge did not constitute error, much less plain error.[142]

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133. *Compare* UCMJ art. 51 (2002) (not including the pretrial confinement instruction as a mandatory instruction), *and* MCM, *supra* note 13, R.C.M. 1005(e) (not including the pretrial confinement instruction as a mandatory instruction), *with* United States v. Davidson, 14 M.J. 81 (C.M.A. 1982). In *Davidson*, the Court of Military Appeals found error when the judge did not instruct the members that the accused had served 143 days in pretrial confinement and the members sentenced the accused to the maximum amount of confinement authorized. This sentence to confinement was approved by the convening authority and affirmed by the Air Force Court of Military Review. *Id. Davidson* was decided before *United States v. Allen*, 17 M.J. 126, 128-29 (C.M.A. 1984) (holding that the accused was entitled to sentence credit for pretrial confinement based on a Department of Defense instruction). *Id.* at 128-29. *But see* MCM, *supra* note 13, R.C.M. 1005(e)(5) discussion ("[T]ailored instructions should bring attention . . . [to] any pretrial restraint imposed on the accused.").

134. 58 M.J. 275 (2003).

135. *Id.* at 277.

136. *Id.* at 275-76.

137. *Id.* at 276.

138. *Id.*

139. *Id.* at 277.

140. *Id.*

141. *Id.* at 276-77.

142. *Id.* at 277.

Consequently, the CAAF affirmed the lower court's decision.

This case is helpful to trial judges because it provides an example of how to deal with the accused talking about the possibility of an administrative separation in his unsworn statement. Judges, however, must be cautious of this opinion; the court repeatedly comments that its decision is limited to facts of the case. Here, there was no objection to the instruction, and the comment about the administrative separation was vague and undeveloped. It was unclear how this comment fit within the defense's strategy during the sentencing phase.[143] When the thrust of the defense's sentencing case is that a punitive discharge is inappropriate, this instruction may not be adequate because the instruction may not place the issue in context. This is particularly dangerous when there is an objection to the instruction. This is a good case for judges to remember, but it should be handled with caution.

Evidentiary Instructions

Curative Instructions

In *United States v. Diaz*,[144] the CAAF reversed the accused's convictions for murder and child abuse because the court held that the military judge abused his discretion when he denied the defense's motion for a mistrial and gave a curative instruction instead.[145] The court found the trial judge's curative instruction was "inadequate and confusing"[146] and "a futile attempt to 'unring the bell.'"[147] This case reminds military judges to be very careful when drafting instructions, especially unscripted curative instructions.

In *Diaz*, the accused was convicted of murdering his daughter, Nicole, and physically abusing his other daughter, Jasmine. Nicole died on 11 February 1994, while she was alone with her father. The accused denied any wrongdoing. The medical examiner could not determine the cause of death but considered the death suspicious. The medical examiner testified that the autopsy findings were consistent with suffocation, but he could not rule out Sudden Infant Death Syndrome (SIDS). On 30 July 1995, the accused burned Jasmine's inner thigh with a heated cigarette lighter. He claimed he accidentally dropped the lighter. A military doctor that examined Jasmine determined that the burn was not an accident. Based on the doctor's evaluation, Child Protective Services (CPS) removed Jasmine from her parents' custody.[148]

When the accused was reassigned to Fort Drum, New York, his wife remained in Hawaii to regain custody of Jasmine. The accused sought counseling to be reunited with his wife and daughter, as required by CPS. During counseling, the social worker, Ms. Reagan Amlin, confronted the accused. She told the accused that she was convinced that he had killed Nicole. The accused responded with strange and equivocal answers.[149]

The prosecution's theory at trial was that the accused suffocated Nicole and intentionally burned Jasmine. The defense's theory was that Nicole's death was unexplained, perhaps SIDS, and that Jasmine's burn was accidental. The government's case consisted primarily of Ms. Amlin's testimony and expert medical testimony, including testimony about other physical injuries to Nicole.[150]

The defense moved *in limine* to limit Ms. Amlin's testimony. Specifically, the defense sought to prevent Ms. Amlin from testifying that she thought the accused had killed Nicole. The government indicated it did not intend to elicit that testimony, but Ms. Amlin, while explaining her therapy, testified that she confronted the accused with her belief that he killed Nicole. When the defense complained, the judge gave a limiting instruction.[151]

Immediately after the members heard the curative instruction related to Ms. Amlin's testimony, the defense moved *in limine* to limit the scope of the testimony of the government's main medical expert, Dr. John Stuemky. In particular, the defense sought to prevent Dr. Stuemky from opining that Nicole's death was a homicide (and from stating the same opinion of the state Death Review Board of which Dr. Stuemky was a member) and to prevent Dr. Stuemky from expressing his opinion that the accused was the perpetrator. The judge allowed Dr. Stuemky to testify about the ultimate issue and his background with the Death Review Board.[152] The judge interrupted Dr. Stuemky's direct examination and suggested an Article 39(a) session.[153] During the Article 39(a) session, the judge clarified his previous ruling about the limits of Dr. Stuemky's

143. *Id.*

144. 59 M.J. 79 (2003).

145. *Id.* at 97.

146. *Id.* at 93.

147. *Id.* at 92.

148. *Id.* at 84.

149. *Id.* at 84-85.

150. *Id.* at 93-96. The CAAF considered the admitted uncharged misconduct in determining the adequacy of the curative instruction given by the trial judge. In its discussion, the court found much of the uncharged misconduct evidence inadmissible. *Id.*

testimony and made sure the trial counsel understood it.[154] Subsequently, when asked to state his conclusions, Dr. Stuemky testified, "My conclusions were that this was a homicide death—this was a physical abuse death. And furthermore, I felt that the perpetrator was the father."[155] The defense moved for a mistrial. The judge denied the motion for a mistrial and instead gave another curative instruction.[156]

The CAAF noted that a military judge's decision to deny a motion for a mistrial will not be reversed absent clear evidence of abuse of discretion.[157] The CAAF found an abuse of discretion in this case because the trial judge misapprehended the prejudicial impact of Dr. Stuemky's testimony and because his curative instruction about it was inadequate. The court noted that the central issues of the murder charge were (1) the cause of Nicole's death and (2) if a homicide, the identity of the perpetrator.[158] The CAAF stressed the significance of Dr. Stuemky's testimony:

> Dr. Stuemky's testimony identifying Appellant as a perpetrator violated a fundamental rule of law that experts may not testify as to guilt or innocence. His testimony was particularly egregious as the defense filed a motion to exclude this testimony, the judge expressly ruled that this testimony was improper, and trial counsel stated he had informed the witness of the judge's ruling to limit the witness's testimony. . . . Dr. Stuemky's testimony was presented as a definitive resolution of the issues of both cause of death and identity of the perpetrator. In this homicide prosecution, the prejudicial impact of linking

151. *Id.* at 86. The judge instructed the members:

> Members of the court, yesterday afternoon you heard the testimony of Ms. Reagan Amlin. She testified about her four sessions with Specialist Diaz. She testified that during one or more of the sessions, she told Specialist Diaz that she either didn't believe him, or she confronted him with her thoughts that a crime was committed. You members, as the voice of the community, have to decide the issues in this case based upon the evidence that's presented to you in court. *Nobody can tell you what happened. That's your job and there are no shortcuts. There is no witness that can tell you that a crime occurred; that's your job to determine that issue.*
>
> So to the extent that you believe that Ms. Amlin testified or implied that she believed that Specialist Diaz committed a crime, committed a murder, committed an intentional burn, *you may not consider that as evidence that a crime occurred, because that's your job*. She used that technique during her therapy to talk with the client. Do you understand what I'm telling you here? *You've got to make the decisions in this case, and there's nobody that can shortcut your job, although I'm sure that would make it easier for you.*

Id. (emphasis added).

152. *Id.* at 86-87. The judge ruled:

> Concerning the defense's objection to the testimony of Dr. Stuemky as to the ultimate issue, I'm denying that motion in limine. I find that his testimony, given the case to this point, is material, and I believe it's probative. I believe he has the qualifications to do it, from what I've been told by counsel. I believe that the information he relied upon is information that would put him in a unique position to be able to make that determination. Applying a[n] [M.R.E.] 403 balancing test, I find that the probative value of the evidence is not substantially outweighed by the likelihood of harm to the accused.
>
> Concerning his testimony about this [Death Review Board], I'm going to allow him to testify about the [Death Review Board], why it was created, what they do. I'm not going to let him talk about any statistics concerning the [Death Review Board], as to how many times they're correct, or how many times they're wrong, or anything like that. I will allow him to testify about his background with the [Death Review Board], how many investigations he's conducted and he's been involved in.
>
> Concerning his testimony about the basis for his determination, I believe he has a sufficient basis to form the opinion that he's going to offer. I would tell the defense, however, that depending on what their cross is, and how they attack him, you may open the door as to his testifying about other evidence that he considered.

Id.

153. UCMJ art. 39 (2002). Article 39(a) of the Uniform Code of Military Justice provides for sessions of court without the presence of the members. *Id.*

154. *Diaz*, 59 M.J. at 87. The judge stated:

> Earlier when I ruled about the ultimate conclusion, I want to make clear that you understand what my ruling is. My ruling is not that this witness can say, "Specialist Diaz murdered his daughter." My ruling does allow you to ask whether the injuries are consistent with a child abuse death; whether he has an opinion as to whether the injuries were caused by child abuse; whether he has an opinion as to whether this was a SIDS death, or inconsistent with a SIDS death. I'll let him do that. I want to make sure you understand that my ruling did not say that he could stand up there and point a finger at specialist [sic] Diaz and say, "He killed his daughter." Do you understand my prior ruling?

Id.

155. *Id.*

> these two issues was immediate, direct, and powerful, as it was an impermissible expert opinion of Appellant's guilt. . . . Dr. Stuemky's inadmissible opinion testimony immediately followed the testimony of Ms. Amlin that she "was convinced that he killed his daughter."[159]

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156. *Id.* at 88-89. The judge instructed the members:

> Members of the court, early on in this trial and during the case on several occasions, I've told you that you have to decide the facts in this case, and you have to make a determination as to whether a crime occurred. You have to make a determination as to the believability or credibility of witnesses. And you have to follow my instructions . . . . [Y]ou all assured me that you could do that.
>
> I'm going to give you some instructions concerning expert testimony. An expert – a person is allowed to testify as an expert because his testimony may be helpful to you in coming to conclusions about issues. The witness you've been hearing has been qualified as an expert in a specific discipline because his knowledge, skill, experience, training or education may assist you in understanding the evidence, or in determining a fact in issue. But [t]he point is that you have to determine the fact in issue. Do you understand that?
>
> [Affirmative responses from the Members]
>
> You are not required to accept the testimony of an expert witness or give it any more or less weight than that of an ordinary witness. But you should consider the expert's experience and qualifications in the specific area.
>
> Expert witnesses are allowed to render opinions, and those opinions are only allowed if they're helpful to you, the fact finder. But again, bear in mind that you have the ultimate determination as to a conclusion about the issues in the case.
>
> *An expert cannot tell you that he thinks a crime occurred, because that's not helpful to you, because you have to decide that. An expert witness cannot tell you that a witness is lying or truthful, or he cannot even tell you that a crime occurred.* Because you have to decide that based on all the evidence, and only the evidence, that's been presented in the courtroom. Do you understand that?
>
> [Affirmative responses from the Members]
>
> *To the extent that Dr. Stuemky opined that he thought a crime occurred, and that a particular specific person committed that crime, you cannot consider that, because that's not helpful to you*. You have to make that decision. Do you understand that?
>
> [Affirmative responses from the Members]
>
> As I told you earlier this morning, there's nobody that can help you in that regard, because you have to make your decision based on the evidence that's presented to you here in court. Nobody else has the unique situation of being present to hear all the evidence in court. Do you understand what I'm telling you?
>
> [Affirmative responses from the Members]
>
> *I'm telling you that you must disregard any testimony about whether a crime occurred, or whether this soldier committed a crime*. Do you understand that?
>
> [Affirmative responses from the Members]
>
> And you can't consider that for any reason during your deliberations. Do you understand that?
>
> [Affirmative responses from the Members]
>
> I've gotten affirmative responses by every member to this point. You can consider evidence that [sic] certain – as to an opinion about whether injuries were consistent with SIDS or not consistent with SIDS, or whether injuries were consistent with a child abuse-type death. *But you cannot consider any testimony as to what this witness thought as to who did it.* Do you understand that?

Id. (emphasis added).

> [T]he judge denied the defense motion for a mistrial without stating on the record his findings of fact or legal analysis to support his ruling. However, the judge's actions in giving a curative instruction and conducting individual voir dire reveal that he concluded that his remedial action was sufficient to ensure that the members would be able to put aside the inadmissible evidence.

Id. at 91.

157. *Id.* at 90.

158. *Id.* at 91.

159. *Id.* at 92.

The court's decision points out several flaws in the trial judge's curative instruction. The court found the instruction inadequate because

> [g]iven the inflammatory nature of Dr. Stuemky's impermissible testimony, the military judge should have immediately instructed the members regarding the impropriety of Dr. Stuemky's testimony that Nicole was murdered and that Appellant was the perpetrator. Instead, the military judge then surrounded his admonition not to consider Dr. Stuemky's impermissible testimony with an instruction telling the members how powerful expert testimony is and an explanation that the impermissible portion of Dr. Stuemky's testimony was "not helpful." In this context, the impact of the military judge's admonition not to consider the impermissible portion of Dr. Stuemky's testimony was significantly diluted.[160]

The court determined that the instruction was confusing, because it contradicted the judge's prior rulings. The judge instructed the members that an expert witness could not opine that a crime occurred after the panel heard two witnesses testify that a crime occurred and that the father was the perpetrator. In light of the circumstances, "the judge had an obligation to be specific and precise."[161] The CAAF found an abuse of discretion and set aside the findings and sentence.[162]

Diaz is a reminder to trial judges that instructions, particularly curative instructions, must be drafted with care. Not only must instructions contain a correct statement of the law, they must also be precise and effective. A curative instruction must provide proper guidance for the court members' deliberations and cure the problem it addresses given the circumstances of the case. A curative instruction can render an error harmless, but drafting and giving a curative instruction is not a perfunctory exercise.[163] Additionally, in some situations a curative instruction may not be good enough to "unring the bell." Although mistrials are disfavored, in some cases that may be the only effective remedy when a witness has clearly exceeded the scope of permissible testimony.

Accomplice Testimony

In *United States v. Gibson*,[164] the CAAF considered the appeal of Private Scott Gibson, who claimed that the military judge erred by refusing to give a requested accomplice instruction.[165] The CAAF ruled that the military judge's instructions on conspiracy and witness credibility did not provide a satisfactory substitute for an accomplice instruction. Because the military judge's instructions were insufficient, the CAAF reversed the accused's conviction for conspiracy to commit murder.[166]

The accused was friends with a group of soldiers who discussed schemes to kill PFC Bell. Members of the group eventually attempted to murder PFC Bell. The accused's actual involvement, however, as a conspirator in the attempted murder was unclear. Several members of the conspiracy testified as witnesses against the accused, and their testimony conflicted in material ways. Three witnesses for the government testified under grants of immunity.[167] The CAAF noted that at court-martial "[t]he court members were required to decide whether Appellant engaged in idle, marijuana-induced chatter or serious planning."[168]

The CAAF clarified its earlier decision in *United States v. Bigelow*[169] by explaining that while the "standard" accomplice instruction need not be given verbatim, "the critical principles of the instruction . . . shall be given."[170] At trial, the military

160. *Id.* at 93. *See supra* note 156 to review the judge's instruction.

161. *Id.*

162. *Id.* at 97. At trial, the accused was sentenced to a dishonorable discharge, confinement for life, total forfeitures of all pay and allowances, and reduction to E1. *Id.* at 80.

163. *Id.* at 92 (citing United States v. Armstrong, 53 M.J. 76, 82 (2000); United States v. Rosser, 6 M.J. 267, 271 (C.M.A. 1979)).

164. 58 M.J. 1 (2003).

165. *See* BENCHBOOK, *supra* note 14, para. 7-10.

166. *Gibson*, 58 M.J. at 8. The CAAF, however, affirmed convictions on the other charges, noting that the failure to provide the requested accomplice instruction was harmless error for the other charges because other evidence corroborated the conviction on the other charges. *Id.*

167. *Id.* at 3-4.

168. *Id.* at 7.

169. 57 M.J. 64 (2002).

170. *Gibson*, 58 M.J. at 6.

judge refused to provide the accomplice instruction requested by the defense. The trial judge reasoned,

> There's got be something in the witnesses' testimony to suggest minimizing their own involvement and pointing the blame at others, or something that they have to gain by virtue of testifying . . . . [T]here was no evidence that any of them had anything to gain . . . by virtue of testifying. And I didn't see anything to indicate that they were minimizing their own involvement.[171]

The judge's instructions covered the elements of conspiracy and witness credibility.[172] The CAAF determined that these instructions as given did not adequately describe the "'critical principles' of the accomplice instruction. The instruction on the elements of conspiracy said nothing about the weight to be given to the testimony of a co-conspirator. There was no mention of 'caution.'"[173] Moreover, the instructions did not cover a key witness who provided testimony in exchange for a reduced sentence.[174]

The CAAF emphasized the importance of the accomplice testimony instruction:

> A cautionary instruction [about accomplices] would have alerted [court] members to consider whether [the witnesses'] characterizations of Appellant's actions were colored by their desire to minimize their culpability or obtain leniency at Appellant's expense. We are "left in grave doubt" regarding the effect of the instructional error on Appellant's conviction of conspiracy.[175]

The important lesson in this case is that the military judge must give the accomplice testimony instruction at trial when an accomplice testifies against the accused. Nothing more is needed. Evidence that the accomplice tried to shift the blame, minimize their involvement, or benefit from their testimony is not required. The instruction in the *Benchbook* need not be given verbatim and other instructions can expand on the witness's credibility, but the critical principles contained in the accomplice testimony instruction must be included.

Variance

In *United States v. Teffeau*,[176] the CAAF considered the appeal of Staff Sergeant (SSgt) Charles Teffeau, a U.S. Marine Corps recruiter, whose female recruit died in an alcohol-related car crash around the time of his recruiting visit. The accused was charged, among other things, with wrongfully furnishing alcohol to the recruit.[177] The court members made findings by exceptions and substitutions, finding the accused not guilty of wrongfully furnishing alcohol to the recruit but guilty of having a nonprofessional personal relationship with her. The CAAF ruled that variance between the charge and the conviction was material and set aside the conviction.

The evidence presented at trial indicated that the accused and a fellow recruiter, SSgt Finch, had taken a government vehicle to visit two recruits, one of whom was about to depart for boot camp. The two recruiters and the two female recruits drank alcoholic beverages for at least three hours at one of the recruit's home. They took their party to another location in two vehicles. While returning, the recruit's car hit a tree—killing her and injuring Finch. The recruit's blood-alcohol level was .07; SSgt Finch's was .14. Staff Sergeant Teffeau was in a separate vehicle. Following the accident, SSgt Teffeau provided statements to civilian police officers about the circumstances surrounding the accident.[178]

One specification charged the accused with failing to obey a general order by wrongfully providing alcohol to his recruit, in violation of paragraph 6d of the Marine Corps Recruiting Depot Order 1100.4a.[179] At trial, the military judge gave the standard instructions on the elements of the offense and gave the standard variance instruction.[180] The trial judge reiterated the vari-

171. *Id.* at 5.

172. *Id.*

173. *Id.* at 7.

174. *Id.*

175. *Id.* at 7-8.

176. 58 M.J. 62 (2003).

177. *Id.* at 63.

178. *Id.* at 64-68.

179. *Id.*

180. *See* BENCHBOOK, *supra* note 14, para. 7-15.

ance instruction when explaining the findings worksheet to the members. The members of the court-martial concluded that the accused was guilty of "wrongfully and engaging in and seeking a nonprofessional, personal relationship with [the recruit]" but was not guilty of wrongfully providing alcohol to her. The substituted language reflected a violation of a different subsection of the same paragraph of the same order. The problem was that the accused had been charged with the alcohol offense, not the relationship offense.[181]

The Navy-Marine Corps Court of Criminal Appeals (NMCCA) found that the variance between the specification and the findings was material, but the NMCCA found no prejudice to the accused.[182] The CAAF took this opportunity to clarify its opinion in *United States v. Allen*.[183] In *Allen*, the court appeared to require that the accused must show both that he was misled by the variance and that the variance put the accused at risk of reprosecution.[184] The CAAF found prejudice, noting that a material variance can prejudice an accused in a number of ways. In this case, the court found prejudice based on a violation of due process; the variance changed the identity of the offense and the accused was denied the opportunity to defend against the allegation.[185]

Another important variance case is *United States v. Walters*.[186] In that case, the CAAF reversed a drug use conviction because of an ambiguous verdict. The accused was charged with use of ecstasy on divers occasions during a four-month period, and the members found him guilty of a single use but did not clarify when that use occurred. During the trial, various witnesses testified about the accused's use of ecstasy on various occasions during the charged period.[187] When the judge instructed the panel, he gave a standard variance instruction.[188] He told the members that as an example they could except out the words "divers uses" and substitute the words "one time." The judge did not further explain that they would need to change the dates or otherwise add language to clarify which incident the members convicted the accused.[189]

The AFCCA relied on Supreme Court precedent[190] and *United States v. Vidal*[191] in upholding the verdict in Walters. In *Vidal*, the CAAF had held that an accused could properly be convicted of a single specification of rape when the government presented two theories of liability: that the accused was the actual perpetrator or that he aided and abetted the rape by holding the victim down. The AFCCA interpreted *Vidal* as providing support for the "common-law rule regarding general verdicts."[192]

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181. *Teffeau*, 58 M.J. at 64-66.

182. *Id.* at 67.

183. 50 M.J. 84 (1999).

184. *Teffeau*, 58 M.J. at 67 n.2.

185. *Id.* at 67.

186. 58 M.J. 391 (2003).

187. *Id*. at 392-93. The testimony included observations of the accused snorting a crushed pill; effects of a drug on the accused such as glassy eyes, dilated pupils and twitching; the accused possessing small pills; and statements of the accused that he had just used or was planning to use ecstasy. *Id*.

188. BENCHBOOK, *supra* note 14, para. 7-15 (Variance - Findings by Exceptions and Substitutions).

189. *Walters*, 58 M.J. at 393.

190. Griffin v. United States, 502 U.S. 46 (1991). Regarding an ambiguous verdict, the Supreme Court held that at common law, a jury verdict is valid if legally supportable on one of several grounds even though the jury relied on an invalid ground. *Id*. at 49. Griffin was charged with conspiracy to defraud the United States by interfering with the Internal Revenue Service (IRS) and the Drug Enforcement Agency. At trial, only evidence concerning the IRS implicated her. On appeal, Griffin argued that her conviction should not be affirmed because it could not be determined on which basis the jury convicted her. The Court rejected her argument holding that a conviction can stand even though the evidence is insufficient to support multiple grounds charged, as opposed to a conviction based on multiple grounds, only some of which are constitutionally valid. *Id.* at 56-57.

191. 23 M.J. 319 (C.M.A.), *cert. denied*, 481 U.S. 1052 (1987). In relying on this case, the AFCCA overruled its own precedent in *United States v. King*, 50 M.J. 686 (A.F. Ct. Crim. App. 1999) (en banc), which involved a similar factual situation. In *King*, the accused was charged with communicating a threat on divers occasions but was found guilty of only one threat. The AFCCA held that it could not affirm the conviction because it did not know which threat the accused was found to have communicated. *Id.*

192. United States v. Walters, 57 M.J. 554, 557 (A.F. Ct. Crim. App. 2002). The AFCCA concluded that because *Vidal* allowed a conviction to stand when multiple theories of criminal liability supported a charge, so too could a conviction stand when the finding rested on multiple acts. *Id.*

The CAAF rejected that view and pointed out that the appellate authority of the service courts is based on Article 66, UCMJ, and not common law. Article 66 requires that the service courts be convinced of both the legal and factual sufficiency of any finding of guilty.[193] As to the latter, the courts must be convinced of an accused's guilt beyond a reasonable doubt. Here, since it was unclear on which use the members relied, it was impossible for the Air Force court to perform this function.

The CAAF noted that in a situation such as this, the fact-finders must make it clear which conduct they have found the accused committed. Excepting out and substituting dates or locations normally suffice. In other situations, further clarification may be needed, for example, by stating what other parties were present or how the drug was used. Judges need to carefully craft their instructions and the findings worksheet to ensure that the members are given appropriate options.

Mixed Pleas

In *United States v. Kaiser*,[194] Sergeant David J. Kaiser argued that the military judge erred by informing the members of the court-martial of the offenses to which he had pled guilty before findings on the offenses to which he had pled not guilty. The CAAF agreed and reversed the lower court's rulings.[195]

The accused was charged with violating the Defense Language Institute's policy that prohibited staff members from forming non-professional relationships with the students and from engaging in unlawful sexual activities. He allegedly had unauthorized contact with four students. He pled guilty to some of the offenses and not guilty to the others. At his court-martial, the military judge told the members about his pleas over the "objection"[196] of the defense. The military judge was under the incorrect belief that the *Benchbook* required that the members be informed of the guilty pleas.[197]

The CAAF corrected the military judge's error, noting that the *Benchbook* does not contain such a requirement.[198] The

193. UCMJ art. 66(c) (2002). Article 66(c) reads in part, "It may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as it finds correct in law and fact . . . ." *Id.*

194. 58 M.J. 146 (2003).

195. *Id.* at 151.

196. *Id.* at 148. The objection by the defense was ambiguous at best. Consider this exchange between the military judge and the defense counsel:

> MJ: Okay. Let's take up some administrative matters right now. Do we have an extra copy of the flyer that we can have marked as an appellate exhibit and has a copy of that been provided to the defense?
>
> DC: No, Your Honor. The defense doesn't even have a copy of the flyer.
>
> MJ: Why don't we just go ahead and use my copy here. Captain Salerno, please approach. [The defense counsel did as directed.] Take a moment to review that. [The military judge hands the defense counsel a copy of the flyer.]
>
> DC: Your Honor, the copy of the flyer that you just provided to me still contains a list of the specifications to which Sergeant Kaiser just pled guilty. Is it your--is it that--
>
> MJ: If you take a look at Page 46 of DA Pam 27-9, you'll note that the members are informed that that has occurred. That's why those specifications remain on it. Okay?
>
> DC: That's fine.
>
> MJ: Captain Salerno, any objection?
>
> DC: No objection, Your Honor.

Id.

197. *Id.* at 147-48.

198. *Id.* at 149. The court provides this admonition:

> Contrary to the military judge's statement that the *Benchbook* directs notification of the court members of guilty pleas as a matter of course, such notification is directed only when specifically requested by the accused. In the absence of a specific request by the accused or circumstances involving a [lessor included offense], "the flyer should not have any specifications/charges which reflect provident guilty pleas if other offenses are being contested."

Id. (citation omitted). *See also* MCM, *supra* note 13, R.C.M. 913; BENCHBOOK, *supra* note 14, para. 2-2-8 note.

CAAF determined that the error by the military judge was prejudicial:

> [O]ne accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial . . . . The circumstances under which the members were advised of Appellant's guilty pleas formed a part of the "filter" through which they viewed the evidence presented at trial and posed a heightened risk that the members felt invited, consciously or subconsciously, to draw an impermissible inference from Appellant's guilty pleas.[199]

As a result, the CAAF reversed the decision of the lower court.[200]

Trial judges frequently face this situation. In mixed plea cases when the government intends to prove the contested specifications, the general rule is not to inform the members of the pleas and findings of guilty until after findings on the contested offenses have been entered. This is only a general rule. Two recognized exceptions to the general rule are (1) when the defense counsel requests the military judge to do so and (2) when the plea is to a lesser-included offense and the government intends to prove the greater offense.[201] There may be other exceptions to the general rule, but these are the most common. Judges should be cautious about violating the general rule in other situations.

Character Evidence

In *United States v. Kasper*,[202] the CAAF considered the issue of human lie detector testimony. This type of testimony is a witness's "opinion as to whether [a] person was truthful in making a specific statement regarding a fact at issue in the case."[203] This case serves as a reminder that use of this type of testimony is inappropriate and contrary to the military's rules of evidence. The harm caused by improper character evidence, particularly on a central issue to a case, is substantial. Should it arise, the military judge must provide effective curative instructions to the court members.

Airman First Class Michelle L. Kasper was found guilty of wrongful use of ecstasy.[204] The government introduced evidence that the accused confessed to a single use of ecstasy when an OSI agent interviewed her. The trial counsel introduced testimony of Special Agent (SA) Maureen Lozania about her interrogation of the accused.

> In response to a question from trial counsel, SA Lozania's testimony provided an opinion as to the veracity of Appellant's denial: "We decided that she wasn't telling the truth. She wasn't being honest with us and we decided that we needed to build some themes and help her to talk about what happened."
>
> According to SA Lozania, the questioning resumed and Appellant began to cry. Eventually, Appellant responded affirmatively to a question as to whether she had used ecstasy in Florida. She held up one finger, which SA Lozania interpreted as a statement that she had used ecstasy once while in Jacksonville. Trial counsel then asked: "At the time she told you that she had used ecstasy and put up her finger and started to cry, was there anything about what she said or the way she behaved that made you believe at that time that she was falsely confessing to you?" SA Lozania responded: "No."[205]

In response to the defense's cross examination, SA Lozania, on redirect examination, further stated that "we assess through body language and other things if the individual is being truthful or not."[206] Repeatedly throughout her testimony, SA Lozania commented on the accused's truthfulness when she confessed.[207] During the defense's case, the accused denied

199. *Kaiser*, 58 M.J. at 150 (internal quotation and citation omitted).

200. *Id.* at 151. Chief Judge Crawford provides a strong dissent to the decision and indicates that the court should not have reversed the decision because (1) the MRE allow evidence concerning the appellant's guilty pleas and (2) the defense did not object to use of the flyer at trial. *Id.*; *see* MCM, *supra* note 13, MIL. R. EVID. 803(22).

201. *Kaiser*, 58 M.J. at 148-49.

202. 58 M.J. 314 (2003).

203. *Id.* at 315 (citations omitted).

204. *Id.* at 314.

205. *Id.* at 316.

206. *Id.*

using ecstasy and stated that she had held up her finger "to indicate that she had been to Jacksonville on only one occasion, not that she had used ecstasy while there."[208] Apparently, the defense presented evidence of the accused's good character for truthfulness.[209] Given the facts of the case, the CAAF reversed the lower court's decision[210] with repeated warnings about the use of human lie detector testimony.

This case contains several lessons for practitioners. In its decision, the CAAF focused on SA Lozania's testimony on direct examination about the accused's untruthfulness when she denied using ecstasy and her truthfulness when she confessed to using ecstasy.[211] This type of evidence is impermissible for several reasons. First, the determination of whether someone is telling the truth is a matter beyond the scope of the witness's expertise, even an expert witness.[212] Second, such testimony violates the rules of evidence "because it offers an opinion as to the declarant's truthfulness on a specific occasion."[213] Finally, this type of opinion testimony usurps the panel's function to weigh the evidence and determine the credibility of witnesses.[214]

The court emphasized the role of the judge, particularly while the testimony is about the accused's character for truthfulness when denying culpability or when confessing:

> The importance of prompt action by the military judge in the present case is underscored by the central role of the human lie detector testimony. The testimony was not offered on a peripheral matter or even as a building block of circumstantial evidence. [It was offered] on the ultimate issue in the case.[215]

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207. *Id.* at 316-17.

208. *Id.* at 318.

209. Although the opinion does not explicitly state this point, the opinion states that the judge gave an instruction on the accused's good character for truthfulness, so it must have been raised by the evidence. The military judge instructed the members that evidence of the accused's good character for honesty and truthfulness "may be sufficient to cause a reasonable doubt as to her guilt. On the other hand, evidence of the accused's good character for honesty and truthfulness may be outweighed by other evidence tending to show the accused's guilt . . . and I'll just stop it there." *Id.* This example is a reminder to judges that they should write out their instructions about sensitive issues in advance.

210. *Id.* at 320.

211. *Id.* at 319. As the court explained,

> The picture painted by the trial counsel at the outset of the prosecution's case through SA Lozania's testimony was clear: a trained investigator, who had interrogated many suspects, applied her expertise in concluding that this suspect was lying when she denied drug use and was telling the truth when she admitted to one-time use. Such "human lie detector" testimony is inadmissible . . . . Moreover, in this case, the human lie detector evidence was presented as a physiological conclusion. SA Lozania twice stated that Appellant "gave all the physical indicators" of being untruthful. Regardless of whether there was a defense objection during the prosecution's direct examination of SA Lozania, the military judge was responsible for making sure such testimony was not admitted, and that members were provided with appropriate cautionary instructions.

Id.

212. *Id.* at 315 (citing United States v. Birdsall, 47 M.J. 404 (1998)).

213. *Id.*

214. *Id.*

215. *Id.*

The court was so emphatic, it stated that even if the evidence was properly admitted, the failure of the military judge to give cautionary instructions could be plain error.[216] This type of testimony is so sensitive that remedial action may be necessary even if the defense asked for what it got. A majority of the court warned judges that a failure to address this issue could rise to plain error. Judges should not depend on the doctrine of waiver.

Conclusion

The *Benchbook* remains the primary resource for instructions; it is the place where judge advocates should begin their research. The *Benchbook*, however, is only the first step. This article illustrates that as the law develops, instructions must be modified. Hopefully, this article will help criminal law practitioners to stay current with developments that affect instructions. Great care and a current understanding of legal developments are critical to writing instructions.

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216. *Id.*

> Even if we were to ignore the prosecution's affirmative use of human lie detector testimony and view the subsequent defense as opening the door to rebuttal, the military judge should have recognized that the repeated introduction of opinion testimony about the truthfulness of witnesses on the ultimate issue in the case required him to provide the members with detailed instructions. SA Lozania's testimony, that Appellant was giving "indicators of being untruthful," reasonably could have been perceived by the members as an expert opinion on Appellant's credibility during the interrogation. . . . Under those circumstances, detailed guidance was essential to ensure that the members clearly understood both the limited purpose for which the evidence might have been considered and the prohibition against using such evidence to weigh the credibility of Appellant . . . . Although as a general matter instructions on limited use are provided upon request under M.R.E. 105, the rule does not preclude a military judge from offering such instructions on his or her own motion, . . . and failure to do so in an appropriate case will constitute plain error.

Id.; *see* MCM, *supra* note 13, MIL. R. EVID. 105.