Military Sentencing 101—Back to the Basics

Major Maureen A. Kohn
Professor, Criminal Law Department
The Judge Advocate General's Legal Center and School
Charlottesville, Virginia

Introduction

"Have you first checked the big red book?"[1] This is the answer most new counsel receives when they ask questions regarding court-martial procedures. The supervisor is not being lazy, but ensuring that the counsel has at least opened the *Manual for Courts-Martial* and read the appropriate rule before asking their question. A working knowledge of the Rules for Courts-Martial (RCM) is essential not only for the merits portion of a case, but also for the sentencing portion. Sentencing in the military is unique. Unlike the civilian system, the military does not use sentencing guidelines but instead uses an adversarial hearing to "receive full information concerning the accused's life and characteristics in order to arrive at a sentence."[2] This enables the Armed Forces to follow a traditional approach; to devise "an individualized sentence . . . that fits the offender and the offense."[3] Counsel may only present evidence that fits specifically within the RCM presentencing procedure.[4] Rule for Courts-Martial 1001(b) allows the government only five categories (or "pigeon holes") to introduce evidence.[5] These five categories include service data from the charge sheet, personal data and character of prior service of the accused, evidence of prior convictions of the accused, evidence in aggravation, and evidence of rehabilitative potential.[6] Under RCM 1001(c), defense counsel has two broad rules in which to introduce evidence: extenuation and mitigation.[7] Although these rules might appear straight-forward at first blush, presenting a strong sentencing takes preparation.

Two rules that often cause counsel confusion are RCM 1001(b)(4), evidence in aggravation, and RCM 1001(c), matters to be presented by the defense.[8] This article addresses evidence in aggravation and the implications of *United States v. Hardison*[9] where the Court of Appeals for the Armed Forces (CAAF) reiterated its holding as to when the government may use uncharged misconduct as aggravating evidence. This article also addresses the defense sentencing case of *United States v. Perez*[10] in which the CAAF emphasized the importance of defense presenting a presentencing case. Through these two cases, the CAAF sent a clear message this past term that counsel need to remember the basics when presenting their presentencing case.

Evidence in Aggravation—the General Rule

Before any discussion of appropriate aggravation evidence can begin, a refresher on the text of the rule is in order. Rule for Courts-Martial 1001(b)(4) states:

> The trial counsel may present evidence as to any aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty. Evidence in aggravation includes, but is not limited to evidence of financial, social, psychological, and medical impact on or cost to any person or entity who was the victim of an offense committed by the accused and evidence of significant

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[1] A common reference to the MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008) [hereinafter MCM].

[2] FRANCIS A. GILLIGAN & FREDRIC I. LEDERER, COURT-MARTIAL PROCEDURE 23–29 (3d ed. 2006) (quoting United States v. Mack, 9 M.J. 300, 316 (C.M.A. 1980)).

[3] *Id.*

[4] *See generally* MCM, *supra* note 1, R.C.M. 1001.

[5] *Id*. R.C.M. 1001(b)(4).

[6] *Id*.

[7] *Id*. R.C.M. 1001(c).

[8] *Id*. R.C.M. 1001(b)(4), (c).

[9] 64 M.J. 279 (2007).

[10] 64 M.J. 239 (2006).

adverse impact on the mission, discipline, or efficiency of the command directly and immediately resulting from the accused's offense.[11]

Not only must the evidence meet the above stated rule, the evidence must also comply with Military Rule of Evidence (MRE) 403.[12] The rule states that the probative value of the evidence must substantially outweigh the danger of unfair prejudice, the evidence must not confuse the issues or mislead the members, and the evidence may not cause undue delay, waste of time, or needless presentation of cumulative evidence.[13] Additionally, the military judge has broad discretion in determining whether to admit evidence under RCM 1001(b)(4).[14] Often, aggravation evidence takes the form of evidence of circumstances surrounding the offense and evidence of impact of the offense on the victim and community.[15] During the 2007 term, the service appellate courts, in unpublished opinions, provided several useful examples of proper aggravating evidence.

The first of these cases is *United States v Palomares*.[16] A general court-martial convicted the accused of wrongful use of diazepam[17] on divers occasions while deployed to Afghanistan and engaged in combat operations.[18] The company commander testified about the character of the unit's combat operations, the difficult nature of their mission, and the complications that the illegal use of the diazepam by the accused and other members of the unit caused during the relief in place.[19] In addition, the commander testified how the company was singled out and subjected to a unit-wide urinalysis and search of their personal gear immediately upon their return home.[20] The urinalysis and search delayed the entire company's reunification with their family members by at least six hours.[21] The Navy-Marine Court of Criminal Appeals (NMCCA) held that although Palomares was not the only Marine who wrongfully used the drug, "his offense still had an unnecessary and deleterious impact on the mission, discipline, and efficiency of the command."[22] This evidence was directly related and resulted from the offense of which he was convicted.[23] In addition, the court found that the probative value of the evidence outweighed any potential prejudicial impact.[24]

Another example of proper aggravating evidence is seen in *United States v. Chapman*.[25] In a military judge alone trial, Lance Corporal Aaron Chapman plead guilty to unauthorized absence and missing movement by design.[26] As evidence in aggravation, the government presented a witness who testified that another Marine was ordered to deploy much earlier than planned to take the accused's place.[27] The accused also acknowledged this fact during his unsworn statement.[28] The defense

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[11] MCM, *supra* note 1, R.C.M. 1001(b)(4).

[12] *Id*. MIL. R. EVID. 403.

[13] *Id*.; *see also* United States v. Glover, 53 M.J. 366 (2000); United States v. Zengel, 32 M.J. 642 (C.G.C.M.R. 1991); United States v. Martin, 20 M.J. 227 (C.M.A. 1985).

[14] *See* United States v. Gogas, 58 M.J. 96 (2003); United States v. Wilson, 47 M.J. 152, 155 (1997); United States v. Rust, 41 M.J. 472, 478 (1995).

[15] DAVID A. SCHLUETER, MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE 941–42 (6th ed. 2004).

[16] No. 200602496, 2007 CCA LEXIS 319 (N-M. Ct. Crim. App. Aug. 23, 2007).

[17] Diazepam is more commonly known by its brand name Valium. Diazepam is in the group of drugs called benzodiazepines and it is used for short term relief of anxiety, seizures, insomnia, and other conditions. Drugs.com, *Diazepam*, http://www.drugs.com/diazepam.html (last visited Apr. 22, 2008). Diazepam is a Schedule IV controlled substance. U.S. Drug Enforcement Administration, *Drug Scheduling*, http://www.justice.gov/dea/pubs/scheduling.html (last visited Apr. 22, 2008).

[18] *Palomares*, 2007 CCA LEXIS 319, at *1–2.

[19] *Id*. at *3.

[20] *Id*..

[21] *Id*. at *4.

[22] *Id*. at *5.

[23] *Id*.

[24] *Id*.

[25] No. 200700035, 2007 CCA LEXIS 243 (N-M. Ct. Crim. App. July 17, 2007).

[26] *Id*. at *1.

[27] *Id*. at *3.

[28] *Id*. at *7.

counsel did not object to the witness's testimony regarding this issue.[29] On appeal, because defense did not object, the NMCCA applied a plain error analysis and found no plain error.[30]

Over defense objection, the same witness also testified to the injuries he personally received while deployed.[31] The military judge noted for the record that he believed that the witness's testimony was directly related to or resulted from the conduct of the accused.[32] He further stated that the testimony provided him information as to the type of duty that the accused took action to avoid.[33] Specifically the military judge stated

> [T]hat on the scale of aggravation in the area of missing movement by design, the type of danger the unit is moving into is relevant in considering what the nature of the specific intent of the accused [sic], what he was seeking to avoid and the actual danger that he was in fact seeking to avoid are relevant factors . . . .[34]

The military judge also performed an MRE 403 balancing test and determined that the information was highly probative and the prejudicial effect was low.[35] The NMCCA held that the military judge properly limited his consideration of the evidence of the injuries the witness received to the nature of the environment to which the accused was to have deployed and the type of danger he specifically intended to avoid.[36] The court stated that this type of evidence, to include the potential for injury, is directly related to the missing movement by design offense under Article 87, UCMJ.[37]

These are just two examples of proper aggravation evidence. The essential element in both examples is that the evidence was *directly related to* or *resulted from* the offenses of which the accused had been found guilty. In *Palomares*, the accused's drug use was directly linked with the problems the unit had conducting the relief in place, and with the delay the unit encounter in reuniting with their family members after a combat deployment.[38] In *Chapman*, the evidence indicated that another individual had to take the accused's place in the deployment. More importantly, the evidence demonstrated the nature of the environment that the accused sought to avoid by intentionally missing movement.[39] The practice point taken from these cases is that case preparation is essential. For the government, this type of information and potential witness testimony may not be obvious from just reading the case file. Instead, trial counsel can uncover this information by conducting in-depth witness interviews. The defense counsel must ensure the evidence fits within the rules, if not, defense must object. These examples provide a clear application of RCM 1001(b)(4). More troublesome however, is determining if and when the government can present evidence of uncharged misconduct as aggravating evidence.

Using Uncharged Misconduct as Aggravation Evidence and *United States v. Hardison*

The CAAF has allowed uncharged misconduct as aggravating evidence in a narrow set of circumstances. Trial counsel cannot use uncharged misconduct to get around the RCM 1001(b)(4)'s requirement that the evidence must directly relate to or result from "the offenses of which the accused has been found guilty."[40] The court has allowed uncharged misconduct as aggravating evidence if it was directly preparatory to the current crime;[41] if it was part of the same course of conduct which

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[29] *Id*. at *6.

[30] *Id*. at *7. The court held that under *United States v. Baer*, 53 M.J. 235, 237 (2000), a trial counsel may argue the evidence of record as well as all reasonable inferences fairly derived for the evidence. In addition, the court also took into consideration that during his unsworn statement the accused reinforced the inference that a specific Marine was deployed in his place. *Chapman*, 2007 CCA LEXIS 243, at *7.

[31] *Chapman*, 2007 CCA LEXIS 243, at *3–4.

[32] *Id*. at *4.

[33] *Id*.

[34] *Id*.

[35] *Id*. at *5.

[36] *Id*. at *9.

[37] *Id*.

[38] United States v. Palomares, No. 200602496, 2007 CCA LEXIS 319 (N-M. Ct. Crim. App. Aug. 23, 2007).

[39] *Chapman*, 2007 CCA LEXIS 243.

[40] MCM, *supra* note 1, R.C.M. 1001(b)(4); *see also* United States v. Hardison, 64 M.J. 279 (2007).

[41] United States v. Wingart, 27 M.J. 128, 135 (C.M.A. 1988).

the accused had committed against the same victim, in the same place, several times prior to the charged offense;[42] if it showed a wider course of conduct;[43] or if it showed a continuous course of conduct involving the same or similar crimes, the same victims, and a similar status.[44] In each of these cases, the uncharged misconduct was direct and closely related in time, type and outcome.[45] Such was not the case in *United States v. Hardison*.[46]

A special court-martial composed of officer members convicted Seaman Vangle Hardison of a single specification of wrongfully using marijuana.[47] The panel sentenced her to a bad conduct discharge, the convening authority approved the findings and sentence, and the NMCCA affirmed.[48] Hardison joined the Navy pursuant to a drug waiver which permitted her to enlist despite an admission of pre-service drug use.[49] Approximately three years into her service commitment, Hardison tested positive for recent marijuana use.[50] During the presentencing argument, trial counsel focused on three enlistment documents. Two of the documents showed Hardison's admission to the pre-service marijuana use and the third document was her signed pledged not use drugs in the future.[51] During arguments, the trial counsel contended that the panel members, when assessing her sentence, should consider that Hardison "knew better. The trial counsel argued that she entered the Navy on a drug waiver. Furthermore he argued that she knew the Navy's drug policy and she violated it anyway."[52] Defense counsel failed to object to this argument and the military judge failed to provide a curative or limiting instruction to the panel in response to the Government's statements.[53] Rather, the military judge instructed the panel members to consider all matters offered in aggravation.[54]

On appeal, the CAAF applied the three-part plain error analysis because defense counsel did not object to the admission of the evidence.[55] The court determined that the military judge committed plain error when he admitted evidence in aggravation of the accused's pre-service drug use and the service waiver for that drug use contained in her enlistment records.[56]

On appeal, the government argued that the uncharged misconduct of the pre-service drug use was evidence in aggravation under RCM 1001(b)(4).[57] The court reasoned that this evidence must fit the requirements of RCM 1001(b)(4) because the rule does not make any distinction between evidence of uncharged misconduct or other aggravating evidence. RCM 1001(b)(4) requires all evidence to be "directly related" to the offenses of which the accused was found guilty and the probative value of the evidence must outweigh the likely prejudicial impact.[58] In the CAAF's holding, they stated that "[t]he

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[42] United States v. Nourse, 55 M.J. 229, 232 (2001).

[43] United States v. Ross, 34 M.J. 183, 187 (C.M.A. 1992).

[44] United States v. Mullens, 29 M.J. 398, 400 (C.M.A. 1990).

[45] *See also* United States v. Erickson, 63 M.J. 504 (A.F. Ct. Crim. App. 2006) (no error in allowing the accused's uncharged misconduct in sentencing because the acts were close in time and directly related to the convicted offense); United States v. Turner, 62 M.J. 504 (A.F. Ct. Crim. App. 2005) (allowing evidence that the accused committed a robbery at the same location several weeks earlier).

[46] United States v. Hardison, 64 M.J. 279, 279 (2007).

[47] *Id*. at 280.

[48] *Id*.

[49] *Id*.

[50] *Id*.

[51] *Id*. The three enlistment documents were: U.S. Dep't of Defense, DD Form 1966/2 (Nov. 2003) (in response to Question 26 which inquired if Hardison had "ever tried or used or possessed . . . cannabis ([including marijuana])," Hardison answered in the affirmative); U.S. Dep't of Defense, DD Form 1966 Annex (Nov. 2003) (in answering Question 8 in Section Three of the form in the affirmative, Hardison admitted to having "experimentally/casually used marijuana within the past six months."); and, U.S. DEP'T OF NAVY, NAVCRUIT 1133/53, ENLISTMENT STATEMENT OF UNDERSTANDING (Aug. 1991) (Hardison confirmed that she understood that "DRUG USAGE IN THE NAVY IS PROHIBITED AND WILL NOT BE TOLERATED!") (emphasis in the original). *Id*. at 280.

[52] *Id*.

[53] *Id*.

[54] *Id*.

[55] *Id*. at 281; *see also* United States v. Powell, 49 M.J. 460, 463-65 (1998); United States v. Hays, 62 M.J. 158, 166 (2005). "Plain error is established when (1) an error was committed; (2) the error was plain, or clear, or obvious; and (3) the error resulted in material prejudice to substantial rights." *Hardison*, 64 M.J. at 281 (citing *Powell*, 49 M.J. at 463–65).

[56] *Hardison*, 64 M.J. at 283.

[57] *Id*.

[58] *Id*. at 281; *see also* MCM, *supra* note 1, R.C.M. 1001(b)(4), MIL. R. EVID. 403.

meaning of 'directly related' under R.C.M. 1001(b)(4) is a function of both what evidence can be considered and how strong a connection that evidence must have to the offenses of which the accused has been convicted."[59] The link between the uncharged misconduct and the crime for which the accused was convicted must be direct, and "closely related in time, type, and/or outcome."[60]

At the time of her enlistment, Seaman Hardison admitted to pre-service drug use.[61] Then three years into her enlistment she tested positive for marijuana.[62] The court concluded that based on these facts her offense was an isolated occurrence.[63] The government did not and could not provide any evidence showing how those two uses were even remotely connected, much less directly related to or resulting from conviction.[64]

Compare the facts of *Hardison*[65] to *United States v. Shupe*[66] where the CAAF upheld the admission of uncharged misconduct as aggravating evidence.[67] During the sentencing case in *Shupe*, the government presented evidence of five uncharged instances of drug distribution that arose during the same time period, were of the same drug type, and were distributed by the accused in the same location as the five specifications of drug distribution to which Shupe had plead guilty.[68] The court held that the five uncharged instances were part of a single "extensive and continuing scheme to introduce and sell [drugs]."[69] In *Hardison*, there was no single, continuous nature between the uncharged and charged conduct.

Next the appellate government counsel argued that aggravation was not from the pre-service drug use alone, but that fact that the Navy provided Hardison with a second chance by granting her a waiver to enter the Navy and that she squandered this second chance.[70] The court rejected this argument, bluntly stating that this argument negated the meaning of the words "directly related."[71]

Based on the above reasoning, the CAAF held that the military judge erred when he admitted the prior service drug admission.[72] The court then considered whether the error materially prejudiced a substantial right of the accused.[73] They weighed the evidence of Hardison's attempts to avoid taking the drug test and her lack of contrition in her unsworn statement with her military history that included no past disciplinary problems and positive evaluations.[74] In addition, the court also took into account that her trial was before a panel.[75] Lastly, the court also noted that the military judge did not offer any curative instructions and had, in fact, stressed to the members that they consider *all* matters offered in aggravation.[76] As such, the CAAF held that Hardison's trial may have been different if the military judge had excluded the evidence of pre-service drug use and waiver.[77] The court affirmed the findings and set aside the sentence.[78]

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[59] *Hardison*, 64 M.J. at 281.

[60] *Id.* at 281–82.

[61] *Id.* at 281.

[62] *Id.*

[63] *Id.* at 282.

[64] *Id.* at 283.

[65] *Id.* at 280.

[66] 36 M.J. 431, 436 (C.M.A. 1993).

[67] *Id.*

[68] *Id.*

[69] *Id.*

[70] *Hardison*, 64 M.J. at 283.

[71] *Id.*

[72] *Id.*

[73] *Id.*

[74] *Id.* at 283–84.

[75] *Id.*

[76] *Id.* at 284.

[77] *Id.*

[78] *Id.*

The bottom line for practitioners is that "the link between RCM 1001(b)(4) evidence of uncharged misconduct and the crime for which the accused has been convicted must be direct as the rule states, and closely related in time, type and/or often outcome, to the convicted crime."[79] Defense counsel must object making the argument that the evidence is not proper aggravation evidence or that the prejudicial effect outweighs any probative value.

Defense Sentencing Case—Matters in Extenuation and Mitigation

"Traditionally, the heart of the sentencing portion of trial by court-martial was the defense effort to achieve the most lenient sentence possible by the presentation of favorable information to the sentencing authority."[80] This evidence takes the form of extenuation and mitigation.[81] Extenuation allows the accused to explain the circumstances surrounding his offense, while mitigation deals with the circumstances of the accused offered to lessen the punishment.[82] Included in mitigation are acts of good conduct or bravery, family circumstances, and the reputation or record of the accused.[83] Evidence of extenuation and mitigation is the framework defense counsel use to develop their sentencing case. A defense counsel has great latitude in developing his case strategy. "As a general matter, the '[CAAF] will not second-guess the strategic or tactical decisions made at trial by defense counsel.'"[84] Recently in *United States v. Perez*,[85] the CAAF reviewed the nature of the defense sentencing case when determining an ineffective counsel claim.[86]

At a general court-martial a military judge alone convicted Sergeant First Class Rafael Perez of several charges and specifications of rape, forcible sodomy, and indecent acts with a child.[87] The adjudged and approved sentence included a dishonorable discharge, confinement for twenty-seven years, and reduction to the lowest enlisted grade.[88]

A brief summary of the facts are necessary to understand the CAAF's holding in this case. The accused's teenage stepdaughter alleged that he sexually abused her over an eight-year period.[89] During the investigation, she provided CID with a written statement describing the sexual abuse.[90] During the findings phase of the trial, the government counsel called the victim as a witness in their case-in-chief.[91] During her testimony, she stated that she could neither remember providing a statement to the investigators nor recall the events described in her statement.[92] The defense also called the victim as a witness during their case-in-chief.[93] During her testimony as a defense witness, she provided specific details that portrayed a significantly lesser scope of sexual activity than she previously provided to investigators.[94] In addition, she disavowed considerable portions of her pretrial statement.[95] During closing, defense counsel concentrated on the distinctly different statements provided by the stepdaughter.[96] Notably, the military judge found Perez not guilty of a number of the charged offenses.[97] On appeal, the accused alleged that the trial defense counsel was ineffective because he called his stepdaughter as

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[79] *Id.* at 281–82.

[80] GILLIGAN & LEDERER, *supra* note 2, at 23–63.

[81] *See* MCM, *supra* note 1, R.C.M. 1001(c).

[82] *Id.*

[83] *Id.*

[84] United States v. Perez, 64 M.J. 239, 243 (2006) (citing United States v. Anderson, 55 M.J. 198, 202 (2001)).

[85] 64 M.J. 239 (2006).

[86] *Id.*

[87] *Id.* at 240.

[88] *Id.*

[89] *Id.* at 241.

[90] *Id.*

[91] *Id.*

[92] *Id.*

[93] *Id.*

[94] *Id.*

[95] *Id.* at 241–42.

[96] *Id.* at 242.

[97] *Id.*

a witness.[98] The CAAF disagreed.[99] The court stated that the military judge's decision to find the accused not guilty on several of the charges came directly from the testimony provided by the stepdaughter.[100] As such, the CAAF held that the accused did not demonstrate ineffective counsel.[101] During the presentencing phase, defense counsel again obtained testimony from the victim in support of the accused.[102]

The defense presentencing case included the accused's unsworn statement, testimony of the victim, and testimony from the accused's wife.[103] At the close of defense's presentencing case, the military judge questioned Perez to whether there were any other matters that he, as the military judge, should consider.[104] Perez informed the military judge that there were no other witnesses or documentary evidence that he wanted to bring forth.[105] In addition to arguing the extenuation and mitigation evidence presented during the defense's presentencing case, the defense counsel asked the judge to consider the earlier "good Soldier" testimony that the accused's first sergeant presented during the findings portion of the trial.[106] Specifically "[d]efense counsel noted that First Sergeant . . . had testified about [Perez] 'being a good soldier, one of the best he ever saw.'"[107] Although the accused faced a maximum sentence that included life in prison, the military judge sentenced him to a lesser sentence that included twenty-seven years of confinement.[108]

On appeal, the accused alleged that the defense counsel was ineffective because he did not recall the first sergeant to testify during the sentencing hearing, and failed to call other witnesses including military officers and noncommissioned officers that he served with, and members of his church. He alleged that these individuals would have testified on his behalf on sentencing and that he provided his defense counsel with their names.[109]

Looking at each issue separately, the CAAF noted that defense counsel specifically referred the military judge back to the first sergeant's testimony on the merits.[110] By doing this instead of recalling the witness, the court noted that defense avoided the risk of having the first sergeant cross examined by the government counsel.[111] The court held that this method was not ineffective.[112]

Next the court assumed, without deciding, that the accused provided his counsel with the above described witnesses.[113] Here the court held that the accused failed to meet his burden because he failed to provide specifically what those witnesses would have said if they testified. As such, the appellant failed to demonstrate how he was prejudiced by defense counsel's failure to call those individuals and the court held that his argument was without merit.[114]

This case demonstrates the importance of defense counsel developing a sentencing case even when the evidence is presented to a military judge alone. Here, the appellate courts were able to identify a defense strategy. As the *Perez* court noted earlier, they will not second guess the tactical or strategic decisions of the counsel.[115] *Perez* demonstrates the

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[98] *Id*. at 243.

[99] *Id*.

[100] *Id*.

[101] *Id*.

[102] *Id*. at 242.

[103] *Id*.

[104] *Id*.

[105] *Id*.

[106] *Id*.

[107] *Id*.

[108] *Id*.

[109] *Id*. at 244.

[110] *Id*.

[111] *Id*.

[112] *Id*.

[113] *Id*.

[114] *Id*.

[115] *Id*.

importance of having a presentencing case.[116] Not only must defense counsel prepare a solid presentencing case but they must also take care to preserve evidentiary issues pertaining to their case, just as they would during findings.

When proper extenuation or mitigation evidence is not allowed and that evidence may have substantially influenced the adjudged sentence, the appellate courts will set aside the sentence.[117] The case of *United States v. Ottley*, decided this past year, provides a good illustration of this principle.[118]

Marine Sergeant (Sgt) Cody Ottley pleaded guilty in a military judge alone general court-martial to negligent homicide.[119] The facts in the case show that the accused negligently commingled magazines containing blank ammunition and magazines containing live ammunition.[120] During a close quarters battle (CQB) exercise, Ottley failed to inspect his weapon to ensure it only contained blank rounds and fired several rounds of live ammunition into another Marine, killing him.[121] During the presentencing case, the defense counsel attempted to introduce testimony through Gunnery Sergeant Morrison, the chief instructor for CQB training at the time of the incident, about changes made to the CQB curriculum prior to the exercise.[122] In addition, defense counsel also attempted to present testimony from Gunnery Sergeant Schmidt, the Range Safety Officer on the date of the shooting, about the remedial measures taken after the incident.[123] Defense argued that the testimony of these two witnesses would have "tended to show additional facts and 'circumstances surrounding' the death of [the victim] which [would have] provided a full or complete picture. . . ."[124] The defense counsel also argued that the testimony would have tended to show that the changes in the curriculum increased the risk that the blank and the live rounds would get commingled, creating a situation where a Marine could fire live ammunition by mistake.[125]

The military judge excluded the testimony as irrelevant and in violation of MRE 407 which prohibits evidence of measures taken after a harm is caused, that if measure, if taken previously, would have made the harm less likely.[126] Although the defense counsel argued that the testimony was admissible as evidence of matters in extenuation and mitigation under RCM 1001(c), the military judge responded, "I will tell you right now, that the M.R.E. trumps the R.C.M."[127] Additionally, the military judge sustained the trial counsel's objection and did not allow Sgt Ottley's supervisor for the year prior to his court-martial to answer whether he had any reservations about going to combat with the accused.[128]

Looking first at the testimony from Sgt Ottley's supervisor, the CAAF held in *United States v. Griggs*[129] that defense may present evidence during sentencing that the witness would willingly serve with the accused.[130] The court in *Griggs*

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[116] *Id.*

[117] United States v. Griggs, 61 M.J. 402, 410 (2005).

[118] United States v. Ottley, No. 200500985, 2007 CCA LEXIS 154 (N-M. Ct. Crim. App. Apr. 24, 2007).

[119] *Id.* at *1.

[120] *Id.* at *3.

[121] *Id.*

[122] *Id.* at *4.

[123] *Id.*.

[124] *Id.* (quoting Appellant's Brief, 27 Feb. 2006, at 15).

[125] *Id.*

[126] *Id.* at *5; *see also* MCM, *supra* note 1, MIL. R. EVID. 407.

> When, after an injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct . . . . This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

Id.

[127] *Ottley*, 2007 CCA LEXIS 154, at *6.

[128] *Id.* at *5–6.

[129] 61 M.J. 402 (2005).

[130] *Id.* at 409.

stated that RCM 1001(b)(5)(D)[131] does not apply to defense mitigation evidence and "specifically does not preclude evidence that a witness would willing serve with the accused again."[132] The court observed that

> '[R]etention evidence' is classic matter in mitigation, which is expressly permitted to be presented by the defense. As noted in *Aurich*, 'the fact that a member of an armed force has sufficient trust and confidence in another member is often a powerful endorsement of the character of his fellow soldier.'[133]

Applying *Griggs*, the NMCCA held that the military judge erred when he excluded the testimony from Sgt Ottley's supervisor.[134]

The court then discussed the issue concerning whether the military judge erred in sustaining the trial counsel's objection to the testimony regarding the changes to the exercise and actions taken after the shooting.[135] Defense witness Gunnery Sergeant Morrison testified that each CQB training package contained minor changes that included adding blank fire.[136] The first training package to use the blank fire was the training package in which the accused failed to inspect his weapon and fired the live rounds instead of the blank rounds.[137] When the defense counsel attempted to question Gunnery Sergeant Morrison about other types of ammunition the Marines used at that exercise, the judge struck the testimony as irrelevant on the grounds that the answer did not change Ottley's duty or his neglect at the time of the offense.[138] After reviewing the record, the NMCCA determined that defense counsel was offering the testimony to "'explain the circumstances surrounding the commission' of the offense, and to demonstrate how those circumstances may have contributed to the appellant negligently loading his weapon with live ammunition."[139] The court held that the military judge again erred in excluding the testimony because it was proper extenuation evidence.[140]

Lastly, the court held that the military judge erred when he excluded Gunnery Sergeant Schmidt's testimony about changes made to the CQB training package after the shooting.[141] The military judge ruled that the testimony would have been irrelevant and inadmissible under MRE 407, as evidence of subsequent remedial measures.[142] The defense counsel argued that the evidence of "safety-related changes . . . made after the offense, impliedly demonstrated that the course was conducted in a less safe manner at the time of the offense."[143] The court held that this testimony "could have served to 'explain the circumstances surrounding the commission' of the offense, and, therefore, would have been proper evidence in extenuation."[144]

Next, the NMCCA considered whether these errors had a "substantial influence on the sentence."[145] They determined that the prohibited testimony likely contained evidence that would have been favorable to Ottley.[146] They found that Ottley's supervisor, a field grade officer with fourteen years experience in the Marine Corps, would have provided powerful evidence in mitigation.[147] Also the other two witnesses could have explained the circumstances surrounding the offense, which may

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[131] MCM, *supra* note 1, R.C.M. 1001(c).

[132] *Griggs*, 61 M.J. at 409.

[133] *Id*. (quoting United States v. Aurich, 31 M.J. 95, 96 (C.M.A. 1990)).

[134] United States v. Ottley, No. 200500985, 2007 CCA LEXIS 154 (N-M. Ct. Crim. App. Apr. 24, 2007).

[135] *Id*. at *7.

[136] *Id*.

[137] *Id*.

[138] *Id*. at *8.

[139] *Id*.

[140] *Id*.

[141] *Id*.

[142] *Id*.

[143] *Id.* at *9.

[144] *Id*.

[145] *Id*. at *10.

[146] *Id*.

[147] *Id*. at *10–11.

have made Ottley's misconduct appear less horrific.[148] As a result, the court held that the "erroneous exclusion of three separate lines of extenuation and mitigation testimony, in light of the cumulative effect this testimony might otherwise have had, tipped the balance in favor"[149] of Sgt Ottley. Concluding that the excluded testimony may have substantially influenced the adjudged sentence, the NMCCA affirmed the findings and set aside the sentence.[150]

Echoing the earlier practice tips, the importance of defense counsel preparing a sentencing case in extenuation and mitigation if the evidence is available cannot be emphasized enough. A good sentencing case will almost always have an impact on the sentence.

Conclusion

Although the 2007 court term was relatively quiet in terms of cases addressing sentencing, the sentencing cases this term emphasized earlier holdings regarding matters in aggravation and the importance of offering matters in extenuation and mitigation. Both trial counsel and defense counsel should remember that the case does not end upon a finding of guilty.

[148] *Id*. at *11.

[149] *Id*. at *12.

[150] *Id*.