Annual Review of Developments in Instructions—2004

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This annual review of cases addressing instructions to court-martial panel members covers cases decided by the Court of Appeals for the Armed Forces (CAAF) during its 2004 term[1], and a few published cases by the service courts during that same period. These decisions are organized in the order in which instructions are provided to court members during the trial: (1) offenses; (2) defenses; (3) evidentiary instructions; and (4) sentencing. This article is written for military trial practitioners, and it will frequently refer to relevant paragraphs in the *Military Judges' Benchbook* (*Benchbook*).[2] The *Benchbook* is the primary resource for drafting instructions, and all military trial practitioners should be intricately familiar with it.

During 2004, some cases provided new law or new guidelines for military judges to use when instructing court members. Other cases reiterated the holdings of past cases or the current law. All of the cases, however, reminded judge advocates that military judges must be alert and pay attention to detail because the instructions to the members are important to a fair trial and require careful thought.

Offenses: Chapter 3, *Military Judges' Benchbook*

Obscene or Indecent Language

In *United States v. Negron*,[3] the CAAF found that the definition of "obscene," which was used during the providence inquiry for the accused's guilty plea to depositing obscene matter in the mail, was erroneous.[4] The court set aside the conviction and adopted a broader definition of "indecent language," which goes back to the plain language of the definition in the *Manual for Court-Martial* (*MCM*), for application to future cases.[5] Although this case involved a guilty plea before a judge alone, it is included in this article because of its significance on the instructions for the offenses of depositing obscene matter in the mail and indecent language.

While working as a postal clerk in Japan, Marine Corporal Negron wrongfully appropriated $1,540 from a postal safe, and made and uttered a worthless check for $500.[6] In an effort to repay the government and his credit union, he applied for a loan from the same credit union.[7] After reading a letter informing him that his loan application was rejected, he wrote a letter to the credit union and placed it in the United States mail.[8] The letter contained the following language.

> Oh, yeah, by the way y'all can kiss my ass too!! Worthless bastards! I hope y'all rot in hell you scumbags. Maybe when I get back to the states, I'll walk in your bank and apply for a blowjob, a nice dick sucking, I bet y'all are good at that, right?[9]

The accused pled guilty to several offenses,[10] including depositing obscene matter in the mail in violation of Article 134.[11]

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[1] The 2004 term began on 1 October 2003 and ended on 30 September 2004.

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

[3] 60 M.J. 136 (2004).

[4] *Id*.

[5] *Id.* at 144.

[6] *Id.* at 137.

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id*. at 138.

[11] MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 94c (2002) [hereinafter MCM].

The issue on appeal involved the definition of "obscene" that the military judge used during the providence inquiry. The *MCM* states that the definition of "obscene" is synonymous with "indecent," as defined in the *MCM* explanation for the offense of indecent language under Article 134.[12] The *MCM* defines indecent language as "that which is grossly offensive to modesty, decency, or propriety, or shocks the moral sense, because of its vulgar, filthy, or disgusting nature, or its tendency to incite lustful thought."[13]

The standard *Benchbook* instruction for depositing obscene matter in the mail, however, uses the definition of "indecent" for the offense of indecent acts, which is different from the definition of "indecent" for indecent language.[14] The *MCM* defines "indecent" for the offense of indecent acts as "that form of immorality relating to sexual impurity which is not only grossly vulgar, obscene, and repugnant to common propriety, but tends to excite lust and deprave the morals with respect to sexual relations."[15]

Also, the standard instruction for depositing mail matter does not include the following language: "[t]he test is whether the particular language employed is calculated to corrupt morals or incite libidinous thoughts, and not whether the words themselves are impure," which is in the standard instruction for indecent language.[16] During the providence inquiry, the military judge used the definition straight from the standard instruction in the *Benchbook*, which was erroneous.[17]

The court found that the erroneous definition did not focus the accused on the required intent.[18] He never stated that he intended to excite libidinous thoughts in the mind of the reader and he repeatedly stated that he only wanted to offend the reader.[19] The accused responded "Yes, sir" to the following question: "Do you believe and admit that this language used in your letter was calculated to corrupt morals or excite lustful thoughts?"[20] The court, however, found that the accused was only parroting answers to leading questions by the military judge.[21]

The exact definition of obscene or indecent language is a contentious issue, as the CAAF has highlighted in some of its more recent case law. In 1990, in *United States v. French*,[22] the Court of Military Appeals (COMA) stated that language must be "calculated to corrupt morals or excite libidinous thoughts" to be obscene.[23] This phrase appeared in military case law since 1959, when the Army Board of Review quoted that phrase from a legal treatise, *Wharton's Criminal Law and Procedure*.[24] In most cases involving the definition of indecent language, the issue has been whether facially innocuous language was indecent because of the message it conveyed under the circumstances.[25] Courts, however, frequently cited that phrase in appellate opinions, and it became unclear whether indecent language must meet that test in every case.

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[12] "'Obscene' is synonymous with 'indecent' as the latter is defined in paragraph 89c." *Id.*

[13] *Id.* para. 89.

[14] *Compare* BENCHBOOK, *supra* note 2, para. 3-94-1d (Mail—Depositing or Causing to Be Deposited Obscene Matter In), *with id*. para. 3-89-1d (Indecent Language Communicated to Another), *and id*. para. 3-90-1d (Indecent Acts with Another).

[15] MCM, *supra* note 11, pt. IV, ¶ 90.

[16] *Compare* BENCHBOOK, *supra* note 2, para. 3-89-1d (Indecent Language Communicated to Another), *with id*. para. 3-94-1d (Mail—Depositing or Causing to Be Deposited Obscene Matter In).

[17] United States v. Negron, 60 M.J. 136, 137-38 (2004).

[18] *Id*. at 142.

[19] *Id*.

[20] *Id.* at 139-40.

[21] *Id*. at 142-43. This question during the providency inquiry indicates that the military judge may have been aware that the standard instruction in the *Benchbook* was lacking and that "obscene" is synonymous with the definition of "indecent" for the offense of indecent language. This question comes from the definition of "indecent" for the offense of indecent language. *See* MCM, *supra* note 11, pt. IV, ¶ 89c; BENCHBOOK, *supra* note 2, para. 3-89-1d (Indecent Language Communicated to Another). The "Yes, sir" response to the military judge's leading question, however, was inconsistent with what the accused had described in more detail earlier during the providence inquiry. *See Negron*, 60 M.J. at 138-39.

[22] 31 M.J. 57 (C.M.A. 1990).

[23] *Id*. at 60.

[24] *See* United States v. Simmons, 27 C.M.R. 654 (A.B.R. 1959).

[25] *See, e.g.*, United States v. Simmons, 27 C.M.R. 654 (A.B.R. 1959); United States v. Wainwright, 42 C.M.R. 997 (C.M.A. 1970); United States v. French, 31 M.J. 57 (C.M.A. 1990).

In 1995, that test from *French* was added to the *MCM* explanation of the offense of indecent language.[26] In order to avoid a misinterpretation of the element as a specific intent element, however, the drafters rephrased it as, "Language is indecent if it tends reasonably to corrupt morals or incite libidinous thoughts."[27]

In *United States v. Brinson*,[28] the CAAF unambiguously held that only language that is "calculated to corrupt morals or excite libidinous thoughts" is indecent, and "calculated" means intended or planned to bring about a certain result.[29] That test is much more restrictive than the original *MCM* definition. In her dissent in *Brinson*, then-Judge Crawford stated, "Paragraph 89c, Part IV, Manual for Courts-Martial, United States (1995 ed.), *provides at least two* definitions of 'indecent language,' either of which can be the basis for a conviction."[30]

When the CAAF decided *Negron*, it was bound by the restrictive definition from *Brinson*, because it was the law at the time of the trial.[31] After deciding the case in front of it, however, the CAAF stated that the *MCM* clearly provides two alternate definitions for indecent language, either one of which could be the basis for a conviction.[32] The CAAF implicitly adopted, for future cases, the rationale in then-Judge Crawford's dissent in *Brinson*. "We adopt and will apply this plain language of the Manual prospectively to cases tried after the date of this decision."[33] Therefore, language is now indecent if it is *either* grossly offensive because of its tendency to incite lustful thought *or* it is grossly offensive to modesty, decency, or propriety, or shocks the moral sense, because of its vulgar, filthy, or disgusting nature.[34] The court pointed out that the element requiring the conduct to be prejudicial to good order and discipline or service discrediting will "filter[ ] out from punishment language that is colloquial vocabulary and may be routinely used by service members."[35]

There are two important lessons on instructions to glean from this case. First, it is occasionally possible that the standard instruction in the *Benchbook* may be inaccurate, and practitioners need to tailor instructions to correctly reflect the current law. Second, all practitioners should annotate, in paragraphs 3-89-1d and 3-94-1d of their copies of the *Benchbook*, that the CAAF adopted the disjunctive definition of "indecent language." Changes to those two paragraphs in the *Benchbook* are being staffed. In the meantime, practitioners with cases involving indecent language or obscene mail should read the *Negron* opinion and tailor the instructions accordingly.

Wrongful Use of a Controlled Substance

In *United States v. Hildenbrandt*,[36] a urinalysis case, the accused was convicted of wrongfully using cocaine.[37] On appeal, he contested the legal and factual sufficiency of the evidence, the constitutionality of the permissive inference of wrongful use, and the wording of the military judge's instruction on the permissive inference.[38] The Navy-Marine Corps Court of Criminal Appeals found no error and affirmed the conviction.[39] The case confirms the appropriateness of the standard *Benchbook* instruction on the permissive inference of wrongful use.

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[26] *See* MCM, *supra* note 11, pt. IV, ¶ 89c, analysis (2002).

[27] *Id.*

[28] 49 M.J. 360 (1998).

[29] *Id*. at 364.

[30] *Id*. at 368 (Crawford, J., dissenting).

[31] United States v. Negron, 60 M.J. 136, 141 (2004).

[32] *Id.* at 144.

[33] *Id*.

[34] *Id*.

[35] *Id*.

[36] 60 M.J. 642 (N-M. Ct. Crim. App. 2004).

[37] *Id*. at 643.

[38] *Id*. at 643-44.

[39] *Id*. at 644.

After finding the evidence legally and factually sufficient and finding the permissive inference constitutional under the Due Process Clause,[40] the court addressed the instruction. The appellant argued that the wording of the military judge's instruction could have resulted in the members applying less than a reasonable doubt standard.[41]

The military judge gave the standard definitions and other instructions in paragraph 3-37-2d of the *Benchbook*,[42] including the instruction concerning the permissive inferences. The military judge instructed the members as follows:

> Use of a controlled substance may be inferred to be wrongful in the absence of evidence to the contrary. However, the drawing of this inference is not required.
>
> Knowledge by the accused of the presence of the substance and the knowledge of its contraband nature may be inferred from the surrounding circumstances. You may infer from the presence of cocaine in the accused's urine that the accused knew he used cocaine. However, the drawing of this inference is not required.[43]

The military judge also gave the ignorance or mistake instruction for drug offenses found in paragraph 5-11-4 of the *Benchbook*, which only requires an honest mistake.[44] It also includes the reminder that the prosecution has the burden to establish the guilt of the accused, including the fact that he was not mistaken or ignorant, beyond a reasonable doubt.

During the trial, there was no objection to the instructions, so the accused forfeited any error, in the absence of plain error.[45] The court easily found that the military judge correctly instructed the members on the burden of proof and the permissive inferences, making it very clear that the members need not draw either inference. The court found no error, plain or otherwise.[46] This case reaffirms for trial practitioners that they are on firm ground when they follow the standard *Benchbook* instruction on permissive inferences in urinalysis cases.

Lesser Included Offenses and the Statute of Limitations

In *United States v. Thompson*,[47] the CAAF reversed the conviction because the instructions on the lesser-included offenses did not account for the statute of limitations. Sergeant First Class (SFC) Thompson was charged with raping his stepdaughter on divers occasions, on or between 1 September 1992 and 1 March 1996, at the three Army posts where SFC Thompson was assigned during that period.[48] The summary court-martial convening authority received the charge sheet on 3 January 2000.[49] The military judge instructed the members on the two lesser-included offenses of carnal knowledge in violation of Article 120 and indecent acts with a child in violation of Article 134.[50] The defense objected on the basis that it was not put on notice to defend against indecent acts with a child.[51]

After the members began deliberations, the government recognized a potential statute of limitations problem if the members found the accused guilty of a lesser-included offense.[52] During several RCM 802 conferences and Article 39(a)

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[40] *Id*. at 644-48.

[41] *Id*. at 648.

[42] BENCHBOOK, *supra* note 2, para. 3-37-2d (Drugs—Wrongful Use).

[43] *Hildebrandt*, 60 M.J. at 648.

[44] *Id. See* BENCHBOOK, *supra* note 2, para. 5-11-4 (Ignorance or Mistake—Drug Offenses).

[45] *Hildebrandt*, 60 M.J. at 648.

[46] *Id*. at 649.

[47] 59 M.J. 432 (2004).

[48] *Id.* at 434.

[49] *Id*. at 433.

[50] *Id.* at 434.

[51] *Id*.

[52] Article 43 bars prosecution for offenses committed more than five years before receipt of sworn charges by the summary court-martial convening authority, with a few exceptions including when the offense is punishable by death. UCMJ art. 43 (2002).

sessions, the military judge discussed solutions. The military judge determined that the proper solution was that, if the members found the accused guilty of a lesser-included offense that included a time period barred by the statute of limitations, the defense could move to exclude that portion of the finding.[53] The military judge indicated that he would grant the motion and order the specification to be amended.[54]

During deliberations, the court was opened three times, once for further instructions on the charged and lesser-included offenses and twice to rehear testimony of witnesses.[55] During deliberations, the military judge never inquired whether the accused wanted to waive the statute of limitations for the lesser-included offenses.[56] He also never took the opportunity to provide modified instructions and a modified findings worksheet to the members in order to amend the dates in the lesser-included offenses so they would be within the statute of limitations.[57]

The members found the accused guilty of indecent acts or liberties with a child on divers occasions on or between 1 September 1992 and 1 March 1996.[58] The defense moved for a finding of not guilty, because it was not possible to determine if the offenses occurred within the statute of limitations.[59] The military judge thought the evidence was clear that on at least one occasion there was an indecent touching within the statutory time period.[60] The defense disagreed.[61] The military judge denied the defense motion, announced he would amend the findings of the court, and stated that he would give the members an opportunity to evaluate the validity of the amendment to the verdict.[62]

After the members were informed of the amendment and given a chance to discuss among themselves whether the amendment did "violence to [their] verdict," the President of the panel informed the military judge that they were satisfied.[63] The defense proposed that the military judge ask the members whether knowing a more precise date of one of the incidents would affect their verdict now that the time period had been amended.[64] The military judge, however, denied their request.[65]

The CAAF reversed the conviction finding that the military judge's instructions were erroneous and the unambiguous findings could not be modified.[66] The court found a series of errors. First, the military judge erred by failing to conduct a statute of limitations waiver inquiry with the accused.[67] Second, while instructing on the lesser-included offenses, the military judge should have excluded any period outside the statute of limitations, unless the accused knowingly and voluntarily waived it.[68] Third, the military judge improperly modified unambiguous findings after they were announced.[69]

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[53] *Thompson*, 59 M.J. at 434.

[54] *Id.* at 435.

[55] *Id.* at 436.

[56] *See id.* at 439-40.

[57] *Id*. at 436. The military judge may have thought, because of the evidence, that the members would either find him guilty of rape or find him not guilty, and a finding of guilty to a lesser-included offense was unlikely.

[58] *Id.*

[59] *Id.* at 436-37.

[60] *Id.* at 437.

[61] *Id.*

[62] *Id*. at 436-37.

[63] *Id.* at 438.

[64] *Id.*

[65] *Id.*

[66] *Id*. at 440.

[67] *Id*. at 439. As the court points out, it is possible that the defense may have waived the statute of limitations for tactical reasons. *Id*. at 440. In that case, there would be no problem with the court's verdict.

[68] *Id*.

[69] *Id*.

All three points in the previous paragraph are good lessons for practitioners. This case, however, is most helpful in illustrating how to correct an error when it is recognized during a trial. The real error was that the instruction on the lesser-included offenses included a time period that was barred by the statute of limitations and not waived by the accused. The government raised the issue during deliberations, and all parties agreed that there was an error in the instructions. It is easy to be a Monday morning quarterback when not in the middle of a trial, especially a hotly contested case like this one, but a military judge facing this situation in the future can take two steps to correct the error so it will not materially prejudice the rights of the accused.

First, the military judge should draw the accused's attention to the fact that prosecution for part of the time period in the lesser-included offense is barred by the statute of limitations, and then the military judge should inquire into whether the accused is willing to waive that right. If the accused is willing to waive the statute of limitations, the military judge should conduct the statute of limitations waiver inquiry with the accused, using the standard advice in paragraph 2-7-12 of the *Benchbook*.[70] If the accused knowingly and voluntarily waives the protections under the statute of limitations, then the instructions would no longer be erroneous and the issue is resolved.

If the accused is not willing to waive his right to assert the bar against prosecution in the statute of limitations, however, the erroneous instructions should be corrected. The military judge should open the court, inform the members that there was an error in the instructions, and instruct the members correctly. The findings worksheet and written findings instructions, if provided to the members, should be retrieved from the President and replaced with corrected copies. Clear and accurate corrected instructions before the members conclude deliberations will ensure a fair trial and avoid the problems encountered in *Thompson*.

Defenses: Chapter 5, *Military Judges' Benchbook*

Self-Defense, Defense of Another, and Accident

In *United States v. Jenkins*,[71] the Army Court of Criminal Appeals (ACCA) reversed a conviction for aggravated assault. The Army court held that the military judge's failure to provide instructions on the defense of accident and the revival of the right to self-defense by withdrawal was prejudicial error.[72]

Specialist (SPC) Jenkins had a dispute with SPC Taite and he received three death threats that he believed came from SPC Taite and SPC Keys.[73] The accused and six friends, including Sergeant (SGT) Eldridge, went to SPC Taite's barracks to resolve the problem.[74] After a noisy confrontation, the staff duty noncommissioned officer ordered the accused and his friends to leave.[75] As they walked back to their parked cars, SPC Taite, SPC Keys, and thirteen others approached the accused's group and stopped them from leaving by surrounding their cars.[76] Specialist Keys began to fight with SGT Eldridge, and SPC Taite's group held the accused's group back from stopping the fight.[77] Specialist Keys sat on top of SGT Eldridge while he was unconscious and punched him in the face.[78] The accused fired his .45 caliber pistol into the air twice at a forty-five degree angle.[79] The accused said that, while lowering the pistol to put it away, the pistol discharged again.[80] The round hit the abdomen of a soldier standing fifteen feet away.[81] The accused claimed the he had fired the pistol into the

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[70] BENCHBOOK, *supra* note 2, para. 2-7-12 (Statute of Limitations).

[71] 59 M.J. 893 (Army Ct. Crim. App. 2004).

[72] *Id.* at 895.

[73] *Id.*

[74] *Id.*

[75] *Id.* at 896.

[76] *Id.*

[77] *Id.*

[78] *Id.*

[79] *Id.*

[80] *Id.*

[81] *Id.* at n.6.

air twice because he thought SPC Keys was going to kill SGT Eldridge and he wanted to disperse the crowd to help SGT Eldridge.[82]

The military judge provided the members with the "defense of another" instruction and the self-defense instruction.[83] As part of the self-defense instruction, the military judge told the members that, if they found beyond a reasonable doubt that SGT Eldridge voluntarily engaged in mutual fighting, then he gave up the right to self-defense.[84] The defense requested the instruction that states that withdrawal revives the right to self-defense because SGT Eldridge was unconscious and not fighting back.[85] The military judge denied the request for the instruction.[86] Also, the defense requested the accident instruction.[87] The defense asserted that the initial firing of the weapon was lawfully in defense of another and the accused acted with due care and without negligence.[88] The military judge denied the defense request for the instruction because he determined that the accused wantonly and recklessly, or at least negligently, fired his pistol in the air in a garrison environment.[89]

During closing argument, the defense counsel referred to the injury as an unintentional accident.[90] The trial counsel objected to the use of the term "accident" and the military judge instructed the members that he determined as a matter of law that the defense of accident does not apply under the facts of the case.[91] During rebuttal argument, the trial counsel stated that the defense wanted them to think that it was an accident, but the judge just told them that it was not an accident.[92] After the defense counsel objected, the military judge told the members, "I did not say that."[93] The trial counsel's argument emphasized that, if SGT Eldridge was a provocateur or mutual combatant, then the accused was not entitled to claim defense of another.[94] The members found the accused guilty of aggravated assault by the intentional infliction of grievous bodily harm.[95]

Instructions for affirmative defenses must be given when, for each element of the defense, there is "some evidence" to which the members may attach credit if they so desire.[96] The ACCA opinion referred to this standard as the "mirror image" of the standard that the military judge uses when considering a motion for a finding of not guilty under RCM 917(d).[97] Under RCM 917, the military judge does not evaluate credibility of witnesses and views the evidence in a light most favorable to the government.[98] The Army court stated that any doubt on the sufficiency of the evidence to provide a defense requested instruction should be resolved in favor of the accused.[99]

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[82] *Id*. at 896.

[83] *Id*. at 897.

[84] *Id*. This instruction comes from the standard instruction on provocateur and mutual combatant. BENCHBOOK, *supra* note 2, para. 5-2-6 n.5 (Other Instructions (Self-Defense)).

[85] BENCHBOOK, *supra* note 2, para. 5-2-6 n.7 (Other Instructions (Self-Defense)).

[86] *Jenkins*, 59 M.J. at 897.

[87] *Id.* at 896.

[88] *Id.*

[89] *Id*.

[90] *Id.*

[91] *Id*. at 896-97.

[92] *Id.* at 897.

[93] *Id*. at 897.

[94] *Id.*

[95] *Id*. at 895.

[96] *Id*. at 897.

[97] *Id*. at 898.

[98] MCM, *supra* note 11, R.C.M. 917(d).

[99] *Jenkins*, 59 M.J. at 898.

The three elements of the defense of accident are that the death, injury, or event was the (1) *unintentional and unexpected result* of doing a (2*) lawful act* in a (3) *lawful manner*.[100] The Army court found that there was some evidence that the accused fired his pistol to prevent further injury to SGT Eldridge, that he showed the care a reasonably prudent person would have shown under the circumstances, that failing to engage the safety before lowering the pistol was not so clearly negligent as to bar the instruction, and that the injury was unintended.[101] Because doubts should be resolved in favor of the accused, the court concluded that the military judge erred by not giving the defense requested accident instruction.[102]

The Army court recognized that persuasive testimony that the beating of SGT Eldridge had ended before the shots were fired might have influenced the military judge in deciding to not instruct on accident.[103] The court, however, reminded trial judges that they cannot invade the province of the fact finders by sifting the evidence and judging credibility.[104] Even the unsupported testimony of the accused, in the face of an overwhelming prosecution case, is sufficient evidence to require the instruction.[105]

When the accused invokes defense of another, he stands in the shoes of the party defended.[106] Therefore, the principles of self-defense apply to defense of another.[107] Thus, deadly force in defense of another is permitted, if the accused reasonably apprehended that death or grievous bodily harm was about to be inflicted wrongfully on the person defended, and the accused believed that the amount of force used was necessary to protect the person from death or grievous bodily harm.[108] If the person defended, however, was the aggressor or engaged in mutual combat, then that person has lost the right to self-defense.[109]

There is an exception, however, when the aggressor, mutual combatant, or provocateur withdraws in good faith before the alleged offense occurred.[110] If an accused withdraws in good faith and indicates a desire for peace by words or actions, and the adversary continues the fight, then the right to self-defense is revived.[111] The court found that SGT Eldridge effectively withdrew from the mutual affray when he became unconscious and ceased resistance.[112] Therefore, his right to self-defense was revived, and defense of another was available to the accused.[113] The military judge's refusal to instruct on "withdrawal as reviving the right to self-defense" was error.[114]

The Army court held that "the military judge's multiple instructional errors, compounded by trial counsel's argument, cumulatively resulted in prejudicial error," and it reversed the aggravated assault conviction.[115] This case is full of lessons on instructing on affirmative defenses. As long as there is some evidence of each element of a defense, the military judge must give the instruction. As with RCM 917 motions, the military judge should not evaluate the credibility of the evidence. Also, the Army held that an aggressor, provocateur, or mutual combatant regains that right to self-defense when he becomes

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[100] MCM, *supra* note 11, R.C.M. 916(f) (emphasis added).

[101] *Jenkins*, 59 M.J. at 899.

[102] *Id*. at 900.

[103] *Id*. at 898.

[104] *Id*.

[105] *See id.*

[106] MCM, *supra* note 11, R.C.M. 916(e)(5).

[107] *Id*.

[108] *Jenkins*, 59 M.J. at 900.

[109] *Id.*

[110] MCM, *supra* note 11, R.C.M. 916(e)(5).

[111] United States v. Lanier, 50 M.J. 772, 778 n.20 (Army Ct. Crim. App. 1999).

[112] *Jenkins*, 59 M.J. at 900.

[113] *Id.* An alternative legal concept under which SGT Eldridge may have been entitled to use force in self-defense, even if he was initially an aggressor or mutual combatant, is if the opposing party escalated the conflict to a level of deadly force. *See* United States v. Cardwell, 15 M.J. 124, 126 (C.M.A. 1983). Because there is no model instruction on this concept, a tailored instruction would be necessary.

[114] *Jenkins*, 59 M.J. at 900.

[115] *Id*. at 902.

unconscious, because that is effectively a withdrawal.[116] In its opinion, the court advised counsel and judges that all conflicts should be submitted to the members with instructions on all lesser-included offenses and affirmative defenses raised, so the accused will have his day in court and needless reversals will be avoided.[117]

Evidentiary Instructions: Chapter 7, Military Judges' Benchbook

Transcripts of Tape Recordings

In *United States v. Craig*,[118] the CAAF held that it is within the discretion of the trial judge to admit the transcript of a tape recording, subject to proper foundation and appropriate procedural safeguards. As will be discussed, the required safeguards include proper instructions to the members on how they may use the transcript.

Specialist Craig was convicted of conspiracy to possess and distribute marijuana.[119] He asked another Soldier, Private First Class (PFC) Pearsall, to go to El Paso, Texas, in order to pick up marijuana for him. Border patrol stopped PFC Pearsall at an immigration checkpoint on the way back to Fort Hood. Border patrol agents found fifty-one pounds of marijuana in two duffle bags.[120] Law enforcement agents recorded telephone conversations, which they had arranged between PFC Pearsall and the accused.[121] During the conversations, the accused made incriminating statements.[122]

During the trial, the law enforcement agent that recorded the conversations and PFC Pearsall testified about the method in which the conversations were recorded.[123] The military judge admitted the cassette tape.[124] While the trial counsel played the tape for the members, the military judge directed that the tape be stopped because he was having difficulty understanding the tape.[125] When asked if the members could understand the tape, the president said, "Only partially."[126]

After a recess, the trial counsel offered a transcript of the contents of the tape, but the military judge found that an adequate foundation had not been laid for the transcript.[127] The court reporter that prepared the transcript testified that she listened to the tape using headphones, which helped her understand the tape, and she testified that the transcript was a fair and accurate representation of the tape.[128] The military judge admitted the transcript, because he found that it was helpful to the members in understanding the tape.[129]

The military judge gave a limiting instruction to the members, telling them that the transcript was prepared to assist them, if at all, in understanding the tape.[130] He instructed them that the tape was the evidence and that the transcript was not a substitute for the tape.[131] Further, he instructed them that they should consider the clarity of the tape in determining what

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[116] *See id.* at 900.

[117] *Id*.

[118] 60 M.J. 156 (2004).

[119] *Id*. at 157.

[120] *Id.*

[121] *Id*. at 158.

[122] *Id*. at 157-58.

[123] *Id.* at 158.

[124] *Id*.

[125] *Id.*

[126] *Id*.

[127] *Id*.

[128] *Id.*

[129] *Id*. at 158-59.

[130] *Id.* at 159.

[131] *Id.*

weight to give it.[132] During the remainder of his testimony, PFC Pearsall testified that the tape was an accurate account of his conversations with the accused.[133] Also, a squad leader identified the voices of the accused and PFC Pearsall on the tape.[134] When the court closed for deliberations, the military judge provided the members with the tape and the transcript, along with a tape recorder on which to play the tape.[135]

It is clear that the CAAF looks favorably upon adequately authenticated transcripts of recorded conversations. The court has long believed that it would be irrational to exclude such a transcript, especially in the military setting where the exigencies of service require the use of recordings of interviews.[136] "We continue to believe that, subject to foundational requirements and appropriate procedural safeguards, a transcript of an audio recording may be used at courts-martial."[137] It is within the discretion of the trial judge to admit such transcripts as an aid in listening to tape recordings.[138]

Tape recordings of actual events, such as drug deals, are admissible despite problems with audibility because it directly portrays what happened.[139] If the recording, however, is substantially unintelligible, then it may render the entire recording untrustworthy.[140] In this case, the president stated that the members could understand it partially. Also, witnesses were able to identify voices on the tape.[141] The tape was properly admitted.[142] Because the tape was admitted, it was appropriate to provide the members with a "substantially accurate" transcript.[143]

The court provided a four-step process to guide military judges when ruling on the admissibility of transcripts of recordings.[144] First, the military judge should review the transcript for accuracy.[145] During this step, military judges should explicitly state what portions of the tape were audible and describe the results of the comparison of the audible portions of the tape with the transcript.[146] The transcript does not need to be perfectly verbatim, but it does need to be substantially accurate.[147]

Second, the defense counsel should be allowed to highlight any alleged inaccuracies and introduce alternative versions.[148] In this case, the defense counsel had repeated opportunities to challenge the transcript and did so at one point.[149]

The third step is a cautionary instruction on how the members can use the transcript.[150] The military judge should instruct the members that the tape recording is the evidence of the recorded conversations and the transcript is an

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[132] *Id*.

[133] *Id.*

[134] *Id*.

[135] *Id*.

[136] *Id*. at 160.

[137] *Id*.

[138] *Id*.

[139] *Id.*

[140] *Id*.

[141] *See id.* at 161.

[142] *Id*. at 160-61.

[143] *Id*. at 161.

[144] *Id*. (adopting the four procedural protections for use of transcripts of tape recordings from *United States v. Delgado*, 357 F.3d 1061, 1070 (9th Cir. 2004)).

[145] *Id.*

[146] *Id.*

[147] *Id.*

[148] *Id.*

[149] *Id*.

[150] *Id*.

interpretation of the tape.[151] The judge must instruct the members that they will disregard anything in the transcript that they do not hear themselves.[152] Also, the military judge should instruct the members to use the transcript only in conjunction with the recording.[153] The court stated that, although the instruction in this case did not include all of that guidance, it was sufficient without defense objection.[154]

The fourth step is that the military judge should give the members an opportunity to compare the tape and the transcript with the benefit of having heard the counsel's arguments on the meaning of the conversations.[155] In this case, the military judge accomplished this step by allowing the members to take the transcript with them during deliberations.[156] In line with the majority of federal courts of appeals, the CAAF held that the military judge has considerable discretion in determining whether to allow the members to consider the transcript during deliberation.[157]

Although the CAAF stated that this case is not a model for the four-step process, it held that the four procedural protections were sufficiently satisfied to allow the admission of the transcript.[158] In the future, trial practitioners will have the benefit of the *Craig* four-step process to guide them through this issue. The military judge has wide discretion in allowing the use of a substantially accurate transcript of recorded conversation, provided an adequate foundation has been laid and the requisite procedural safeguards are used.

Accomplice Testimony

In *United States v. Simpson*,[159] the Army court held that the military judge erred by not giving the requested accomplice testimony instruction.[160] The accused was charged with conspiracy to steal a laptop computer.[161] The co-conspirator made two statements to Criminal Investigation Division investigators.[162] In the first statement, the co-conspirator admitted to stealing the computer to get even with the owner, and he did not mention the accused.[163] In the second statement, the co-conspirator admitted stealing the computer with the accused, and he portrayed the accused as the one who instigated, planned, and persisted in the commission of the larceny.[164] The government offered the second statement into evidence, and the military judge admitted it as a statement against interest.[165] The co-conspirator did not testify. He expressed his intent to invoke his right against self-incrimination, and the government did not give him testimonial immunity.[166]

The defense requested the accomplice testimony instruction.[167] The military judge denied the request to give the instruction, based on the erroneous belief that the instruction only applies when the purported accomplice testifies as a

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[151] *Id.*

[152] *Id.* (quoting U.S. v. Holton, 116 F.3d 1536, 1543 (D.C. Cir. 1997)).

[153] *Id*. (quoting *Holton*, 116 F.3d at 1543).

[154] *Id.* at 162.

[155] *Id.* at 161.

[156] *Id.* at 162.

[157] *Id*.

[158] *Id*. at 161.

[159] 60 M.J. 674 (Army Ct. Crim. App. 2004).

[160] *Id*. at 680.

[161] *Id.* at 675.

[162] *See id.* at 675.

[163] *Id.*

[164] *Id*. at 675-76.

[165] *Id*. at 676. The Army court held that the admission of this statement violated the accused's right to confrontation under the sixth amendment. *Id*. at 678.

[166] The court found that the military judge erred by finding the co-conspirator unavailable, which was required for admissibility of the statement, because the government could have granted immunity and made the co-conspirator available. *Id*.

[167] *See* BENCHBOOK, *supra* note 2, para. 7-10 (Accomplice Testimony).

witness at trial.[168] The court held that, when either the in-court testimony or an out-of-court hearsay statement of an accomplice[169] is admitted, the military judge must give the members a properly tailored cautionary instruction regarding accomplice testimony.[170]

Although some of the language of the model *Benchbook* instruction specifically mentions the witness testifying in the case,[171] the purpose of the instruction applies as much or more to an out-of-court statement. The purpose is to instruct the members that they ought to receive the testimony of an accomplice, which incriminates an accused, with suspicion.[172] The members must receive it with more care and caution than the testimony of other witnesses.[173] The court stated, "In fact, the suspicious nature of the statement is heightened further where, as in this case, the declarant is not subject to cross-examination by the defense."[174]

Because of the *Confrontation Clause*,[175] especially after *Crawford v. Washington*,[176] this will not be a common issue. In this case, the Army court held that the admission of the statement violated the confrontation clause, under both the old *Ohio v. Roberts*[177] analysis and the current *Crawford v. Washington* analysis. For those rare cases in which an accomplice's out-of-court statement is admitted, however, the military judge must tailor the accomplice testimony instruction and instruct the members so they receive the evidence with the appropriate suspicion.

Accused's Failure to Testify

In *United States v. Forbes*,[178] the military judge instructed the members, over defense objection, to disregard the fact that the accused did not testify and to not draw any adverse inference from it. The Navy-Marine court held that the accused has a military due process right to elect, through his defense counsel, whether or not the members are given that instruction, except in the interest of justice in the most unusual cases.[179] Under the facts of this case, the court found that the military judge erroneously gave the instruction over defense objection and that the "great risk of prejudice" required reversal.[180]

Quartermaster First Class (E-6) Forbes was a married Navy recruiter.[181] Complaints about his relationships with four high school girls resulted in charges of rape, indecent assault, sodomy, adultery, violation of a lawful general regulation, obstruction of justice, and other offenses.[182] The prosecution presented the testimony of the four complainants and

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[168] *Simpson*, 60 M.J. at 679-80.

[169] A witness is an "accomplice" if he could be convicted of the same crime. *Id*. at 680.

[170] *Id*.

[171] *E.g.*, BENCHBOOK, *supra* note 2, para. 7-10 (Accomplice Testimony) ("Whether (state the name of the witness), who testified as a witness in this case, was an accomplice is a question for you to decide.").

[172] *See Simpson*, 60 M.J. at 680.

[173] *Id.*

[174] *Id*.

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

[176] 541 U.S. 36 (2004) (holding that, for testimonial evidence, the confrontation clause requires "unavailability and a prior opportunity for cross-examination").

[177] 448 U.S. 56 (1980) (holding that the confrontation clause does not require the exclusion of an unavailable witness's statement against a criminal defendant, if the statement bears adequate "indicia of reliability"), *overruled by* Crawford v. Washington, 541 U.S. 36 (2004).

[178] 59 M.J. 934 (N-M. Ct. Crim. App. 2004) (en banc), *review granted*, 2004 CAAF LEXIS 966 (Sept. 15, 2004).

[179] *Id*. at 941.

[180] *Id*. at 936.

[181] *Id.* at 935.

[182] *Id.*

substantial evidence that corroborated their testimony.[183] A "vigorous defense" was presented, but the accused did not testify.[184]

After the conclusion of presentation of evidence on the merits, the military judge discussed findings instructions with counsel during an Article 39(a) session.[185] The military judge stated that he intended to give the instruction on the accused's silence.[186] The defense stated that it did not want that instruction, and it objected to the instruction.[187] The military judge stated that he would consider the defense objection and that his intent was to protect the accused from any adverse feelings by the members.[188]

After a one-hour recess, the military judge stated that he felt it was necessary to give the instruction, unless the defense counsel had case law stating he should not give it.[189] After the defense said it did not have case law, the military judge said he thought it was important to tell the members to not ask themselves why the accused did not testify.[190] The defense counsel then requested that the instruction on the accused's silence not be the last instruction and the military judge said he would move it so that it would be before the instruction on findings by exceptions.[191] The military judge, however, apparently forgot to move it and he gave the instruction on the accused's silence last.[192]

After the findings were announced, the defense moved for a mistrial based, in part, on the instruction on the accused's silence, particularly the timing of the instruction.[193] The military judge stated that it was his error in giving the instruction

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[183] *Id.*

[184] *Id*.

[185] *Id.* at 936.

[186] *Id.*

[187] *Id.*

[188] *Id*. The following discussion took place between the military judge and the assistant defense counsel.

> MJ: . . . The instruction on the accused's silence.
>
> ADC: Sir, we would waive that reading, sir.
>
> MJ: You don't want to have that instruction?
>
> ADC: No, sir.
>
> MJ: Do you object to that instruction?
>
> ADC: Yes, sir, we do. I don't even—has that been even commented on, sir. Well, the fact that he didn't testify, we would rather not draw attention to that.
>
> MJ: It says, "The accused has an absolute right to remain silent. You are not to draw and inference adverse to the accused"—
>
> ADC: Yes, sir. We want to waive—object to that, sir.
>
> MJ: You object to it? Well, I will have to consider that. That is a standard instruction. Normally it is given and its intent—my intent is to protect the accused from any adverse feelings by the members. I know it calls attention to it, and that is probably your objection to it. I understand. Do you want to be heard further?
>
> ADC: No, sir.
>
> MJ: Let me think about that one.

Id.

[189] *Id*. at 937.

[190] *Id*.

[191] *Id*.

[192] *Id*.

[193] *Id*. at 937-38.

last, but he denied the motion for a mistrial.[194]

The Discussion to RCM 920(e) states that, in an appropriate case, an instruction to not draw any adverse inference from the accused's failure to testify may be included in the findings instructions.[195] It refers the reader to Military Rule of Evidence (MRE) 301(g), which provides the following.

> *Instructions*. When the accused does not testify at trial, defense counsel may request that the members of the court be instructed to disregard that fact and not to draw any adverse inference from it. Defense counsel may request that the members not be so instructed. Defense counsel's election shall be binding upon the military judge except that the military judge may give the instruction when the instruction is necessary in the interests of justice.[196]

The Analysis to MRE 301(g) reminds practitioners that the Supreme Court has stated that it is wise to not give the instruction over defense objection.[197] It also states that the Joint Service Committee's intent in drafting MRE 301(g) was "to leave the decision in the hands of the defense in all but the most unusual cases."[198]

This was not one of those most unusual cases. The only reason for the instruction that the military judge put on the record was his fear that the members would hold the silence of the accused against him.[199] Although a valid concern, it is a routine concern that usually exists in such cases. The President considered the standard fear that members might misuse the accused's silence, and the President decided to give the election to the defense team.[200]

The Navy-Marine court stated that it will give differing levels of deference to the trial judge, depending on how much of the analysis is articulated on the record. A judge that articulates the case-specific "interests of justice" and the balancing test on the record will be "accorded great deference under a standard of review of abuse of discretion."[201] A judge that articulates the "interests of justice" involved, but does not put the balancing analysis on the record will be accorded less deference.[202] If the judge does not even articulate the case-specific "interests of justice" involved, the court will use a *de novo* standard of review.[203]

In this case, after scrutinizing the record, the court could not find any mention by the military judge of an "interest of justice" beyond the routine concern that the members would hold the accused's silence against him.[204] There were no ambiguous comments during voir dire, questions by members, or comments during the trial concerning the accused's silence.[205] Using a *de novo* standard of review, the court found that there was no "interest of justice" beyond the standard fear that the members might hold the accused's silence against him.[206] The court held that the military judge erred by giving the instruction over defense objection.[207]

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[194] *Id*. at 938.

[195] MCM, *supra* note 11, R.C.M. 920(e) discussion.

[196] *Id.* MIL. R. EVID. 301(g).

[197] *Forbes*, 59 M.J. at 938 (quoting Lakeside v. Oregon, 435 U.S. 333, 340-41 (1978)..

[198] MCM, *supra* note 11, MIL. R. EVID. 301(g) analysis, at A22-7.

[199] *Forbes*, 59 M.J. at 939.

[200] *Id*. at 940.

[201] *Id*. at 939.

[202] *Id*.

[203] *Id*.

[204] *Id*.

[205] *Id*. at 940.

[206] *Id.*

[207] *Id*.

The issue of the proper test for material prejudice was an issue of first impression for the court.[208] After a lengthy discussion, it adopted a test that put the burden on the government, but the burden is not as high as the harmless error test for constitutional errors.

> [W]hen a military judge commits error by giving this instruction over defense objection in the absence of articulated case-specific interests of justice, a presumption of prejudice results. The government then bears the burden of showing by a preponderance of the evidence why the appellant was not prejudiced by the instruction.[209]

In this case, the court found that the presumption of prejudice had not been rebutted.[210] It held that the error deprived the accused of military due process and it set aside the findings and sentence.[211]

If military judges are considering giving the failure to testify instruction over defense objection, then they must do carefully. They should clearly develop the record with their reasoning, by articulating the case-specific "interests of justice" that support their decision and articulating the balancing of those interests against the election of the defense. A military judge should not give the instruction over defense objection, except in the most unusual case when *case-specific* reasons make it necessary in the interests of justice.

Variance

Within the last year, there were two CAAF opinions addressing variance. The court applied its holding in *United States v. Walters*, [212] which concerned an ambiguous verdict when the members enter a finding of guilty except the words "on divers occasions" without specifying which occasion, to *United States v. Seider*.[213] In *United States v. Lovett*,[214] the CAAF addressed solicitation—when the underlying offense in the findings differs from the underlying offense in the specification.

Airman First Class Seider was charged with wrongful use of cocaine on divers occasions and wrongful distribution of cocaine. [215] The government introduced evidence of two separate allegations of wrongful use of cocaine.[216] Three Airmen testified that, while playing cards and drinking at the accused's apartment, the accused provided cocaine and used some himself.[217] One of the three airmen also testified that, a month earlier while at the accused home watching football, the accused provided cocaine and used some himself.[218]

During instructions on findings, the military judge gave the members the following variance instruction concerning the specification alleging wrongful use of cocaine:

> As to Specification 1 of the Charge, if you have doubt the accused wrongfully used cocaine on divers occasions, but you are satisfied beyond a reasonable doubt that the accused wrongfully used cocaine once,

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[208] *Id*.

[209] *Id*. at 941.

[210] *Id*. at 942.

[211] *Id*.

[212] 58 M.J. 391 (2003).

[213] 60 M.J. 36 (2004).

[214] 59 M.J. 230 (2004).

[215] *Seider*, 60 M.J. at 36.

> The specification alleging wrongful use of cocaine stated, "In that Airman First Class Shane T. Seider, United States Air Force, 559th Flying Training Squadron, Randolph Air Force Base, Texas, did, at or near Universal City, Texas, on divers occasions between on or about 1 October 2000 and on or about 31 December 2000, wrongfully use cocaine." *Id.* at 37.

[216] *Id.*

[217] *Id.*

[218] *Id*.

you may still reach a finding of guilty; however, you must change the specification by exception, i.e., deleting the words "on divers occasions."[219]

The military judge did not instruct the members to specify a use and did not instruct them on how to make exceptions and substitutions on the findings worksheet.[220] The members found the accused guilty of the specification of wrongful distribution of cocaine and guilty of the specification of wrongful use of cocaine except the words "on divers occasions."[221] There were no substituted words or figures specifying which one of the two uses was proven beyond a reasonable doubt and no one requested or provided any clarification of the findings.[222]

The CAAF held that, because the ambiguous finding of guilty of wrongful use of cocaine did not disclose the conduct on which it was based, the Air Force Court of Criminal Appeals (AFCCA) could not conduct a factual sufficiency review of the conviction.[223] The Government argued that the AFCCA resolved any ambiguity by finding beyond a reasonable doubt that the accused used and distributed cocaine while playing cards with the three other Airmen, and that the AFCCA also found beyond a reasonable doubt that the members' verdict was based on that incident.[224] The CAAF, however, explained that, because of the fundamental principle that a court of criminal appeals cannot find as fact any allegation in a specification for which the fact-finder has found the accused not guilty, the AFCCA was prevented from even conducting a factual sufficiency review.[225] The CAAF reversed the decision of the AFCCA and set aside the finding of guilty of Specification 1 and the sentence.[226]

This case reiterates lessons from *Walters*. If a specification alleges "on divers occasions" and the evidence is such that the members might find the accused guilty beyond a reasonable doubt on one, but not more than one, occasion, the military judge should carefully tailor a variance instruction to advise the members how to specify the occasion by exceptions and substitutions.[227] Also, the findings worksheet should be tailored to assist the members in recording a verdict that is unambiguous.[228] In addition, when reviewing the findings worksheet to ensure it is in proper form before the findings are announced, if the worksheet shows a finding of guilty except the words "on divers occasions" without exceptions or substitutions specifying on which occasion the accused is found guilty, then the military judge should have the members clarify their findings. Fortunately for trial practitioners, when this situation arises in the future, there are now approved interim changes to the *Benchbook* that provide guidance and model instructions.[229] Because this situation is not uncommon,

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[219] *Id*.

[220] *Id.*

[221] *Id.*

[222] *Id*.

[223] *Id.* at 38.

[224] *Id.*

[225] *Id*.

[226] *Id*.

[227] *See id.* at 37-38.

[228] *See id.*

[229] On 16 September 2003, after the *Walters* opinion, the Army Trial Judiciary approved the following interim changes to the *Benchbook*:

> [Add the following to the end of the first NOTE in paragraph 2-5-16.]
> ***If the words "divers occasions" or another specified number of occasions have been excepted, IAW U.S. v. Walters, 58 M.J. 391 (2003), the MJ must ensure there remains no ambiguity in the findings. Normally, that is accomplished by the panel substituting (a) relevant date(s), or other facts. See paragraph 7-25 for a suggested instruction on clarifying an ambiguous verdict.***
>
> [Add the following new paragraph 7-25.]
>
> **7-25. DIVERS OR SPECIFIED OCCASIONS**
>
> **NOTE 1*: "Divers occasions." When a specification alleges that the offense occurred on "divers occasions," the court members should be instructed substantially as follows:***
>
> "Divers occasions" means two or more occasions.

trial practitioners must remain vigilant to detect potential *Walters* problems and to take the appropriate steps to avoid uncertainty in the verdict.

In *United States v. Lovett*, the accused was charged, *inter alia*, with raping his step-daughter and soliciting the murder of his wife.[230] The solicitation specification alleged that SSG Lovett solicited a man, LC, to murder his wife, TL, by telling him that he wanted his wife to disappear, providing him with a picture to identify his wife, and discussing how much it would cost to have him make his wife disappear.[231] LC testified that the accused told him that he wanted his wife to disappear, that the accused gave him a picture of his wife, and that he discussed how much this would cost.[232]

After all the evidence had been received, the government requested the military judge instruct the members on the lesser-included offense of soliciting a general disorder in violation of Article 134.[233] The defense objected to the instruction, but the military judge instructed the members on a lesser-included offense that the accused solicited LC to take some action to cause the accused's wife to disappear or to fail to appear in court.[234] After deliberations, the members excepted the word "murder" from the specification and found the accused guilty of soliciting LC "to cause [TL] to disappear or to wrongfully prevent her from appearing in a civil or criminal proceeding" by telling him that he wanted his wife to disappear, providing him a picture to identify his wife, and discussing how much it would cost to have him make his wife disappear.[235]

When the variance between pleadings and proof is material and prejudiced the accused, the variance is fatal.[236] A material variance can cause prejudice by putting the accused at risk of another prosecution, by misleading the accused to the extent that he is unable to adequately prepare for trial, or by changing the nature of the offense such that the accused is denied the opportunity to defend against the charge.[237]

On appeal, SSG Lovett argued that the variance prevented him from adequately preparing a defense.[238] Defending against a charge of soliciting murder is different from defending against a charge of soliciting a general disorder.[239] The CAAF agreed that the language in the charge did not put the accused on notice to defend against a lesser-included offense of

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NOTE 2: ***When a specification alleges that the offense occurred on "divers occasions" or on a specified number of occasions and the members return a verdict substituting "one" for "divers" or reducing the number of occasions, IAW U.S. v. Walters, 58 M.J. 391 (2003), the court members should be instructed as follows:***
Your verdict appears to be in the proper form, with the exception of (the) Specification(s) (_____) of (the) (Additional) Charge(s) (_____). Because you have substituted (one) (_____) for the language ("divers occasions,") ("__ occasions,"), your findings must clearly reflect the specific instance(s) of conduct upon which your findings are based. That may be reflected on the findings worksheet by filling in (a) relevant date(s), or other facts clearly indicating which conduct served as the basis for your findings. Two thirds of the members, that is ___ members, must agree on the specific instance(s) of conduct upon which your findings are based. If two-thirds or ___ members do not agree on (at least one) (a) (the) specific instance(s) of conduct, then your finding as to (the) Specification(s) (_____) of (the) (Additional) Charge(s) (_____) [and (the) Charge(s)] must be changed to a finding of "Not Guilty."

NOTE 3: ***The military judge should ordinarily provide a supplemental findings worksheet to assist the court members in identifying the date(s) or specific instance(s) of conduct upon which the finding of guilty is based. Counsel for both sides should be consulted before the supplemental findings worksheet is provided to the court members.***
NOTE 4: When the government has pled a course of conduct specification or specification alleging conduct on "divers occasions," the military judge should carefully consider the strength of the evidence adduced. If a variance instruction is warranted or findings by exceptions and substitutions are likely, careful tailoring of the original findings worksheet may obviate the necessity to give the instruction in NOTE 2 above.

[230] 59 M.J. 230, 232 (2004).

[231] *Id.*

[232] *Id.*

[233] *Id.*

[234] *Id*. at 232-33.

[235] *Id*. at 233.

[236] *Id*. at 235.

[237] *Id*. at 236.

[238] *Id.* At 235.

[239] *Id*.

soliciting a general disorder that was essentially obstruction of justice, and it held that the variance was fatal.[240] The CAAF set aside the solicitation conviction and the sentence.[241] When considering variance, trial practitioners should, as CAAF did in this case,[242] carefully analyze the explicit language in the specification and the impact it had on where the defense team channeled its efforts.

Sentencing Instructions: Chapter 2, *Military Judges' Benchbook*

Instructions on Wheeler *Factors*

In *United States v. Griggs*,[243] the AFCCA addressed the requirement of the military judge to instruct the members on extenuation and mitigation evidence. In *United States v. Wheeler*,[244] the COMA held that presentencing instructions must delineate the matters that the court-martial should consider in its deliberations.[245] Military appellate courts, however, have pointed out that military judges have considerable discretion and only need to tailor the sentencing instructions by selecting the general categories of mitigating and extenuating evidence.[246] The AFCCA followed this trend and reminded trial practitioners that the military judge does not need to list each and every piece of extenuation and mitigation evidence—providing general guidelines to the members is sufficient.[247]

Senior Airman Griggs pleaded guilty to using marijuana and pleaded not guilty the remaining offenses.[248] A panel of officer members convicted him of two specifications of using ecstasy and two specifications of distributing ecstasy.[249] The members adjudged a sentence of a bad-conduct discharge, confinement for 150 days, total forfeitures, and reduction to the grade of E-1.[250]

While discussing sentencing instructions at an Article 39(a) session, the defense counsel requested the military judge to highlight the following specific extenuation and mitigation evidence.

(1) the fact the appellant was 24 years old at the time of the offenses;
(2) the appellant's "personal background" and "family difficulties;"
(3) his status as a parent of a two-year-old son;
(4) his high school education;
(5) the length of time he had been "under charges;"
(6) his guilty plea;
(7) his efficient duty performance as reflected in his performance reports;
(8) his remorse;
(9) his participation in a substance abuse awareness seminar;
(10) his awards;
(11) his desire to remain in the service; and
(12) his desire to avoid a bad-conduct discharge.[251]

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[240] *Id*. at 236.

[241] *Id*. at 237.

[242] *Id*. at 236-37.

[243] 59 M.J. 712 (A.F. Ct. Crim. App. 2004).

[244] 38 C.M.R. 72 (C.M.A. 1967).

[245] *Id*. at 75.

[246] *See, e.g.*, United States v. Hopkins, 56 M.J. 393 (2002); United States v. Blough, 57 M.J. 528 (A.F. Ct. Crim. App. 2002).

[247] *Griggs*, 59 M.J. at 716-17.

[248] *Id.* at 713.

[249] *Id.*

[250] *Id.*

[251] *Id*. at 716.

The military judge declined to do so, but he advised the defense counsel that he was free to highlight the specific evidence during argument.[252] The military judge instructed the members as follows.

> In determining the sentence, you should consider all the facts and circumstances of the offenses of which the accused has been convicted, and all matters concerning the accused whether presented before or after findings. Thus, you should consider the accused's background, his character, his service record, all matters in extenuation and mitigation, and any other evidence he presented.[253]

The military judge also gave the standard instruction that guilty pleas are a matter in mitigation and the instruction that the members must give appropriate consideration to the unsworn statement.[254]

When asked by the military judge, the defense did not object to the instructions.[255] The AFCCA stated that the defense waived any error, unless it was plain error.[256] The court could have found no plain error and relied on that to affirm the sentence. The court, however, went further and held that, even if there was no waiver, the military judge did not err.[257] The military judge has considerable discretion in tailoring instructions.[258] In this case, the military judge sufficiently instructed the members on the general categories of extenuating and mitigating evidence.[259]

For trial practitioners, this case confirms that the military judge must instruct the members on the general categories of mitigating and extenuating evidence, but the military judge is not required to provide a detailed list of specific extenuation or mitigation evidence. At their discretion, however, military judges may decide to provide more detail, when instructing the members on the sentencing evidence they should consider during deliberations.[260]

Conclusion

This annual review of instructions illustrated that military trial practitioners must remain alert and pay attention to detail. The *Benchbook* is the primary resource when researching instructions in preparation for trial. The *Benchbook* should only be the first step, however, because it might not adequately reflect new case law or cover the law in a unique situation. Hopefully, this article assists military trial practitioners in understanding and staying current with developments in the area of instructions to court-martial members.

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[252] *Id*. at 716-17.

[253] *Id*. at 717.

[254] *Id*.

[255] *Id.*

[256] *Id*.

[257] *Id*.

[258] *Id*.

[259] *Id.*

[260] The *Benchbook* provides helpful guidance in this area. It contains a list of twenty-two possible types of extenuation and mitigation evidence and seven possible types of aggravation evidence. BENCHBOOK, *supra* note 2, para. 2-5-23 (Other Instruction); para. 2-6-11 (Other Instructions). The list goes into more detail than the law requires. If, however, military judges want to exercise their discretion to go into more detail, then this list is a good starting point for tailoring the instructions.