Another Broken Record—The Year in Court-Martial Personnel, Voir Dire and Challenges, and Pleas and Pretrial Agreements

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Introduction

Baseball legend Yogi Berra once stated, "I always thought that record would stand until it was broken."[1] While Yogi's statement refers to a baseball statistic, his quote applies equally to trial attorneys and judges who believed that their "record" of trial would stand until it was later broken under appellate scrutiny. This article discusses recent developments in the areas of court-martial personnel, voir dire and challenges, and pleas and pre-trial agreements and focuses on issues involving potential "record-breaking" errors. This article discusses opinions from the Court of Appeals for the Armed Forces (CAAF) and the military's service courts and attempts to discern trends and practical implications for the field.[2] The CAAF's most important, and controversial, decision this term in the area of court-martial personnel set limitations on a military judge's ability to consider collateral matters in crafting a sentence.[3] In the area of voir dire and challenges, the CAAF issued a groundbreaking decision that the mandate placed on military judges to liberally grant challenges for cause applies only to defense challenges.[4] Likewise, the President, by Executive Order, drastically changed the voir dire landscape by amending Rule for Courts-Martial (RCM) 912(f)(4), the "But For Rule," to "preclude further consideration of the challenge of [an] excused member upon later review" if that member is peremptorily excused by either party.[5] In the pleas and pre-trial agreements arena, the appellate courts, as in years past, continue to reverse findings, sentences, or both because the record of trial lacks a sufficient factual predicate outlining the accused's criminal misconduct.[6]

Court-Martial Personnel

Referral Issues

Two referral issues arose this year that warrant discussion. First, the Navy-Marine Court of Criminal Appeals (NMCCA) explored the power of all convening authorities to refer a case[7] and, second, the Army Court of Criminal Appeals (ACCA) clarified the indicia needed to establish an acting commander or successor commander's personal selection of court-martial members.[8]

In *Jones*, after allegations of an improper relationship with a midshipman at the U.S. Naval Academy, the accused was reassigned to Quantico, Virginia.[9] The Quantico General Court Martial Convening Authority (GCMCA) referred to a special-court-martial the following specifications against the accused: fraternization, assault, drunk and disorderly, and

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[1] Yogi Berra, Yogi Berra Quotes: "Yogi-isms," http://www.umpirebob.com/DATA/yogiisms.htm (last visited Apr. 26, 2006).

[2] *See* Major Deidra J. Fleming, *Out, Damned Error Out, I Say! The Year in Court-Martial Personnel, Voir Dire and Challenges, and Pleas and Pretrial Agreements*, ARMY LAW., May 2005, at 1; *see also* Lieutenant Colonel Patricia A. Ham, *Crossing the I's and Dotting the T's: The Year in Court-Martial Personnel, Voir Dire and Challenges, and Pleas and Pretrial Agreements*, ARMY LAW., July 2004, at 10; Major Bradley J. Huestis, *You Say You Want a Revolution: New Developments in Pretrial Procedures,* ARMY LAW., Apr./May 2003, at 17 [hereinafter Huestis, *Revolution*]; Major Bradley J. Huestis, *New Developments in Pretrial Procedures: Evolution or Revolution?*, ARMY LAW., Apr. 2002, at 20 [hereinafter Huestis, *Evolution*].

[3] United States v. McNutt, 62 M.J. 16 (2005).

[4] United States v. James, 61 M.J. 132 (2005).

[5] *See* Exec. Order No. 13,387, 70 Fed. Reg. 60697 (Oct. 18, 2005); MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 912(f)(4) (2005) [hereinafter MCM].

[6] *See* United States v. Gilchrist, 61 M.J. 785 (Army Ct. Crim. App. 2005); United States v. Harding, 61 M.J. 526 (Army Ct. Crim. App. 2005); United States v. Jackson, 61 M.J. 731 (N-M. Ct. Crim. App. 2005); United States v. Littleton, 60 M.J. 753 (Army Ct. Crim. App. 2004); United States v. Sierra, 62 M.J. 539 (Army Ct. Crim. App. 2005).

[7] United States v. Jones, 60 M.J. 917 (N-M. Ct. Crim. App. 2005).

[8] *Gilchrist*, 61 M.J. at 785.

[9] *Jones*, 60 M.J. at 917.

indecent language.[10] At trial, the military judge dismissed the fraternization specification for failure to state an offense. The record of trial failed to reflect the status of the additional offenses, but the parties' subsequent actions on the case support the inference that, at some point, all specifications were dismissed without prejudice.[11]

After the government's dismissal of the additional offenses, a routine change of command occurred at Quantico. Thereafter, the Naval Academy Staff Judge Advocate, on behalf of the Naval Academy Superintendent (Commander), requested the new Quantico GCMCA to refer charges anew based on additional misconduct.[12] After further investigation, the new Quantico GCMCA did not re-refer any charges but stated that he would make the accused available if the Naval Academy GCMCA desired to refer charges.[13] The Naval Academy GCMCA then referred charges, including those specifications previously referred and those specifications involving the alleged additional misconduct. The military judge dismissed all the charges without prejudice on grounds of an improper referral.[14] The military judge found the referral improper for the following two reasons: (1) a disagreement existed between the two convening authorities as to an appropriate disposition that required resolution by the first common superior to both authorities and (2) the second referral was more onerous and RCM 604(b)[15] required the government to include on the record the reasons for the original withdrawal of charges and subsequent re-referral.[16]

The NMCCA scrutinized both reasons and, regarding the first issue, stated that "a command other than the one to which the accused is attached may refer charges against the accused to a court-martial."[17] The Discussion to RCM 601(b), which outlines the ability of a GCMCA to refer charges, states that:

> [t]he convening authority may be of any command, including a command different from that of the accused, but as a practical matter the accused must be subject to the orders of the convening authority or otherwise under the convening authority's control to assure the appearance of the accused at trial. The convening authority's power over the accused may be based upon agreements between the commanders concerned.[18]

The NMCCA held that the military judge incorrectly found a disagreement between the two convening authorities.[19] The Quantico GCMCA simply made the accused available to the Naval Academy GCMCA for referral of charges as provided for in the Discussion to RCM 601(b).[20] The convening authorities, however, did not disagree over who would refer the case, so it was unnecessary to raise the issue to the first common superior to both commands.[21] Further, the military judge erred in finding the re-referral more onerous and requiring an explanation by the government under RCM 604(b).[22] The court recognized that more serious offenses were referred than originally referred, but the test under RCM 604(b) is whether those more onerous specifications were "re-referred."[23] The court stated "[b]ecause [those more onerous] charges were never

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[10] *Id.* at 918.

[11] *Id.*

[12] *Id.* This alleged additional misconduct included forcible sodomy and indecent assault. *Id.*

[13] *Id.*

[14] *Id.* at 918-19. The government filed an appeal under RCM 908. *Id.*

[15] MCM, *supra* note 5, R.C.M. 604(b). The Discussion to RCM 604(b) states "the reasons for the withdrawal and later referral should be included in the record of the later court-martial, if the later referral is more onerous to the accused." *Id.* R.C.M. discussion.

[16] *Jones*, 60 M.J. at 919.

[17] *Id.*

[18] *See* MCM, *supra* note 5, R.C.M. 601(b) discussion.

[19] *Jones*, 60 M.J. at 919.

[20] *Id.* at 920.

[21] *Id.*; *see* United States v. Blaylock, 15 M.J. 190, 193-94 (C.M.A. 1983) (holding that a GCMCA frustrated in gaining referral control over an accused may elevate the case to the common superior of both GCMCAs).

[22] *Jones*, 60 M.J. at 921.

[23] *Id.*

referred to trial by the original convening authority, the Superintendent of the Naval Academy was free to refer them to court-martial without explanation" under RCM 604(b).[24]

In today's "purple"[25] environment, *Jones* emphasizes to practitioners that any convening authority may, under RCM 601(b), refer a case against any Soldier, Airman, Marine or Sailor under their command. If the servicemember is not under the convening authority's command, he may still refer charges if the accused's GCMCA agrees. Only if a disagreement exists between the accused's GCMCA and a GCMCA desiring to refer charges against a servicemember not under his command does the need arise to elevate the case to the next common superior in the chain of command. While the NMCCA affirmed *Jones*, the case also reminds practitioners to document any actions taken in a case, including the withdrawal of specifications, to clarify any factual situations for the appellate court.

The second referral issue this year involves the indicia needed to establish an acting or successor commander's personal selection of court-martial members. This issue arises when an acting or successor commander uses another GCMCA's court-martial convening order (CMCO) to refer a case. An acting or new convening authority must personally select the members listed in the CMCO[26] Until recently, ACCA opinions differed on the indicia necessary to establish an acting or successor commander's personal adoption of members from another GCMCA's CMCO.[27] One ACCA panel, in an unpublished decision, "decline[d] to adopt a presumption that a referral order by a convening authority also supports the conclusion that that convening authority personally selected or adopted the members."[28] The ACCA, in a published opinion, clarified its position this term, holding that no requirement exists for a convening authority or an acting convening authority during referral to expressly adopt a CMCO selected by another GCMCA.[29]

In *United States v. Gilchrist*, the Acting Commander, Colonel (COL) Wallace B. Hobson, Jr., referred the accused's case to CMCO Number 3, whose members were originally selected by Major General (MG) Green.[30] At court-martial, the government notified the defense that MG Green selected the members for CMCO Number 3, the military judge twice clarified that COL Hobson was the Acting Commander, and the defense did not challenge COL Hobson's personal selection of the members.[31] On appeal, appellate defense counsel asserted, for the first time, that the record of trial lacked evidence that COL Hobson personally selected the members in CMCO Number 3 as required by Article 25, UCMJ.[32] The ACCA, affirming, held that "[a]bsent evidence to the contrary, adoption can be presumed from the convening authority's action in sending the charges to a court-martial whose members were selected by a predecessor in command" without the necessity of further documentation.[33]

For Army practitioners, *Gilchrist* clears the muddy waters as to an acting commander's or successor commander's need to document his personal selection of members when using a previously selected CMCO. The mere act of referral, absent evidence to the contrary, establishes the commander's personal selection of members, as required by Article 25, UCMJ.

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[24] *Id.*

[25] Purple refers to a joint operational environment that includes servicemembers and units from all of the United States' armed forces.

[26] *See* UCMJ art. 25 (d)(2) (2005); *see also* United States v. Ryan, 5 M.J. 97, 100 (C.M.A. 1978) (holding a "convening authority's power to appoint a court-martial is one accompanying the position of command and may not be delegated").

[27] *See* United States v. Starks, No. 20020224 (Army Ct. Crim. App. Mar. 10, 2004) (unpublished) (holding that "while there is no explicit statement of adoption of the selection of court members by the successor-in-command, we are not aware of any authority that so requires"). Contrary ACCA opinions, which are no longer available on the ACCA website, required a predecessor in command to expressly adopt the panel members selected by a previous commander. *See* United States v. Jost, No. 20030975 (Army Ct. Crim. App. Mar. 29, 2005) (unpublished); United States v. Meredith, Jr., No. 20021184 (Army Ct. Crim. App. Jan. 27, 2005) (unpublished) (on file with the author). These rulings appear overruled by the *Gilchrist* decision *See infra* note 29.

[28] *Jost*, No. 20030975, at 5. The court stated "[b]y the simple expedient of attaching and correctly referencing a predecessor's recommended CMCO in the referral documents, [staff judge advocates] can ensure that the codal responsibilities of the convening authority are clearly met." *Id.*

[29] United States v. Gilchrist, 61 M.J. 785 (Army Ct. Crim. App. 2005).

[30] *Id.* at 787.

[31] *Id.* at 787-88.

[32] *Id.* at 787.

[33] *Id.* at 788 (citing United States v. Brewick, 47 M.J. 730 (N-M. Ct. Crim. App. 1997)).

Article 25, UCMJ, requires that any "request for membership of the court-martial to include enlisted persons [to] be in writing and signed by the accused or [to] be made orally on the record" by the accused.[34] Similarly, Article 16, UCMJ, requires the accused to state orally on the record or in writing his desire for his case to be tried by military judge alone.[35] Last year, the service courts issued several opinions dealing with the accused's failure to comply with Articles 25 and 16, UCMJ;[36] this past term, the CAAF dealt with the same issue.[37]

In *Alexander*, the military judge advised the accused of his forum selection rights, which the accused, through counsel, requested to defer.[38] During a later proceeding, the military judge stated that he was told an enlisted panel would hear the case; defense did not object to the military judge's statement.[39] An enlisted panel was sworn and the parties conducted voir dire and issued challenges; however, the accused never stated in writing or on the record his request for enlisted members.[40] The CAAF, affirming, stated that the accused's failure to make a personal election of forum on the record was a procedural, as opposed to jurisdictional, error.[41] The court stated "[the] right being addressed and protected in Article 25 is the right of an accused servicemember to select the forum by which he or she will be tried. The underlying right is one of forum selection, not the ministerial nature of its recording."[42] The issue then turns on whether the accused's substantial rights were materially prejudiced by the administrative error.[43] The court held if the record reflects, by a totality of the circumstances, that the accused personally elected members, then no material prejudice occurs to the accused's substantial rights.[44] The CAAF, reviewing the totality of the circumstances in *Alexander*, found that the record established the accused's personal selection of trial by panel members and concluded that the accused did not suffer material prejudice.[45]

As discussed last year:

> The obvious fix to a forum selection problem is to ensure the accused submits a personally signed written request to the court or advises the military judge on the record of his election choice [and] [e]ven if this

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[34] UCMJ art. 25(c)(1) (2005); *see* MCM, *supra* note 5, R.C.M. 903(b)(1).

[35] UCMJ art. 16.

[36] *See* Fleming, *supra* note 2, at 5-7; *see also* United States v. Andreozzi, 60 M.J. 727 (Army Ct. Crim. App. 2004) (holding that under the totality of the circumstances the accused personally directed the election of an enlisted panel); United States v. Goodwin, 60 M.J. 849 (N-M. Ct. Crim. App. 2005) (determining that the military judge's failure to advise the accused of his forum rights materially prejudiced the accused's right to forum selection and warranted reversal); United States v. Follord, No. 20020350 (Army Ct. Crim. App. Feb 15, 2005) (unpublished) (finding that numerous errors in apprising the accused of his rights to a five member officer panel did not comply with Article 16, UCMJ).

[37] United States v. Alexander, 61 M.J. 266 (2005).

[38] *Id.* at 267.

[39] *Id*. at 267-68. The military judge stated: "On Monday, I intend to impanel – I believe I was told – an enlisted panel in this case, and we're going to go forward with trial." *Id.*

[40] *Id.* at 268.

[41] *Id.* at 269-70 (citing United States v. Morgan, 57 M.J. 119 (2002); United States v. Townes, 52 M.J. 275 (2000); United States v. Turner, 47 M.J. 348 (1997); United States v. Mayfield, 45 M.J. 176 (1996)).

[42] *Id*. at 270.

[43] *Id.*

[44] *Id.*

[45] *Id.* The court identified the following factors as relevant:

> The military judge presented Appellant with his options. Appellant acknowledged his options and deferred election. The military judge subsequently stated on the record that an election had been made for a panel including members, without comment or correction by counsel or Appellant. Appellant proceeded through voir dire and trial with a panel of one-third enlisted members, without objection. Indeed, Appellant did not raise the question of selection and prejudice either in his submissions under R.C.M. 1105 or before the court below.

Id.

process is skipped at court-martial, the military judge could convene a post-trial Article 39, UCMJ session to clarify any omission.[46]

By taking notes at every court-martial session and recording whether the accused has made a personal election of forum orally on the record or in writing, government counsel and military judges could more easily track and resolve any potential error. Even if the parties fail to correct the mistake at trial, the CAAF, based on *Alexander*, seems likely to affirm the case if the accused was properly advised of his forum election rights by the military judge and the accused and his counsel failed to object to the actual forum selection on the record at court-martial.

"Bridging the Gap"[47]

During the 2005 term of court, the CAAF explored a military judge's ability to consider collateral matters in deciding an appropriate sentence for an accused.[48] In *McNutt*, the military judge revealed during the "Bridging the Gap" session that he structured the accused's sentence to take into account good time credit.[49] The military judge said he sentenced the accused to seventy days confinement, thinking under the good time credit policy that the accused would receive ten days good credit towards his sentence, so the actual amount of confinement would equal sixty days.[50] In post-trial clemency matters and on appeal, defense argued that the military judge improperly considered the Army's "good time" credit policy when it was neither judicially noticed nor admitted into evidence.[51] The government argued under RCM 1008, dealing with sentence impeachment, that: "[a] sentence which is proper on its face may be impeached only when extraneous prejudicial information was improperly brought to the attention of a member, outside influence was improperly brought to bear upon any member, or unlawful command influence was brought to bear upon any member."[52]

The ACCA then focused on whether the information was (1) extraneous, and (2) if extraneous, whether it was improperly brought before the military judge.[53] The court held the evidence was extraneous—"[the] regulation was not mentioned at trial, admitted into evidence, or judicially noticed . . . [a]s such, the information relied upon by the military judge was clearly 'extraneous.'"[54] This extraneous information, however, was not improperly before the military judge, as it was "within the general and common knowledge a military judge brings to deliberations;" and, as such, ACCA found no basis for impeaching the accused's sentence.[55]

The CAAF, reversing the ACCA decision, held that the military judge improperly considered the collateral administrative effect of "good time" credit.[56] The CAAF reasoned that "sentence determinations should be based on the facts before the military judge and not on the possibility that [the accused] may serve less time than he was sentenced to based on the Army's policy."[57] A military judge must sentence the accused based on the particular facts of the case as presented at court-martial.[58] "'Good time' credited is awarded as a consequence of the convicted servicemember's future behavior—

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[46] Fleming, *supra* note 2, at 6; *see also* United States v. Mayfield, 45 M.J. 176, 177-78 (1996) (holding that a post-trial advisement of the accused's forum rights by the military judge is authorized).

[47] "Bridging the Gap" refers to a discussion about the case between the military judge, the trial counsel, and the defense counsel after the court-martial's adjournment.

[48] United States v. McNutt, 62 M.J. 16 (2004).

[49] *Id.* at 18.

[50] *Id.* At that time of the accused's court-martial, the Army's policy was "to credit service members with 5 days per month of 'good time' on sentences of 12 months or less." *Id.*; *see* U.S. DEP'T OF ARMY, REG. 633-30, APPREHENSIONS AND CONFINEMENT: MILITARY SENTENCES TO CONFINEMENT para. 10a (28 Feb. 1989).

[51] *McNutt*, 62 M.J. at 18.

[52] MCM, *supra* note 5, R.C.M. 1008.

[53] United States v. McNutt, 59 M.J. 629 (Army Ct. Crim. App. 2003).

[54] *Id.* at 632.

[55] *Id.*

[56] *McNutt*, 62 M.J. at 20.

[57] *Id.*

[58] *Id.*

behavior that may or may not take place."[59] The CAAF, like ACCA, reminded military judges not to reveal their deliberative thought process stating "the core of the deliberative process remains privileged, and military judges should refrain from disclosing information during 'Bridging the Gap' sessions concerning their deliberations, impressions, emotional feelings, or the mental processes used to resolve an issue before them."[60]

McNutt clearly limits a military judge's ability to consider "good time" credit as a factor in crafting an accused's sentence. *McNutt*, however, leaves unanswered, what, if any, other collateral matters a military judge may consider. Conservative practitioners will likely shy away from considering any collateral matters in deference to the CAAF's "general preference for prohibiting consideration of collateral consequences."[61] Less conservative practitioners may note that the CAAF recognized that "military judges and members should not generally consider collateral consequences in assessing a sentence, this [however] is not a 'bright-line rule.'"[62] Perhaps more importantly, *McNutt* reminds all military trial judges to limit "Bridging the Gap" sessions to a critique of counsel's conduct and to curtail any discussion as to the considerations behind a particular sentence.

Voir Dire and Challenges

Overview

A panel member should not serve where "the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality"[63] is questioned. Voir dire is the process used to obtain information regarding a member's impartiality so counsel may intelligently exercise a causal or peremptory challenge.[64] After voir dire of the members, both sides are entitled to unlimited challenges for cause and one peremptory challenge.[65] Until this term,[66] the appellate courts mandated military judges to liberally grant challenges for cause for both sides because of the parties' limited ability to use peremptory challenges.[67]

Rule for Courts-Martial 912(f)(1)(N) allows for a challenge for cause on the following two grounds: (1) actual bias and (2) implied bias.[68] "The test for actual bias is whether any bias is such that it will not yield to the evidence presented and the judge's instructions."[69] Actual bias is determined by the military judge's subjective review of the member's credibility. The CAAF gives "the military judge great deference when deciding whether actual bias exists because it is a question of fact, and the judge has observed the demeanor of the challenged member."[70] Implied bias, however, is an objective standard "viewed through the eyes of the public, focusing on the appearance of fairness."[71] While a military judge's ruling on actual bias is reviewed for an abuse of discretion, "[b]y contrast, issues of implied bias are reviewed under a standard less deferential than abuse of discretion but more deferential than *de novo*."[72]

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[59] *Id.* The CAAF also dismissed the argument that MRE 606(b), which establishes guidelines and protections for sentence impeachment inquiries, applies to military judges, especially when the military judge voluntarily reveals his deliberations. *Id.*; *see* MCM, *supra* note 5, M.R.E. 606(b).

[60] *Id*. at 20.

[61] *Id*. at 19.

[62] *Id.*

[63] MCM, *supra* note 5, R.C.M. 912(f)(1)(N).

[64] *Id.* R.C.M. 912(d) discussion. Counsel's voir dire "should be used to obtain information for the intelligent exercise of challenges." *Id.*

[65] UCMJ art. 41(a)(1) (2005).

[66] *See* United States v. James, 61 M.J. 132 (2005) (holding that the liberal grant mandate applies only to defense challenges for cause).

[67] FRANCIS A. GILLIGAN & FREDERICK I. LEDERER, COURT-MARTIAL PROCEDURE § 15-54.10 (2d ed. 1999) (citing United States v. Smart, 21 M.J. 15 (C.M.A. 1985)).

[68] United States v. Armstrong, 54 M.J. 51 (2000).

[69] United States v. Wiesen, 56 M.J. 172, 174 (2001), *recon. denied*, 57 M.J. 48 (2002).

[70] United States v. Napolitano, 53 M.J. 162, 166 (2000).

[71] United States v. Rome, 47 M.J. 467, 469 (1998).

[72] United States v. Downing, 56 M.J. 419, 422 (2002).

The Liberal Grant Mandate

Prior to *United States v. James*,[73] the CAAF directed military judges that "[t]he proper course of action is to give heed to the mandate for liberality in passing on challenges [for cause]."[74] During the 2005 term, however, the CAAF, in a unanimous decision, held that the liberal grant mandate applies only to defense challenges for cause.[75] In *James*, the accused pleaded guilty to ecstasy use and distribution.[76] During voir dire, the trial counsel questioned a member regarding her views on sentencing in drug cases.[77] The member made the following statement to the trial counsel:

> [I]t almost feels like it is a one shot deal . . . everyone has seen the Air Force Times showing the big drug bust in the Virginia area and all the [accused], and what sentences they have received . . . and it was kind of shocking to me . . . I just thought, wow, these guys made a mistake and look at the punishment for this.[78]

The member also stated that she would feel uncomfortable sitting on the case, that a "young person shouldn't be probably kicked out and put in jail or whatever," but further confirmed that she could perform her court member duties and be fair to both sides.[79] The government challenged the panel member for cause stating that her comments demonstrated an "inelastic predisposition in favor of defense."[80] The military judge granted the government's challenge finding that the member would have an extremely difficult time considering the entire range of punishments.[81]

On review, the CAAF first decided whether the "liberal grant" mandate should apply to government challenges for cause.[82] The court ruled that "[g]iven the convening authority's broad power to appoint [panel members, under Article 25, UCMJ, there is] no basis for application of the 'liberal grant' policy when a military judge is ruling on the government's challenges for cause."[83] A liberal grant policy is neither necessary nor appropriate for the government because the convening authority, at the time of panel member selection, culls through the potential panel member pool and, as required by Article 25, UCMJ, selects the "best qualified" members.[84] Additionally, the court reasoned that the government also "has ample opportunity to affect the makeup of the panel before trial defense has any opportunity for input" because the staff judge advocate may potentially excuse one third of the panel members under RCM 505(c)(1)(B).[85] The CAAF affirmed the case,

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[73] United States v. James, 61 M.J. 132 (2005).

[74] United States v. Smart, 21 M.J. 15, 17 (C.M.A. 1985); *see also* United States v. Reynolds, 23 M.J. 292, 295 (C.M.A. 1987) (stating that "[w]e again take the opportunity to encourage liberality in ruling on challenges for cause. Failure to heed this exhortation only results in the creation of needless appellate issues"); United States v. Moyar, 24 M.J. 635, 638 (A.C.M.R. 1987) (recognizing that "What is being tested is whether the trial judge adhered to the mandate to be liberal in granting challenges for cause – a judicial policy designed to compensate for the fact that a military defendant has only a single peremptory challenge.").

[75] *See James*, 61 M.J. 132.

[76] *Id.* at 133. The accused selected an enlisted panel to decide his sentence.

[77] *Id.* at 137.

[78] *Id.* at 137-38.

[79] *Id.* at 138.

[80] *Id.*

[81] *Id*. The military judge stated:

> It just seems to the court, from viewing her and viewing her expressions as she described the Air Force Times article in regard to those other cases, that she would have an extremely difficult time in sitting on this case and doing just what she promised to do, which was consider the entire range of punishments, just wavering a little bit in that area is cause for concern as well.

Id.

[82] *Id.* at 139.

[83] *Id.*; *see* UCMJ art. 125 (2005) (stating that "the convening authority shall detail . . . such members of the armed forces as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament). *Id.*

[84] *James*, 61 M.J. at 139.

[85] *Id.* Rule for Courts-Martial 505 states "[t]he convening authority may delegate, under regulations of the Secretary concerned, authority to excuse individual members to the staff judge advocate or legal officer or other principal assistance to the convening authority." MCM, *supra* note 5, R.C.M. 505(c)(1)(B)(i).

finding that no evidence existed that the military judge applied the liberal grant mandate to his ruling or otherwise abused his discretion in determining that the challenged panel member's responses amounted to actual bias.[86]

The CAAF's ruling is a clear change to the voir dire landscape. An increased burden is placed on the government to articulate specific defined grounds for any desired challenge for cause because the military judge is now prohibited from liberally granting the government's requested challenge. When granting a government challenge for cause, the military judge should state his specific reasoning and clarify that he did not apply the liberal grant mandate. A military judge's specific findings of fact on this issue can assist in protecting his ruling during any later appellate review. Arguably, *James* also indicates the CAAF's dissatisfaction with Article 25, UCMJ, and the court-martial panel member selection process.[87] By limiting the government's casual challenge possibilities because the convening authority selects the panel members, the CAAF appears to indirectly undermine Article 25, UCMJ. Ironically, the CAAF undercuts Article 25, UCMJ, through voir dire cases, as opposed to directly attacking the system when presented with panel selection cases.[88]

Challenges for Cause—Members' Former Interaction with Trial Counsel

Another important voir dire ruling from the CAAF this year involves the potential bias that may arise from a panel member's prior interactions with the trial counsel presenting the case.[89] In *Richardson*, a contested panel case for wrongful possession and distribution of marijuana, four panel members were identified as having a professional relationship with the trial counsel.[90] In response to the military judge's questions,[91] each member advised the military judge that their relationship with the trial counsel would not affect their ability to equally evaluate each side's case.[92] The defense counsel discussed this relationship issue with only one of the four panel members during individual voir dire.[93] After the close of individual voir dire, the defense counsel requested to briefly recall the other three members to discuss their relationship with the trial counsel.[94] The military judge denied defense's request stating "[a]ll members that have said they know [the trial counsel] said that they would not give him any special deference whether for or against him. I trust them on their word and what they've said . . . I think there's been enough that's been brought out [on that]."[95] Defense then challenged for cause, under both the "actual and implied bias" theory, the four members based on their alleged special relationship with the trial counsel.[96] The military judge granted only one of the four requested challenges based on any potential relationship bias.[97]

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[86] *James*, 61 M.J. at 139.

[87] *See* Fleming, *supra* note 2, at 4 (citing Major Christopher Behan, *Don't Tug on Superman's Cape: In Defense of Convening Authority Selection and Appointment of Court-Martial Panel Members*, 176 MIL. L. REV. 190 (2003); Information Paper, Criminal Law Division, U.S. Army, Office of the Judge Advocate General, subject: Rationale for Rule Changes in Light of *Armstrong* and *Wiesen* (6 Dec. 2002) (on file with author) [hereinafter *Armstrong* and *Wiesen* Info. Paper]).

[88] *See* Fleming, *supra* note 2, at 4; *see* United States v. Wiesen, 56 M.J. 172 (2001), *recon. denied*, 57 M.J. 48 (2002). In *Wiesen*, the court held that the military judge erred by failing to grant a defense challenge for cause based against the board president who had an actual or potential command relationship over six of the other nine members of the panel. *Id.* at 175. Because the president and the six other members formed the two-thirds majority necessary to convict, the CAAF determined an "intolerable strain [was placed on the] public perception of the military justice system." *Id.* One interpretation of *Wiesen* is that the CAAF is trying to limit the convening authority's power to select members. In 2004, however, the CAAF decided a panel selection case and refused to overhaul Article 25, UCMJ, providing that "[b]ut long ago regarding this matter of members selection, we stated 'this Court sits as a judicial body which must take that law as it finds it, and that any substitution of a new system of court selection must come from Congress.'" United States v. Dowty, 60 M.J. 163, 176 (2004) (quoting United States v. Kemp, 46 C.M.R. 152 (1973)).

[89] United States v. Richardson, 61 M.J. 113 (2005).

[90] *Id.* at 114.

[91] *Id.* at 114-15.

[92] *Id.*

[93] *Id.* at 115-16. The defense counsel asked the panel member several questions regarding his relationship with the trial counsel. *Id.* The member indicated that he had spoken to the trial counsel approximately six times regarding general legal matters and described him as a good and trusted legal advisor. *Id.*

[94] *Id.* at 116.

[95] *Id.*

[96] *Id.*

[97] *Id.* The military judge granted a challenge for cause against one of the panel members because of the member's extensive drug interdiction experiences and "to a very lesser degree his dealings with the trial counsel." *Id.* at 117.

The NMCCA, affirming, held that the record "does not clearly show that the military judge applied the correct objective standard for implied bias," but the court more importantly held that a factual basis to grant the other three challenges did not exist.[98] The court found that "the trial counsel provided advice to these [challenged] members strictly in their official capacities as commanding officer, operations officer, and executive officer, respectively"[99] and mere official legal representation between a member and a trial counsel, without additional information, does not constitute an implied bias challenge.[100]

The CAAF, reversing, held that the military judge abused his discretion by failing to reopen voir dire to further inquire into the members' relationships with the trial counsel.[101] The CAAF held that "the military judge had a responsibility to further examine the nature of the relationship[s] in the context of the implied bias review, particularly when asked to do so by defense counsel."[102] The requirement to further examine the members is enhanced when the majority of the legal advice rendered by the trial counsel to the members involves criminal law.[103] The CAAF refused to order a *Dubay*[104] hearing because "little prospect" existed that a hearing, five years after the original court-martial, would yield any determinative facts from the three members.[105] The CAAF summarized its ruling as follows:

> [T]his case should not be read to necessarily bar the participation of members who might have had previous or current official contact with the trial participants. To the contrary, we recognize that in a close-knit system like the military justice system, such situations will arise and may at times be unavoidable. But where such situations are identified, military judges should not hesitate to test these relationships for actual and implied bias. And a factual record should be created that will demonstrate to an objective observer that notwithstanding the relationships at issue, the accused received a fair trial. Member voir dire is the mechanism for doing so.[106]

Richardson clearly emphasizes the need to explore any potential panel member's relationship with the trial counsel. Failure to adequately develop the factual context of such a relationship on the record is potential error, particularly when the defense counsel asks for further inquiry. While a military judge is charged with controlling the voir dire process,[107] *Richardson* indicates that a military judge's discretion to limit questioning regarding a member's prior interaction with trial counsel is minimal to non-existent.

Challenges for Cause After Court-Martial

On an issue of first impression, the CAAF determined the standard required to order a rehearing because of a panel member's potential incorrect or false response during voir dire.[108] In *Sonego*, the accused selected officer members for sentencing after pleading guilty to ecstasy use.[109] During group voir dire, a panel member told the military judge that he did

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[98] United States v. Richardson, No. 200101917, 2003 CCA LEXIS 180, at *11 (N-M. Ct. Crim. App. Aug. 22, 2003) (unpublished) (citing United States v. Downing, 56 M.J. 419, 422 (2002)).

[99] *Id.* at *6.

[100] *Id.* at *11.

[101] *Richardson*, 61 M.J. at 119.

[102] *Id.*

[103] *Id.* at 119.

[104] United States v. Dubay, 17 C.M.A. 147 (1967) (authorizing a case's remand from an appellate court for a fact finding hearing).

[105] *Richardson*, 61 M.J. at 120 (citing *Dubay*, 17 C.M.A. 147).

[106] *Id.*

[107] *See* United States v. Dewrell, 55 M.J. 131 (2001) (affirming a military judge's discretion to control voir dire by preventing either side from conducting group voir dire); United States v. Lambert, 55 M.J. 293, 296 (2001) (holding that "neither the UCMJ nor the [MCM] gives the defense the right to individually question the members").

[108] United States v. Sonego, 61 M.J. 1 (2005).

[109] *Id.* at 2.

not have an inelastic predisposition as to the accused's punishment.[110] The members later sentenced the accused to a bad-conduct discharge (BCD), restriction to the limits of his base for two months, forfeiture of five hundred dollars pay per month for twelve months, and reduction to E-1.[111] Approximately one month after the accused's court-martial, his attorney represented another Airman for drug use.[112] During this second contested court-martial, the same panel member, serving again as a panel member, stated during voir dire that any servicemember convicted of a drug offense should receive a BCD.[113] Because the second court-martial resulted in an acquittal, a verbatim transcript was not available. Sonego's defense counsel instead submitted an affidavit to AFCCA requesting a sentence rehearing based on the panel member's different responses.[114] The AFCCA denied the defense's request for a new hearing stating that the accused failed to demonstrate that the panel member incorrectly or dishonestly answered any question at Sonego's court-martial. [115]

The CAAF granted review to determine the "measure of proof required to trigger an evidentiary hearing" based on an allegation of panel member dishonesty.[116] Noting that the federal circuits differ on this issue, the CAAF adopted a "colorable claim" test, requiring "something less than [prima facie] proof of juror dishonesty before a hearing is convened."[117] The court reasoned that the "colorable claim" standard would eliminate any frivolous claims but otherwise keep the door open for claims that could prove valid on further review.[118] The court, ordering a *Dubay* hearing, ruled that the defense attorney's affidavit constituted a "colorable claim" of juror dishonesty warranting a further evidentiary hearing.[119] Judge Crawford dissented, reasoning that the defense counsel raised the issue in an untimely manner.[120] Judge Crawford noted that the defense counsel submitted his affidavit ten months after the second court-martial, that the issue was never raised during post-trial clemency matters, that no other affidavits regarding the panel member's statement were presented to the court, and that the defense did not attempt to obtain the second court-martial's tape recordings.[121] Judge Crawford framed the issue not as a "failure to disclose a material matter of fact, but [as] a potential difference of opinion and, more importantly, [as a] question of when, if ever, [the panel member's] opinion on the matter changed."[122]

Executive Order Change to RCM 912

The most important update this year in the area of voir dire and challenges is the change to RCM 912(f)(4) by Presidential Executive Order 13,387.[123] Prior to the executive order, RCM 912(f)(4) stated:

> [w]hen a challenge for cause has been denied, failure by the challenging party to exercise a peremptory challenge against any member shall constitute waiver of further consideration of the challenge upon later review. *However, when a challenge for cause is denied, a peremptory challenge by the challenging party against any member shall preserve the issue for later review, provided that where the member who was unsuccessfully challenged for cause is peremptorily challenged by the same party, that party must state that*

[110] *Id.* The CAAF noted that the panel member was an active member who asked the military judge questions during the proceeding. *Id.*

[111] *Id.* at 1-2.

[112] *Id*. at 2.

[113] *Id.* An inelastic predisposition as to sentence exists if the member categorically states that the accused should receive a BCD. United States v. Giles, 48 M.J. 60 (1998); *see* MCM, *supra* note 5, R.C.M. 912(f)(1) discussion.

[114] *Sonego*, 61 M.J. at 3.

[115] *Id.*

[116] *Id.*

[117] *Id.* at 4.

[118] *Id.*

[119] *Id.*

[120] *Id.* at 5 (Crawford, J., dissenting). Judge Crawford also ruled that a prima facie showing, as opposed to a "colorable claim" standard, is required to order a rehearing based on potential panel member dishonesty. *Id.*

[121] *Id.* at 6 (Crawford, J., dissenting).

[122] *Id.* (Crawford, J., dissenting).

[123] *See* Exec. Order No. 13,387, 70 Fed. Reg. 60697 (Oct. 18, 2005).

> *it would have exercised its peremptory challenge against another member if the challenge for cause had been granted.*[124]

The authors of the rule and military legal scholars recognized that RCM 912(f)(4) was "a subject of controversy."[125] This controversy centered on a parties' ability to dismiss an objectionable member from court membership with a peremptory challenge while retaining the ability to litigate on appeal the appropriateness of military judge's ruling denying the member's challenge for cause.[126] The rule allowed appellate courts to review, and potentially reverse, a military judge's denied challenge for cause ruling on a potential panel member who was ultimately dismissed from the court-martial and never acted on the accused's case. Opponents to the rule argued that the Supreme Court has ruled that there is no constitutional right to a peremptory challenge, nor is "the Sixth Amendment right to an impartial jury [ ] the Fifth Amendment right to due process is violated when a defendant chooses to peremptorily challenge a juror who should have been excused for cause."[127]

The CAAF, however, focusing on the uniqueness of the military system and the parties' ability to only use one peremptory challenge per Article 41, UCMJ, disregarded the opponents' arguments.[128] In 2001, the CAAF stated "[t]o say that [the accused] cured any error by exercising his one [and only] peremptory challenge against the offending member is reasoning that, if accepted, would reduce the right to a peremptory challenge from one of substance to one of illusion only."[129] The court noted that while the Supreme Court has held the right to peremptory challenge is not constitutional,[130] the President, through RCM 912(f)(4), has the authority to afford more protections to a military accused, to include allowing review of his denied challenge for cause, and "until RCM 912(f)(4) is modified or rescinded, a military accused is entitled to its protections."[131]

In 2005, the President rejected the CAAF's reasoning and modified RCM 912(f)(4) to eliminate the accused's right to appellate review of a denied challenge for cause if a peremptory strike is used by either party on the challenged member.[132] Rule for Courts-Martial 912(f)(4)'s fifth sentence, emphasized in italics in the original rule cited above, was deleted.[133] The fourth sentence was amended as follows:

> When a challenge for cause has been denied, the successful use of a peremptory challenge by either party, excusing the challenged member from further participation in the court-martial, shall preclude further consideration of the challenge of that excused member upon later review, failure by the challenging party to exercise a peremptory challenge against any member shall constitute waiver of further consideration of the challenge upon later review.[134]

This change adopts Supreme Court precedent that a peremptory challenge is not constitutional. The amendment is also a possible response to recent reversals from the CAAF based on a military judge's denial of a challenge for cause on a member who was later peremptorily challenged.[135]

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[124] MCM, *supra* note 5, R.C.M. 912(f)(4) (emphasis added).

[125] *Id.* R.C.M. 912(f)(4) analysis, at A21-61; GILLIGAN & LEDERER, *supra* note 67, §15-57.00.

[126] GILLIGAN & LEDERER, *supra* note 67, § 15-57.00; *Armstrong* and *Wiesen* Info. Paper, *supra* note 89.

[127] United States v. Armstrong, 54 M.J. 51, 54 (2000) (citing United States v. Martinez-Salazar, 528 U.S. 304 (2000)).

[128] *See* UCMJ art. 41 (2005); United States v. Wiesen, 56 M.J. 172, 177 (2001), *recon. denied*, 57 M.J. 48 (2002); *Armstrong*, 54 M.J. at 54-55 (recognizing that in the federal system the parties have several peremptory challenges and Article 41, UCMJ provides for only one peremptory challenge unless additional members are detailed after initial causal and peremptory challenges are granted); United v. Jobson, 31 M.J. 117, 120-21 (C.M.A. 1990).

[129] *Wiesen*, 56 M.J. at 117.

[130] *See* Ross v. Oklahoma, 487 U.S. 81, 88 (1988).

[131] *Armstrong*, 54 M.J. at 55.

[132] *See* Exec. Order No. 13,387, 70 Fed. Reg. 60697 (Oct. 18, 2005).

[133] *Id.*

[134] *Id.*

[135] *See Wiesen*, 56 M.J. at 177; *Armstrong*, 54 M.J. at 55. In *Wiesen*, the accused received an initial sentence of a dishonorable discharge, confinement for twenty years, total forfeitures, and reduction to the grade of E-1 for committing sodomy and indecent act offenses against his children *Wiesen*, 56 M.J. at 173. At retrial, the accused negotiated with the government for a pretrial agreement for five years confinement, forfeiture of all pay and allowances, and reduction to E1. United States v. Wiesen, No. 9801779 (Army Ct. Crim. App. July 16, 2005) (unpublished), *aff'd*, 61 M.J. 153 (2005).

The amendment to RCM 912(f)(4) fails to diminish, and likely increases, the controversy surrounding the rule. This change, as previously discussed by the CAAF, "require[s] an accused, at his peril, to leave the objectionable member on the panel in order to obtain review of the military judge's ruling on his [denied] challenge for cause."[136] Strategically, a defense counsel must decide whether to leave a potentially undesirable member on the panel or to otherwise forego appellate review of the military judge's denial of that member's challenge for cause by striking the member from the court-martial with a peremptory challenge. Likewise, government counsel, if they want to absolutely eliminate the possibility of appellate review of the military judge's ruling, could peremptorily strike the member instead of relying on the defense to later use its peremptory challenge on the member. In that regard, a conservative trial counsel initially could even join in the defense's challenge for cause of a member who creates a close question as to bias.

Pleas

Introduction

The CAAF, in *United States v. Care*, developed the requirements for a guilty plea based on current Supreme Court law.[137] Under *Care*, a guilty plea providence inquiry must:

> [R]eflect not only that the elements of each offense charged have been explained to the accused but also that the military trial judge . . . has questioned the accused about what he did or did not do, and what he intended (where this is pertinent), to make clear the basis for a determination by the military trial judge . . . whether the acts or the omissions of the accused constitute the offense or offenses to which he is pleading guilty.[138]

In 1984, RCM 910, based generally on Article 45, UCMJ, and Rule 11 (pleas) of the Federal Rules of Criminal Procedure (FRCP), codified the *Care* requirements.[139] "The Military Judge's Benchbook provides a detailed script for the military judge to follow to ensure that the mandates of *Care* and subsequent case law expanding the required colloquy are scrupulously followed."[140]

Factual Basis for Plea—Failure to Discuss Elements

During the providence inquiry, a military judge must explain the offense's elements to the accused.[141] "If the military judge fails to do so, he commits reversible error, unless 'it is clear from the entire record that the accused knew the elements, admitted them freely, and pleaded guilty because he was guilty.'"[142] On review, the CAAF will, "rather than focusing on a technical listing of the elements of an offense, look at the context of the entire record to determine whether an accused [was] aware of the elements, either explicitly or inferentially."[143] Failure to discuss a complex offense's elements generally results in reversal whereas failure to discuss a simple offense's elements, while erroneous, is not per se prejudicial to the accused's rights if he expresses a belief in his own guilt and admits the facts necessary to sustain the element.[144] Although the military

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[136] United States v. Jobson, 31 M.J. 117, at 120-21 (C.M.A. 1990).

[137] United States v. Care, 40 C.M.R. 247 (C.M.A. 1969) (citing Boykin v. Alabama, 395 U.S. 238 (1969); Halliday v. United States, 394 U.S. 831 (1969); McCarthy v. United States, 394 U.S. 459 (1969)).

[138] *Id.* at 250.

[139] *See* MCM, *supra* note 5, R.C.M. 910 analysis, at A21-58; GILLIGAN & LEDERER, *supra* note 67, § 9-022.20.

[140] Ham, *supra* note 2, at 32. "Because there are potential dangers in the abuse of [an] abbreviated method of disposing of charges, a number of safeguards have been included" for a military providence inquiry. United States v. Felder, 59 M.J. 444, 445 (2004) (citing DAVID A. SCHLEUTER, MILITARY CRIMINAL JUSTICE 372 (5th ed. 1999)); *see* U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGE'S BENCHBOOK ch. 2, sec. II (15 Sept. 2002).

[141] *See* United States v. Faircloth, 45 M.J. 172 (1996); United States v. Davenport, 9 M.J. 364 (C.M.A. 1980); *see also* MCM, *supra* note 5, R.C.M. 910 (e) discussion (stating that "the accused must admit every element of the offense(s) to which the accused pleaded guilty. . . [and o]rdinarily, the elements should be explained to the accused.").

[142] United States v. Redlinski, 58 M.J. 117, 119 (2003) (quoting United States v. Jones, 34 M.J. 270, 272 (C.M.A. 1992)).

[143] *Id.*

[144] *See id.* (recognizing that an attempt offense crime is more complex unlike some simple military offenses).

guilty plea system originally derived from federal caselaw,[145] a recent Supreme Court case demonstrates the current variance between the two systems.

This past term, the Supreme Court addressed a trial judge's failure to advise the accused on the elements of an offense.[146] In *Stumpf*, a capital case, the trial judge failed to advise the accused at the plea hearing on the specific intent element for the offense of aggravated murder.[147] The accused's attorney, however, represented that he had explained the intent element to the accused and the accused agreed with his counsel's representation.[148] After pleading guilty to aggravated murder and attempted aggravated murder, the accused received a death sentence at a contested penalty hearing before a three-judge panel.[149] On appeal, the accused argued that his plea was not voluntary or knowing because the judge failed to advise him on the specific intent element.[150] The Supreme Court stated that a judge is not personally required to advise the accused of the elements; "[r]ather, constitutional requirements may be satisfied where the record accurately reflects that the charge's nature and the crime's elements were explained to the defendant by his own, competent counsel."[151] The Supreme Court recognized that they have never required a judge to personally explain the elements of each offense to the accused.[152]

Failure to Establish a Factual Predicate or to Resolve an Inconsistent Matter or Defense

A military judge must inquire into the factual basis for the accused's plea.[153] The accused must describe all relevant facts surrounding his offense(s) to establish his guilt.[154] Rule for Courts-Martial 910(e) states that a "military judge shall not accept a plea of guilty without making such inquiry of the accused as shall satisfy the military judge that there is a factual basis for the plea."[155] A mere "yes" or "no" answer by the accused in response to the military judge's legally conclusive questions does not suffice.[156] "Mere conclusions of law recited by an accused are insufficient to provide a factual basis for a guilty plea."[157] Prior to accepting an accused's guilty plea, a military judge must resolve any inconsistent matter or defense raised either by the accused or by any other witness or evidence presented during the court-martial.[158] Article 45, UCMJ, provides the following:

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[145] *See* United States v. Care, 40 C.M.R. 247 (C.M.A. 1969) (citing Boykin v. Alabama, 395 U.S. 238 (1969); Halliday v. United States, 394 U.S. 831 (1969); McCarthy v. United States, 394 U.S. 459 (1969)).

[146] Bradshaw v. Stumpf, 125 S. Ct. 2398 (2005).

[147] *Id.* at 2405. The accused and a co-accused were charged with aggravated murder, attempted aggravated murder, aggravated robbery, and two counts of grand theft surrounding the robbery and shooting of an Ohio couple. *Id.* at 2403. The accused and his accomplice killed one individual and seriously wounded another. *Id.*

[148] *Id.* at 2405-06.

[149] *Id.* at 2403.

[150] *Id.* at 2405. The accused's displeasure with his plea and death sentence likely increased when his co-accused received a sentence of life with a possibility of parole in twenty years at a fully contested trial. *Id.* at 2403. Stumpf's trial occurred first because his accomplice fled Ohio and resisted extradition from Texas. *Id.*

[151] *Id.*

[152] *Id.*

[153] UCMJ art. 45 (2005); *see* United States v. Care, 40 C.M.R. 247 (C.M.A. 1969).

[154] MCM, *supra* note 5, R.C.M. 910(e) discussion.

[155] *Id.*

[156] United States v. Outhier, 43 M.J. 326, 330-32 (1996) (ruling that the accused's affirmative responses to the military judge that his actions could have produced grievous bodily harm were not sufficient to sustain a guilty plea to the offense of aggravated assault by a means or force likely to produce death or grievous bodily harm when the actual facts elicited did not establish a factual predicate for the charged offense); *see also* United States v. Jordan, 57 M.J. 236 (2002) (determining that an accused's mere "Yes" response to the military judge's question as to whether the accused's conduct was prejudicial to good order and discipline or service discrediting does not sustain a plea if the factual circumstances revealed by the accused do not objectively support that element).

[157] *Outhier*, 43 M.J. at 331.

[158] *Id.* "[A]n accused servicemember cannot plead guilty and yet present testimony that reveals a defense to the charge." United States v. Clark, 28 M.J. 401, 405 (C.M.A. 1989).

> If an accused, . . . after a plea of guilty[,] sets up matter inconsistent with the plea, or if it appears that he has entered the plea of guilty improvidently or through lack of understanding of its meaning and effect . . . a plea of not guilty shall be entered in the record, and the court shall proceed as though he had pleaded not guilty.[159]

An appellate court will only overturn a guilty plea if the record of trial, in its entirety, shows a substantial basis in law and fact for questioning the plea.[160] Although this rule appears to set a high standard, the CAAF and the service courts, in published and unpublished opinions, continue to reverse numerous findings and sentences because a review of the entire record of trial either fails to establish a factual predicate for the accused's plea or reveals an inconsistent matter or defense that remains unresolved on the record.[161] Over the past several years, guilty pleas involving absent without leave (AWOL) offenses[162] resulted in numerous cases in this area.[163] During the 2005 term of court, three service court opinions concerning these offenses warrant discussion.[164]

AWOL Offenses

In *Duncan*, the accused received permission from his squad leader to miss his unit's morning accountability formation in order to take his infant son to a hospital appointment.[165] The accused, however, lied to his squad leader about his son's appointment because he did not want to attend the formation and get in "trouble for not having the equipment required for that morning's formation."[166] On appeal, defense counsel asserted that the accused's plea was improvident as to the failure to repair (FTR) element of "without proper authority" because the accused had authority from his squad leader to miss formation, "albeit authority obtained by making a false statement."[167] Defense argued that the controlling factor was the accused's receipt of actual authority from his squad leader and not the manner in which that authority was obtained.[168] The ACCA, affirming, ruled that authority "preceded by the use of false statements, false documents, or false information provided by or on behalf of an accused" is still punishable as a FTR and does not constitute "proper authority" to miss formation.[169] The unit lost accountability of the accused because he was not at his morning formation nor at the hospital appointment he received permission to attend.[170]

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[159] UCMJ art. 45(a) (2002).

[160] *Jordan*, 57 M.J. at 238 (citing United States v. Prater, 32 M.J. 433, 436 (C.M.A. 1991)).

[161] *See* United States v. Gilchrist, 61 M.J. 785 (Army Ct. Crim. App. 2005); United States v. Harding, 61 M.J. 526 (Army Ct. Crim. App. 2005); United States v. Jackson, 61 M.J. 731 (N-M. Ct. Crim. App. 2005); United States v. Littleton, 60 M.J. 753 (Army Ct. Crim. App. 2004); United States v. Sierra, 62 M.J. 539 (Army Ct. Crim. App. 2005).

[162] *See* UCMJ, art. 86 (2005).

[163] *See* United States v. Pinero, 60 M.J. 31 (2004); United States v. Hardeman, 59 M.J. 389 (2004); *see also* United States v. Le, 59 M.J. 859 (Army Ct. Crim. App. 2004) (ruling that the military judge erred by failing to resolve the conflict between the accused's plea of guilty to desertion and statements indicating that the accused deserted under duress); United States v. Scott, 59 M.J. 718 (Army Ct. Crim. App. 2004) (holding an AWOL plea from 16 August 2002 through November 2002 improvident because the accused signed in with his unit on 11 September 2002); United States v. Banks, No. 20021302 (Army Ct. Crim. App. Sep. 7, 2004) (unpublished) (failing to have the accused state in his own words why he failed to report to formation); United States v. Gonzalez, No. 20020744 (Army Ct. Crim. App. July 21, 2004) (unpublished) (determining a missing movement through neglect plea was not provident where the facts conflicted as to whether the accused possessed authority to change his flight); United States v. Boyd, No. 20021264 (Army Ct. Crim. App. June 16, 2004) (unpublished) (reasoning the military judge erred by accepting the accused's plea without explaining the inability defense).

[164] United States v. Duncan, 60 M.J. 973 (Army Ct. Crim. App. 2005); United States v. Adams, 60 M.J. 912 (N-M. Ct. Crim. App. 2005); United States v. Gilchrist, 61 M.J. 785 (Army Ct. Crim. App. 2005).

[165] *Duncan*, 60 M.J. at 974. The accused also pleaded guilty to making a false official statement, larceny, wrongful appropriation, and housebreaking and received a BCD, confinement for four months, forfeiture of $700.00 pay per month for four months, and reduction to E1. *Id.* at 973.

[166] *Id.* at 974.

[167] *Id.* at 975.

[168] *Id.*

[169] *Id.* at 976.

[170] *Id.* "[A] fraud that allows one to absent himself from his unit, impairs that unit's ability to perform its primary function and 'diminishes the unit's readiness and capability to perform its mission.'" *Id.*

The NMCCA faced a similar but more complex issue this year—whether an accused's passive failure to act, as opposed to an accused's affirmative action to deceive,[171] constitutes a FTR offense.[172] In *Adams*, the military judge did not accept the accused's plea to AWOL but did accept his plea, by exceptions and substitutions, to failing to go to his appointed place of duty.[173] During the providence inquiry, the accused stated that he knew his unit had a formation, that he did not know the exact formation location, and that he purposefully avoided determining the location.[174] The accused's only effort to locate his unit involved peeking out his barrack's window. In addition, the accused intentionally avoided the on-duty barrack's noncommissioned officer who could have told him the formation location.[175] The NMCCA, recognizing that an accused's knowledge of the report location is an element of a FTR offense, held that the accused's "deliberate and conscious efforts to avoid learning of his duty nevertheless rendered his guilty plea to failing to go to his reported place of duty provident."[176] Under a "deliberate avoidance or ignorance" doctrine, a finder of fact may "rely upon a permissive inference that the accused had knowledge of the fact that the accused deliberately avoided."[177] The court acknowledged, however, that the deliberate avoidance doctrine is not commonly recognized in the military system but is consistent with federal practice.[178] Practitioners should note, before actively applying the deliberate avoidance doctrine, that the CAAF is reviewing this case and heard oral argument on 7 February 2006.[179]

The third service court case involves the reversal of an accused's conviction for going from his appointed place of duty when the record failed to establish that the accused knew he was required to report.[180] In *Gilchrist*, the accused was charged with leaving his appointed place of duty—a doctor's appointment at the William Beaumont Army Medical Center (WBAMC).[181] The stipulation of fact stated that the accused had a 0900 doctor's appointment and that his drill sergeant drove him to the appointment.[182] After dropping off the accused, the Drill Sergeant observed the accused leaving the hospital a few minutes later and running to a convenience store across the street.[183] During the providence inquiry, the accused told the military judge that he had an appointment at the hospital after lunch but his drill sergeant was busy that day and needed to drop him off at the hospital at 0900.[184] Further inquiry established the following: the drill sergeant did not tell the accused that he could not leave the hospital, the accused went to the convenience store to obtain food because it was unavailable at the hospital, and the accused's drill sergeant ordered him back into the van causing the accused to miss his appointment.[185] The ACCA reversed the accused's conviction for going from his place of duty because the record failed to establish an adequate factual predicate for the accused's plea of guilty to the offense.[186] The court found that Gilchrist did not admit that he was required to be at the hospital at 0900. Instead, Gilchrist admitted that he had to report for a medical appointment at 1300.

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[171] *Id.* at 973.

[172] United States v. Adams, 60 M.J. 912 (N-M. Ct. Crim. App. 2005).

[173] *Id*. at 914.

[174] *Id.*

[175] *Id.*

[176] *Id.* at 915.

[177] *Id.* "The rationale for the deliberate avoidance doctrine is that 'a defendant's affirmative efforts to see no evil and to hear no evil do not somehow magically invest him with the ability to do no evil." *Id.* (citing United States v. DiTommaso, 817 F.2d 201, 281 n.26 (1987)).

[178] *Id.*

[179] United States v. Adams, 60 M.J. 912 (N-M. Ct. Crim. App. 2005), *review granted*, 62 M.J. 329 (2005); *see* United States Court of Appeals for the Armed Forces, Scheduled Hearings, http://www.armfor.uscourts.gov/Feb2006.htm (last visited Apr. 27, 2006) (providing a list of scheduled hearings, including *United States v. Adams*).

[180] United States v. Gilchrist, 61 M.J. 785 (2005).

[181] *Id.* at 789.

[182] *Id.* at 789-90.

[183] *Id.* at 790.

[184] *Id.*

[185] *Id.* The military judge accepted the accused's plea but amended the time of the accused's missed appointment to 1300. *Id.*

[186] *Id.* at 791.

"Appellant's statements during the providence inquiry indicate he did not understand he was reporting to his place of duty, a 1300 doctor's appointment at WBAMC, when he arrived over four hours early."[187]

Larceny Offenses

An additional factual predicate concern covered by the service courts[188] this past term involves the government's failure to establish on the record a specific, or any, property value for larceny specifications. In *Harding*, the accused pleaded guilty to two larceny specifications charging him, on divers occasions, with stealing currency of a value in excess of $1000 dollars.[189] After trial, the convening authority approved a sentence of a bad conduct discharge and twenty-one months confinement.[190] On appeal, the defense focused on the value of the property taken during the two different timelines for the alleged divers occasions specifications.[191] During the providence inquiry, the accused stated that he stole over $1000 dollars during the two lengthy timeframes alleged, but he never admitted that he took any currency or any combination of currency valuing over $100 dollars during any single transaction within those two lengthy timeframes.[192] This is an important distinction because an increased punishment for a larceny offense exists if an accused steals property of a value more than $100 during a single transaction.[193] A punishment of five years confinement is authorized for stealing property exceeding $100 per a single transaction and a punishment of only six months confinement is authorized for stealing property equal to or less than $100 per a single transaction.[194] The ACCA recognized that "the record must show either that one item of the property stolen has . . . [over a $100] value or that several items taken at substantially the same time and place have such an aggregated value."[195] The record failed to establish that the accused stole over $100 dollars at substantially the same time during the broad two month divers occasions timeframes alleged in the two specifications, and the court amended the findings from stealing property in excess of $100 to stealing property of a value less than or equal to $100.[196] The court then re-adjusted the accused's approved confinement from twenty-one months to six months.[197]

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[187] *Id.*

[188] *See* United States v. Harding, 61 M.J. 526 (Army Ct. Crim. App. 2005); United States v. Sierra, 62 M.J. 539 (Army Ct. Crim. App. 2005); *see also* United States v. Boston, No. 20030108 (Army Ct. Crim. App. June 2, 2005) (unpublished) (amending findings from one larceny specification of over $500 to two larceny specifications of under $500 where the accused testified during the providence inquiry to taking property at two separate times of an amount under $500); United States v. Cox, No. 20030260 (Army Ct. Crim. App. June 6, 2005) (unpublished) (fixing larceny findings to correlate with the accused's plea that he did not steal military property in one specification and that he stole services, as opposed to property, in another specification); United States v. Ezelle, No. 200301560, 2004 CCA LEXIS 262 (N-M. Ct. Crim. App. Nov. 29, 2004) (unpublished) (determining that the stolen property was of "some" value, but the parties' failures to specifically assert on the record that the value exceed $500 made the plea improvident as to the aggravating element of an amount over $500); United States v. Ferrell, 2005 CCA LEXIS 272 (A.F. Ct. Crim. App. Aug. 23, 2005) (unpublished) (holding that the record failed to reflect that the accused stole property in excess of $500 and amending his specification to sustain a conviction for property of a value under $500); United States v. Irby, No. 35424, 2004 CCA LEXIS 293 (A.F. Ct. Crim. App. Dec. 30, 2004) (unpublished) (finding the accused's plea to larceny improvident but affirming the offense of wrongful appropriation where the accused stated she intended to pay back the credit card company but the military judge failed to resolve this inconsistency); United States v. West, No. 20030277 (Army Ct. Crim. App. Feb. 23, 2005) (unpublished) (reversing the accused's conviction for larceny of an amount over $500 where the stipulation of fact and the record of trial failed to establish the amount of the approximately fifteen pieces of luggage stolen by the accused in the Pittsburgh International Airport). *But see* United States v. Kerr, No. 20021064 (Army Ct. Crim. App. Mar. 29, 2005) (unpublished) (holding that the accused could not plead guilty to stealing the entire amount of his "do-it-yourself" (DITY) reimbursement but finding that the record established that he stole money in excess of $500 for each DITY claim).

[189] *Harding*, 61 M.J. at 526. The larceny offenses surrounded the accused taking and using another soldiers' ATM card. *Id.* at 527.

[190] *Id.* at 526.

[191] *Id.* at 527 (listing the timeframes as 24 August 2001 to 31 October 2001 and 1 November 2001 to 10 December 2001).

[192] *Id.*

[193] *Id.* at 528; *see* MCM, *supra* note 5, pt. IV, para. 121.e. (outlining the maximum punishment for larceny offenses). The president changed the required maximum punishment value from $100 to $500 dollars in 2002. *See* Exec. Order No. 13,262, 3 C.F.R. 210 (2003).

[194] *Harding*, 60 M.J. at 528.

[195] *Id*. (citing United States v. Christensen, 45 M.J. 617, 619 (Army Ct. Crim. App. 1997)).

[196] *Id.* at 530.

[197] *Id.*

A property value issue also arose in another ACCA opinion, *United States v. Sierra*.[198] In *Sierra*, the accused was charged with, among other offenses, obtaining services by false pretenses from an internet website, Priceline.com.[199] The stipulation of fact and the accused's providence inquiry statements contained no evidence that the use of Priceline.com had any value.[200] The ACCA noted that there was no indication in the record or from the stipulation of fact "that Priceline.com ever charged a service fee in connection with its operation [and the accused] cannot be found guilty of *wrongfully* obtaining *free* services by false pretenses."[201] The court set aside the obtaining services by false pretense specification and reassessed the accused's sentence.[202]

Practitioners should note the importance of clarifying on the record and in the stipulation of fact, the value of any property involved in a larceny-related offense. Absent a clearly defined value, the appellate courts are likely to set aside the specification, as in *Sierra*, or amend the value of the stolen property to a value under the maximum punishment limit, as in *Harding*. In *Sierra*, the ACCA did not rule that Priceline.com was a free service per se, but found that the parties failed to present evidence of the service's value. If the parties agree, and the accused admits, that the service or property has a value, even if minimal in nature, the appellate courts are likely to affirm the larceny-related specification.

Legal Issues Waived

The following motions must be raised by the accused prior to the entry of his plea, absent good cause: defects in the preferral, forwarding, investigation, or referral of charges; defects in charges or specifications; motions to suppress evidence; discovery motions; severance of charges; and denial of counsel issues.[203] Rule for Courts-Martial 905(e) specifically states that "other motions, requests, defenses or objections, except lack of jurisdiction or failure of a charge to allege an offense, must be raised before the court-martial is adjourned for that case and, unless otherwise provided in this Manual, failure to do so shall constitute waiver."[204] Other than those legal issues specifically exempted by RCM 905(e), "[m]ilitary practice recognizes very few issues that are not subject to waiver."[205] Defense waiver of a legal issue becomes paramount on appeal, as described below:

> Why is it important to "make" an appellate record by properly preserving issues at trial? The answer lies in the doctrine of waiver. Simply stated, the failure to properly preserve an issue at trial "waives" the issue for appeal. This means that an appellate court is unlikely to consider the issue. In other words, the accused has almost no chance of relief on appeal.[206]

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[198] United States v. Sierra, 62 M.J. 539 (Army Ct. Crim. App. 2005). The accused used his non-commissioned officer in charge's government credit card to obtain airline tickets on Priceline.com for a co-worker. *Id*. He was also charged with attempted larceny of military property and providing a false official statement. *Id*. at 540.

[199] *Id.*

[200] *Id.* at 543.

[201] *Id.* at 544. The court further stated that "[i]f, as we suspect, access to Priceline.com website was free, the problem with this conviction goes beyond an improvident plea. Since appellate defense counsel are correct that it is legally impossible to steal free services, the specification would fail to state an offense." *Id.*

[202] *Id*. Following his plea of guilty, the accused originally received a BCD, confinement for three months, forfeiture of $737.00 pay per month for three months, and reduction to E1. *Id.* at 539. The court reassessed the accused's sentence to a BCD, confinement for two months, forfeiture of $737.00 pay per month for two months, and reduction to E1. *Id.* at 544.

[203] MCM, *supra* note 5, R.C.M. 905(b), 905(e).

[204] *Id.* RCM 905(e); *see id.* RCM 907(b); *see also* United States v. Vaughan, 58 M.J. 29 (2003) (stating that under RCM 907(b)(1)(B) the issue of failing to state an offense is never waived); United States v. Robbins, 52 M.J. 159 (1999) (finding that a preemption doctrine claim is not waived for an assimilated offense because it involves subject matter jurisdiction); United States v. Coffey, 38 M.J. 290 (C.M.A. 1993) (holding that jurisdictional issues are not waived by the accused's failure to raise them at trial).

[205] Lieutenant Colonel Patricia A. Ham, *Making the Appellate Record: A Trial Defense Attorney's Guide to Preserving Objections—the Why and How*, ARMY LAW., Mar. 2003, at 12. Lieutenant Colonel Ham's article discusses the difference between waiver, the intentional abandonment of a known right, versus forfeiture, the failure to timely assert a right. These terms are used interchangeably in this article. Legal issues that are not subject to waiver include adjudicative (versus accusatory) command influence. *Id.* (citing United States v. Weasler, 43 M.J. 15 (1995) (holding that the defense can waive accusatorial command influence); *cf.* United States v. Baldwin, 54 M.J. 308, 310 n.2 (2001) (finding that an issue of "unlawful command influence arising during trial" is not waived by a failure of defense to object)).

[206] Ham, *supra* note 205, at 11.

Two methods exist for an accused to preserve his legal issue for appeal: (1) plead not guilty or (2) enter a conditional plea.[207] Under RCM 910(a)(2), an accused may enter "a conditional plea of guilty reserving the right, on further review or appeal, to review of the adverse determination of any specified pretrial motion" if the military judge and the government consent to such plea.[208] A plea is unconditional and subject to the waiver rules of RCM 905(b) and RCM 905(e), unless the accused specifically asserts that his plea is conditional under RCM 910(a)(2) and the government and the military judge consent. This year, the CAAF dealt with two cases involving the defense's waiver of a legal issue after the accused's entry of an unconditional guilty plea. The first case involves a suppression motion[209] and the second case involves an Article 10, UCMJ, motion.[210]

In *Farley*, a child sexual assault case, the accused made incriminating statements to two social workers, Ms. Martin and Mr. Warren.[211] The government notified the defense, under MRE 304(d)(1), that the accused made an incriminating statement to one of the social workers, Mr. Warren, but failed to list the other social worker, Ms. Martin.[212] Prior to the court-martial commencing, the government advised the defense that Ms. Martin, not Mr. Warren, would testify in the pre-sentencing phase.[213] Before the accused entered his plea of guilt, the defense counsel stated that "depending on who the government calls as witnesses, we may have some brief motions to suppress statements made by the accused." The accused's plea, however, was not conditioned on his ability to later raise a suppression motion.[214] The accused then proceeded through his providence inquiry, the military judge accepted his plea, and the government called Ms. Martin to testify.[215] The defense moved to strike Ms. Martin's testimony as "violative of the Fifth and Sixth Amendments," which the military judge denied as untimely.[216] On appeal, the CAAF noted that the two applicable MREs were unclear as to whether the accused could make a suppression motion after entry of his pleas.[217] Military Rule of Evidence 304(d)(2)(A) states that the defense may not raise a suppression motion after pleas absent good cause shown.[218] Military Rule of Evidence 304(d)(5), however, states that a plea of guilty waives a suppression motion regardless of whether the issue was raised prior to the plea.[219] The CAAF, declining to decide if a motion to suppress under the Fifth and Sixth Amendment is waived by a guilty plea under MRE 304(d)(2)(A) or MRE 304(d)(5), held error, if any, in denying the motion was harmless because of the other extensive evidence admitted against the accused.[220]

The CAAF's decision, or indecision, leaves the field practitioner, particularly a military judge, in a quandary whether to apply MRE 304(d)(2)(A) or MRE 304(d)(5). While defense counsel will clearly argue the applicability of MRE 304(d)(2)(A); the government will request the military judge to apply MRE 304(d)(5). The safest course of action for a

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[207] Ham, *supra* note 2, at 38.

[208] MCM, *supra* note 5, R.C.M. 901(a)(2); *see also* United States v. Mapes, 59 M.J. 60 (2003); United States v. Vaughn, 58 M.J. 29 (2003); United States v. Shelton, 59 M.J. 727 (Army Ct. Crim. App. 2004); United States v. Proctor, 58 M.J. 792 (A.F. Ct. Crim. App. 2003). For Army practitioners, the staff judge advocate should consult with the Chief, Criminal Law Division, prior to the government's consent to a conditional plea. *See* U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE para. 5-26b (16 Nov. 2005).

[209] United States v. Farley, 60 M.J. 492 (2005).

[210] United States v. Mizgala, 61 M.J. 122 (2005).

[211] *Farley*, 60 M.J. at 493. The accused made statements to the effect that he touched his stepdaughter and that if his mother was present he would have touched her also. *Id.*

[212] *Id.* Military Rule of Evidence 304(d)(1) states that "prior to arraignment, the prosecution shall disclose to the defense the contents of all statements, oral or written, made by the accused that are relevant to the case, known to the trial counsel, and within the control of the armed forces." MCM, *supra* note 5, M.R.E. 304(d)(1).

[213] *Farley*, 60 M.J. at 493.

[214] *Id.*

[215] *Id.*

[216] *Id.* The military judge provided the accused the opportunity to withdraw from his plea in order to make his motion, which the accused refused to accept. *Id.*

[217] *Id.*

[218] MCM, *supra* note 5, M.R.E. 304(d)(2)(A).

[219] *Id.* M.R.E. 304(d)(5).

[220] *Farley*, 60 M.J. at 493. The stipulation of fact and a videotape of the victim's statements outlined numerous instances of the accused's misconduct so that the military judge's decision to admit the one statement to Ms. Martin was harmless. *Id.*

military judge is to determine, under MRE 304(d)(2)(A), whether good cause exists to permit the defense to raise an untimely suppression motion. If the CAAF rules that MRE 304(d)(2)(A) is the applicable rule, then the military trial judge's ruling is correct. However, even if the CAAF rules that MRE 304(d)(5) trumps MRE 304(d)(2)(A) and finds that the military trial judge erroneously applied the incorrect rule, the judge's application of the more defense favorable rule mitigates against the appellate court finding that the military trial judge's error prejudiced the accused's substantial personal rights.

The second CAAF decision during the 2005 term involving waiver focused on whether a contested Article 10, UCMJ, motion is waived by an accused's unconditional guilty plea.[221] In *Mizgala*, the government released the accused from pretrial confinement after one hundred and seventeen days to prevent a speedy trial violation.[222] The defense, however, raised an Article 10 speedy trial motion, which the military judge, after applying an erroneous legal test, denied.[223] After this ruling, the accused entered an unconditional guilty plea to all charges.[224] On appeal, the AFCCA ruled that the accused's unconditional guilty plea waived appellate consideration of his denied Article 10 motion.[225] The CAAF, however, held that ordinary waiver rules do not apply when an accused unsuccessfully litigates an Article 10 speedy trial motion at court-martial because of the rule's legislative history and unique importance.[226] The CAAF stated:

> Preservation of the right to appeal adverse Article 10 rulings is not only supported by the congressional intent behind Article 10, it also maintains the high standards of speedy disposition of charges against members of the armed forces and recognizes 'military procedure as the exemplar of prompt action in bringing to trial those members of the armed forces charged with offenses.' A fundamental, substantial, personal right – a right that dates from our earlier cases – should not be diminished by applying ordinary rules of waiver and forfeiture associated with guilty pleas.[227]

After determining that the accused did not waive appellate review of his Article 10 motion by pleading guilty, the court held that the military judge's erroneous application of law did not prejudice the accused because a factual predicate did not exist for his Article 10 motion.[228]

After *Mizgala*, defense practitioners should, as before, immediately raise a motion when a potential Article 10 violation exists. Defense strategy, however, is now different because an accused may make an unconditional guilty plea to gain a sentence limitation while knowing, because of *Mizgala*, that the appellate courts will review a military judge's denial of his Article 10 motion. Unanswered, however, is whether an Article 10 motion, which is not raised at the trial level, is waived. May the accused successfully assert an Article 10 violation for the first time on appeal? The CAAF's determination that Article 10 is a "fundamental, substantial, personal right"[229] of the accused gives appellate defense counsel grounds to assert that an uncontested Article 10 motion may be raised for the first time on appeal.

Conclusion

This past term, the CAAF and the service courts issued several decisions in the areas of court-martial personnel, voir dire and challenges, and pleas and pretrial agreements. The courts focused on several potential "record-breaking" issues existing

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[221] United States v. Mizgala, 61 M.J. 122 (2005). Article 10, UCMJ, states that if an accused is placed into pretrial confinement that "immediate steps shall be taken to inform him of the specific wrong of which he is accused and to try him or to dismiss the charges and release him." UCMJ art. 10 (2005).

[222] *Mizgala*, 61 M.J at 123. Rule for Courts-Martial 707 states that a speedy trial violation occurs if the accused is not arraigned within one hundred and twenty days of his entry into pretrial confinement. MCM, *supra* note 5, R.C.M. 707(a)(2).

[223] *Mizgala*, 61 M.J. at 128. The military judge erroneously ruled that an Article 10 violation does not occur without a RCM 707 speedy trial violation and that gross negligence in processing the case is required by the government to sustain an Article 10 violation. *Id.* The correct legal test for an Article 10 violation is whether the government proceeded with reasonable diligence. *Id.*

[224] *Id.* at 123-24.

[225] *Id.* at 124. The AFCCA also held, absent the accused's waiver, that a factual predicate did not exist for the Article 10 motion. *Id.*

[226] *Id.* at 126.

[227] *Id.* at 126-27 (citing United States v. Pierce, 19 C.M.A. 225, 227 (1970)).

[228] *Id.* at 129. Although the court recognized that the processing "of this case is not stellar," the government's actions on the case reflected reasonable diligence under all the circumstances. *Id.*

[229] *Id.* at 126.

in court-martial transcripts. In the area of court-martial personnel, the CAAF's most important decision limited a trial judge's ability to craft a sentence based on collateral matters.[230] One of the CAAF's most groundbreaking decisions this year came in the area of voir dire—the ruling that a military judge may only liberally grant challenges for cause for the defense.[231] Ironically, the President, by executive order, may have created an even more revolutionary voir dire change by amending RCM 912(f)(4), the "But For Rule."[232] How these two changes will coexist and affect new cases and further appellate review remains to be seen. Last term's cases involving providence inquiry issues, such as advising the accused of the elements of the offense and obtaining a factual predicate for the offense from the accused on the record, continue to reaffirm the "CAAF and the service courts' generally paternalistic approach to the military courts-martial process, as compared to civilian practice."[233] This article provides trial practitioners with trends and practical implications from the 2005 term of court so that their records of trial will survive appellate scrutiny.

[230] *See* United States v. McNutt, 62 M.J. 16 (2005).

[231] *See* United States v. James, 61 M.J. 132 (2005).

[232] *See* Exec. Order No. 13,387, 70 Fed. Reg. 60697 (Oct. 18, 2005).

[233] *See* Fleming, *supra* note 2, at 25.