Counsel Should Provide More Fury, Less Nothing: 2004 Developments in Professional Responsibility

Major Jon S. Jackson
Professor, Criminal Law Department
The Judge Advocate General's School, U.S. Army
Charlottesville, Virginia

"To-morrow, and to-morrow, and to-morrow,
Creeps in this petty pace from day to day,
To the last syllable of recorded time;
And all our yesterdays have lighted fools
The way to dusty death. Out, out, brief candle!
Life's but a walking shadow; a poor player,
That struts and frets his hour upon the stage,
And then is heard no more: it is a tale
Told by an idiot, full of sound and fury,
Signifying nothing..."[1]

Introduction

Several years have passed since the *Military Justice Symposium* included an article that deals with the issues surrounding the ethics of lawyers. Last year, Major Robert Best's Sixth Amendment *Symposium* article covered most topics associated with attorney ethics.[2] This year, however, the Sixth Amendment article focused on the recent explosion of cases involving testimonial immunity within the context of *Crawford v. Washington*.[3] Therefore, this year sees the return of an article dealing with attorney ethics. This article will specifically address the ethical issues of ineffective assistance of counsel, confidentiality, and prosecutorial misconduct.

Ineffective Assistance of Counsel: What is the Correct Standard to Apply?

More than twenty years ago, the Supreme Court rendered its decision in *Strickland v. Washington*.[4] At that time, the Court announced that all future ineffective assistance of counsel claims must be analyzed using a two-prong test.[5] First, a convicted individual must show that his or her attorney's performance was so deficient that counsel did not meet the requirements of the Sixth Amendment.[6] Whether or not counsel was deficient is judged by using a reasonableness standard, looking at the facts and circumstances of the individual case.[7] Courts that review ineffective assistance claims must be highly deferential to the counsel's decisions and view the case without the benefit of hindsight.[8] The court must evaluate the counsel's performance and determine if the choices made were within the wide range of available, reasonable, and professional judgments at the time.[9] If the performance and choices were reasonable, then counsel's representation does not violate *Strickland*'s first prong, and the analysis ends.[10]

If the court determines that counsel's performance was unreasonable, it must then decide *Strickland's* second prong. *Strickland's* second prong requires a showing of actual prejudice.[11] Actual prejudice results when there is not a fair trial with

---

[1] WILLIAM SHAKESPEARE, MACBETH, *available at* http://www.allshakespeare.com/258 (last visited Jan. 26, 2005).

[2] *See* Major Robert Best, *2003 Developments in the Sixth Amendment: Black Cat on Strolls*, ARMY LAW., July 2004, at 55.

[3] 541 U.S. 36 (2004).

[4] 466 U.S. 668 (1984).

[5] *Id*. at 687.

[6] *Id*.

[7] *Id*. at 688.

[8] *Id*.

[9] *Id*.

[10] *Id*.

[11] *Id*. at 690.

a reliable verdict.[12] The burden is on the convicted individual to establish actual prejudice by showing there is a reasonable probability that, but for the attorney's acts or omissions, the result of the trial would have been different.[13]

The Supreme Court in *Strickland* also addressed the issue of when a court should presume that representation is ineffective without conducting an analysis in accordance with the two-prong *Strickland* test. The Court noted that presuming prejudice without analyzing the facts of the particular case should only be done when the "[p]rejudice in these circumstances is so likely that a case-by-case inquiry . . . is not worth the cost."[14] The Court declined to provide further significant guidance.

Is there a Presumption of Ineffectiveness When Counsel Concedes Guilt?

The Supreme Court recently decided a case based on the above question. In that case, *Florida v. Nixon*,[15] Mr. Joe Elton Nixon faced capital charges for kidnapping a woman from a shopping mall parking lot and murdering her.[16] Nixon met Ms. Jeanne Bickner on 12 August 1984, at a local mall parking lot in Tallahassee, Florida.[17] He asked for her assistance in starting his car.[18] Ms. Bickner agreed to assist him by giving him a ride in her vehicle.[19] He convinced her to drive to a remote location, attacked her, tied her to a tree with jumper cables, and robbed her.[20] After robbing her, he began to burn some of her belongings.[21] Ms. Bickner pled for her life and offered to give Nixon money if he spared her.[22] Because Mr. Nixon feared Ms. Bickner might identify him, he burned her alive while she was tied to the tree.[23] On August 13, 1984, a passerby found her badly burned corpse.[24]

Mr. Nixon was charged with capital murder after the State established he had committed the heinous crime.[25] The state's evidence was overwhelming against Nixon. The evidence included several confessions made by Mr. Nixon to friends and relatives.[26] There were also numerous items of physical evidence that linked him to the crime.[27]

An assistant public defender represented Mr. Nixon.[28] The public defender, after examining the evidence, concluded that Mr. Nixon's guilt was not "subject to any reasonable dispute."[29] He then attempted to negotiate a plea agreement with the state that would prevent Mr. Nixon from facing the death penalty.[30] No plea ensued as the state would not recommend a sentence other than death.[31]

---

[12] *Id*.

[13] *Id*.

[14] *Id*. at 692.

[15] 125 S. Ct. 551 (2004).

[16] *Id*. at 556.

[17] *Id*..

[18] *Id*.

[19] *Id*.

[20] *Id*.

[21] *Id*.

[22] *Id*.

[23] *Id*.

[24] *Id*. at 555.

[25] *Id*. at 556.

[26] *Id*.

[27] *Id*.

[28] *Id*.

[29] *Id*.

[30] *Id*. at 556-57.

[31] *Id*. at 557.

During the public defender's investigation, he uncovered powerful mitigation evidence, including evidence that Mr. Nixon had an incredibly terrible childhood.[32] Based on this information, the public defender decided the best strategy at trial was to concede guilt and focus on the sentencing phase.[33] The public defender believed that by conceding guilt he could maintain credibility for the sentencing phase and have the best chance to save Mr. Nixon's life.[34]

Mr. Nixon did not agree or disagree with this strategy.[35] On at least three occasions, the public defender discussed this strategy with Mr. Nixon and each time Mr. Nixon ignored the proposal.[36] The public defender, lacking any assistance or direction from Mr. Nixon in preparing the case, decided to concede guilt without Mr. Nixon's consent.[37] Mr. Nixon disrupted the trial during jury selection by pulling off his clothing and shouting at the judge and was consequently not in the courtroom during the remainder of the trial.[38]

During the merits' phase, the public defender conceded his client's guilt in his opening statement.[39] He stated, "In this case there won't be any question, none whatsoever, that my client, Joe Elton Nixon, caused Jeannie Bickner's death."[40] The defense counsel conducted very limited cross-examination of the State's witnesses, objected to several crime scene photos and objected to some of the proposed jury instructions.[41] He did not present any evidence during the defense case-in-chief.[42] Mr. Nixon was convicted of capital murder.[43]

During the sentencing phase, the public defender presented testimony from Mr. Nixon's friends and relatives.[44] These witnesses testified about Mr. Nixon's difficult childhood and recent erratic behavior.[45] The public defender then called a psychiatrist and a psychologist to address "Nixon's antisocial personality, his history of emotional instability and psychiatric care, his low IQ, and the possibility that at some point he possibly suffered brain damage."[46] The state relied mainly on the merits phase evidence during sentencing.[47] The state, however, introduced evidence, over the defense's objection, that Mr. Nixon removed the victim's undergarments "in order to terrorize her."[48] In his sentencing argument, the public defender highlighted the mitigating evidence and asked the jury to spare the respondent from the death penalty.[49] The jury deliberated for three hours and recommended a sentence of death.[50] The trial court followed the jury's recommendation and imposed the death penalty.[51]

The Florida Supreme Court held that the public defender was presumed ineffective when he conceded Mr. Nixon's guilt without the latter's express consent.[52] The Court relied upon *United States v. Cronic*[53] and presumed prejudice without conducting a *Strickland* analysis.[54]

---

[32] *Id*.

[33] *Id*.

[34] *Id*.

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] *Id.* at 558.

[42] *Id.*

[43] *Id*.

[44] *Id*.

[45] *Id*.

[46] *Id*.

[47] *Id*.

[48] *Id*.

[49] *Id*.

[50] *Id*.

[51] *Id*.

[52] *Id*. at 559. *See* Nixon v. Singletary, 758 So. 2d 618 (Fla. 2000).

The United States Supreme Court reversed and held that, while an attorney must consult with and obtain the client's consent regarding the exercise or waiver of basic trial rights, counsel is not obliged to obtain consent for "every tactical decision."[55] Although the decision whether to plead guilty is a basic trial right, the public defender's concession of his client's guilt was not the equivalent of a guilty plea because, the Court reasoned, Mr. Nixon retained all the rights of a defendant in a criminal trial.[56] Furthermore, the state retained the burden of proving the respondent's guilt beyond a reasonable doubt with admissible evidence.[57]

According to the Court, the public defender fulfilled his obligation to Mr. Nixon by explaining the proposed trial strategy to him on several occasions.[58] He was not additionally required to secure the client's express consent before proceeding.[59] Given Mr. Nixon's failure to assist his counsel, the public defender's decision to concede guilt and focus on punishment was reasonable based on the evidence available at the time.[60]

Finding that the concession of guilt by the public defender did not amount to a guilty plea, the Court held the Florida Supreme Court's use of the *Cronic* standard, which does not require a showing of prejudice, was incorrect.[61] According to the Court the proper standard for evaluating counsel's performance in this case was the *Strickland* standard.[62]

Practitioners in the military should note that the *Nixon* case was specifically decided in the context of a capital trial. The Court was quick to note that concession of guilt without a client's consent might be a much closer question in a "run-of-the-mine" case.[63] Rare is the case indeed that a defense counsel will face such an unresponsive client. Counsel should discuss this ethical issue with a supervisor (senior defense counsel or regional defense counsel) and determine the best course of action based on all available evidence. Regardless, the Supreme Court made it clear in *Nixon* that future ineffective assistance claims must be analyzed using the *Strickland* standard.

Article 32 Waiver Plus Tunnel Vision Equal Ineffective Assistance in *Garcia*

While the *Nixon* case deals with a defense counsel conceding guilt without a client's approval; *United States v. Garcia*,[64] addresses the issue of what a defense counsel must discuss with a client prior to the client conceding guilt. The appellant, Staff Sergeant Fernando Garcia, was charged with robbery, conspiracy, housebreaking, receiving stolen property, and other offenses.[65] The charges were based on a crime spree with several co-conspirators that included carjackings, armed robberies, and burglary.[66]

After being apprehended, the appellant hired a civilian defense counsel and a military counsel was detailed to represent him.[67] The civilian defense counsel advised the appellant that he should not accept any pretrial agreement that allowed for more than six years of confinement.[68] At the same time, the military defense counsel advised the appellant he could face

---

[53] 466 U.S. 648 (1984) (holding there could be some circumstances where an attorney's performance was so deficient that prejudice to the client could be presumed).

[54] *Nixon*, 125 S. Ct. at 560.

[55] *Id*. at 560 (quoting Taylor v. Illinois, 484 U.S. 400, 417-18 (1988)).

[56] *Id*. at 561.

[57] *Id*.

[58] *Id*.

[59] *Id*.

[60] *Id*.

[61] *Id*. at 562.

[62] *Id*.

[63] *Id*.

[64] 59 M.J. 447 (2004)

[65] *Id*. at 448.

[66] *Id*. at 449.

[67] *Id*.

[68] *Id*.

more than forty years of confinement if convicted on all charges.[69] The military defense counsel also informed the appellant that the government would likely agree to a pretrial agreement that would limit his confinement from twenty to twenty-five years.[70] The appellant chose to believe his civilian defense counsel and refused to enter into a plea agreement.[71]

Prior to trial, the appellant's civilian defense counsel unconditionally waived the Article 32, UCMJ, investigation without consulting the appellant.[72] Approximately three weeks before trial, the civilian defense counsel withdrew from the case.[73] During the government's case-in-chief, the military defense counsel informed the appellant that things were going terribly for the appellant.[74] Based on that discussion, the appellant disclosed his full involvement in the criminal conduct to his assigned military defense counsel.[75] The defense counsel suggested that the appellant confess his involvement to the members of the court during the defense case-in-chief.[76] The defense counsel did not discuss any other options with the appellant.[77] The options that were possible "include[ed] exploring the possibility of a plea agreement, changing his plea to guilty, having Garcia remain silent, or having Garcia confess and throw himself on the mercy of the court without changing his plea."[78] The appellant took the only advice given, took the stand, confessed, and threw himself on the mercy of the court.[79]

The appellant was found guilty of all charges. During the sentencing phase, the trial counsel requested a sentence that included a fine of $23,000 and confinement for eighty-six years.[80] The panel returned a sentence of one hundred twenty-five years confinement, a dishonorable discharge, total forfeiture of all pay and allowances, a fine of $60,000, and reduction to the pay grade of E-1.[81]

The Court of Appeals for the Armed Forces (CAAF) held that the appellant received ineffective assistance of counsel when his civilian defense counsel waived the Article 32 investigation without his consent and when his military defense counsel failed to advise him of the range of options available after the appellant revealed the full extent of his involvement.[82] The court agreed with the appellant that the right to an Article 32 investigation is a personal right, which in most cases, cannot be waived without an accused's informed consent.[83] The appellant suffered prejudice because if he had seen the strength of the government's case against him at the Article 32 hearing, he "might have sought a plea agreement" which would have limited his sentence.[84]

The CAAF could not find a reasonable explanation for the defense counsel's failure to explain the full range of options available to the appellant before deciding that the appellant should confess his guilt during their case-in-chief.[85] Further, the tack taken did not evidence any sound trial strategy.[86] During the appellant's direct, the defense counsel did not elicit any expressions of remorse or contrition.[87] Another example of the inexplicable was the defense's sentencing argument which included the following language: "Was he three-and-a-half-pounds of trigger pull away from [killing or injuring someone]?

---

[69] *Id*.

[70] *Id*. Based on a review of the record of the case the appellant faced a maximum of two hundred sixty years confinement. *Id*.

[71] *Id*. at 449-50.

[72] *Id*. at 449.

[73] *Id*. at 450.

[74] *Id*.

[75] *Id*.

[76] *Id*. at 452. *See also* U.S. DEP'T OF THE ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS R.1.4(b) (1 May 1992) [hereinafter AR 27-26]. "A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions about the representation." *Id*.

[77] *Id*.

[78] *Id*.

[79] *Id*.

[80] *Id*. at 448.

[81] *Id*.

[82] *Id*. at 452.

[83] *Id*. at 451.

[84] *Id*. *See* United States v. Grigoruk, 56 M.J. 304 (2002).

[85] *Garcia*, 59 M.J. at 452.

[86] *Id*.

[87] *Id*.

Yes."[88] The sentence, in the opinion of the court was strong evidence of the prejudicial impact of the defense counsel's lack of sound trial strategy; therefore, there was a reasonable probability of a different result at trial.[89]

The decision in *Garcia* serves as an important reminder for both civilian and military defense counsel in three key areas. First, the defense counsel must obtain a client's consent in writing or on the record for a waiver of the Article 32 hearing. Second, trial counsel must ensure it is the client that has waived the Article 32 hearing and not the attorney. Third, defense counsel must explain all options available to his client at each stage of the proceeding. From a practical standpoint, if, after discussing all available options, the client's decision is similar to the approach in *Garcia* it is best to memorialize that decision and all advice given in writing.

Concession and Credibility During Defense Sentencing Arguments

Many defense counsel struggle with the question of how to maintain credibility during sentencing after a client's conviction for serious crimes. Such was the question faced by the defense counsel in *United States v. Quick*.[90] The appellant, Private Spencer W. Quick, pled guilty to rape, wrongful appropriation, robbery, assault with intent to inflict grievous bodily harm, and kidnapping pursuant to a pretrial agreement.[91] In the quantum portion of the pretrial agreement, the convening authority agreed to suspend all confinement in excess of thirty years for a period of twelve months following the appellant's release from confinement.[92]

The guilty plea resulted from events occurring on June 2, 1999. After a night of drinking at an "adult establishment," the appellant hailed a cab driven by a young woman.[93] After an unsuccessful attempt to locate a friend, the appellant, while beginning to exit the cab, saw a rock on the floor.[94] He grabbed the driver by the neck, pulled her into the backseat, and struck her several times in the head with the rock.[95] The appellant then drove the cab to a rural area off-base where he raped the driver.[96] He drove the cab until it ran out of gas and then took one hundred and ten dollars that he found in the cab and abandoned the cab and victim.[97]

The defense counsel, in sentencing, argued that a dishonorable discharge was appropriate in the case.[98] Additionally, the defense counsel stated that confinement in excess of forty years would be excessive.[99] The military judge sentenced the appellant to a dishonorable discharge, sixty-five years confinement, and total forfeitures of all pay and allowances.[100] Pursuant to the pretrial agreement, the convening authority suspended all confinement in excess of thirty years for twelve months and approved the remainder of the sentence.[101]

On appeal, the appellant argued that his defense counsel rendered ineffective assistance of counsel when he conceded the appropriateness of the dishonorable discharge and confinement up to forty years.[102] The CAAF held that the appellant failed to show prejudice.[103] The CAAF noted that the lower court correctly concluded that the defense counsel improperly conceded the appropriateness of a dishonorable discharge when the record was silent on whether the appellant agreed to that

---

[88] *Id.*

[89] *Id*. at 453.

[90] 59 M.J. 383 (2004).

[91] *Id*.

[92] *Id*. at 384.

[93] *Id*.

[94] *Id*.

[95] *Id*.

[96] *Id*.

[97] *Id*.

[98] *Id*.

[99] *Id*. at 385.

[100] *Id*. No reduction was adjudged because the appellant was already in the grade of E-1.

[101] *Id*.

[102] *Id*.

[103] *Id*. at 387.

strategy.[104] The CAAF did not address the appropriateness of counsel's concession on the amount of confinement because the lower court did not.

The CAAF resolved this case solely using the prejudice prong of the *Strickland* test.[105] The CAAF held that the lower court used the wrong standard in assessing the prejudice prong of *Strickland* even though there was a concession of a punitive discharge without the appellant's agreement.[106] The lower court incorrectly applied a standard measuring whether the sentence adjudged was "reasonably likely" rather than whether there is a reasonably probability that, but for counsel's errors, there would have been a different result at trial.[107] Therefore, *Strickland* is the proper standard to test prejudice in a case where ineffective assistance of counsel is raised based on a defense counsel's concession of a punitive discharge.[108] Given the nature of the crimes at issue in this case, the CAAF held that there was no reasonable probability that the result would have been different.[109]

This case provides the basis for excellent practical advice for all three participants in a court-martial. Foremost, the defense counsel must ensure that their client agrees with the strategy of conceding a punitive discharge during the sentencing argument. Additionally, the trial counsel and military judge must listen to the defense sentencing argument carefully. When the trial counsel or military judge hears a defense concession of a punitive discharge, they have a duty to preserve the record and ensure that the accused agrees with the strategy on the record.

Cuts Like a Knife:[110] *Adams* and Ineffective Assistance in the Appellate Process

In *United States v. Adams*, the appellant, Specialist Brian Adams, retained a civilian counsel to represent him in the post-trial process.[111] The civilian counsel submitted Rule for Courts-Martial (RCM) 1105 matters claiming the military judge's ruling allowing the admission of the appellant's pretrial statement to law enforcement was in error.[112] Appellant's military defense counsel became aware that the appellant would be represented by a civilian defense counsel, but the civilian defense counsel never filed a notice of appearance with Army Court of Criminal Appeals.[113] After the first military appellate counsel left active duty, another military appellant counsel took over, but he did not make contact with the appellant or the civilian defense counsel.[114] A third military appellate counsel, Captain Carrier, then took over the case and made contact with the appellant.[115] During this initial conversation, the appellant did not mention that he was represented by a civilian defense counsel.[116] Captain Carrier submitted the case on its merits, which included a footnote asking the Army Court of Criminal Appeals to consider the issues raised in the RCM 1105 matters.[117] The Army Court of Criminal Appeals affirmed the trial court noting that the court considered the issues personally specified by the appellant.[118]

The military appellate counsel filed a petition for review with the CAAF.[119] After filing the petition, the military appellate counsel became aware of the civilian defense counsel's involvement with the case and that the civilian defense

---

[104] *Id*. at 386.

[105] *Id*.

[106] *Id*.

[107] *Id.* at 386-387.

[108] *Id.* at 387. *See* United States v. Pineda, 54 M.J. 298 (2001) (holding that concession of a punitive discharge without a client's consent equates to deficient performance).

[109] *Id*.

[110] BRYAN ADAMS, CUTS LIKE A KNIFE (A&M Records 1983). The author is not aware of any familial relationship between the artist, Bryan Adams, and the appellant, Brian Adams.

[111] 59 M.J. 367, 368 (2004). Specialist Brian P. Adams, convicted of rape and adultery, was sentenced at trial to a bad-conduct discharge, confinement for fourteen months, total forfeitures, and reduction to E-1. *Id*.

[112] *Id*. at 368.

[113] *Id*..

[114] *Id*. at 369.

[115] *Id*.

[116] *Id*.

[117] *Id*.

[118] *Id*.

[119] *Id*.

counsel's pleading had not been filed with Army Court of Criminal Appeals.[120] Thereafter, the military appellate counsel requested to withdraw the petition, which the CAAF granted.[121] The appellant then filed a motion for leave to file an out of time request for reconsideration with Army Court of Criminal Appeals.[122] The Army Court of Criminal Appeals denied the motion.[123]

The CAAF declined to decide if the following constituted deficient performance: the civilian defense counsel's failure to file a notice of appearance, the lack of communication among the various military appellate counsel, and the failure of the civilian defense counsel to file his brief with the Army Court of Criminal Appeals.[124] Instead, the CAAF assumed deficient performance and analyzed the case based on the prejudice prong of the *Strickland* test.[125]

The CAAF, finding no prejudice, noted the brief eventually attached to the paperwork, only addressed the admissibility of the appellant's pretrial statement.[126] The brief, the CAAF observed, did not add significantly to the matters fully litigated at trial.[127] Furthermore, there was no indication that the Army Court of Criminal Appeals failed to perform its duties to review the legal issue raised at trial.[128] Also, defense counsel represented the appellant before Army Court of Criminal Appeals at all times.[129] Foremost, the merits brief specifically directed Army Court of Criminal Appeals' attention to the appellant's post-trial matters.[130] Those matters were prepared by the civilian defense counsel and specifically challenged the voluntariness of the appellant's statements.[131] Even if the matters presented by the civilian defense counsel were before Army Court of Criminal Appeals, the CAAF declared its confidence that Army Court of Criminal Appeals would have reached the same result it reached earlier in affirming the case.[132]

What Can a Lawyer Disclose When His Client Is AWOL from Trial?

The appellant in *United States v. Marcum*[133] was charged with and found guilty of several offenses including forcible sodomy, indecent acts, and indecent assault.[134] After reaching findings, the court-martial recessed overnight.[135] At some time during the overnight recess the appellant went absent without leave.[136]

After several recesses and over defense objection, the sentencing proceedings began and ended without appellant being present.[137] The appellant's civilian defense counsel presented a twenty-page document as an unsworn statement that the appellant prepared prior to trial.[138] The unsworn statement was a typed document of notes prepared by the appellant for his civilian defense counsel.[139] The statement had six sections referencing each male airman with whom the appellant was

---

[120] *Id.* at 369-70.

[121] *Id*.

[122] *Id*. at 370.

[123] *Id*.

[124] *Id*. at 371. *See* AR 27-26, *supra* note 76, R. 1.4(a). "A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information." *Id.*

[125] *Id*.

[126] *Adams*, 59 M.J. at 372.

[127] *Id*.

[128] *Id*.

[129] *Id*.

[130] *Id*.

[131] *Id*.

[132] *Id.* at 373.

[133] 60 M.J. 198 (2004).

[134] *Id*. at 199.

[135] *Id.* at 208.

[136] *Id*.

[137] *Id*.

[138] *Id*.

[139] *Id*.

alleged to have had sexual contact.[140] The document contained "graphic descriptions of the charged and uncharged sexual contact between Appellant and each airman."[141]

The appellant argued on appeal that the document was covered by the attorney client privilege and should not have been released without the accused's consent.[142] The CAAF agreed with the appellant and held that the document was confidential, subject to the attorney-client privilege, and that the appellant did not waive his privilege.[143] The CAAF notes that although defense counsel may refer to evidence presented at trial during his sentencing argument, he may not offer an unsworn statement containing material subject to the attorney-client privilege without the client's waiver.[144] The CAAF goes on to say that although some of the appellant's trial testimony, during his direct examination, reflected what was in the statement, the tone and substance of the sentencing statement was more explicit.[145] Finally, the appellant did not waive his confidentiality through his trial testimony.[146]

Prosecutorial (Mis)Conduct?

The appellant in *United States v. Rodriguez*[147] pled guilty to conspiracy to commit larceny, making false official statements, wrongfully selling and disposing of military property, wrongful appropriation, and larceny.[148] During the sentencing argument, the trial counsel stated "[t]hese are not the actions of somebody who is trying to steal to give bread so his child doesn't starve, sir, some sort of a [L]atin movie here. These are actions of somebody who is showing that he is greedy."[149] The comment was referencing the appellant's "Mexican descent."[150] The defense counsel objected to the trial counsel's use of the term "steal" and on the ground that trial counsel was commenting on pretrial negotiations.[151] The defense counsel did not object to the reference to "[L]atin movie."[152] The Navy-Marine Court of Criminal Appeals (NMCCA) could discern no logical basis for the comment and found "the comment improper and erroneous."[153] The court also stated that the comment was merely a gratuitous reference to race, not an argument based on racial animus, nor likely to evoke racial animus.[154] Based on defense counsel's lack of an objection, the NMCCA tested the ethnic reference for plain error and found none.[155]

The CAAF based its decision on the specific facts of the case—the nature of the improper argument and that it occurred before a military judge alone during sentencing—and found no prejudice to a substantial right of the appellant.[156] While race *is* different, the CAAF declined appellant's invitation to adopt a *per se* prejudice rule for arguments involving unwarranted references to race.[157] Where there is no prejudice to an appellant, it's readily apparent that the CAAF will not forsake society's interests in timely and efficient administration of justice, the victim's interest in justice, and in the military context, the potential impact on national security.[158]

---

[140] *Id*.

[141] *Id*.

[142] *Id*. at 209. *See* AR 27-26, *supra* note 76, R. 1.6(a). "A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation." *Id.*

[143] *Id.* at 210.

[144] *Id*.

[145] *Id*

[146] *Id*.

[147] 60 M.J. 87 (2004).

[148] *Id*. at 87-88.

[149] *Id.* at 88.

[150] *Id*.

[151] *Id*.

[152] *Id*.

[153] *Id*.

[154] *Id*.

[155] *Id*.

[156] *Id*. at 90.

[157] *Id*. at 89-90.

[158] *See id.*

All counsel must scrupulously avoid unwarranted references to race or ethnicity. The CAAF is clear when it notes "[r]ace is different."[159] The result in future cases will be different if the circumstances surrounding the use of a racially unacceptable argument are changed. For example, the CAAF recognizes that in a case before members such comments are magnified regardless of motivation.[160]

Conclusion

The best way to learn is not by making mistakes, but from observing other people's mistakes. A sampling of last year's professional responsibility cases provides practitioners with examples of missteps, miscommunication, and mismanagement during and after the trial. Counsel and military judges would do well to read these cases and avoid the same ethical pitfalls.

[159] *Id*. at 90.

[160] *Id*.