Annual Review of Developments in Instructions—2005

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This annual installment of developments in instructions covers cases decided by military appellate courts during the Court of Appeals for the Armed Forces' (CAAF) 2005 term.[1] As with earlier reviews on instructions, this article addresses new cases from the perspective of substantive criminal law, evidence, and sentencing. This article is written for military trial practitioners, and it frequently refers to the relevant paragraphs in the *Military Judges' Benchbook* (*Benchbook*).[2] The *Benchbook* remains the primary resource for drafting instructions.

Substantive Criminal Law

Military Judge's Responsibility to Determine Lawfulness of an Order: United States v. Deisher[3]

Obedience to lawful orders is at the very heart of military discipline. In *United States v. New*,[4] the CAAF held that, in a case involving an order to wear United Nations accoutrements with the U.S. Army uniform, the military judge properly decided the issue of lawfulness of the order as a question of law. In *United States v. Jeffers*,[5] where the accused challenged the necessity of his company commander's no-contact order, the CAAF reiterated that lawfulness is a question of law. The court held that the military judge did not err in determining lawfulness of the alleged order and not submitting the issue to the members. Since *New*, it is black letter law that the legality of an order is a question of law to be decided by the military judge. When questions of fact and law are inextricably intertwined, however, the procedural steps for applying this rule may be confusing. In *United States v. Deisher*, the CAAF provided additional guidance to military judges on their responsibilities when the lawfulness of an order is at issue.

Airman (Amn) Deisher was charged, *inter alia*, with failure to obey a lawful order from Staff Sergeant (SSgt) Hazen, a Security Forces Investigator, to have no contact with Amn Pennington.[6] During a pretrial session, the defense counsel moved to dismiss the charge because it did not have the legal attributes of a lawful order. The defense counsel argued that the communication lacked the clarity of a lawful order, did not have a definite duration, and exceeded the investigator's authority.[7] The parties litigated the motion based on two exhibits—a memorandum from SSgt Hazen written a month after the incident and subsequent testimony at the Article 32 investigation.[8] The trial counsel argued that the panel members, rather than the military judge, should resolve the issue of lawfulness of the order.[9] The defense counsel disagreed. When the military judge suggested that the question of whether the order had been given was a question of fact to be decided by the members, the defense counsel responded that that was only one of the questions at issue, and the military judge had to resolve the remaining questions raised by the defense counsel.[10]

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[1] The 2005 term began on 1 October 2004 and ended on 30 September 2005.

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

[3] 61 M.J. 313 (2005).

[4] 55 M.J. 95 (2001).

[5] 57 M.J. 13 (2002).

[6] *Deisher*, 61 M.J. at 314.

[7] *Id.*

[8] *Id.*

[9] *Id.* at 315.

[10] *Id.*

The military judge denied the motion to dismiss.[11] The military judge's written ruling included the following:

> Based on the proffered facts, the court cannot find as a matter of law the alleged order was unlawful. The defense motion is essentially an argument that the evidence is insufficient to establish either that an order was given or that it was lawful. These are questions of fact for the members to determine.[12]

During the trial on the merits, SSgt Hazen testified that he was investigating the accused concerning an altercation with Amn Pennington. Staff Sergeant Hazen testified that he initially issued a no-contact order to the accused in a vehicle on the way to the medical clinic. Staff Sergeant Hazen could not recall the specific words, but he testified that when the accused expressed concern about what might happen to him, SSgt Hazen told the accused, "Let's get this behind you. Don't worry about it. Just don't have any more contact with Pennington. Don't get yourself in any more trouble."[13] Staff Sergeant Hazen testified that the accused responded with "I know. I know."[14]

Staff Sergeant Hazen testified that he issued a second no-contact order at the clinic in front of the accused's first sergeant. Staff Sergeant Hazen testified that, to the best of his recollection, he said to the accused, "In front of your first sergeant, I'm giving you a lawful order to have no contact with Airman Pennington; and if he approaches you, let somebody in your chain of command know or let me know and we'll take care of it as soon as possible."[15] Staff Sergeant Hazen testified that the accused nodded his head.[16]

Staff Sergeant Hazen testified that he issued a third no-contact order on the way from the clinic to the base. He testified that he said, "You could make a career out of this. Let's not screw up any more, and don't have any more contact with Pennington."[17] Staff Sergeant Hazen testified that the accused acknowledged this statement with something to the effect of "I know. I know. I'm going to stay out of trouble. I'm going to be okay."[18]

During cross-examination, SSgt Hazen stated that the only statement he felt comfortable testifying under oath about was the statement at the clinic.[19] Also, SSgt Hazen did not mention any no-contact orders in his report, and he did not speak to the accused's chain of command about the no-contact orders.[20]

After instructing the members on the elements of violating a lawful order, the military judge instructed the members on what is required for an order to be lawful.[21] The military judge gave the instruction from the old note 4 to paragraph 3-16-2 of the *Benchbook*.[22] The CAAF issued its opinion in *United States v. New* six months before the trial in *Deisher*,[23] but the model instruction in the *Benchbook* had not yet been changed.[24]

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[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id*. at 315-16.

[16] *Id*. at 316.

[17] *Id*.

[18] *Id.*

[19] *Id*.

[20] *Id*.

[21] *Id*. at 317.

[22] *See* BENCHBOOK, *supra* note 2, para. 3-16-2 n.4.

[23] *Deisher*, 61 M.J. at 318.

[24] On 10 February 2004, the model instructions in paragraphs 3-14-2, 3-15-2, 3-16-1, 3-16-2, and 3-16-3 were changed to reflect the holding in *United States v. New*. Because of the CAAF's opinion in *United States v. Deisher*, the new note 4 in paragraph 3-16-2 and identical notes in paragraphs 3-14-2, 3-3-15-2, 3-16-1, and 3-16-3 do not accurately state the law. Those notes provide an instruction for those rare circumstances where the question of lawfulness is intertwined with questions of fact and should be submitted to the members with appropriate guidance. The issue of lawfulness does not ever need to be submitted to the members. However, the last two sentences of that note may be helpful as a format for an instruction, if the content of the order is in dispute and the military judge makes a preliminary ruling that an order with specific language would be lawful but an order with other specific language would not be lawful. *See* BENCHBOOK, *supra* note 2, para. 3-16-2 (IC, 10 Feb. 2004).

The CAAF held that the military judge erred when he ruled that both the predicate factual aspects of the issue of lawfulness and the actual issue of lawfulness were matters to be resolved by the members.[25] The court reiterated that "the legality of the order is an issue of law that must be decided by the military judge, and not the court-martial panel."[26] In the previously quoted language of the military judge's ruling, it was unclear whether the military judge made an affirmative determination that the order was lawful. The CAAF found a "significant likelihood" that the military judge did not do so and that the issue was resolved only by the panel.[27] The court reversed the conviction of failure to obey a lawful order and set aside the sentence.[28]

In ruling on a motion to dismiss on grounds that the alleged order was unlawful, the military judge should make a preliminary ruling whether certain communication under a set of specific circumstances constitutes a lawful order. This finding may necessarily require the military judge to make threshold contingent factual conclusions to determine whether the order at issue was lawful. This preliminary ruling on the lawfulness of an order, however, does not relieve the government of its burden to prove each element of the offense. The court-martial panel must still resolve all factual issues pertinent to the elements.[29]

Deisher confirms that the lawfulness of an order is a question of law that must be decided by the military judge. It also clarifies that a military judge need not instruct the members on what is required for an order to be lawful. The military judge must resolve any necessary preliminary factual questions relating to lawfulness and determine the lawfulness of the order.

Conspiracy to Commit Unpremeditated Murder

In *United States v. Shelton*,[30] the CAAF reversed a conviction for conspiracy to commit unpremeditated murder.[31] *Shelton* highlights an important point concerning the mens rea requirement for the offense of conspiracy under Article 81 of the Uniform Code of Military Justice (UCMJ). If the underlying offense has an element requiring a certain result, then the agreement must include the intent to achieve that result.

Sergeant (SGT) Shelton was charged with, inter alia, the premeditated murder of Private First Class (PFC) Chafin and conspiracy with SGT Seay to commit the premeditated murder of PFC Chafin.[32] In accordance with the defense counsel's request, the military judge instructed the members of the court on the lesser included offenses of unpremeditated murder and conspiracy to commit unpremeditated murder.[33] When instructing on the elements of unpremeditated murder, the military judge properly instructed the members that the offense required that "at the time of the killing, the accused had the intent to kill or inflict great bodily harm on PFC Chafin."[34] When instructing on the elements of conspiracy to commit unpremeditated murder, the military judge properly instructed the members that the offense required that the accused "entered into an agreement with SGT Bobby D. Seay II to commit unpremeditated murder."[35] However, when providing the required instruction on the elements of the offense within which the accused was charged—conspiracy to commit premeditated murder—the military judge instructed the members that the elements of the object of the conspiracy were "the same as set forth in the instruction on the lesser included offense of unpremeditated murder," without specifically repeating

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[25] *Deisher*, 61 M.J. at 318.

[26] *Id*. at 317.

[27] *Id*. at 318.

[28] *Id*. at 319.

[29] *Id*. at 317. It is important to remember that lawfulness of the order is not an element, so factual issues pertinent to lawfulness do not need to be submitted to the members, unless they are also pertinent to one or more of the elements.

[30] 62 M.J. 1 (2005).

[31] *Id*. at 5. The court affirmed the lesser included offense of conspiracy to commit aggravated assault, the findings as to the remaining offenses, and the sentence. *Id*. The court consisting of officer members adjudged a sentence of a dishonorable discharge, confinement for life, total forfeiture of pay and allowances, and reduction to the grade of E-1. *Id*. at 2.

[32] *Id*.

[33] *Id*. at 4.

[34] *Id*.

[35] *Id*.

the elements.[36] The officer panel convicted the accused of, inter alia, unpremeditated murder and conspiracy to commit unpremeditated murder.[37]

Based on these instructions, the CAAF found that the members could have convicted the accused of conspiracy to commit unpremeditated murder based on an intent to inflict great bodily harm.[38] The court held that, "[i]f the intent of the parties to the agreement was limited to the infliction of great bodily harm, their agreement was to commit aggravated assault, not unpremeditated murder."[39] Therefore, the CAAF affirmed a finding of guilty of only the lesser included offense of conspiracy to commit aggravated assault.[40]

Although the court did not discuss at any length the law of conspiracy, a brief analysis of the elements of the offense will show the court was correct. The two elements of a conspiracy are: (1) an agreement to commit an offense under the Uniform Code of Military Justice; and (2) an overt act by one or more of the conspirators to effect the object of the conspiracy.[41] The issue in this case involved the first element. The agreement must be to bring about the actual commission of the offense. If one of the elements of the offense requires a certain result, such as the death of a person, then a conspiracy to commit that offense would require an agreement to bring about that result.[42] Therefore, even though an intent to either kill or inflict great bodily harm is sufficient for unpremeditated murder, conspiracy to commit unpremeditated murder would necessarily require an intent to kill.[43]

The trial practitioner can glean two lessons from this case. First, if an offense requires a certain result, then a conspiracy to commit that offense requires an agreement to bring about that result. This would apply not only to conspiracy to commit unpremeditated murder, but also to conspiracy to commit other offenses such as maiming. Second, military judges must be cautious when cross-referencing during instructions on findings. It is unclear whether the military judge in this case intended to instruct the members that an intent to inflict great bodily harm was sufficient for conspiracy to commit unpremeditated murder or whether that was done inadvertently when cross-referencing to the instruction on unpremeditated murder that had already been given. In most cases where conspiracy and the underlying offense are charged, the military judge should first instruct on the underlying offense and then refer back to the elements and definitions when instructing on conspiracy. In cases like *Shelton*, however, the military judge should restate the elements of the underlying offense and highlight the differences for the members.

Variance by Excepting the Language "On Divers Occasions"

In *United States v. Augspurger*,[44] the CAAF again addressed an ambiguous finding of guilty resulting from the members excepting the words "on divers occasions" from a specification and not clearly disclosing upon which single occasion the conviction was based.[45]

Airman Basic Augspurger was charged, *inter alia*, with wrongfully using marijuana "on divers occasions" between 15 October 2001 and 20 February 2002.[46] The government presented evidence of three separate allegations of wrongful use of marijuana. The evidence for one of the allegations consisted of a positive urinalysis result and a confession to smoking marijuana at an off-base apartment with friends on 1 December 2001. The evidence for the other two allegations consisted of

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[36] *Id.*

[37] *Id.*

[38] *Id.* at 5.

[39] *Id.*

[40] *Id.*

[41] UCMJ art. 81 (2005); *see also* MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 5b (2005) [hereinafter MCM]; BENCHBOOK, *supra* note 2, para. 3-5-1c.

[42] *See* 2 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 12.2(c)(2), at 276-79 (2d ed. 2003).

[43] *Shelton*, 62 M.J. at 5. Similarly, even though an intent to either kill or inflict great bodily harm is sufficient for unpremeditated murder, attempted unpremeditated murder requires a specific intent to kill. United States v. Roa, 12 M.J. 210, 212 (C.M.A. 1982); *see* BENCHBOOK, *supra* note 2, para. 3-4-2c.

[44] 61 M.J. 189 (2005).

[45] The CAAF has started to refer to this as a "*Walters* violation." *See* United States v. Scheurer, 62 M.J. 100, 112 (2005) (referring to United States v. Walters, 58 M.J. 391 (2003)).

[46] *Augspurger*, 61 M.J. at 189-90.

the testimony of another Airman, who had been previously convicted of drug use, that he had seen the accused smoke marijuana on two separate occasions in January and February 2002.[47]

The members found the accused guilty of the specification of wrongful use of marijuana except the words "on divers occasions."[48] The members did not indicate on which of the three occasions they based their finding.[49] The defense counsel requested that the military judge have the members clarify their findings, but the military judge declined to do so.[50]

On appeal, the Air Force Court of Criminal Appeals (AFCCA) held that the military judge erred by not requiring the members to specify on which of the occasions they based their finding.[51] However, the AFCCA concluded that it was able to determine beyond a reasonable doubt that the members convicted the accused of the December 2001 use, and the Air Force court modified the findings to resolve the ambiguity.[52]

The CAAF found that the Air Force court erred.[53] When the accused is found guilty, except the words "on divers occasions," then the accused has been found *guilty* of misconduct on a single occasion and *not guilty* of the remaining occasions.[54] "Where the findings do not disclose the single occasion on which the conviction is based, the Court of Criminal Appeals cannot conduct a factual sufficiency review or affirm the findings because it cannot determine which occasion the servicemember was convicted of and which occasion the servicemember was acquitted of."[55]

In *Augspurger*, the CAAF makes it clear that it is the trial judge's responsiblity to ensure that the findings, as announced, clearly state the factual basis for the offense. During the trial, there are two opportunities for the military judge to accomplish this. First, during the instructions on findings, the military judge should instruct the members that if they except the words "divers occasions," they must specify which allegation was the basis of their finding. Second, if there is an ambiguity when the military judge is examining the findings worksheet prior to announcement, the military judge should instruct the members to clarify their findings.[56]

This case reiterates for trial practitioners the lessons learned from *Walters*. Fortunately, when this situation arises now, there are approved interim changes to the *Benchbook* that provide guidance and model instructions.[57] If a specification alleges "on divers occasions" and the evidence is such that the members might find the accused guilty of not more than one occasion, then the military judge should provide an appropriate variance instruction. Also, the findings worksheet should be tailored to assist the members in announcing an unambiguous verdict. In addition, when reviewing the findings worksheet before the findings are announced, the military judge must instruct the members to clarify their findings if the worksheet shows a finding of guilty except the words "on divers occasions" without exceptions or substitutions specifying upon which occasion the finding of guilt is based. Because this situation is relatively common, trial practitioners must remain vigilant to avoid committing a "*Walters* violation."

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[47] *Id*. at 190.

[48] *Id*.

[49] *Id*.

[50] *Id*.

[51] *Id*. at 191.

[52] *Id*.

[53] *Id*. at 192.

[54] *Id*. at 190.

[55] *Id*.

[56] *Id*. at 192.

[57] On 16 September 2003, after the *Walters* opinion, the Army Trial Judiciary approved an interim change (IC) to the *Benchbook* that added the new paragraph 7-25. It contains notes with guidance for the military judge, the definition for "divers occasions," and a model instruction for the members when the military judge's review of the findings worksheet reveals a finding of guilty except the words "on divers occasions" without specifying which one occasion. *See* BENCHBOOK, *supra* note 2, para. 7-25 (IC, 16 Sept. 2003).

In *United States v. Green*,[58] the AFCCA set aside a conviction for desertion.[59] The central issue at trial was mental responsibility. The accused was a noncommissioned officer with nineteen years and six months on active duty. He absented himself from his unit and was living on the streets for several months.[60] The defense provided evidence, including expert testimony, supporting its argument that the accused was not mentally responsible at the time of the offense.[61] The government's expert witness opined that the accused was not suffering from a mental disease or defect and was probably malingering.[62] The military judge gave the standard instruction on mental responsibility, including the definition of clear and convincing evidence as "proof which will produce . . . a firm belief or conviction as to the facts sought to be established."[63] The military judge then gave the Air Force's tailored definition of proof beyond a reasonable doubt as "proof that leaves you firmly convinced of the accused's guilt."[64]

The Air Force court concluded that the military judge erred in not adequately instructing the members on the distinction between these burdens of proof. During prefatory instructions to the members, the military judge instructed them that proof beyond a reasonable doubt is a more stringent standard than the preponderance standard generally used in administrative hearings.[65] However, the members were not instructed on any distinction between proof beyond a reasonable doubt and clear and convincing evidence.[66] Because of the semantic similarity between "firm belief or conviction" and "firmly convinced," the court found that it was critical for the military judge to instruct the members on how to differentiate between the two

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[58] 62 M.J. 501 (A.F. Ct. Crim. App. 2005).

[59] *Id*. at 504.

[60] *Id*. at 502.

[61] *Id*.

[62] *Id*. at 502-03.

[63] *Id*. at 503. The *Benchbook* provides the following definition for "clear and convincing evidence.

> By clear and convincing evidence I mean that measure or degree of proof which will produce in your mind a firm belief or conviction as to the facts sought to be established. The requirements of clear and convincing evidence does not call for unanswerable or conclusive evidence. Whether the evidence is clear and convincing requires weighing, comparing, testing, and judging its worth when considered in connection with all the facts and circumstances in evidence.

BENCHBOOK, *supra* note 2, para. 6-4.

[64] *Green*, 62 M.J. at 503.

[65] *Id*. Although the opinion does not quote this part of the instructions given to the members in this case, the Air Force Supplement to the *Benchbook* contains the following definition of "reasonable doubt" in both the Preliminary Instructions in paragraph 2-5 and the Closing Substantive Instructions on Findings in paragraph 2-5-12.

> A "reasonable doubt" is a conscientious doubt, based upon reason and common sense, and arising from the state of the evidence. Some of you may have served as jurors in civil cases, or as members of an administrative board, where you were told that it is only necessary to prove that a fact is more likely true than not true. In criminal cases, the government's proof must be more powerful than that. It must be beyond a reasonable doubt. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the accused's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the accused is guilty of the offense charged, you must find (him) (her) guilty. If, on the other hand, you think there is a real possibility that the accused is not guilty, you must give (him) (her) the benefit of the doubt and find (him) (her) not guilty.

U.S. DEP'T OF ARMY, PAM. 27-9, LEGAL SERVICES: MILITARY JUDGES' BENCHBOOK para. 2-5 (15 Sept. 2002) (Air Force Supplement).

The standard *Benchbook* preliminary instruction on "reasonable doubt" is a follows.

> A reasonable doubt is an honest, conscientious doubt, suggested by the material evidence, or lack of it, in the case. It is an honest misgiving generated by insufficiency of proof of guilt. Proof beyond a reasonable doubt means proof to an evidentiary certainty, although not necessarily to an absolute or mathematical certainty. The proof must exclude every fair and reasonable hypothesis of the evidence except that of guilt.

BENCHBOOK, *supra* note 2, para. 2-5. The standard *Benchbook* closing substantive instruction on "reasonable doubt," when mental responsibility is in issue, is a follows.

> By reasonable doubt is intended not a fanciful or ingenious doubt or conjecture, but an honest, conscientious doubt suggested by the material evidence or lack of it in the case. It is an honest misgiving generated by insufficiency of proof of guilt. Proof beyond a reasonable doubt means proof to an evidentiary certainty although not necessarily to an absolute or mathematical certainty. The proof must be such as to exclude not every hypothesis or possibility of innocence, but every fair and rational hypothesis except that of guilt.

Id. para. 2-5-12. This instruction is virtually identical to the closing substantive instruction when mental responsibility is not in issue, except for some quotation marks and a comma that are insubstantial.

[66] *Green*, 62 M.J. at 503.

standards.[67] The Air Force court held, "When the 'clear and convincing' standard is employed, the military judge must, at a minimum, clearly instruct the members that it is an intermediate standard; higher than a mere probability, but not as high as 'proof beyond a reasonable doubt.'"[68]

This case is significant for those practicing in the Air Force, but less important for those practicing in the other services. The potential confusion in this case was created by the language of the tailored Air Force instruction on "reasonable doubt" when it was used in conjunction with the standard *Benchbook* instruction on "clear and convincing evidence," along with distinguishing "proof beyond a reasonable doubt" from "preponderance of the evidence" but not "clear and convincing evidence." This potential confusion is not present when using the standard *Benchbook* instruction on "reasonable doubt" and when "proof beyond a reasonable doubt" is not distinguished from "preponderance of the evidence." However, a broader lesson for all from this case is that trial practitioners must strive to keep instructions clear and understandable for the court members.

Evidence

Character for Truthfulness: United States v. Diaz[69]

Chief Petty Officer Diaz testified on his own behalf at trial and several witnesses testified to his character for truthfulness. Prior to instructions, the defense requested Instruction 7-8-1 from the *Benchbook* regarding the accused's character for truthfulness. Specifically, the defense sought the language that states "[e]vidence of the accused's character for truthfulness may be sufficient to cause a reasonable doubt as to his guilt."[70] The military judge denied the defense request, stating that truthfulness was not a pertinent character trait given that the accused was charged with molesting his daughter.[71]

The NMCCA agreed with the military judge that truthfulness was not a pertinent character trait in this case under Military Rule of Evidence (MRE) 404(a)(1). Accordingly, the accused's character for truthfulness did not "bear *directly* on guilt or innocence,"[72] and the requested instruction was not legally correct. Recognizing that the testimony was offered only to support the accused's character for truthfulness after it had been attacked at trial (under M.R.E. 608(a)), the NMCCA held the military judge correctly instructed the members that they could consider the proffered character evidence when determining the accused's believability.[73]

This case illustrates the different ways that evidence of an accused's character for truthfulness may apply in any given case. When charged with an offense for which a truthful character trait would be "pertinent," such as false official statement, Instruction 7-8-1 may be appropriate.[74] However, if truthfulness is not a "pertinent" character trait, evidence of such a character trait is admissible only as it bears on the accused's credibility,[75] and Instruction 7-8-3 of the *Benchbook* should be used.

Article 112a and the Inference of Wrongfulness: United States v. Brewer[76]

Air Force Master Sergeant (MSgt) Ronald Brewer was charged with wrongful use of marijuana. The government's evidence consisted of both urinalysis and hair analysis test results. At trial, the government relied upon the permissible inference to show the accused's use of marijuana was wrongful.[77]

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[67] *Id.*

[68] *Id.* at 504. The court further suggested, when the need for an instruction on "clear and convincing evidence" is apparent at the beginning of trial, providing a tailored instruction distinguishing between the various burdens of proof instead of the standard Air Force instruction discussing only preponderance and beyond a reasonable doubt. *Id.* n.4.

[69] 61 M.J. 594 (N-M. Ct. Crim. App. 2005).

[70] *See* BENCHBOOK, *supra* note 2, instr. 7-8-1.

[71] *Diaz*, 61 M.J. at 608.

[72] *Id.* at 609 (citing United States v. Yarborough, 18 M.J. 452, 457 (C.M.A. 1984)).

[73] *Id.* This instruction was consistent with Instruction 7-8-3 of the BENCHBOOK.

[74] *See* MCM, *supra* note 41, MIL. R. EVID. 404(a)(1).

[75] *See id.* MIL. R. EVID. 608(a).

[76] 61 M.J. 425 (2005).

At trial, the military judge strayed from the model Article 112a instructions in the *Benchbook*, instructing the officer and enlisted members as follows:

> To be punishable under Article 112a, use of a controlled substance must be wrongful. Use of a controlled substance is wrongful if it is without legal justification or authorization.
>
> Use of a controlled substance is not wrongful if such act or acts are: (a) done pursuant to legitimate law enforcement activities (for example, an informant who is forced to use drugs as part of an undercover operation to keep from being discovered is not guilty of wrongful use); (b) done by authorized personnel in the performance of medical duties or experiments; or (c) done without knowledge of the contraband nature of the substance (for example, a person who uses marijuana, but actually believes it to be a lawful cigarette or cigar, is not guilty of wrongful use of marijuana).
>
> Use of a controlled substance may be inferred to be wrongful in the absence of evidence to the contrary. However, the drawing of this inference is not required.
>
> *The burden of going forward with evidence with respect to any such exception in any court-martial shall be upon the person claiming its benefit.*
>
> *If such an issue is raised by the evidence presented, then the burden is on the United States to establish that the use was wrongful.*
>
> Knowledge by the accused of the presence of the substance and knowledge of its contraband nature may be inferred from the surrounding circumstances. However, the drawing of the inference is not required.
>
> . . .
>
> [T]he burden of proof to establish the guilt of the accused beyond a reasonable doubt is on the government. The burden never shifts to the accused to establish innocence or to disprove the facts necessary to establish each element of the offense.[78]

On appeal, MSgt Brewer challenged the military judge's instructions as erroneous. The CAAF found the military judge's instructions had turned the permissive inference of wrongfulness into an improper "mandatory rebuttable presumption" and reversed.[79]

The CAAF focused on the two paragraphs above in italics—taken from the explanation section of the *Manual for Courts-Martial* and not found in the model instruction contained in the *Benchbook*. The CAAF held that the military judge's failure to explain the term "burden of going forward" and use of the term "exception" may have led the members to believe the accused had a "responsibility to prove that one of the exceptions applies" or that only when the accused so proves does the burden "shift[] back to the Government to show wrongful use."[80] As a result, the CAAF found a reasonable member could have interpreted the instructions as saying wrongfulness was presumed unless the accused proved an exception, thus improperly creating a mandatory presumption of wrongfulness.[81]

The CAAF found error in the portions of the instruction taken from the *MCM* (and not included in the model *Benchbook* instruction). Importantly, *Brewer* does not hold that the Article 112a *Benchbook* instruction regarding the permissive inference of wrongfulness is erroneous.[82] Had the military judge used the *Benchbook* instruction, instructional error likely would not have occurred.

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[77] *Id.* at 427; *see* MCM, *supra* note 41, para. 37c(5); BENCHBOOK, *supra* note 2, instr. 3-37-2d.

[78] *Brewer*, 61 M.J. at 430. It appears that the military judge drew these instructions (with the exception of the last paragraph) directly from the *MCM*. MCM, *supra* note 41, para. 37c(5). The majority opinion states that these instructions were taken "almost verbatim" from the *Benchbook*. Although the above instruction also appears in the *Benchbook* (with the exception of the italicized language), as the dissent correctly notes, the instructions are nearly verbatim from the *MCM*.

[79] *Brewer*, 61 M.J. at 432.

[80] *Id.* at 431.

[81] *Id.*

[82] BENCHBOOK, *supra* note 2, instr. 3-37-2d.

Findings Arguments Run Amuck: Comment on Constitutional Rights
United States v. Carter[83]

Airman Carter was charged with committing indecent acts with Amn D while he and Amn D were alone in a barracks room. Airman D was the only government witness and the defense presented no evidence, instead focusing only on challenging the alleged victim's credibility.[84]

During opening argument on findings, the trial counsel repeatedly referred to the government's evidence of the accused's misconduct as "uncontroverted" or "uncontested."[85] At the conclusion of the defense argument on findings, the military judge instructed the members that the accused had an absolute right not to testify and the members must disregard the accused's failure to testify.[86] Significantly, after defense argument, the trial counsel in rebuttal again repeated the theme that the government evidence was "uncontradicted."[87] The military judge did not further instruct the members on the accused's right to remain silent and the panel later returned a finding of guilty. The AFCCA reversed, finding plain error.[88] The Air Force Judge Advocate General certified the issue for review by the CAAF.[89]

Reviewing the totality of the situation, the CAAF affirmed the AFCCA's reversal, finding the trial counsel's comments to be impermissible comments on the accused's right to remain silent, which shifted the burden of proof from the government.[90]

Although the Discussion to Rule for Court-Martial (RCM) 919(b)[91] does not explicitly preclude trial counsel from arguing the government's evidence is unrebutted, when the accused and the victim are the only two people present at the time of the alleged offenses, certainly the direct implication is that the rebuttal must come from the accused.[92] Thus, such comments by the government are improper.

Defense counsel must be alert to situations that could be interpreted as a comment on their client's right to remain silent and must object.[93] Likewise, even without defense objection, the military judge should sua sponte instruct the members on the accused's right to remain silent, the presumption of innocence, and the burden of proof[94] when the trial counsel's argument implies the defense has an obligation to present evidence.[95]

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[83] 61 M.J. 30 (2005)

[84] The case indicates that the defense did intend on calling one witness, but when the government objected to that witness' testimony, the defense decided not to call the witness and rested at the close of the government's case. *Id.* at 32.

[85] *Id.*

[86] BENCHBOOK, *supra* note 2, instr. 7-12. The defense did not object to the propriety of the trial counsel's comments and the military judge did not further address them.

[87] *Carter*, 61 M.J. at 33.

[88] *Id.* (citing 2003 CCA LEXIS 257).

[89] *Id.* at 31.

[90] *Id.* at 34.

[91] "Trial counsel may not argue the prosecution's evidence is unrebutted if the only rebuttal could come from the accused." MCM, *supra* note 41, R.C.M. 919(b) Discussion.

[92] As the CAAF noted, "[o]nly [the accused] possessed information to contradict the Government's sole witness." *Carter*, 61 M.J. at 34.

[93] Failure to do so results in the appellate courts evaluating the issue under a plain error analysis – distinctly less favorable to the accused than had the issue been preserved by objection.

[94] Although the *Benchbook* does not have a single instruction addressing all these issues for use by the military judge in situations such as these, the *Benchbook* does address these issues thus:

> The accused has an absolute right to remain silent (BENCHBOOK, *supra* note 2, instr. 7-12);
>
> The accused is presumed not guilty until proven otherwise by the government (BENCHBOOK, *supra* note 2, sec. V, paras. 2-5 and 2-5-12); and
>
> The government carries the burden of proof and the burden never shifts to the defense (*Id.*).

Although the members would have heard each of these instructions by the end of trial, the military judge could remind the members of these instructions should the situation dictate.

[95] The CAAF implies that had the military judge repeated his instruction to the members regarding the accused's right to remain silent after the trial counsel's closing argument, the result may have been different: "Although the military judge instructed the members that they were not to make adverse inferences from [the accused's] decision to remain silent, we agree with the majority opinion below that trial counsel's subsequent rebuttal [argument] vitiated any curative effect." *Carter*, 61 M.J. at 35.

Findings Arguments Run Amuck: A Litany
United States v. Fletcher[96]

Technical Sergeant Fletcher elected to be tried by members and took the stand in his own defense. He denied using cocaine and presented evidence of his character for truthfulness, his church affiliation, and his good family life.[97]

Tempers apparently flared between trial and defense counsel during trial. During the findings argument, the trial counsel inappropriately injected her own personal beliefs and opinions, improperly vouched for the government's evidence and witnesses, provided her own personal views of the evidence and the accused's guilt, and made disparaging remarks about both the defense counsel and the accused's credibility.[98]

There were no defense objections to the majority of the trial counsel's improper actions. Finding plain error, however, the CAAF reversed.[99]

Addressing the role of the military judge during argument, the CAAF again reiterated that curative instructions by the military judge (even absent objection) may remedy an error. The CAAF noted that the military judge "did not make any effort to remedy any misconduct other than a few statements to which defense counsel objected."[100] Although the military judge provided the standard *Benchbook* instruction that the arguments of counsel are not evidence,[101] he took no further action in response to the trial counsel's argument.

As a repeated theme this term, the CAAF touched upon the military judge's sua sponte obligation to give corrective instructions to the members in response to improper argument by counsel. Whether the improper argument is by the government or the defense, the military judge should be prepared to interrupt, advise the members that the objectionable portion of the argument is improper and direct them to disregard it.[102]

The Military Judge Going Too Far: Instructing on the Accused's Failure to Testify:
United States v. Forbes[103]

At his court-martial, Quartermaster First Class Forbes did not testify. Concerned that the members might draw an adverse inference from his silence, the military judge told counsel that he intended to give the standard *Benchbook* instruction on the accused's failure to testify.[104] The defense objected. The military judge decided to give the instruction anyway.[105]

Last year's annual review of instructions article discussed the NMCCA response to this case. On appeal, the NMCCA held that giving the instruction over defense objection was error and, applying a presumption of prejudice, found the error prejudicial.[106]

When evaluating whether the military judge properly gave the instruction over defense objection, the NMCCA said the military judge must balance the defense objection to the request against the "case-specific interests of justice."[107] By

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[96] 62 M.J. 175 (2005).

[97] *Id.* at 178.

[98] Appendix I to the Court's opinion contains the entire findings argument by the government.

[99] *Fletcher*, 62 M.J. at 185.

[100] *Id.*

[101] *See* BENCHBOOK, *supra* note 2, sec. V, para. 2-5-9.

[102] The CAAF specifically said the military judge "should have interrupted trial counsel before [s]he ran the full course of [her] impermissible argument. Corrective instructions at an early point might have dispelled the taint of the initial remarks." *Fletcher*, 62 M.J. at 185 (quoting United States v. Knickerbocker, 2 M.J. 128, 129 (C.M.A. 1977)).

[103] 61 M.J. 354 (2005).

[104] BENCHBOOK, *supra* note 2, instr. 7-12.

[105] The military judge did not make a record of specific concerns that caused him to give the instruction, other than a generalized concern that the members might hold the accused's failure to testify against him. Although the military judge told counsel that he would not give the instruction last, he did. When that error was pointed out by the defense after instructions, the military judge admitted the error was his. However, he denied a request for mistrial.

[106] United States v. Forbes, 59 M.J. 934 (N-M. Ct. Crim. App. 2004).

[107] *Id.* at 939.

analogy, the NMCCA compared that balancing to the balancing test under MRE 403. The NMCCA stated the deference they would give the military judge's analysis as follows:

> When a military judge gives a fail-to-testify instruction over defense objection after having identified the case-specific "interests of justice" that support his decision and articulating his analysis of those interests relative to the defense election, then he should be accorded great deference under a standard of review of abuse of discretion. If he identifies the interests of justice in question but does not articulate his balancing of those interests with the defense election, he is accorded less deference. If he does not identify interests of justice at all, the standard of review is de novo.[108]

If the reviewing court finds error on the military judge's part, the NMCCA said prejudice to the accused should be presumed, with the government bearing the burden to rebut it:

> When a military judge commits error by giving this instruction over defense objection in the absence of articulated case-specific interests of justice, a presumption of prejudice results. The Government then bears the burden of showing by a preponderance of the evidence why the appellant was not prejudiced by the instruction. Admittedly, this may be a difficult burden for the Government to bear. But, this court did not write the Rule, and on the issue of an appropriate test for prejudice, we feel compelled to take our cues from the President's language that so clearly favors the military accused.[109]

Finding the military judge had erred and that the government had not carried its burden, the NMCCA reversed.

The Judge Advocate General of the Navy certified two questions to the CAAF: (1) Did the NMCCA err in finding the instruction was error, and (2) Did the NMCCA err in presuming prejudice?[110] The CAAF answered no to both questions, specifically adopting the NMCCA's framework for review.[111]

Citing MRE 301(g),[112] the CAAF emphasized that the decision to give this instruction belongs to the defense, with one exception. The military judge may give the instruction over defense objection when it is "necessary in the interests of justice."[113]

The reason given by the military judge was to "protect the accused from any adverse feelings by the members."[114] The CAAF determined that this "generalized fear" alone is insufficient to override the defense decision against the instruction.[115] Unfortunately, the military judge made no "case-specific" findings of necessity, nor did he articulate his analysis of those against the defense objection to the instruction. Finding no case-specific circumstances in their de novo review, the CAAF affirmed the NMCCA's reversal.[116]

In future cases, if the military judge gives the failure to testify instruction over defense objection, the trial counsel should ensure that the military judge makes "case specific" findings of necessity on the record and articulates why those factors outweigh the defense objection to the instruction.[117]

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[108] *Forbes*, 61 M.J. at 358.

[109] *Id.* at 359.

[110] *Id.* at 355-56.

[111] *Id.* at 356.

[112] Rule 301(g) and the Drafter's Analysis for MRE 301(g), which makes it clear that the intent is to "leave[] that decision solely within the hands of the defense . . . in all but the most unusual circumstances." MCM, *supra* note 41, MIL. R. EVID. 301(g).

[113] *Id.*

[114] *Forbes*, 61 M.J. at 357.

[115] *Id.* at 359.

[116] *Id.* at 360.

[117] The factors included should go beyond the potential—that arguably exists in every case—that the members might "hold it against the accused" if he did not testify. For example, if questions from the members repeatedly indicate a desire to hear from the accused or repeatedly question why the accused did not testify, such an instruction may be necessary, over defense objection, "in the interests of justice."

The Military Judge Going Too Far: Comment on Right to Silence:
United States v. Andreozzi[118]

During Staff Sergeant (SSG) Andreozzi's general court-martial for a litany of serious offenses against his wife, the defense called a high school friend as a character witness. Three times during that witness's testimony, he stated the accused had told him he wanted to "preserve his marriage."[119] The military judge sustained the first objection. The military judge also sustained the second objection, but in addition told the members "to disregard the 'testimony with regard to what [the accused] might have told his friend.'"[120] In apparent frustration, the military judge gave the following instruction after sustaining the third objection:

> Members of the court, you can't consider that part of the testimony. It[']s not before you. It is hearsay testimony. The trial counsel has not had an opportunity to cross examine the person who allegedly made the statement; therefore you may not consider it.[121]

The military judge denied a motion for mistrial based upon improper comment on the accused's right to silence.[122] When the defense rested without the accused testifying, the military judge gave the standard *Benchbook* instruction on the accused's right to silence. He gave the instruction again during findings instructions.

On appeal, the Army Court of Criminal Appeals (ACCA) determined that the military judge's third instruction to the members was an erroneous comment on the accused's right to silence.[123] Given the two specific instructions on the accused's right to silence, however, the ACCA determined the error was harmless and affirmed.

Trial work can be a frustrating business for military judges and counsel. Attempts by military judges to educate the members as to why certain evidence is impermissible, borne of that frustration, may also inadvertently result in constitutional error. Ruling upon the objection, without comment further than assuring the members will disregard the evidence, may be advisable in such challenging situations.

Sentencing

Unsworn Statements and Sentence Comparison: United States v. Barrier[124]

Following his conviction for wrongfully using drugs, Senior Airman (SrAmn) Barrier included the following in his unsworn statement to the members:

> When deciding whether your sentence should include some amount of confinement, I know that each case has to be decided on its own merits. But I also believe that similar cases should receive similar punishments. Such as last year, Senior Airman Watson from Tyndall was charged with using ecstasy and the confinement portion of his sentence was only three months.[125]

Senior Airman Watson was not a co-accused nor was he charged with conspiring with Barrier—he was merely another airman convicted of drug use. After the accused's unsworn statement, the military judge, over defense objection, gave the following instruction to the members, based on the 2000 AFCCA case of *United States v. Friedmann*:[126]

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[118] 60 M.J. 727 (Army Ct. Crim. App. 2004).

[119] *Id.* at 742.

[120] *Id.*

[121] *Id.*

[122] BENCHBOOK, *supra* note 2, instr. 7-12.

[123] The ACCA cited *United States v. Mobley*, 31 M.J. 273, 279 (C.M.A. 1990) ("It is black letter law that a trial counsel [or military judge] may not comment directly, indirectly, or by innuendo, on the fact that an accused did not testify in his defense."). *Andreozzi*, 60 M.J. at 742.

[124] 61 M.J. 482 (2005).

[125] *Id.*

[126] 53 M.J. 800 (A.F. Ct. Crim. App. 2000).

> Now, during the accused's unsworn statement, he alluded to a case of another individual who the accused had stated had received a certain degree of punishment. In rebuttal, the trial counsel offered you Prosecution Exhibit 6, which was the court-martial order from that case which stated what that individual got in that case.
>
> The reason I mention this is for the following reason, and that is because, in fact, the disposition of other cases is irrelevant for your consideration in adjudging an appropriate sentence for this accused. You did not know all the facts of those other cases, or other cases in which sentences were handed down, nor anything about those accused in those cases, and it is not your function to consider those matters at this trial. Likewise, it is not your position to second guess the disposition of other cases, or even try to place the accused's case in its proper place on the spectrum of some hypothetical scale of justice.
>
> Even if you knew all the facts about other offenses and offenders, that would not enable you to determine whether the accused should be punished more harshly or more leniently because the facts are different and because the disposition authority in those other cases cannot be presumed to have any greater skill than you in determining an appropriate punishment.
>
> If there is to be meaningful comparison of the accused's case to those of other [sic] similarly situated, it would come by consideration of the convening authority at the time that he acts on the adjudged sentence in this case. The convening authority can ameliorate a harsh sentence to bring it in line with appropriate sentences in other similar cases, but he cannot increase a light sentence to bring it in line with similar cases. In any event, such action is within the sole discretion of the convening authority.
>
> You, of course, should not rely on this in determining what is an appropriate punishment for this accused for the offenses of which he stands convicted. If the sentence that you impose in this case is appropriate for the accused and his offenses, it is none of your concern as to whether any other accused was appropriately punished for his offenses.
>
> You have the independent responsibility to determine an appropriate sentence, and you may not adjudge an excessive sentence in reliance upon mitigation action by higher authority.[127]

On appeal, SrA Barrier argued the military judge interfered with his "largely unfettered" right to provide information in his unsworn statement.[128] The CAAF disagreed and affirmed. Providing further guidance to the bench and bar, the CAAF stated that when the accused brings such sentence comparison information to the attention of the members, the military judge may appropriately address three areas.[129] First, the military judge may tell the members "that in the military justice system[,]. . . the members are required to adjudge a sentence based upon their evaluation of the evidence without regard to the disposition of other cases. . . ."[130] Second, the military judge's instruction may say "to the extent that the [military justice] system provides for sentence comparison, that function is not part of the members' deliberations; [but] it is a power assigned to the convening authority and Court of Criminal Appeals. . . ."[131] Finally, the military judge may tell the members "in the course of determining an appropriate punishment, . . . [they] may not rely upon the possibility of sentence reduction by the convening authority or the Court of Criminal Appeals."[132]

Significantly, the court said that such sentence comparison evidence—not of a co-accused, but merely of someone similarly situated—is irrelevant as extenuation and mitigation under RCM 1001 and may be appropriately excluded "if the military judge determines that an instruction would not suffice to place the statement in proper context for the members."[133]

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[127] *Barrier*, 61 M.J. at 483. Although an instruction of similar import currently exists in the BENCHBOOK, *supra* note 2, sec. V, para. 2-5-23, the military judge's instruction here was much more detailed.

[128] *Id.* at 484 (citing United States v. Grill, 48 M.J. 131, 133 (1998)).

[129] *Id.* at n.2.

[130] *Id.*

[131] *Id.*

[132] *Id.* at 484.

[133] *Id.* at 486.

This language is a narrowing of the court's opinion in *United States v. Grill*, where the military judge was reversed for barring the accused from referring in his unsworn statement to the sentences received by his civilian co-accused.[134]

Unsworn Statements and Polygraph Evidence:
United States v. Johnson[135]

Although not specifically involving an instructions issue, this case is another in the CAAF's trend this term to restrict the information presented to the court by an accused through an unsworn statement.

Technical Sergeant Johnson was accused of trafficking in marijuana. Before trial, he took a private polygraph test after which the examiner concluded the accused was not deceptive. Notwithstanding, the accused was tried and convicted. Prior to making his unsworn statement at trial, the accused apparently provided the substance of that statement to the military judge. His proposed unsworn statement referred to passing the polygraph test. The military judge prohibited him from including any reference to his exculpatory polygraph test in his unsworn statement.[136]

Citing *Grill* for the proposition that the allocution right in an unsworn statement is largely unfettered and broadly construed, the accused argued that the military judge erred in preventing him from addressing the polygraph in his unsworn statement. On appeal, the CAAF disagreed and affirmed.[137]

Discussing the unsworn statement and its limits, the court said the unsworn statement "remains a product of RCM 1001(c) and thus remains defined in scope by the rule's reference to matters presented in extenuation, mitigation and rebuttal."[138] Finding that an exculpatory polygraph result does not fit into any of these categories, but instead is contrary to existing caselaw that prohibits relitigating findings during sentencing,[139] the CAAF found the military judge appropriately excluded those references from the accused's unsworn statement.

Although *Grill* allows the military judge to appropriately instruct the members on how to use otherwise inadmissible information from an unsworn statement, *Barrier* makes clear that the military judge may use his discretion to prohibit some information outright, instead of later instructing the members. *Johnson* goes one step further and makes clear that information conveyed through the unsworn statements must meet the definitional requirements of RCM 1001(c) as either extenuation, mitigation, or rebuttal, before it is a permissible part of an unsworn statement.

Unsworn Statements and a Co-Accused's Acquittal:
United States v. Sowell[140]

Seaman Stacie Sowell's situation rounds out the CAAF's handling of unsworn statements.

Seaman Sowell was charged with conspiracy and larceny involving government computers. Two co-conspirators were never charged, and a third, Petty Officer (PO) Elliot, was acquitted of "substantively identical charges."[141] Petty Officer Elliot testified for the accused that they never talked about stealing computers and never took any of the computers. Trial counsel challenged PO Elliot's credibility, arguing on findings that, as a co-conspirator, she had a motive to lie.[142]

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[134] United States v. Grill, 48 M.J. 131 (1998). Judge Crawford said she "mourn[s the Court's] . . . missed opportunity to clarify, modify, or overrule this Court's opinion in *United States v. Grill*. . . ." *Barrier*, 61 M.J. at 486. Many may agree. Citing *United States v. Mamaluy*, 10 C.M.R. 102 (C.M.A. 1959), the *Barrier* majority said "It has long been the rule of law that the sentences in other cases cannot be given to court-martial members for comparative purposes." Query: If that has always been the case, why was the military judge reversed in *Grill?*

[135] 62 M.J. 31 (2005).

[136] *Id*. at 37.

[137] *Id.* at 38.

[138] *Id*. at 37.

[139] The CAAF eschewed the common term "impeachment of the verdict" in favor of the term relitigation of the findings. *Id.* at 37 n.2.

[140] 62 M.J. 150 (2005).

[141] *Id*. at 151.

[142] *Id.*

After her conviction, Seaman Sowell sought to tell the members that PO Elliott had been acquitted. The military judge prevented the accused from doing so.[143]

On appeal, the accused contended that the military judge's actions interfered with her right to make an unsworn statement, as set forth in *Grill*. In response, government appellate counsel argued that reference to the acquittal would impeach the findings, as both the accused and Elliott faced the same charges. Additionally, the government argued that it would be impermissible sentence comparison, citing *Mamaluy*.[144]

The CAAF agreed with the defense and reversed, but on different grounds.[145] The CAAF held that under the specific facts of this case, trial counsel's argument on findings opened the door and therefore such a comment by the accused was proper rebuttal under RCM 1001(c). Because the trial counsel had referred to Petty Officer Elliott as a "co-conspirator," he implied that she was also guilty of the offenses with which the accused was charged. Thus, in the CAAF's view, what would otherwise have been improper extenuation and mitigation evidence became appropriate RCM 1001(c) rebuttal evidence, as part of an unsworn statement.[146]

The result notwithstanding, *Sowell* represents a continuation of the trend this term to limit the scope of the court's prior opinion in *Grill*, allowing the military judge more flexibility to deal with sentence comparison information in unsworn statements.

Conclusion

The cases from the CAAF's 2005 term provide many lessons on instructions for military justice practitioners. The *Benchbook* is the primary resource for instructions, and varying from the standard *Benchbook* instructions should only be done for good reason and with careful deliberation. The *Benchbook* should only be the first step, however, because it might not adequately reflect new caselaw or cover the law in a unique situation. Military judges must pay attention to detail in order to provide clear and accurate instructions to the members. Also, military judges must be ready to stop improper arguments and provide curative instructions. Instructions to the members require careful thought because they are critical to a fair trial.

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[143] *Id.*

[144] *Id.* at 152 (citing United States v. Mamaluy, 10 C.M.R. 102 (C.M.A. 1959)).

[145] One might think that such information would clearly be allowed under *Grill* – in fact, the CAAF reversed the military judge in *Grill* for failing to allow the accused to include arguably similar information in his unsworn statement: that "no charges have ever been brought against [a civilian co-accused], and may never be brought against him." United States v. Grill, 48 M.J. 131, 132 (1998). However, following its framework for analysis from *Johnson*, the CAAF in *Sowell* characterized the comment as appropriate rebuttal based on the facts of this case – not generally appropriate, as they did for the comment in *Grill*.

[146] "Ordinarily, such information might properly be viewed in context as impeaching the member's findings. As the Court of Criminal Appeals concluded, . . . *Mamaluy* remain[s] good law. However, we conclude under the limited circumstances of this case, that the Government's argument on findings opened the door to proper rebuttal. . . ." *Sowell*, 62 M.J. at 152.