2003 Developments in the Sixth Amendment: Black Cats on Strolls

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"A black cat crossing your path signifies that the animal is going somewhere."[1]

Introduction

In this space last year, Major Christina Ekman[2] discussed new developments in the area of discovery.[3] Similar to last year,[4] development in this area has been slow.[5] As a change of pace, therefore, this article focuses on the Sixth Amendment's rights to confrontation[6] and the effective assistance of counsel.[7] Readers will notice some discussion of cases after 2003, but that is because of the newer cases' relative importance. While two cases represent change, the majority clarify fairly clear law. These new cases are like "black cats." The lesson from these cases is that, on whatever side the practitioner is on, a black cat may be crossing the path, but the practitioner should not read too much into it. The proper approach in reading these cases is to realize that the cat's color does not necessarily portend ill tidings. The cat may be just on a stroll.

On the issue of confrontation, the Court of Appeals for the Armed Forces (CAAF), spoke only once in *United States v. McCollum*,[8] but the case represents a center of gravity in the area of remote child testimony.[9] The case is especially significant because it represents the CAAF's first review of the validity of Military Rule of Evidence (MRE) 611(d)(3),[10] promulgated after the court's decision in *United States v. Anderson*.[11] The CAAF's decision must be understood in context; therefore, a brief discussion of the roots of remote testimony will precede commentary on the case. Also regarding confrontation, the U.S. Supreme Court recently issued the landmark decision of *Crawford v. Washington*.[12] Although the Court's ruling came down on 8 March 2004, the decision's importance requires immediate discussion. Perhaps by next year, some of the opinion's ramifications will have been fleshed-out; the reader may safely expect a reprise of *Crawford*.[13]

With respect to the effective assistance of counsel, the Court, the CAAF, and the service courts have spoken a number of times on a number of nuances. In pretrial investigation and trial

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1. BrainyQuote, Groucho Marx Quotes, *available at* http://www.brainyquote.com/quotes/quotes/g/grouchomar137213.html (last visited June 2, 2004).

2. Former Professor, Criminal Law Department, The Judge Advocate General's School, Charlottesville, Virginia.

3. Major Christina E. Ekman, *New Developments in the Law of Discovery*, ARMY LAW., Apr./May 2003, at 103.

4. *Id*. (noting that there were no "earth-shattering new developments").

5. The following is a brief recitation of the new discovery cases: United States v. Mahoney, 58 M.J. 346 (2003) (holding that the government's failure to disclose a letter critical of an government expert witness in urinalysis violated the appellant's constitutional right to due process of law under *Brady v. Maryland*, 373 U.S. 83 (1963)); United States v. Ruiz, 536 U.S. 622 (2002) (holding that the government is not required to disclose impeachment evidence before an accused's entry into a plea agreement); United States v. Vanderbilt, 58 M.J. 725 (N-M. Ct. Crim. App. 2003) (holding that, notwithstanding a defense request for all pretrial statements made by a witness to his attorney, an immunized witness does not waive his attorney-client privilege when giving testimony under a grant of immunity); United States v. Rodriguez, 57 M.J. 765 (N-M. Ct. Crim. App. 2002), *review granted*, 59 M.J. 117 (2003) (holding that the appellant failed to demonstrate that the requested evidence was both necessary and relevant, therefore, he was not entitled to compulsory process under Rule for Courts-Martial (RCM) 703(a)).

6. "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U.S. CONST. amend. VI.

7. "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." *Id.*

8. 58 M.J. 323 (2003).

9. MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 611(d)(3) (2003) [hereinafter MCM].

10. *Id*.

11. 51 M.J. 145 (1999) (approving the use of a screen and the repositioning of child witnesses after the military judge made a finding of necessity under *Maryland v. Craig*, 497 U.S. 836 (1990)).

12. 124 S. Ct. 1354 (2004).

13. That is unless the incumbent professor in this area, MAJ Mike Holley (a graduate of the 52d Judge Advocate Officer Graduate Course) decides otherwise.

tactics, the Air Force Court of Criminal Appeals,[14] the Navy-Marine Court of Criminal Appeals,[15] and the CAAF[16] issued important opinions, none of which covered precisely the same issue. The Army Court of Criminal Appeals issued an important decision in *United States v. Cain*[17] in the area of conflicts that the CAAF recently reversed. The Supreme Court and the Army Court pushed forward the jurisprudence concerning effective assistance of counsel in sentencing in *Wiggins v. Smith*[18] and *United States v. Kreutzer*,[19] respectively. The Navy-Marine Court also had its say in this area in two cases: *United States v. Starling*[20] and *United States v. Wallace*.[21] Finally, the CAAF spoke on post-trial assistance of counsel in *United States v. Dorman*,[22] a case which clarified the duties of trial defense counsel during appellate review. While there are a number of cases in the area of effective assistance of counsel, trends are difficult to identify given the concept's breadth. Nonetheless, several important lessons can be drawn from each case; this article discusses each one.

When Watching Television Is Necessary: Remote Live Testimony

The Supreme Court in *Maryland v. Craig*[23] faced the issue of whether a witness who testified via one-way closed circuit television satisfied the Confrontation Clause. In holding that a Maryland statute providing for such a procedure passed constitutional muster, the Court declared, "[T]hough we reaffirm the importance of face-to-face confrontation with witnesses appearing at trial, we cannot say that such confrontation is an indispensable element of the Sixth Amendment's guarantee of the right to confront one's accusers."[24] The basis for the Court's decision was its affirmation of the "important public policy" undergirding the Maryland statute: protecting "the physical and psychological well-being of child abuse victims."[25] To invoke the remote testimony procedure, the Court declared that the trial judge must "hear evidence and determine whether use of the one-way closed circuit television procedure is *necessary* to protect the welfare of the particular child witness who seeks to testify."[26] To satisfy this burden, the Court requires two particular findings: (1) the presence of the accused would traumatize the child witness; and (2) the emotional distress must be more than *de minimis*.[27] Once a trial judge makes these findings, the public policy interest "may be sufficiently important to outweigh, at least in some cases, a defendant's right to face his or her accusers in court."[28] That public policy interest notwithstanding, the Court still requires the testimony's reliability to be otherwise assured; that is, the witness must be under oath, subject to cross examination, and observable by the finders of fact.[29]

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14. United States v. Brozzo, No. 34542, 2003 CCA LEXIS 187 (A.F. Ct. Crim. App. Aug. 26, 2003), *review granted*, 59 M.J. 399 (2004).

15. United States v. Garcia, 57 M.J. 716 (N-M. Ct. Crim. App. 2002), *rev'd*, 59 M.J. 447 (2004). The Navy-Marine Court affirmed a conviction after the appellant alleged ineffective assistance of counsel when his civilian defense counsel waived the Article 32, Uniform Code of Military Justice (UCMJ) hearing without the appellant's consent and for failing to advise the appellant that he could change his not guilty plea during the trial. *Id.* at 722-23, 725. Since drafting this article, the CAAF issued an opinion reversing the Navy-Marine Court's decision on one of these two issues, rendering any initial conclusions moot. Trial and defense counsel should read the Navy-Marine Court's opinion but must understand its lessons in the context of the CAAF's reversal. A full discussion of the CAAF opinion is outside the stretched time scope for this article.

16. United States v. Baker, 58 M.J. 380 (2003).

17. 57 M.J. 733 (Army Ct. Crim. App. 2002), *rev'd*, 59 M.J. 285 (2004).

18. 539 U.S. 510 (2003).

19. 59 M.J. 773 (Army Ct. Crim. App. 2004).

20. 58 M.J. 620 (N-M. Ct. Crim. App. 2003).

21. 58 M.J. 759 (N-M. Ct. Crim. App. 2003).

22. 58 M.J. 295 (2003).

23. 497 U.S. 836 (1990).

24. *Id*. at 849-50.

25. *Id*. at 853.

26. *Id*. at 855 (emphasis added).

27. *Id*. at 855-56.

28. *Id*. at 853.

29. *Id*. at 857.

In response to *Craig*, the President of the United States by Executive Order No. 13,140[30] promulgated MRE 611(d)[31] and Rule for Courts-Martial (RCM) 914A.[32] The expressed purpose of the rules was "to avoid trauma to children,"[33] which is consistent with the public policy vindicated in *Craig*. Military Rule of Evidence 611(d)(3) expanded the bases for using remote testimony beyond those discussed by the Court in *Craig*.[34] Under MRE 611(d)(3), necessity may be based on a finding of any *one* of the following: the child cannot testify because of fear; there is a substantial likelihood that the child would suffer emotional trauma from testifying; the child suffers from a mental or other infirmity; or conduct by the accused or defense counsel causes the child to be unable to testify further.[35] If the military judge makes any of these findings, "[a] child shall be allowed to testify out of the presence of the accused."[36] The procedures for remote testimony are in RCM 914A,[37] which calls for, in the usual case, two-way closed circuit television.[38] The point, of course, is to ensure that the rights of the accused are protected while maintaining the reliability of the testimony as mandated by the Confrontation Clause and by *Craig*.

In *United States v. McCollum*,[39] the CAAF tackled the constitutionality of MRE 611(d). In this case, U.S. Air Force Staff Sergeant McCollum was charged with various sexual abuse crimes against CS, a child under sixteen years.[40] During trial, the trial counsel moved the court to allow the twelve-year-old victim to testify from a remote location via two-way closed circuit television under the provisions of MRE 611(d).[41] The defense counsel objected, arguing that there was insufficient evidence that the victim would suffer trauma sufficient to render her unable to testify reasonably, and, further, that such a procedure would violate the appellant's Sixth Amendment right to confront witnesses against him.[42]

Seizing on MRE 611(d)(3)(B)'s requirements that trauma be established by expert testimony, the trial counsel called a licensed clinical social worker, Ms. Prior, as an expert[43] to testify about the potential harm to CS if she were required to testify in the appellant's presence.[44] Ms. Prior testified that if required to testify in the presence of the appellant, the victim would "decompensate" or "function in a more disorganized way . . . . She would become highly agitated, her anxiety would increase so that her level of functioning would change overall. She might have a reoccurrence of nightmares, she might

30. 1999 Amendments to the Manual for Courts-Martial, United States, 64 Fed. Reg. 55,115 (Oct. 12, 1999).

31. MCM, *supra* note 9, MIL. R. EVID. 61(d).

32. *Id*. R.C.M. 914A.

33. *Id*. Analysis of R.C.M. 914A, A21-63.

34. *Craig*, 497 U.S. at 856 (specifying that the presence of the accused would traumatize the child).

35. MCM, *supra* note 9.

36. *Id*.

37. Specifically, RCM 914A(a) states in relevant part:

> At a minimum, the following procedures shall be observed:
> (1) The witness shall testify from a remote location outside of the courtroom;
> (2) Attendance at the remote location shall be limited to the child, counsel for each side (not including an accused pro se), equipment operators, and other persons, such as an attendant for the child, whose presence is deemed necessary by the military judge;
> (3) Sufficient monitors shall be placed in the courtroom to allow viewing and hearing of the testimony by the military judge, the accused, the members, the court reporter and the public;
> (4) The voice of the military judge shall be transmitted into the remote location to allow control of the proceedings; and
> (5) The accused shall be permitted private, contemporaneous communication with his counsel.

Id.

38. *Id*.

39. 58 M.J. 323 (2003).

40. *Id*. at 326.

41. *Id*. at 327.

42. *Id*.

43. The trial judge accepted the witness as an expert in the field of diagnosing and treating children who have been abused sexually. *Id*.

44. *Id*. Ms. Prior counseled CS at weekly sessions eleven to twelve times.

become more withdrawn."[45] Ms. Prior also opined that testifying "could setback her healing process and reactivate some of the symptoms of CS's Post Traumatic Stress Disorder (PTSD)."[46] While testifying itself would be harmful to CS, Ms. Prior believed that any harm would be "extremely" aggravated if the appellant were in the courtroom.[47] When asked whether the victim desired to testify, Ms. Prior stated although CS wanted to, doing so would be "detrimental to her."[48] In response to the military judge's question about whether the victim expressed any fear of the appellant, Ms. Prior testified that the victim feared that the appellant would beat her if she ever told anyone of the abuse.[49]

Based on the unrebutted expert testimony, the military judge found that the victim would be traumatized if required to testify in the appellant's presence.[50] The military judge also found that the victim was unable to testify in open court because of her fear, which caused her emotional trauma.[51] The military judge ruled that trial counsel met the requirements of MRE 611(d)(3) and *Craig* (that is, the necessity for the procedures) and granted the government's motion.[52] When the trial counsel called the victim, the military judge allowed the appellant to leave the courtroom as permitted by RCM 804(c) and the victim testified in the courtroom.[53]

On appeal, the Air Force Court held that there was ample evidence that the military judge applied MRE 611(d)(3) and *Craig* correctly.[54] Because the reliability of the testimony was otherwise assured (the witness testified under oath, was subject to cross-examination, and was observable by the court-martial), the Air Force Court held that the appellant was not denied his right of confrontation.[55] The court expressly declined to rule on the constitutionality of MRE 611(d)(3), confining its review to the military judge's factual determinations.[56]

Before the CAAF, the appellant asserted several arguments the court found unpersuasive: the military judge erred because the witness's trauma derived, not from testifying in his presence, but rather from being in the court-room; the military judge should have questioned the victim before ruling on the motion; the fear the victim felt was unreasonable, and therefore not a basis for ordering the use of remote testimony; and the military judge erred when she found that the witness would suffer more than *de minimis* harm.[57]

The CAAF spent a good portion of its opinion answering the appellant's argument that MRE 611(d)(3) was constitutional only if certain language were read into the rule. The appellant argued that the rule was constitutional as applied to him only if (1) the military judge found that the child witness would suffer such trauma that she would be unable to testify; and (2) the potential trauma or fear-causing trauma was the result of the appellant's presence.[58] Applying the standards in *Craig*, the court noted that MRE 611(d)(3)'s requirement that the military judge find "that a child is unable to testify in open court in the presence of the accused" means that the inability to testify results, not from the courtroom generally, but from the accused's presence.[59] The CAAF interpreted the rule's language to require that before a military judge orders remote testimony procedures, she must find that a child will suffer more than *de minimis* emotional distress, "whether brought on by fear *or* some form of trauma" that would render the witness from reasonably testifying.[60] In short, the court agreed with the

45. *McCollum*, 58 M.J. at 327 (quoting Ms. Prior's testimony).

46. *Id*.

47. *Id*. at 327 (quoting Ms. Prior's testimony).

48. *Id*.

49. *Id*. at 328.

50. *Id*.

51. *Id*.

52. *Id*.

53. *Id*.

54. United States v. McCollum, 56 M.J. 837, 840 (A.F. Ct. Crim. App. 2002).

55. *Id*. at 841.

56. *Id*. at 840 n.*.

57. *McCollum*, 58 M.J. at 328.

58. *Id*. at 330.

59. *Id*.

appellant that MRE 611(d)(3) must be read consistent with *Craig*, but disagreed that the military judge failed to do so.[61]

With respect to the source of the trauma, the appellant argued that the military judge's decision was premised on a finding that the victim would suffer emotional harm from testifying generally, rather than from the more specific source of having to testify in the appellant's presence.[62] The court rejected the claim that the military judge did not find that the victim would *also* suffer trauma from testifying in the appellant's presence observing, "*Craig* did not require that a child's trauma derive *solely* from the presence of the accused."[63] So long as a military judge makes a finding of necessity based on fear or trauma caused by the accused's presence, that ruling would be consistent with *Craig*'s requirements.[64] The court determined that the military judge made such a finding, supported by Ms. Prior's testimony that any harm would be "extremely" aggravated if CS were required to testify in the appellant's presence.[65] The CAAF concluded "there was sufficient evidence for the military judge to conclude that the fear or trauma, brought on by CS's fear of Appellant alone, would have prevented CS from reasonably testifying."[66]

The appellant's more interesting challenge was his argument that the military judge erred by not questioning CS before making her ruling.[67] The CAAF gave the argument relatively short shrift, determining that the Sixth Amendment does not require a judge to interview or observe the witness before allowing remote testimony.[68] Noting that the expert testimony was unrebutted, the court stated, "While it may be appropriate, and even necessary, in some circumstances for a military judge to question or observe a child witness before ruling . . . such an action is not required per se."[69] In the court's judgment, the military judge had sufficient information to make her decision without talking to or observing CS.[70]

Tackling an avenue of approach not discussed in *Craig*—MRE 611(d)(3)(A)'s fear—the CAAF dismissed the appellant's argument that any fear must be reasonable to provide a basis to order remote testimony.[71] Earlier in its opinion, the court noted that the military judge linked MRE 611(d)(3)(A) and (B).[72] A link between fear and trauma, the court declared, is not required: "the Supreme Court's language in *Craig* is sufficient to uphold the constitutionality of both M.R.E. 611(d)(3)(A) and (B), independent of each other."[73] After identifying trauma and fear as two separate bases for necessity, the CAAF held that MRE 611(d)(3)(A) does not require imminent harm or reasonable fear.[74] Rather, "the fear of the accused [must] be of such a nature that it prevents the child from being able to testify in the accused's presence."[75]

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60. *Id*. at 330-31 (emphasis added).

61. *Id*. at 332.

62. *Id*.

63. *Id*.

64. *Id*.

65. *Id*. at 333. Of some importance was that the victim was willing to testify. In a footnote, the CAAF observed that *willingness* to testify is distinct from the *ability* to testify reasonably: "That CS wanted to testify in Appellant's presence does not, by itself, establish that CS would have been able to reasonably testify in Appellant's presence." *Id*. at 333 n.2. In this circumstance, the military judge was "free . . . to defer to Ms. Prior's conclusion that CS would be harmed by testifying in front of Appellant in making her determination that CS would be unable to reasonably testify." *Id*.

66. *Id*.

67. *Id*. at 332.

68. *Id*. at 333.

69. *Id*.

70. *Id*.

71. *Id*.

72. The "military judge appears to have concluded that both fear *and* trauma were required for a finding of necessity." *Id*. at 331 (emphasis added). Military Rule of Evidence 611(d)(3)(B) covers the trauma basis for a finding of necessity. MCM, *supra* note 9, MIL. R. EVID. 611(d)(3)(B).

73. *McCollum*, 58 M.J. at 331.

74. *Id*. at 333.

75. *Id*. The CAAF also took the time to note that although the military judge did not expressly rely on MRE 611(d)(3)(B), her findings were sufficient to show necessity on that basis as well. *Id.* at 334.

In upholding the constitutionality of MRE 611(d), the CAAF broke no new ground. Given the CAAF's prior decision in *United States v. Anderson*,[76] upholding a decision on similar facts should come as no great surprise, particularly when considering that subdivision (B) is similar to the statute in *Craig*.[77] What is of some interest to trial practitioners is that the CAAF upheld subdivision (A) as an *independent* basis—a non-trauma reason—for using remote testimony procedures. A witness's fear must cause emotional distress, causing that witness to be unable to testify reasonably. The basis for the Supreme Court's decision in *Craig*, however, was the promotion of the public interest in protecting children from the *trauma* of having to testify in the accused's presence. Whether fear, by itself, is a sufficient basis to lay aside the preference for face-to-face confrontation is answered in the affirmative, at least for the present.[78] Of further interest, the trial practitioner should note that appellate courts will give appropriate deference to a trial judge's findings of fact when they are supported, as in this case, by unrebutted expert testimony. The persuasiveness of Ms. Prior's testimony as an objective matter is debatable considering the weakness of her opinions drawn from limited interaction with the victim. Nonetheless, if the defense does not mount any challenge with its own expert, the finding of necessity should be no surprise. Finally, the issue regarding whether a military judge should observe a child witness before ruling on necessity is still unsettled. The CAAF held that such a procedure is not required, but advisable in certain cases. The CAAF, however, declined to specify when the circumstances might be appropriate. Certainly, *McCollum* is an important case for the government. The lesson for defense counsel, though, is to mount a challenge to the expert.

The Confrontation Clause and Hearsay: Looking Back to See Forward

Before leaving the Sixth Amendment's right to confrontation, discussion of the landmark case of *Crawford v. Washington*[79] is appropriate. As a result of this case, the paradigm for analyzing a hearsay statement's compliance with the Confrontation Clause changed dramatically. More specifically, the Supreme Court overruled the *Ohio v. Roberts*[80] mode of analyzing the admission of hearsay statements *vis-à-vis* the Confrontation Clause.[81] Before *Crawford*, the reliability of a hearsay statement was the key determination in assessing that hearsay statement's compliance with the Confrontation Clause.[82] After *Crawford*, reliability is a by-product of a procedure mandated by the Confrontation Clause—an opportunity to cross-examine the witness.

The facts of *Crawford* are straightforward.[83] Crawford was charged with assault and attempted murder after he stabbed Mr. Lee. Crawford stabbed Lee during an altercation arising from Lee's alleged rape attempt of Sylvia, Crawford's wife. After the alleged rape attempt, Sylvia led Crawford to Lee's apartment, thus facilitating the assault. Police arrested both Crawford and Sylvia and advised them of their *Miranda*[84] rights. In one of his statements to police, Crawford claimed self-defense. Sylvia gave two statements, the second of which was a recorded statement that ostensibly undermined Crawford's self-defense claim. At trial, Crawford invoked marital privilege to prevent Sylvia from taking the stand in the prosecution's case. In response, the prosecution sought to admit her recorded statement to police as one against her penal interests. The evidentiary privilege Crawford invoked did not extend to hearsay statements by a spouse admissible under a hearsay exception.[85]

Crawford claimed that the statement's admission would violate his confrontation rights.[86] The trial court admitted the

76. 51 M.J. 145 (1999).

77. *See* Maryland v. Craig, 497 U.S. 836 (1990). As quoted in the Supreme Court's opinion in *Craig*, the provision under scrutiny there provided for remote testimony when a "judge determines that testimony by the child victim in the courtroom will result in the child suffering serious emotional distress such that the child cannot reasonably communicate." *Id*. at 840 n.1. There was no similar provision regarding a witness having fear of the accused.

78. Because the military judge in this case was (perhaps presciently) cautious by linking fear and trauma in finding necessity, this case is not particularly well-suited for the Supreme Court's adjudication if the appellant is looking for a different result on a higher appeal.

79. 124 S. Ct. 1354 (2004).

80. 448 U.S. 56 (1980) (holding that a hearsay statement meets the requirements of the confrontation clause if it possesses indicia of reliability established either through a showing that the statement fits within a firmly-rooted exception to the hearsay rule or it possesses particularized guarantees of trustworthiness).

81. *See Crawford*, 124 S. Ct. at 1374.

82. *Roberts*, 448 U.S. at 66.

83. *See Crawford*, 124 S. Ct. at 1356-58.

84. Miranda v. Arizona, 384 U.S. 436 (1966) (holding that before a custodial interrogation, a subject must be warned that he has a right to remain silent, to be informed that any statement made may be used as evidence against him, and to the presence of an attorney).

85. *Crawford*, 124 S. Ct. at 1358.

statement, using the *Roberts* test to conclude that the statement possessed particularized guarantees of trustworthiness[87] (a necessary finding as a statement against penal interest is not firmly rooted).[88] The trial court offered several reasons to support its conclusion that the statement was trustworthy: Sylvia did not shift blame from herself, but rather corroborated Crawford's statement that he acted in self-defense; she had direct knowledge as an eyewitness; the events described were recent; and the statement was made to a "neutral" law enforcement officer.[89]

The Washington Court of Appeals reversed Crawford's conviction, applying a nine-factor test to determine that Sylvia's statement did *not* possess sufficient particularized guarantees of trustworthiness.[90] The Washington Supreme Court unanimously reinstated Crawford's conviction finding that Sylvia's statement *did* possess particularized guarantees of trustworthiness because it interlocked with Crawford's statement.[91] The Supreme Court framed the issue as "whether the State's use of Sylvia's statement violated the Confrontation Clause."[92]

The Court reversed the Washington Supreme Court's judgment. Justice Scalia, writing for the seven-member majority (Chief Justice Rehnquist and Justice O'Connor concurred in the judgment), reviewed the pedigree of the Confrontation Clause and its meaning in English common law and early American jurisprudence.[93] His review generated the following important inferences: (1) that the Confrontation Clause was principally directed against the civil-law mode of criminal procedure, particularly its use of *ex parte* examinations against a criminal defendant[94] and (2) "that the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination."[95]

Regarding the first inference, Justice Scalia noted that the Framers' focus on the civil-law mode of criminal procedure means that "not all hearsay implicated the Sixth Amendment's core concerns."[96] For example, an "off-hand, overheard remark might be unreliable evidence and thus a good candidate for exclusion under hearsay rules, but it bears little resemblance to the civil-law abuses the Confrontation Clause targeted."[97] Contrasting such a hearsay statement, Justice Scalia wrote, "*ex parte* examinations might sometimes be admissible under modern hearsay rules, but the Framers certainly would not have condoned them."[98] The Court declined to specify which of the

86. *Id*. The Court noted that the lower court opinion resolved the problem of Crawford creating the Confrontation Clause issue. The lower court held that forcing Crawford to choose between the marital privilege and the Confrontation Clause was "an untenable Hobson's choice." *Id*. at 1359 n.1 (quoting Washington v. Crawford, 54 P.3d 656, 600 (Wash. 2002)).

87. *Id*.

88. Lilly v. Virginia, 527 U.S. 116, 134 (1999) (plurality opinion).

89. *Crawford*, 124 S. Ct. at 1358.

90. *Id*. The Washington Court of Appeals' reasons included the following: the statement contradicted one given previously; it was made in response to leading questions; and Sylvia admitted to closing her eyes during the alleged assault. *Id*. Those factors were reviewed in the lower court's unpublished opinion, *Washington v. Crawford*, 2001 Wash. App. LEXIS 1723, *14-*17 (Wash. Ct. App. July 30, 2001) (unpublished) (listing and applying the nine factors: whether the declarant had an apparent motive to lie; whether the declarant's general character suggests trustworthiness; whether more than one person heard the statement; whether the declarant made the statement spontaneously; whether the timing of the statements and the relationship between the declarant and the witness suggests trustworthiness; whether the statement contained expressed assertions of past fact; whether cross-examination could help show the declarant's lack of knowledge; the possibility that the declarant's recollection was faulty because the event was remote; and whether the circumstances surrounding the making of the statement suggest that the declarant misrepresented the defendant's involvement).

91. *Crawford*, 124 S. Ct. at 1358. The Washington Supreme Court did not apply the nine-factor test applied by the lower court because if the statement interlocked with Crawford's statement, Sylvia's statement possessed sufficient indicia of reliability. *Crawford*, 54 P.3d at 661. Why the Washington Supreme Court did not apply or even cite *Idaho v. Wright*, 497 U.S. 805 (1990) is unexplained in its opinion. *Wright* stands for the simple proposition that an out-of-court statement's particularized guarantees of trustworthiness is tested by looking *only* at the circumstances surrounding the making of the statement, extrinsic evidence having no role in that determination. *Id*. at 819. Therefore, the interlocking nature of the statements is immaterial to the reliability analysis. Indeed, as noted by Chief Justice Rehnquist in his concurrence in the judgment, a citation to *Wright* would have been sufficient to dispose of the issue before the Court. *Crawford*, 124 S. Ct. at 1378 (Rehnquist, C.J., concurring in judgment).

92. *Id*. at 1359.

93. *Id*. at 1359-63.

94. *Id*. at 1363.

95. *Id*. at 1365.

96. *Id*. at 1364.

97. *Id*.

98. *Id*.

many varieties of hearsay statements have Sixth Amendment implications. What the Court made clear, however, is that "testimonial"[99] hearsay statements *do* have Sixth Amendment implications.[100] The Court noted that even if the Sixth Amendment "is not solely concerned with testimonial hearsay, that is its primary object, and interrogations by law enforcement officers fall squarely within that class."[101]

Regarding the second inference, the Court determined that the common law in 1791 conditioned the admissibility of an absent witness' examination "on unavailability and a prior opportunity to cross-examine."[102] The Sixth Amendment, therefore, incorporated those limitations.[103] The requirement for the opportunity to cross-examine is dispositive "and not merely one of several ways to establish reliability."[104] Justice Scalia, after discussing the history of several cases interpreting the Confrontation Clause,[105] turned his attention to determining what, if anything, was left of the *Roberts* test.

The Court overruled *Roberts* declaring that "[w]here testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protections to the vagaries of the rules of evidence, much less to amorphous notions of 'reliability.'"[106] Most notably, the Court stated, "[The Clause] commands, not that evidence be reliable, but that *reliability be assessed in a particular manner*: by testing in the crucible of cross-examination."[107] The case at bar was an ideal example of the "unpardonable vice of the *Roberts* test," that is, "its demonstrated capacity to admit core testimonial statements that the Confrontation Clause plainly meant to exclude."[108] Justice Scalia noted that "*Roberts*' failings were on full display in the proceedings below" with the trial court applying several factors showing reliability while the intermediate appellate court relied on different factors for a different result.[109] The Washington State Supreme Court in yet another analysis relied only on the interlocking nature of the statements (how similar the statements were), disregarding every factor considered below it.[110] To the Court, "[t]he case is thus a self-contained demonstration of *Roberts*' unpredictable and inconsistent application."[111]

Refusing to be drawn into "reweighing the 'reliability factors' under *Roberts*," the Court declared that the "Constitution prescribes a procedure for determining the reliability of testimony in criminal trials, and we, no less than the state courts, lack authority to replace it with one of our devision."[112] Therefore, the Court held "[w]here testimonial evidence is at issue . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination."[113] When non-testimonial evidence is at issue, however, "it is wholly consistent with the Framers' design to

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99. Justice Scalia listed the various formulations of the class of "testimonial" statements:

> "[*E*]*x parte* in-court testimony or its functional equivalent--that is, material such as affidavits, custodial examination, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that the declarants would reasonably expect to be used prosecutorially" [citation omitted]; "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions" [citation omitted]; "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial" [citation omitted].

Id.

100. *See id*. at 1365.

101. *Id*. This language is of particular importance in considering whether *Crawford* has implications to the myriad of other hearsay exceptions routinely admitted at trial.

102. *Id*. at 1366.

103. *Id*.

104. *Id*. at 1367.

105. *Id.* at 1367-69.

106. *Id*. at 1370.

107. *Id*. (emphasis added). Perhaps the best quotation and most telling from the case is: "Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty." *Id*. at 1371.

108. *Id*.

109. *Id*. at 1372; *see supra* note 90.

110. *Id*. at 1372.

111. *Id.*

112. *Id*. at 1373.

afford the States flexibility in the development of hearsay law – as does *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether."[114] The Court did not give the practitioner much help in defining the precise parameters of "testimonial hearsay" noting only that, at a minimum, the term applies to "prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations."[115]

The Court's decision in this case raises several questions. Given the holding, it would appear that the *Roberts* unavailability standard (limited by the Court's later decisions in *United States v. Inadi*[116] and *White v. Illinois*[117]) has been resurrected, at least in relation to cases involving testimonial hearsay. Before the prosecution can present a testimonial hearsay statement in which the declarant was subjected to cross-examination, it must show that the witness is unavailable. Further, what *Crawford* means to many of the previously admissible (for both evidentiary as well as Confrontation Clause purposes) hearsay statements under the rubric of "firmly rooted" is unclear. The Court sought to downplay the *Crawford* decision's impact on such cases as *White* by noting that *White* involved the very narrow question of whether the *Roberts* unavailability requirement applied to excited utterances and statements made for medical diagnosis and treatment.[118]

For the trial practitioner, however, the practical effects of this decision are muddy at best. At a minimum, careful trial counsel should ensure that any complainants' hearsay statements are at least subjected to the opportunity for cross-examination.[119] In that light, Article 32, Uniform Code of Military Justice (UMCJ)[120] investigations likely will gain greater importance, particularly in cases involving reluctant witnesses or witnesses who potentially will have trouble testifying at trial. Even if the defense offers to waive the hearing, a prudent trial counsel may want to go forward with the hearing to give the accused the opportunity for cross-examination. Outside of the clearly testimonial arena, however, there are many unanswered questions. For example, what will matter more, the essential character of the statement or the intent of the declarant at the time the statement is made or at whose behest a statement is made? Will the Court interpret future cases very narrowly or will the facts cause the Court to look outside the "core" concerns that motivated the framers?[121]

In cases involving, for example, child sexual abuse victims who make statements to persons other than law enforcement (mothers, guidance counselors, etc.) or medical personnel, *Crawford*'s impact is unclear. A cursory review of case law reveals that such statements are routinely admitted as excited utterances or statements made for medical treatment or diagnosis—firmly rooted exceptions under *Roberts*—or as residual hearsay.[122] Will trial courts parse out the "testimonial" aspects of such statements or will the exceptions fall *in toto* to the requirements of the Confrontation Clause as interpreted by *Crawford*? Will trial courts look at whether there is a difference in the declarant's mindset in determining what is testimonial and what is not? The answers are not clear.

For example, the reason underlying the hearsay exception for an excited utterance under MRE 803(2)[123] is that a statement made under the stress of excitement possesses inherent reliability because the excitement removes any opportunity for calculation.[124] Do the circumstances under which the statement is

113. *Id*. at 1374.

114. *Id*.

115. *Id*. The majority did note "that our refusal to articulate a comprehensive definition in this case will cause interim uncertainty. But it can hardly be worse than the status quo." *Id*. at 1374 n.10.

116. 475 U.S. 387, 394 (1986) (holding that "*Roberts* cannot fairly be read to stand for the radical proposition that no out-of-court statement can be introduced by the government without a showing that the declarant is unavailable").

117. 502 U.S. 346, 354 (1992) (holding that "*Roberts* stands for the proposition that [the] unavailability analysis is a necessary part of the Confrontation Clause analysis *only* when the challenged out-of-court statements were made in the course of a prior judicial proceeding" (emphasis added)).

118. *Crawford*, 124 S. Ct. at 1368 n.8.

119. The *Crawford* majority made clear that the Confrontation Clause does not bar testimonial statements offered for purposes other than establishing the truth. *Id*. at 1369 n.9.

120. UCMJ art. 32 (2002). "(a) No charge or specification may be referred to a general court-martial for trial until a thorough and impartial investigation of all the matters set forth therein has been made." Key to the trial counsel is the language providing that "full opportunity shall be given to the accused to cross-examine witnesses against him if they are available . . . ." *Id*.

121. Justice Scalia hinted that the future of the Confrontation Clause's interpretation may be very narrow. He noted that in *White*, the Court rejected a proposal to apply the Confrontation Clause only to testimonial statements—read *ex parte* testimony—leaving the remainder for regulation by hearsay law. *See Crawford*, 124 S. Ct. at 1369-70 (citing *White*, 502 U.S. at 352-53). He also observed that, while the decision in *Crawford* casts doubt on *White*'s holding, "we need not definitively resolve whether it survives our decision today . . . ." *Id*. at 1370.

122. *See, e.g.*, White v. Illinois, 502 U.S. 346 (1992) (excited utterance and medical diagnosis and treatment); United States v. Donaldson, 58 M.J. 447 (2003) (excited utterance); United States v. Hollis, 57 M.J. 74 (2002) (medical exception); United States v. Ureta, 44 M.J. 290 (1996) (residual hearsay).

made make a difference as to the essential *character* of that statement in terms of whether it is or *could be* "testimonial"? Or are the manner and circumstances under which the statement is made determinative as to whether it is testimonial?[125]

Contrast the declarant's mindset while under a stressful event with the mindset necessary for the hearsay exception for medical diagnosis or treatment. In cases of the latter, if the declarant has the subjective expectation of medical treatment, such statements are thought to be reliable because people seeking medical treatment are more likely to be telling the truth for "selfish reasons."[126] The opportunity—indeed necessity—for cool reflection necessary to inform a medical professional of the injury or symptoms traditionally bears nothing on the reliability analysis of such a statement. A closer look reveals that such a statement *may be* testimonial in that it may identify the person responsible for the injury or harm.[127] Nevertheless, if the Court interprets the Confrontation Clause consistent with the core concerns of protecting against the civil law's method of procuring evidence, such statements would not implicate the Confrontation Clause. To the extent, however, that a declarant identifies the alleged perpetrator, whether under stress or to a doctor, it would seem inapposite *not* to apply the strictures of the Confrontation Clause to test the reasons for the identification.[128]

While the answers to these questions remain unclear at this point, *Crawford* requires that all counsel keep a close eye on future interpretations of the opinion. To do otherwise is to put at risk future prosecutions or to suffer the consequences of ineffective assistance of counsel (IAC).

The (In)Effective Assistance of Counsel: How Much Is Enough?

In *Strickland v. Washington*, the Supreme Court articulated the standard for reviewing claims of IAC.[129] To prevail on a claim of IAC, an accused must show two things. First, she must show that "counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment."[130] In evaluating an IAC claim, the reviewing court must determine whether the performance of his defense counsel was objectively reasonable—that is, did the performance fall below the prevailing professional standards and norms considering all the circumstances?[131] Second, the accused must show that that failure resulted in prejudice to her. In evaluating prejudice, the reviewing court is tasked to determine whether "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable."[132] Stated differently, the accused must show that but for counsel's unprofessional errors, there is a reasonable probability the result of the proceeding would have been different. A reasonable probability is defined as "a probability sufficient to undermine confidence in the outcome."[133] The *Strickland* standard

123. MCM, *supra* note 9.

124. 2 Stephen A. Saltzburg, Lee D. Schinasi, & David A. Schlueter, Military Rules of Evidence Manual § 803.02[3][a] (5th ed. 2003).

125. This inquiry is important if only because, as Justice Scalia noted in *Crawford*, the Confrontation Clause is not concerned with the reliability of hearsay statements *per se* as much as it is in the procedure of testing a hearsay statement's reliability through cross-examination. *See supra* text accompanying note 107. Of course, this point may be academic if Justice Thomas' formulation were to carry the day. *See* White v. Illinois, 502 U.S 346, 365 (1992) (Thomas, J., concurring in part and in judgment) (noting that the Clause was aimed at a discrete category of evidence that prosecutors used as a means to deprive criminal defendants of the adversarial process; e.g., "formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions"). Justice Thomas' formulation, interestingly, mirrors the articulated minimums noted in *Crawford*. *See supra* text accompanying note 115.

126. Saltzburg, Schinasi, & Schlueter, *supra* note 124, § 803.02[5][a].

127. The identity of the perpetrator of the injury or harm has been held to fall within the exception. *See, e.g.*, United States v. Quigley, 35 M.J. 345 (C.M.A. 1992) (noting that the identity of the perpetrator is important because if not identified, the child might go back into the same environment where she is being victimized and therapy would not be as effective); *see also* United States v. Turning Bear, 357 F.3d 730 (8th Cir. 2004) (noting that that "hearsay statements disclosing the identity of a sexual abuser are admissible under [Federal] Rule [of Evidence] 803(3) only 'where the physician makes clear to the victim that the inquiry into the identity of the abuser is important to diagnosis and treatment, and the victim manifests such an understanding,'" (quoting United States v. Renville, 779 F.2d 430, 438 (8th Cir. 1985))); United States v. Tome, 61 F.3d 1446 (10th Cir. 1995) (observing that the identity of the defendant as the sexual abuser was necessary to the therapeutic treatment of the victim, because effective treatment may require that the victim avoid contact with the abuser and because the psychological effects of sexual molestation by a father or other relative may require different treatment than those resulting from abuse by a stranger).

128. Looking at the survey of "testimonial" statements discussed in *Crawford v. Washington*, 124 S. Ct. 1354, 1364 (2004), one of those definitions includes those statements that an objective person could reasonably believe would be available for use at a later trial. At least with respect to medical diagnosis statements, if a child-victim were taken to a medical professional at the behest of law enforcement, it would be hard to argue that any subsequent statements could not be reasonably seen as made for use at a later trial.

129. 466 U.S. 668 (1984).

130. *Id.* at 687.

131. *Id.* at 688.

132. *Id.* at 687.

for effective assistance of counsel applies to practice in courts-martial by virtue of the Court of Military Appeals' decision in *United States v. Scott*.[134]

Pretrial Investigation and Trial Tactics

United States v. Brozzo[135] is a case that will not go away. The appellant was tried and convicted of wrongful use of cocaine based on a positive random drug test.[136] After trial, defense counsel learned of an internal blind quality control sample that tested positive for cocaine metabolite (a "false positive"). The appellant contended that the report for the result was not disclosed[137] in violation of the requirements of *Brady v. Maryland*.[138] The Air Force Court initially looked at *Brozzo* as a discovery case.[139] After determining that the government did not withhold the requested drug testing information,[140] the Air Force Court affirmed the conviction, observing that "[t]he furnished data put the appellant on notice that there was further information about possible impeachment evidence. We find that the government disclosed information that would have led diligent counsel to the analytical data in question."[141] In view of the Air Force Court's conclusion that the trial defense counsel did not exercise reasonable diligence in discovering an erroneous drug testing laboratory report, the CAAF returned the case to the lower court to determine whether Brozzo was provided effective assistance of counsel.[142]

The Air Force Court began its analysis by correcting any "misunderstanding of the earlier holding of this Court."[143] Senior Judge Breslin, writing for the court, stated the Air Force Court's previous decision did *not* find that trial defense counsel failed to exercise due diligence in discovering the erroneous test report.[144] To support this assertion, the Air Force Court noted the applicable standard for reviewing allegations of error in discovery cases in which the evidence is suppressed.[145] The test for error in such cases is that evidence is not suppressed if the accused knew or should have known, in the exercise of reasonable diligence, of the essential facts that would permit him to take advantage of the evidence.[146] The test for prejudice is similar to the test for prejudice in IAC cases—that there is a reasonable probability that had the evidence been disclosed, the result at trial would have been different.[147] The court then addressed the standard of review for IAC cases, noting that the standards for finding error are different—the test in discovery matters focuses on specific information while the test for IAC focuses on the counsel's entire performance.[148] Given the different standards, the Air Force Court reached a logical conclusion: A determination that the disclosed information would have led a diligent defense counsel to the analytical data at issue was *not* tantamount to a finding that trial defense counsel was ineffective for Sixth Amendment purposes.[149] The court spent the remainder of its opinion on this point, holding that the appellant's trial defense counsel was not ineffective.[150]

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133. *Id*. at 694.

134. 24 M.J. 186 (C.M.A. 1987).

135. United States v. Brozzo, 57 M.J. 564 (A.F. Ct. Crim. App. 2002), *set aside by* 58 M.J. 284 (2003), *aff'd on remand*, 2003 CCA LEXIS 187 (A.F. Ct. Crim. App. Aug. 26, 2003) (unpublished), *review granted*, 59 M.J. 399 (2004).

136. *Id*. at 565.

137. *Id*.

138. 373 U.S 83 (1963).

139. Major Ekman's article extensively covered this case as a discovery matter. Ekman, *supra* note 3, at 108.

140. Trial defense counsel submitted a specific discovery request for "false positives" and "false negatives." The appellant's counsel also requested "copies of documents relating to inspections of the laboratory, the quality control program, mishandling of samples, and other administrative errors in testing for the three months before the appellant's sample was tested, the month of the testing, and the month after the testing." *Brozzo*, 57 M.J. at 565.

141. *Id.* at 567.

142. United States v. Brozzo, 58 M.J. 284 (2003).

143. United States v. Brozzo, 2003 CCA LEXIS 187, *3 (A.F. Ct. Crim. App. Aug. 26, 2003) (unpublished).

144. *Id*.

145. *Id*. at *4.

146. *Id*.

147. *Id*.

148. *Id*. at *6.

As framed by the Air Force Court, the appellant asserted that "trial defense counsel was deficient for failing to investigate the quality control report showing a technician's error regarding one specific quality control sample occurring two months before the testing of appellant's sample."[151] The Air Force Court reasserted its earlier finding that the defense counsel was not deficient in this regard.[152] Indeed, there was no evidence in the record that defense counsel failed to inquire into the quality control sample: "All we can tell from the record is that trial defense counsel did not specifically cross-examine the expert witness about the 'technician error' for this particular failure of a blind quality control sample."[153] Reviewing the entire performance of the defense counsel, the Air Force Court concluded that "it is apparent trial defense counsel zealously defended their client in this case."[154] Although the defense counsel did not cross-examine the primary government expert witness about the technician's error on the blind quality control sample at issue, the Air Force Court did not find that this failure rose to deficient performance under *Strickland*.[155] Simply because "appellate defense counsel . . . can devise more cross-examination questions on this point does not mean that, considering all circumstances, the appellant was effectively deprived of counsel under the Sixth Amendment."[156]

The Air Force Court then noted that even if defense counsel did not inquire further into quality control data the government provided, there was still no deficient performance.[157] The court premised its conclusion on the following: (1) the monthly reports revealed that personnel in the quality control section made errors, and trial defense counsel elicited that information on cross-examination; (2) the reports did not disclose unusual or significant problems in the quality control section during the month the appellant's sample was tested; (3) there was a separation between the quality control section and the section handling members' samples; and (4) "there was little to be gained from focusing an attack on the quality control section."[158]

Finally, the Air Force Court analyzed the prejudice prong of *Strickland*, noting the similarity in the standard between discovery cases and IAC claims. Reprising its conclusion that the evidence on the discovery issue was not material, the Air Force Court similarly found no reasonable probability that the result would have been different if defense counsel had investigated further or presented additional impeachment information regarding the erroneous sample.[159] The court dismissed with dispatch the various arguments the appellant made in an effort to show prejudice. First, the Air Force Court rejected the conclusion that the result at issue was a "false positive" because the sample was never reported as positive.[160] Further, there was no evidence that the gas chromatography/mass spectrometry (GC/MS) test was flawed.[161] Also, the problem with the quality control sample was in its aliquoting or handling of the sample, not in the test itself, which was supervised, but not handled, by the same expert who testified at trial.[162] Finally, the court rejected the argument that a negative urine sample could reach GC/MS contaminated by a prior sample because a member's sample reaches GC/MS only after two positive preliminary tests.[163]

The trial practitioner should take note of this case for two reasons. First, the CAAF has granted review on the case—so the *Brozzo* saga continues.[164] Whether the CAAF will determine that the defense counsel was ineffective for failing to discover the report is debatable. Given the CAAF's recent decision in *United States v. Jackson*,[165] it seems more likely that

149. *Id.* at *6-7.

150. *Id*. at *19.

151. *Id.* at *8.

152. *Id*.

153. *Id*.

154. *Id.* at *9.

155. *Id*. at *12.

156. *Id*. at *12-13.

157. *Id*. at *13.

158. *Id.* at *14-15.

159. *Id.*at *16.

160. *Id*. at *17.

161. *Id*.

162. *Id.* at *18.

163. *Id*. at *18-19.

the CAAF will dispose of this case on the granted discovery issue.[166] The second reason this case is important is that the Air Force is putting the onus on the defense counsel to carefully review information the government provides and to exercise reasonable diligence in culling through the disclosed information. If the CAAF does not reverse the Air Force Court on this point, trial counsel can rely on the Air Force Court opinion in support of an argument that the defense, if it has access to the information requested, carries a burden to exercise reasonable diligence in securing requested discovery. The next case discusses what defense counsel should do when faced with knowing that a client is likely to commit perjury.

United States v. Baker[167] demonstrates the ethical and constitutional quandary defense counsel face when they believe their client will not testify truthfully in his own defense. After the defense began its case-in-chief with two witnesses, four stipulations of expected testimony, and eight other exhibits, the defense requested a short recess.[168] Forty-five minutes later, the military judge conducted an Article 39(a), UCMJ, session to discuss the request of the appellant's two defense counsel to be removed from the case.[169] After discussing the issue with both defense counsel, the military judge deduced that the reason for the withdrawal request was because counsel had concerns about their client committing perjury. The military judge then began a discussion with the appellant as to how the trial would proceed if he chose to testify.[170]

The military judge told the appellant he would have to testify without the assistance of counsel, that he would be cross-examined by trial counsel and questioned by members without the assistance of counsel, and that his defense counsel could not use anything he said in his testimony in their closing argument.[171] The military judge refused to allow either defense counsel off of the case.[172] Recognizing the likelihood of appellate litigation, she instructed both defense counsel to prepare a memorandum for record detailing the situation as known by them both before and after the appellant's testimony.[173] The military judge informed the appellant that these memoranda would be retained in counsel's files, but would be releasable if the appellant raised an IAC claim.[174] The appellant eventually testified in a narrative form, responding to questions from both the trial counsel and the military judge.[175]

The CAAF noted that under circumstances in which a defense counsel believes an accused will commit perjury, the defense counsel is placed at the "intersection of competing and sometimes conflicting interests."[176] The first issue the CAAF addressed was the factual standard an attorney must apply to determine whether the proposed testimony is false.[177] The CAAF stated that defense counsel must have a "firm factual basis" to believe their client is going to commit perjury before being required to take action under the ethical standards.[178] Once this basis is satisfied, the proper approach for defense counsel is to provide non-specific notice to the trial court that

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164. The CAAF granted review on the following IAC issue: "II. WHETHER, IN VIEW OF THE CONCLUSION OF THE AIR FORCE COURT OF CRIMINAL APPEALS THAT TRIAL DEFENSE COUNSEL DID NOT EXERCISE REASONABLE DILIGENCE IN DISCOVERING THE ERRONEOUS TEST REPORT, APPELLANT WAS PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL." United States v. Brozzo, 59 M.J. 399 (2004).

165. 59 M.J. 330 (2004) (holding that the government's failure to disclose to defense information detailing a report of a negative blind quality control sample that tested positive for the cocaine metabolite violated RCM 701(a)(2)(B) with such failure being prejudicial to the appellant).

166. *Brozzo*, 59 M.J. at 399. The court granted review on the following discovery issue:

> I. WHETHER BRADY V. MARYLAND AND ARTICLE 46, UCMJ, REQUIRE THE GOVERNMENT TO DISCLOSE EVIDENCE OF A URINALYSIS 'FALSE POSITIVE' FOR COCAINE WHERE APPELLANT WAS CHARGED WITH USE OF COCAINE; THE QUALITY CONTROL PROCESS COULD NOT DETERMINE THE CAUSE OF THE ERROR; THE LABORATORY MADE THE ERROR LESS THAN TWO MONTHS PRIOR TO TESTING APPELLANT'S SAMPLE; THE GOVERNMENT EXPERT WITNESS WORKED SUBSTANTIVELY ON BOTH TESTS; AND TRIAL COUNSEL DID NOT EXERCISE DUE DILIGENCE IN DISCLOSING THE ERROR.

Id.

167. 58 M.J. 380 (2003).

168. *Id.* at 381.

169. *Id*. at 382.

170. *Id*. at 382-83.

171. *Id*.

172. *Id*. at 383.

173. *Id.*

174. *Id*.

175. *Id*. at 384.

the accused will testify in a narrative form without the assistance of counsel.[179]

In the case at bar, there was no direct evidence on the record as to why the defense counsel requested to withdraw and allowed their client to testify in a narrative form.[180] In the case's current posture, therefore, the CAAF set aside the decision of the service court and remanded the case for a *DuBay* hearing.[181] The CAAF suggested procedures for defense counsel and military judges to use in future cases when they are faced with client perjury issues in court.[182]

This case's importance is clear for defense counsel at a similar "intersection." Although the CAAF did not resolve the issue before it, the nonbinding guidance for the defense counsel and military judge in such circumstances is very helpful. It would seem a harsh result for the CAAF to find IAC under these facts unless counsel did not conduct a sufficient investigation and advise the appellant on the options after the investigation. The tack taken by the CAAF suggests what a careful defense counsel should already do if faced with a similar circumstance. Counsel who does not heed the CAAF's baseline suggestions does so at their client's and their own peril.

Conflicts and Ineffective Assistance: United States v. Cain *and the Creation of a New Per Se Category of Conflict*

The accused's right to the effective assistance of counsel, includes the right to an attorney free from conflicts.[183] The case of *United States v. Cain*[184] tested the parameters of this constitutional guarantee in the context of a criminal homosexual relationship between a defense counsel and his client. The Army Court decided the case in October 2002 and the CAAF issued its reversal in March 2004. Given the importance of the CAAF's holding in *Cain*, it is appropriate to discuss the case. The Army Court opinion will be discussed in some detail, followed by a discussion of the CAAF opinion.

The appellant was convicted pursuant to his pleas of two specifications of indecent assault.[185] In his initial brief to the Army Court, the appellant alleged that he and his lead military defense counsel had a coerced homosexual relationship that denied him effective assistance of counsel.[186] The Army Court ordered a *DuBay* hearing to determine the underlying facts.[187] The court determined the following: Major S and the appellant entered into a consensual sexual relationship shortly before the Article 32, UCMJ investigation on 3 December 1997; the relationship continued until the conclusion of the trial about six months later; the appellant told several people about the relationship, including two civilian attorneys, who told the appellant that he should fire MAJ S because MAJ S's behavior was

176. *Id*. Those interests include: the constitutional right to the effective assistance of counsel; the constitutional right to present a defense; the ethical obligation of defense counsel to provide competent and diligent representation; the general prohibition against disclosure of communications between an attorney and her client; the criminal prohibitions against perjury; the ethical duty of an attorney to not offer or assist in offering material evidence known to be false; the ethical duty of an attorney who knows that a client is contemplating a criminal act to counsel the client against doing so; the ethical duty of an attorney to withdraw if a client persists in fraudulent or criminal conduct; and the rules governing impeachment and rebuttal. *Id*. at 384-85.

177. *Id.* at 386.

178. *Id*.

179. *Id*.

180. *Id*. at 387. Counsel did not prepare the memoranda for record as directed by the military judge. *Id.*

181. The issues to be addressed were as follows: (1) What information led defense counsel to conclude that the appellant's testimony would present an ethical problem? (2) What inquiry did defense counsel make? (3) What facts did the inquiry reveal? (4) What standard did defense counsel use in assessing those facts? (5) What determination did counsel make with respect to the testimony in light of those facts? (6) After making any determinations, what advice did counsel provide to the appellant? (7) What was the appellant's response? (8) What information did counsel disclose during the off-the-record conversation with the military judge? *Id*.

182. Those procedures include: defense counsel should conduct an investigation into the facts and discuss her findings with the client, including the potential consequences of providing perjured testimony; defense counsel should request an *ex parte* hearing with the military judge if the client persists; and the military judge should not inquire into the reasons but should remind the counsel to conduct an investigation; ensure that the client understands the consequences of narrative format testimony; direct further consultations between defense counsel and the client and direct the preparation of a memorandum for record describing the investigation, the factual concerns, and the advice provided to the client. *Id.* at 387-88.

183. Wood v. Georgia, 450 U.S. 261, 271 (1981) ("Where a constitutional right to counsel exists, our Sixth Amendment cases hold that there is a correlative right to representation that is free from conflicts of interest.").

184. 57 M.J. 733 (Army Ct. Crim. App. 2002), *rev'd*, 59 M.J. 285 (2004).

185. *Id.* at 734.

186. *Id*.

187. *Id*.

unethical and illegal; the appellant did not fire MAJ S because he believed that MAJ S was the best military defense counsel available; in January 1998, MAJ S detailed Captain (CPT) L to the case at the appellant's request; after consulting with the appellant and MAJ S (both of whom initially wanted to contest the case) and thoroughly reviewing the facts, CPT L initiated negotiations with the government regarding a pretrial agreement; on 2 June 1998, the accused pled guilty and was found guilty by a military judge sitting as a general court-martial; on 6 June 1998, the appellant's parents, without the appellant's knowledge, sent a letter to the convening authority alleging that MAJ S pressured appellant into sexual favors; on 18 June 1998, Lieutenant Colonel F, the Trial Defense Service Executive Officer, informed MAJ S of the allegation in the letter; and the following morning, MAJ S killed himself.[188]

When alleged IAC arises from a conflict of interest, the Army court applies the two-pronged test of *Cuyler v. Sullivan*: an accused who raises no objections at trial must show that (1) an actual conflict of interest existed; and (2) the conflict of interest adversely affected counsel's performance.[189] If both elements are shown, prejudice is presumed.[190] In cases involving a guilty plea, the *Cuyler* test is modified in that the accused must show (1) an actual conflict of interest; and (2) that the conflict adversely affected the voluntary nature of the plea.[191] Quoting *United States v. Mays*,[192] the court specifically noted that an accused "must point to specific instances in the record to suggest an actual conflict . . . [and] must demonstrate that the attorney made a choice between possible alternative courses of action" to the accused's detriment.[193] The Army Court also noted that an accused may waive the right to conflict-free counsel, but such waiver must be made "voluntarily, knowingly, and intelligently with sufficient awareness of the relevant circumstances and likely consequences."[194]

Analyzing whether there existed an actual conflict, the Army Court found that the appellant failed to meet his burden. The Army court, citing *United States v. Babbit*[195] for support, noted that a counsel's sexual relations with a client do not create a *per se* actual conflict of interest and declined the appellant's invitation to adopt a *per se* criminal conduct rule.[196] Although his conduct was similar to the charged misconduct of the appellant, MAJ S's conduct was unrelated to the appellant's charged crimes.[197] To the Army Court, "[t]he best way to maintain appellant's confidence required that M[ajor] S represent appellant's interests to the utmost of his abilities, and that appellant know of MAJ S's efforts on his behalf." Therefore, "not only did MAJ S and appellant's interests not conflict, in some respects, they converged."[198]

The court then reviewed, even if there were an actual or potential conflict, whether the appellant waived it. The question before the court was

> whether someone, at some point, "laid out for appellant at the *basic* ramifications and pitfalls of the arrangement so that he could make informed judgments as to (1) whether his counsel had a conflict of interest . . . and (2) if so, whether he wished to waive the right to conflict-free counsel."[199]

The appellant sought and received the benefit of talking to several people, including two civilian attorneys who told him that MAJ S's conduct merited his release. Notwithstanding that advice, the appellant "wanted M[ajor] S to continue to represent him because he believed him to be the best military attorney available."[200] Most telling was that when asked by the military judge during the providence inquiry whether he was satisfied with his counsel's advice, the appellant told the mili-

188. *Id.* at 735-36.

189. 446 U.S. 335, 346-47 (1980).

190. *Id.* at 349-50.

191. *Cain*, 57 M.J. at 737 (citing Thomas v. Foltz, 818 F.2d 476, 480 (6th Cir. 1987)).

192. 77 F.3d 906, 908 (6th Cir. 1996).

193. *Cain*, 57 M.J. at 737.

194. *Id.*

195. 26 M.J. 157 (C.M.A. 1988).

196. *Cain*, 57 M.J. at 737-38.

197. *Id.* at 738.

198. *Id.*

199. *Id.* (quoting United States v. Henry, 42 M.J. 231 (1995)) (emphasis added).

200. *Id.* at 739.

tary judge that he was satisfied.[201] Given these facts, plus that he asked for and received additional counsel, was sufficient for the court to conclude, "Appellant knew what he was doing when he made his choice."[202]

Finally, the Army Court found that, even if MAJ S labored under an actual conflict that the appellant did not waive, there was no evidence in the record that the conflict adversely affected the defense team's performance, the appellant's decision to plead guilty, or the terms and conditions of the appellant's guilty plea.[203] Further, even if MAJ S labored under a conflict, CPT L did not, because CPT L knew nothing of the relationship.[204] The court stated, "Measuring the combined efforts of M[ajor] S and C[aptain] L on behalf of appellant, it is difficult to imagine what more they could have done on his behalf to produce a more favorable result."[205]

The Army Court's opinion, while well-written and supported in fact and law, did not withstand the CAAF's scrutiny. The CAAF looked at the same facts, applied the same legal standard, yet came to the opposite conclusion: there was an actual, unwaived conflict that created IAC.[206] In reviewing the facts, the CAAF fleshed-out in more detail than did the Army Court the misgivings the appellant held during MAJ S's representation.[207] The theme throughout the quotations pulled from the *DuBay* hearing was that the appellant was caught between the fear of exposing MAJ S's conduct and the appellant's "deep need . . . to believe his defense counsel would 'save him.'"[208] The CAAF then discussed the various possible criminal[209] and administrative[210] consequences that both MAJ S and the appellant faced because of their sexual relationship, concluding that "Major S . . . engaged in a course of conduct with Appellant . . . which exposed both of them to the possibility of prosecution, conviction, and substantial confinement for the military crimes of fraternization and sodomy."[211] Even if not tried by court-martial, the CAAF noted that "the conduct initiated by Major S exposed him and Appellant to administrative proceedings that could have resulted in involuntary termination for homosexuality."[212] The CAAF also noted the ethical considerations involved in the case, observing that MAJ S faced professional disciplinary action for his conduct with the appellant.[213]

Notwithstanding the ethical considerations, however, the CAAF focused on possible criminal results of MAJ S's actions holding, "The uniquely proscribed relationship before us was inherently prejudicial and created a per se conflict of interest in counsel's representation of the Appellant."[214] In so holding, the CAAF avoided the harder issue of the appellant's being required to show prejudice.[215] In declaring that the relationship was a *per se* conflict, the CAAF suggested that the possible adverse consequences provided MAJ S with compelling motivation to place secrecy above trial strategy, thereby affecting his ability to provide objective advice to the appellant on defense options.[216] In reviewing the Army court's determination that even if there was a conflict the appellant waived it, the CAAF determined that neither civilian counsel whom appellant

201. *Id*.

202. *Id*.

203. *Id.*

204. *Id*.

205. *Id*.

206. United States v. Cain, 59 M.J. 285, 295-96 (2004).

207. *See id*. at 290-92.

208. *Id*. at 291 (quoting Attorney W).

209. Fraternization violates Article 134, UCMJ, while sodomy violates Article 125, UCMJ. MCM, *supra* note 9; UCMJ arts. 125 & 134 (2000).

210. Homosexual conduct is a basis for involuntary separation. U.S. Dep't of Army, Reg. 635-200, Active Duty Enlisted Administrative Separations para. 15-3 (19 Dec. 2003); U.S. Dep't of Army, Reg. 600-8-24, Officer Transfers and Discharges para. 4-22 (3 Feb. 2003).

211. *Cain*, 59 M.J. at 292.

212. *Id*. at 293.

213. *See id*. at 293-94. The CAAF observed that the professional rules applicable to judge advocates prohibit representation by an attorney when interests of the attorney "may be materially limited . . . by the lawyer's own interests." *Id*. at 293 (quoting U.S. Dep't of Army, Reg. 27-26, Legal Services Rules of Professional Conduct For Lawyers app. B, Rule 1.7(b) (1 May 1992)).

214. *Cain*, 59 M.J. at 295.

215. *See* United States v. Cain, 57 M.J. 733, 739 (Army Ct. Crim. App. 2002).

216. *See Cain*, 59 M.J. at 295.

contacted "provided him with a detailed explanation of the relationship between the merits of the case and the attorney's ethical obligations."[217] Therefore, "[a]ppellant's conversations with the two civilian attorneys in this case did not involve the type of informed discussion of the specific pitfalls of retaining Major S that would demonstrate a knowing, intelligent waiver of the right to effective assistance of counsel."[218]

This case created a new *per se* category of conflict on a very thin reed. With respect to the sexual nature of the conflict, the majority did cite a case with somewhat similar facts, *United States v. Babbit*[219] and sought to distinguish it from the case at bar. The *Babbit* court refused to adopt a *per se* conflict rule in the context of a civilian attorney having a sexual relationship with his military client.[220] Clearly distinguishable from *Babbit*, *Cain* did involve a commissioned officer who abused his military office, violated his duty of loyalty, fraternized, and committed a "same criminal offense" for which the appellant was on trial.[221] The *Babbit* court's opinion, however, was not limited to its facts and the *Cain* majority's attempt to limit *Babbit* is unpersuasive.[222] Also of some importance is that although there are no cases directly like this case, as observed by the majority,[223] similar cases have required a showing of prejudice.[224] What is more, even in the federal cases cited by Chief Judge Crawford's dissenting opinion, there was not "the mitigating presence of an independent counsel, or a guilty plea tested through the extensive providence inquiry required in military practice."[225] Importantly, CPT L did not labor under the conflict,[226] and he *endorsed* the pretrial agreement—indeed he negotiated it.[227] The CAAF majority did not fully explain how an unconflicted counsel's advice would not cure any conflict.[228] Rather, they gave the dismissive comment that "[a]ppellant relied on Major S and was entitled to the benefit of conflict-free advice from Major S about the range of alternatives before him. He did not receive that advice."[229] Also unexplained in the CAAF opinion is why the majority did not analyze the performance under the "team concept," which the court recently reaffirmed.[230] Is the CAAF saying that because one counsel was conflicted, the entire team was conflicted? If so, the majority cited no cases in support of that proposition. If the CAAF was not saying that, the majority should have looked at the defense team rather than looking only at MAJ S to reach its result.[231]

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217. *Id*. at 296. This observation stands in stark contrast to the Army Court's formulation of what the appellant should have been told. *See supra* text accompanying note 200.

218. *Id*.

219. 26 M.J. 157 (C.M.A. 1988) (holding that a civilian attorney who had consensual sexual intercourse with a client the night before the last day of trial was not denied effective assistance of counsel because the attorney was not actively representing conflicting interests). It should be noted that the Court of Military Appeals in *Babbit* agreed with the lower court's characterization of Babbit's argument: "appellant's 'arguments ultimately boil down to the proposition that an attorney's sexual relations with his client *per se* create an actual conflict of interest which violates the client's Sixth Amendment right to effective assistance of counsel.'" *Id.* at 159 (quoting United States v. Babbit, 22 M.J. 672, 677 (A.C.M.R. 1986)).

220. *Id.*

221. *Cain*, 59 M.J. at 295. Major S, however, did not commit the "same criminal offense" as his client. The *DuBay* findings were that the relationship between MAJ S and Cain was *consensual*. United States v. Cain, 57 M.J. 733, 735 (Army Ct. Crim. App. 2002). Therefore, MAJ S, while he did commit criminal acts with the appellant, he did not commit the "same criminal offense" for which Cain was on trial. Cain was on trial for forcible sodomy. *Cain*, 59 M.J. at 286.

222. After the majority cited *Babbit* and discussed its basic facts, the *Cain* majority then discussed its holding with the introductory clause "[i]n those circumstances." *Id*. at 295. A fair reading of the language used by the Court of Military Review in its opinion indicates that it was speaking in terms broader than the specific facts before it. *See supra* text accompanying note 196.

223. The CAAF noted that the "appeal before us presents a case of first impression, with no direct counterpart in civilian law. The case involves a volatile mixture of sex and crime in the context of the military's treatment of fraternization and sodomy as criminal offenses." *Cain*, 59 M.J. at 295.

224. As noted by Chief Judge Crawford in her dissent, "there have been many federal cases [that] were allegedly involved in a related criminal endeavor" but those courts have refused to adopt a *per se* rule. *Id.* at 297 (Crawford, C.J., dissenting).

225. *Id*.

226. The majority's opinion does not state that CPT L labored under any conflict.

227. *Id*.

228. Interestingly, one might ask whether the retrial of this case would accomplish the same thing (that is, an unconflicted counsel offering her assistance to the appellant).

229. *Id.* at 296.

230. *Compare* United States v. Adams, 59 M.J. 367 (2004), *with Cain*, 59 M.J. 285. In *Adams*, the CAAF declared: "In analyzing Adams' claim of ineffective appellate representation, we do not look at the shortcomings of any single counsel and speculate about the impact of individual errors. Rather, we measure the impact upon the proceedings 'by the combined efforts of the defense team as a whole.'" (citing United States v. McConnell, 55 M.J. 479, 481 (2001) (quoting United States v. Boone, 42 M.J. 308, 313 (1995))). *Adams*, 59 M.J. at 367.

Effective Assistance in Sentencing—Investigate and Present Arms!

The Supreme Court's latest significant IAC pronouncement is *Wiggins v. Smith*.[232] This case involved a petitioner convicted of murdering a seventy-seven-year-old woman found drowned in her bathtub.[233] Wiggins decided to be tried by a judge, who after a four-day trial convicted Wiggins of first-degree murder, robbery, and two counts of theft.[234] After conviction, Wiggins elected to be sentenced by a jury.[235] His two public defenders moved to bifurcate the sentencing proceedings.[236] Their intent was to first show that Wiggins did not kill the victim by his own hand (a required finding for death eligibility), and then, if necessary, to present a mitigation case.[237] The trial judge denied the motion.[238] At the beginning of the sentencing case, one of Wiggins' public defenders told the jury that they would hear about Wiggins' difficult life.[239] During the defense's sentencing proceedings, however, the defense did not present any such evidence.[240] Instead the defense focused on the theory that Wiggins was not the actual perpetrator of the victim's death.[241] Before closing arguments, the public defender made a proffer outside of the jury's presence, of the mitigation evidence the defense would have introduced but for the judge's ruling on the bifurcation motion.[242] In that proffer, the defense explained it would have introduced psychological reports and expert testimony regarding Wiggins' limited intellectual capacity and immature emotional state, as well as the absence of any aggressive behavior patterns, his capacity for empathy, and his desire to function in the world.[243] Importantly to the Court's holding, "[a]t no point did [counsel] proffer any evidence of petitioner's life history or family background."[244] The jury returned with a sentence of death.[245]

Wiggins' efforts to obtain post-conviction relief based on IAC in Maryland states courts failed.[246] As part of his efforts, his new counsel commissioned a social history report from a licensed social worker certified as an expert by the trial court.[247] That report detailed lengthy abuse at the hands of his mother, his foster parents and siblings, as well as his supervisor in the Job Corps program.[248] At the close of the post-conviction trial proceedings, the trial judge characterized the failure to compile a social history report as "absolute error."[249] Nevertheless, the

231. Naturally, to avoid this difficult issue, the CAAF merely declares a *per se* conflict—thus avoiding a performance and impact analysis—and moves out smartly from there.

232. 539 U.S. 510 (2003).

233. *Id.* at 514.

234. *Id.* at 514-15.

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.*

245. *Id.*

246. *See id.* at 514-21.

247. *Id.* at 514-15.

248. The Court recounted the sordid details of the report: Wiggins' "mother, a chronic alcoholic, frequently left Wiggins and his siblings alone home for days, forcing them to beg for food and to eat paint chips and garbage"; she also beat the child for breaking into the kitchen, which was often kept locked; she had sex while the children slept in the same bed; forced Wiggins' hand against a hot stove burner; Wiggins' first and second foster mothers repeatedly raped and molested him; at one foster home, the foster mother's sons allegedly gang-raped him on more than one occasion; and after entering into the Job Corps, Wiggins' supervisor sexual abused him. *Id.* at 516-18.

249. *Id.*

judge found that Wiggins' counsel's decision not to investigate was a matter of trial tactics and thus, there was no IAC.[250] The Maryland Court of Appeals affirmed the decision observing that counsel had access to the presentence investigation report (PSI) and the social service records that recorded the abuse, an alcoholic mother, and multiple placements in foster care; therefore, counsel did investigate and made a reasoned tactical choice.[251] Wiggins then filed for a writ of habeas corpus in federal district court.[252] The district court determined that counsel did not perform a reasonable investigation and that the knowledge counsel had triggered an obligation to look further.[253] The Fourth Circuit reversed the district court's determination, holding that counsel made a reasonable strategic decision to focus on Wiggins' direct responsibility.[254] After granting Wiggins' petition for certiorari, the Supreme Court reversed and set aside the death penalty sentence.[255]

Applying the two-pronged *Strickland* test for IAC, the Court held that the failure of Wiggins' defense counsel to conduct a presentencing investigation into potential mitigating evidence fell below professional standards then prevailing in Maryland.[256] Those standards included retention of a forensic social worker (e.g., mitigation expert) to prepare a social history report, for which funds were set aside but never used by Wiggins' counsel.[257] The Court also noted that counsel failed to comply with the American Bar Association's standards for capital litigation, standards the Court declared as "guides to determining what is reasonable."[258] More specifically, the Court stated,"[C]ounsel abandoned their investigation of petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of sources."[259] Given the information that counsel did know,[260] the Court declared that "any reasonably competent attorney would have realized that pursuing these leads was necessary to making an informed choice among possible defenses."[261] In this case, the investigation conducted by counsel made "an informed decision with respect to sentencing strategy impossible."[262]

Having determined that counsel did not perform as they should have, the Court turned to a determination of prejudice. The Court found prejudice because of the "powerful" nature of the unpresented evidence: severe privation and abuse while in the custody of his alcoholic, absentee mother; and physical torment, sexual molestation, and repeated rape while in foster care.[263] The Court referred to this type of evidence as "the kind of troubled history we have declared relevant to assessing a defendant's moral culpability."[264] The Court was troubled that the jury heard only one significant mitigating factor—that Wiggins had no prior convictions.[265] "Had the jury been able to place petitioner's excruciating life history on the mitigating side of the scale, there is a reasonable probability that at least one juror would have struck a different balance."[266]

The lesson from this case is clear: investigate. The Court does not require that counsel investigate and present every conceivable avenue of approach in a sentencing case.[267] What the

250. *Id.*

251. *Id.*.

252. *Id.* at 518.

253. *Id.*

254. *Id.*

255. *Id.*

256. *Id.* at 524.

257. *Id.*

258. *Id.* (quoting Strickland v. Washington, 466 U.S. 667, 688 (1984)).

259. *Id.*

260. The Court disputed the notion that counsel knew of the instances of sexual abuse because those instances were not recorded in the presentencing report or social service records—"the records contain no mention of molestations and rapes" of Wiggins detailed in his post-conviction social history report. *Id.* at 528.

261. *Id.* at 525.

262. *Id.* at 527-28.

263. *Id.* at 533.

264. *Id.*

265. *Id.* at 537.

266. *Id.*

Court *does* require is a reasonable investigation of the facts before determining the appropriate course. The failure of counsel in *Wiggins* to investigate beyond the PSI and social service records, particularly when those records did not disclose much detail, was the key to the Court's IAC finding. The most recent Army Court case that touches on these same issues is *United States v. Kreutzer*.[268]

On the morning of 27 October 1995, members of Sergeant (SGT) Kreutzer's brigade were getting ready for a unit run to mark the brigade's assumption of duty as the 82d Airborne Division's Division Ready Brigade.[269] The appellant, SGT Kreutzer, hid in a nearby wood-line, and as the unit moved out from their pre-run formation, he opened fire on his fellow Soldiers, wounding seventeen and killing one.[270] He was found guilty, *inter alia*, of one specification of premeditated murder and eighteen specifications of attempted premeditated murder and sentenced to death.[271] The Army Court discussed two issues: (1) whether the military judge abused his discretion when he denied the appellant the services of a mitigation expert; and (2) whether the appellant was denied effective assistance of counsel at the presentencing stage of the trial.[272] A majority of the Army court panel determined that the military judge abused his discretion by denying a defense motion for a mitigation expert; the contested findings were set aside on that basis.[273] The court also unanimously held that defense counsel were ineffective in the sentencing stage of the trial, therefore requiring reversal of the adjudged sentence.[274]

As noted by the Army court, the three military counsel that represented the appellant did not have any prior capital litigation experience, and only one had any capital litigation training.[275] In reviewing the particular failings of the defense team, the Army Court noted a number of crucial errors that led to the conclusion that the appellant was denied effective assistance of counsel.[276]

The Army Court noted that during the government's sentencing case-in-chief, the defense failed to cross-examine several wounded victims, several family members, and a coworker of the dead Soldier.[277] With respect to the evidence presented by the defense, the defense team called a British exchange Soldier and the appellant's platoon sergeant to testify about the appellant's nickname, "Crazy Kreutzer."[278] Two other witnesses testified about the appellant's conduct while deployed to the Sinai Peninsula[279] and about the lack of respect accorded to the appellant.[280] The last witness the defense called was Major (Dr.) Diebold, the president of the appellant's sanity board.[281] The Army court's assessment of Dr. Diebold's testimony was less than ringing. This expert's testimony included answers to hypothetical questions designed to show that the appellant's behavior was tied to his diagnosed mental health

267. *Id.* at 533 ("[W]e emphasize that *Strickland* does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing.").

268. 59 M.J. 773 (Army Ct. Crim. App. 2004).

269. *Id.* at 774.

270. *Id*.

271. *Id*. The appellant pled guilty to the lesser included offense of murder while engaged in an act inherently dangerous to another. He also pled guilty to the lesser included offense of aggravated assault with a loaded firearm as to the attempted premeditated murder specifications. Those findings were affirmed. *Id*.

272. *Id*. at 775.

273. *Id.* The military judge's determination clearly had an adverse impact on the defense's ability to present an effective sentencing case: "[T]he judge's abuse of discretion adversely impacted the fairness of the trial . . . on sentencing as to the presentation of mitigating circumstances that may have made the death penalty inappropriate in the minds of the court members." *Id.* at 779-80.

274. *Id*. at 784. By way of comparison, one judge did not agree that the military judge abused his discretion by failing to order a mitigation expert for the defense. *Id*. at 802 (Chapman, J., concurring in part and dissenting in part).

275. *Id*. at 780. Major Gibson was the only counsel who had any training in the area by virtue of his attendance at a two-day course at the Naval Justice School in 1995. *Id*. at 785. As noted in the concurrence, training and experience in capital cases is not a *per se* requirement for qualification as defense counsel in such cases. *Id*. at 794 (Currie, J., concurring in result).

276. In reviewing this portion of the evidence, the court noted that "[t]he psychiatric evidence failure is most notable." *Id.* at 783.

277. *Id*. at 781.

278. *Id*.

279. While a member of the Multi-national Force Observers (MFO) in 1994, the appellant had and articulated homicidal feelings toward fellow Soldiers, which were the subject of treatment by an Army social worker, CPT Fong. *Id* at 777. The concurring opinion discusses in some detail the appellant's troubles in while assigned to the MFO. *See id*. at 786-87 (Currie, J., concurring in result).

280. *Id*. at 781.

status.[282] The answers "were hardly emphatic or compelling" in making that causal connection.[283] Most devastatingly for the defense's case, on cross-examination, Dr. Diebold agreed that the appellant "was thinking clearly throughout all phases of this attack."[284] He also agreed that none of the diagnosed problems would have any effect on the appellant's ability to plan, premeditate, or execute the shooting.[285] The panel also received the standard "good Soldier" packet and heard a number of stipulations of expected testimony that left, in the opinion of the court, "the impression of a normal, loving, caring, stable, family upbringing."[286] How the counsel thought this sort of evidence—portraying the appellant as a normal Soldier—would square with the notion that the appellant's mental health issues were causally related to his crimes is not explained.

In its discussion, the Army Court berated the defense team for its numerous failures. Specifically, the defense failed to interview and learn of a report prepared by Colonel (Dr.) Brown, a member of the defense team.[287] Dr. Brown interviewed the appellant at Walter Reed Medical Center at the defense's request, and he opined that he was seriously mentally ill and that the crimes committed were causally related to his illness.[288] The defense also did not call CPT Fong,[289] Dr. Diamond,[290] or Dr. Messer,[291] each of whom had significant interactions with the appellant and had testimony that could have been evaluated and presented.[292] The court declared that the defense "failed in significant ways to discover and evaluate the full range of psychiatric evidence and expert opinion available to be used in mitigation."[293] The effect of the defense's failure was the making of "uninformed decisions such as calling Dr. Diebold as the sole defense expert as to appellant's mental health status."[294] The defense team compounded its errors by failing to interview the deceased Soldier's wife, a principal witness in the government's sentencing case.[295] The court called this particular failing "a tragic flaw."[296]

Citing *Wiggins*, the Army Court held that "[d]efense counsel's investigation into appellant's mental health background fell short of reasonable professional standards."[297] As a result of the cumulative deficiencies in the case, the court held that the appellant suffered prejudice in the presentencing proceedings and set aside the death sentence.[298] Interestingly, the Army Court noted that even if the military judge had not erred by denying the defense motion for a mitigation expert, they would have reversed the sentence given the performance of the appellant's detailed defense counsel.[299]

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281. *Id.*

282. *Id.* Dr. Diebold's diagnoses of appellant were: adjustment disorder with mixed anxiety and depressed mood, dsythymia, and a personality disorder not otherwise specified with a mixture of paranoid and narcissistic traits. *Id*.

283. *Id*.

284. *Id* (quoting Dr. Diebold).

285. *Id*.

286. *Id*.

287. *Id.* at 783.

288. *Id*. at 776.

289. Captain Fong, an Army social worker, previously treated the appellant regarding homicidal feelings toward fellow soldiers while assigned to the Multi-national Force and Observer rotation in 1994. *Id*. at 777.

290. Captain (Dr.) Diamond, the 82d Airborne Division psychiatrist, saw and talked to the appellant the morning of the shooting at the CID office. *Id.* at 775.

291. Lieutenant Commander (Dr.) Messer, a lawyer and psychologist, performed a suicide assessment of the appellant while the appellant was in pretrial confinement at Camp Lejeune. He concluded that there were "'definite mental health issues' in appellant's case." *Id*.

292. *Id*. at 783.

293. *Id.*

294. *Id*.

295. *Id*.

296. *Id*. According to the Army Court, Mrs. Badger was "apparently a woman of strong religious faith which gave her a powerful impetus to forgive appellant for his terrible act of killing her kind and loving husband." *Id*.

297. *Id*. at 784.

298. *Id*.

Kreutzer is enormously important for several reasons. First, the result points to the government's failing in its exercise of discretion regarding the employment of a mitigation expert. The defense team made a timely and wholly appropriate request to the convening authority followed by a motion to the military judge. For apparently myopic reasons, the request to the convening authority was denied. The lesson is that if the convening authority wants to refer a case capital, it should pay for the increased expense of a mitigation expert. It cannot expect to obtain a reliable capital sentence "on the cheap."[300] With respect to the Sixth Amendment issues, counsel must recognize that given the "broad latitude" granted by RCM 1004(b)(3)[301] for evidence in extenuation and mitigation, there are many avenues of approach in formulating and presenting a case in presentencing. Further, counsel must dedicate the time necessary to interview all available witnesses, while ensuring that those interviews take place. A key issue in *Kreutzer* was the defense team's failure to establish who was interviewing whom.[302]

Contrasting the failures in *Kreutzer* are *United States v. Starling*[303] and *United States v. Wallace*.[304] In the first case, the appellant alleged IAC because counsel did not present *any* evidence in presentencing or in clemency. In the second case, the defense counsel did not call military witnesses. The Navy-Marine Court determined in both cases that the appellants failed to show their counsel were ineffective.

In *Starling*, after the trial counsel entered pertinent provisions of the appellant's service record, the trial defense counsel did not offer any evidence in extenuation or mitigation.[305] During closing argument, however, the defense counsel highlighted favorable evidence from the appellant's service record.[306] After trial, the defense counsel did not submit anything on behalf of the appellant in clemency.[307] The Navy-Marine Court expressly declined the appellant's invitation to find that the failure to offer evidence in extenuation and mitigation or the failure to submit post-trial matters would constitute ineffectiveness *per se*.[308] Addressing each claim in turn, the Navy-Marine Court noted that the defense's reference to favorable matters in the prosecution exhibit of the appellant's service record "had the identical effect as if the defense had offered the same evidence in extenuation and mitigation."[309] With respect to post-trial matters, the appellant acknowledged his right to submit post-trial matters, yet did not submit any evidence that trial defense counsel acted contrary to his wishes, and further did not submit matters that would have been submitted but for the trial defense counsel's inaction.[310] Thus, the appellant failed to show any prejudice.

In *Wallace*, the appellant was convicted of unpremeditated murder, kidnapping, and obstruction of justice.[311] To support his claim of IAC, the appellant argued that there were two military witnesses who believed his rehabilitation potential was outstanding and that his defense counsel should have called those witnesses.[312] Post-trial declarations from these witnesses showed, however, that their potential testimony was limited to his good military character, which the Navy-Marine Court declared "does not automatically equal rehabilitative potential."[313] By rejecting the appellant's claims, the Navy-Marine Court also noted that the appellant apparently concurred in the trial defense counsel's tactical decision to introduce the appellant's good military character via service book entries.[314] The Navy-Marine Court reaffirmed a well-settled principle from

299. *Id.*

300. As cogently presented in the concurrence, in capital cases "it is prudent that staff judge advocates, convening authorities, and military judges provide the defense team the expert assistance it needs to effectively defend the accused, and thereby render the results of trial reliable." *Id.* at 801.

301. MCM, *supra* note 9, R.C.M. 1004(b)(3).

302. *Kreutzer*, 59 M.J. at 794-95 (Currie, J., concurring in result) (noting each counsel thought the other was responsible for talking to witnesses).

303. 58 M.J. 620 (N-M. Ct. Crim. App. 2003).

304. 58 M.J. 759 (N-M. Ct. Crim. App. 2003).

305. *Starling*, 58 M.J. at 622.

306. *Id.*

307. *Id.* at 621.

308. *Id.* at 622.

309. *Id.* at 623.

310. *Id.*

311. United States v. Wallace, 58 M.J. 759, 761 (N-M. Ct. Crim. App. 2003).

312. *Id.* at 771.

313. *Id.*

Strickland "that a defense counsel's tactical decisions are virtually unchallengeable."[315]

These last two cases offer an interesting contrast to *Wiggins* and *Kreutzer.* Although *Wiggins* and *Kreutzer* were death penalty cases, and the level of scrutiny was necessarily more stringent, the gravity of the offenses in *Wallace* cannot be underestimated. Counsel in *Starling* and *Wallace* had strong support in the records for their decisions—decisions made with the apparent consent of the appellants. In *Starling* and *Wallace,* counsel investigated the appropriate facts and made tactical decisions after acquiring the information necessary to make them. The counsel in *Wiggins* and *Kreutzer* failed in that endeavor and made decisions based on incomplete information. The standard in *Strickland* for showing IAC remains high, and *Starling* and *Wallace* show that that standard *can* be difficult to meet, particularly in non-capital cases.[316]

Post-trial: It Isn't Over until . . . .

An accused maintains his right to effective assistance of counsel through the appellate process.[317] In *United States v. Dorman,*[318] the CAAF spelled out the parameters of that duty *vis-à-vis* trial defense counsel. Pursuant to his pleas, the appellant was convicted of attempted wrongful use of a controlled substance, three specifications of wrongful use of a controlled substance, and wrongful distribution of a controlled substance.[319] After trial, the appellant hired a civilian defense counsel, who asked the trial defense counsel for her case file.[320] The trial defense counsel refused the request, a denial the Air Force Court sustained.[321] After civilian defense counsel filed a motion at the CAAF to compel production of the file, trial defense counsel turned over the requested information.[322] The issue was whether trial defense counsel must grant appellate defense counsel access to the case file on request, irrespective of an IAC claim.[323] The CAAF noted that trial defense counsel maintains a duty of loyalty, which requires counsel to provide reasonable assistance to appellate counsel when permitted.[324] The CAAF also noted that trial defense counsel maintains an ethical duty of confidentiality.[325] The CAAF, therefore, held that trial defense counsel must, on request, supply appellate defense counsel with the case file, but only after receiving the client's written release;[326] the contrary ruling by the Air Force Court was error.[327] The importance of this case is that it clarifies the circumstances under which a trial defense counsel must turn over a file to appellate defense counsel outside of the IAC arena.

Conclusion—What in Tarnation Does It All Mean?

Just like the black cat noted in the quotation at the beginning of this article who is just out for a stroll, appellate decisions, while they appear to portend bad news for either the government or defense, sometimes merely flesh-out well-established legal principles. For the majority of the cases discussed above, this idea is true. In two particulars, however, the black cat does indeed signal a significant change. *Crawford* and *Cain* changed the legal landscape; whether for ill or weal remains to be seen.

The import of *Crawford* is beyond question. With respect to testimonial hearsay, the *Roberts* mode of analysis is dead. No longer will counsel be able to simply show that a statement fits within a firmly rooted hearsay exception or that the statement possesses particularized guarantees of trustworthiness. Now

314. *Id.* This decision was made because of the potential for effective cross-examination of any military witnesses. *Id.*

315. *Id.*

316. The recent case of *United States v. Garcia,* 59 M.J. 447 (2004) is a possible exception.

317. United States v. Dorman, 58 M.J. 295, 297 (2003) (including the rules and cases cited therein).

318. *Id.*

319. *Id.* at 296.

320. *Id.* at 297.

321. *Id.*

322. *Id.*

323. As noted by the CAAF in *Dorman, United States v. Dupas,* 14 M.J. 28 (C.M.A. 1982) stands for the proposition that when a claim of IAC is raised, trial defense counsel must provide appellate counsel with the case file. *Id.*

324. *Id.* at 298.

325. *Id.*

326. *Id.*

327. *Id.* at 299.

the analysis is much more complicated: Is the statement hearsay? Is the statement testimonial hearsay? What does "testimonial" mean in the context of the residual hearsay rule or the firmly rooted hearsay exceptions? Defense counsel should be prepared to make motions *in limine* to exclude all manner of hearsay statements if the declarant is unavailable at trial and was not subject to a prior opportunity cross-examination. Unfortunately for military judges and counsel, the Supreme Court did not offer guidance beyond the narrow class of testimonial statements at which the Confrontation Clause was aimed. It seems unlikely, however, that the Court will hold fast to the narrow definition of "testimonial" articulated in *Crawford*.[328]

The impact of the CAAF's decision in *Cain* will, in all likelihood, be minimal given the unusual facts involved in that case. The importance of the decision, however, is borne out by the appellate courts' differing reasoning. Clearly, the Army Court's opinion was well-reasoned and supported by the facts and law. The CAAF side-stepped the harder questions; the court's willingness to create a new category of *per se* conflict rather than face the hard question of prejudice is troubling.

With respect to the remainder of the cases discussed above, these cases are apparently just cats crossing the path of the military bar, on their way to describe legal precedents that are already fairly clear. Despite their ominous color, these cats bear no ill tidings for military practitioners. The government can protect child witnesses, defense counsel must carefully review the discovery provided by the government, and defense counsel are required to investigate their cases before deciding on an appropriate course of action. These concepts are not new and portend no bad tidings to counsel who are, in the main, very professional and skilled.

328. *See supra* text accompanying notes 79-128.