2008 New Developments in Self-Incrimination

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"No person . . . shall be compelled in any criminal case to be a witness against himself . . . ."[1]

Introduction

During the 2008 court term, four cases were decided that shed light on rarely examined, but exceptionally important, areas of self-incrimination law. The Court of Criminal Appeals (CAAF) case of *United States v. Freeman*[2] and Navy-Marine Court of Criminal Appeals (NMCCA) case of *United States v. Wheeler*[3] examined the issue of voluntariness of confessions that were indisputably preceded by knowing and intelligent waivers of Article 31, Uniform Code of Military Justice (UCMJ) and Military Rule of Evidence (MRE) 305 rights. In *Wheeler*, the NMCCA's analysis of when a trial defense counsel can use evidence of polygraph examinations taken during an accused's interrogation to attack the voluntariness of an accused's subsequent confession is especially valuable.[4] The outcome of this case may prove surprising in light of MRE 707's general, if not comprehensive, prohibition on the use of evidence that an accused took a polygraph for any reason.[5]

In addition, the Coast Guard Court of Criminal Appeals (CGCCA) case of *United States v. Bonilla*, addressed the circumstances under which government law enforcement agents may re-initiate the questioning of a suspect after he has invoked his Fifth Amendment right to counsel during a continuous custody situation.[6] Finally, the Army Court of Criminal Appeals (ACCA), in the case of *United States v. Matthews*, evaluated a trial judge's handling of a defense witness's invocation of his right against self-incrimination under cross-examination and the government trial counsel's comment upon that invocation during her closing argument on merits.[7] All four of these cases examine areas of self-incrimination that are infrequently litigated and too rarely understood by most military trial and defense counsel.

Voluntariness

The UCMJ recognizes four sources of self-incrimination law. These sources include the Fifth Amendment,[8] the Sixth Amendment,[9] Article 31(b), UCMJ[10] and the Common Law Doctrine of Voluntariness.[11] These sources of self-incrimination law are encompassed by MRE 301–306.[12] These rules represent a partial codification of the law relating to self-incrimination

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[1] U.S. CONST. amend. V.

[2] 65 M.J. 451 (C.A.A.F. 2008).

[3] 66 M.J. 590 (N-M. Ct. Crim. App. 2008).

[4] *Id.* at 592–95.

[5] MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 707 (2008) [hereinafter MCM].

[6] 66 M.J. 654 (C.G. Ct. Crim. App. 2008).

[7] 66 M.J. 645 (A. Ct. Crim. App. 2008).

[8] U.S. CONST. amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself . . . .").

[9] *Id.* amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.").

[10] UCMJ art. 31 (2008). Article 31(b) states:

> No person subject to this interrogate, or request any statement from an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.

Id.

[11] Hopt v. Utah, 110 U.S. 574 (1884) (recognizing that the common law requirement for voluntariness has been adopted into federal evidence law); *see generally* Fredric I. Lederer, *The Law of Confessions—The Voluntariness Dcotrine*, 74 MIL. L. REV. 67 (1976).

[12] MCM, *supra* note 5, MIL. R. EVID. sec. III, analysis, at A22-5.

as well as confessions and admissions.[13] These rules are only a partial codification of statutory and case law because they contain some gaps that may be filled by referring to rules of evidence recognized by U.S. district courts and, when consistent with the district courts' rules, the rules of evidence at common law.[14] This system of codification of the statutory and common law rules in the MRE is unique when compared to any other state or federal codes and often represent rules of criminal procedure as well as evidence.[15]

Military Rule of Evidence 304(c)(3) defines a statement as involuntary "if it is obtained in violation of the self-incrimination privilege or due process clause of the Fifth Amendment to the Constitution of the United States, Article 31, or through the use of coercion, unlawful influence, or unlawful inducement."[16] When a motion or objection to the use of an admission or confession by an accused is made by the defense, "the prosecution has the burden of establishing the admissibility of the evidence"[17] by a preponderance of the evidence.[18] The voluntariness of a confession is a question of law that is reviewed by appellate courts de novo.[19]

Trial judges or appellate courts examine the "totality of the circumstances" surrounding an accused's confession to determine "whether the confession is the product of an essentially free and unconstrained choice by its maker."[20] When attempting to determine whether a particular statement was voluntary or the result of an accused's will being overborne, the trial judge or appellate court looks at the characteristics of the accused and the circumstances surrounding the interrogation.[21] The courts have considered factors such as: the youth of the accused,[22] his lack of education,[23] or his low intelligence,[24] the lack of any advice to the accused of his constitutional rights,[25] the length of detention,[26] the repeated and prolonged nature of the questioning,[27] and the use of physical punishment such as the deprivation of food or sleep.[28] When analyzing these factors, trial judges or appellate courts examine the factual circumstances surrounding the confession or admission, assess the psychological impact on the accused, and evaluate the legal significance of how the accused reacted.[29] Armed with this basic understanding of the law, we will turn our attention to the CAAF case of *United States v. Freeman.*[30]

United States v. Freeman[31]

In this case, the CAAF reviewed a U.S. Air Force trial judge's failure to suppress an accused's confession at trial.[32] In *Freeman*, the accused, a twenty-three-year-old E-4, was questioned about an alleged aggravated assault by Special Agent

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[13] *Id.*

[14] *Id.* MIL. R. EVID. 101.

[15] STEPHEN A. SALTZBURG ET AL., MILITARY RULES OF EVIDENCE MANUAL 3-7, 3-8 (6th ed. 2006).

[16] 2008 MCM, *supra* note 5, MIL. R. EVID. 304(c)(3).

[17] *Id.* MIL. R. EVID. 304(e).

[18] *Id.* R.C.M. 304(e)(1); *see also* United States v. Bubonics, 45 M.J. 93 (C.A.A.F. 1996).

[19] Arizona v. Fulminante, 499 U.S. 279, 287 (1991); United States v. Bresnahan, 62 M.J. 137, 141 (C.A.A.F. 2005).

[20] *Bubonics*, 45 M.J. at 95.

[21] Schneckloth v. Bustamone, 412 U.S. 218, 226 (1973) .

[22] Haley v. Ohio, 332 U.S. 596 (1948).

[23] E.g., Payne v. Arkansas, 356 U.S. 560 (1958).

[24] *E.g.*, Fikes v. Alabama, 352 U.S. 191 (1957).

[25] *E.g.*, Davis v. North Carolina, 384 U.S. 737 (1966).

[26] *E.g.,* Chambers v. Florida, 309 U.S. 227 (1940).

[27] *E.g.*, Ashcraft v. Tennessee, 322 U.S. 143 (1944).

[28] *E.g.*, Reck v. Pate, 367 U.S. 433 (1961).

[29] Culombe v. Conneticut, 367 U.S. 568, 603 (1961).

[30] 65 M.J. 451 (C.A.A.F. 2008).

[31] *Id.*

[32] *Id.*

(SA) Bogle of the U.S. Air Force Office of Special Investigations (AFOSI).[33] After being advised of and waiving his rights, Senior Airman (SrA) Freeman personally prepared a seven-page statement in which he admitted having a relationship with the victim, but denied assaulting her or having any knowledge of the attack.[34] In addition to providing a written statement, SrA Freeman agreed to return to the AFOSI office for a polygraph examination at a later date.[35]

Almost two weeks later, SrA Freeman returned to the AFOSI office for the previously agreed upon polygraph examination.[36] Senior Airman Freeman arrived at 9:06 a.m., and a short while later he was advised of his rights by SA Larsen.[37] Senior Airman Freeman waived his rights and signed another form consenting to a polygraph which included an additional rights advice.[38] Over the course of ten hours, SrA Freeman was subjected to four polygraph examinations and questioned by both SA Larsen and SA Bogle.[39] By 6:10 p.m., SrA Freeman had admitted his role in the assault and was led to a room where, over the course of about an hour and a half, he personally prepared his written confession on a computer.[40]

At trial, SrA Freeman objected to the admission of his confession into evidence.[41] Senior Airman Freeman did not argue that he was not advised of his rights or that he did not knowingly and intelligently waive those rights.[42] Instead, he argued that his confession was involuntary because it was obtained by the interrogators' "use of coercion, unlawful influence or unlawful inducement" in violation of Article 31, UCMJ and MRE 304(c)(3).[43] The military judge overruled the defense objections to the admissibility of the confession and SrA Freeman was subsequently convicted of making a false official statement and aggravated assault.[44]

On appeal, SrA Freeman did not contest the military judge's findings of fact, but reopened his attack on the voluntariness of his confession and argued "that the military judge incorrectly applied the law to the facts of this case."[45] Specifically, SrA Freeman claimed that his will was overborne by the convergence of the following three factors: (1) the length of the interview; (2) the interrogators' physical intimidation by invading his personal space; (3) the interrogators use of lies, threats, and promises.[46]

Regarding the use of lies, threats, and promises, SrA Freeman alleged that the investigators threatened: (1) to tell Freeman's commander whether or not he cooperated; (2) that if he did not cooperate he would be turned over to civilian authorities; and (3) that civilian punishment would be harsher, especially since the victim was a civilian; and (4) that he could be sent to jail for a long time if he did not cooperate.[47] Senior Airman Freemen further alleged that the investigators lied that fingerprint evidence as well as witnesses contradicted his denials that he was with the victim that night, despite the fact that there really was no fingerprint evidence and no witnesses; and promised that the sooner they completed the interrogation, the sooner everybody could go home and Freeman could get on with his life.[48] The findings of fact supporting the military judge's decision to deny SrA Freeman's suppression motion confirmed the threats, lies, and promises alleged by the

[33] *Id.* at 454.

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *Id.* (quoting MCM, *supra* note 5, MIL. R. EVID. 304(c)(3)).

[40] *Id.* at 455.

[41] *Id.* at 453–54

[42] *Id*. at 454.

[43] *Id.*

[44] *Id.* at 452–53.

[45] *Id.* at 454.

[46] *Id.*

[47] *Id.*

[48] *Id.*

defense.[49] While the military judge agreed that these acts occurred, he did not feel that SrA Freeman's will was overborne.[50] The U.S. Air Force Court of Criminal Appeals (AFCCA) agreed and affirmed.[51]

Reviewing the trial judge's and the AFCCA's opinions, the CAAF engaged in its own de novo review of the voluntariness of SrA Freeman's confession by using the two-part test developed in *Schneckloth v. Bustamonte*.[52] Looking first at the characteristics of the accused, the CAAF determined that the preponderance of evidence weighed in favor of voluntariness.[53] The court noted that SrA Freeman was a twenty-three-year-old who had been properly advised of his rights before providing a personally prepared seven-page typed confession.[54] Between his original interview in which he denied attacking the victim and his subsequent polygraph and written confession, the court observed that he had thirteen days to seek counsel or decline further interviews and he chose not to do so.[55] The court noted that SrA Freeman had completed high school, could read and write, and that there was no evidence that SrA Freeman was not of average intelligence, or was in any way mentally impaired.[56] Moreover, the court noted that SrA Freeman had testified that he had six hours of sleep before reporting for the polygraph and that he denied any fatigue, hunger, thirst, or other problems.[57] Finally, the court observed that SrA Freeman never asked for an attorney during his interview, he never asked to leave the interview, nor did he indicate in any way that he felt coerced into making a statement.[58]

Turning to the second part of the *Schneckloth* test, the court evaluated the details of the interrogation.[59] While stating that the facts of this case made this test less definitive than the first test, the CAAF still found that the facts favored a finding of voluntariness.[60] The court pointed out that the polygraph examiner, SA Larson, properly advised SrA Freeman of his rights before administering two twenty to thirty-five-minute polygraph examinations over the course of two hours.[61] The court also looked favorably upon the breaks SrA Freeman was given between the polygraph examinations and the non-confrontational interview techniques applied by SA Larson.[62] At the conclusion of the first thirty-two-minute polygraph, SrA Freeman was given a one-hour break and allowed to leave the interview room while SA Larson analyzed the charts.[63] When SrA Freeman returned, SA Larson informed him that the results of the polygraph were "indiscernible" and that he would have to retest.[64] After a second exam lasting twenty-nine minutes, the appellant was given a twenty minute break while SA Larson again reviewed the charts.[65] When SA Larson and SrA Freeman met again, SA Larson informed him that he had

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[49] *Id.* at 455.

> Over the course of the interview, SA Bogle suggested to the accused that everyone makes mistakes and the best thing to do is to admit it and get it behind you. He promised the accused that if he cooperated, they could tell his commander about it and it might help. On the other hand, he told the accused, if you don't tell the truth, the case will go downtown and with a civilian victim you could get five years in jail. When the accused denied being out that night, SA Bogle lied to him and told him a witness saw him out. He also told the accused that his fingerprints were found at the scene.

Id.

[50] *Id.* 453.

[51] United States v. Freeman, ACM No. 35822, 2006 CCA LEXIS 160 (A.F. Ct. Crim. App. June 13, 2006) (unpublished).

[52] 412 U.S. 218 (1973).

[53] *Freeman*, 65 M.J. at 454.

[54] *Id.*

[55] *Id.*

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] *Id*.

[60] *Id.*

[61] *Id.* at 454–55.

[62] *Id.*

[63] *Id.* at 454.

[64] *Id.* at 454–55.

[65] *Id.*

concluded that he was being deceptive about his knowledge of the victim's injuries.[66] At this point in the interview, SA Bogle took over the questioning and was soon joined by SA Mann.[67]

At about this point in the interview, the SAs' interview tactics become more aggressive. Prior to meeting with SrA Freeman and confronting him with his determination that he was being deceptive, SA Larson rearranged the furniture in the room so that SrA Freeman was sitting directly in front of him.[68] After SA Larson told SrA Freeman that the results of the polygraph indicated that he had been deceptive, the interview turned into more of a confrontational interrogation—although the testimony indicated that SA Bogle only raised his voice above a conversational tone once.[69] Over the next six and a half hours of interrogation, SrA Freeman was reminded of his rights once, given two breaks, and left alone in a room for one hour and twenty minutes to prepare his confession on a computer.[70]

In his findings of fact, the trial judge found that SA Bogle had told SrA Freeman that everyone makes mistakes, that the best thing SrA Freeman could do was admit it and put his mistake behind him, and that if SrA Freeman cooperated with SA Bogle he would tell his commander and that might help his situation.[71] The trial judge further found that SrA Freeman was told that if he didn't tell the truth, he would be turned over to civilian police and because the victim was a civilian, it might result in five years of confinement.[72] Finally, the trial judge found that in response to SrA Freeman's assertions that he wasn't out the night of the attack, SA Bogle lied to him by telling SrA Freeman that his fingerprints were found at the scene and witnesses had seen him out that night when this was not the case.[73]

The CAAF dismissed SrA Freeman's assertion that his confession should be suppressed as the result of SA Bogle's threats and promises.[74] Looking first at the promises of SA Bogle, the CAAF noted that since the 1991 case of *Arizona v. Fulminante*,[75] promises by law enforcement personnel are considered only one factor in the voluntariness equation.[76] Turning next to SA Bogle's lies (about the existence of SrA Freeman's fingerprints at the crime scene) and threats (that if he did not cooperate he would be turned over to harsher civilian law enforcement), the CAAF again pointed out that these tactics were not in themselves determinative.[77]

In determining that SrA Freeman's will was not overborne, the CAAF noted that although his interrogation may have lasted ten hours, SrA Freeman had several breaks during which he was allowed to leave the interrogation room, go outside, and smoke.[78] The CAAF also observed that he was provided food and declined offers of further food and drink.[79] Finally, while SA Bogle may have lied to SrA Freeman about his fingerprints and threatened him that he would be turned over to

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[66] *Id.* at 455.

[67] *Id.*

[68] *Id.*

[69] *Id.*

[70] *Id.*

[71] *Id.*

[72] *Id.*

[73] *Id.*

[74] *Id.*

[75] 499 U.S. 279 (1991). Prior to *Fulminante*, any confession "obtained by any direct or implied promises, however, slight," was not considered voluntary. Bram v. United States, 168 U.S. 532, 542–43 (1897).

[76] *Freeman*, 65 M.J. at 455. *See, e.g.*, United States v. Morris, 49 M.J. 227, 229–30 (C.A.A.F. 1998) (holding that an investigator telling the accused during an interrogation that "[i]f you help use, we will help you," did not, per se, amount to unlawful inducement).

[77] *Freeman*, 65 M.J. at 455. *See, e.g.*, United States v. Mendoza, 85 F.3d 1347, 1350–51 (8th Cir. 1996) (holding that an investigator's threat of immediate arrest if he did not cooperate did not overbear the accused's will); Ledbetter v. Edwards, 35 F.3d 1062, 1069–70 (6th Cir. 1994) (holding that an investigator's use of a series of psychological ploys, including lying about evidence, staging a phony identification, and showing charts and graphs allegedly linking the accused to the crime did not result in an involuntary confession); United States v. Davis, 6 M.J. 874, 879 (A.C.M.R. 1979) ("An investigator's use of artifice or some other form of deception is permissible as long as the artifice is not likely to produce an untrue confession.").

[78] *Freeman*, 65 M.J. at 456.

[79] *Id.*

civilian law enforcement if he did not confess, he was not physically abused or threatened with such abuse.[80] The CAAF concluded that under the totality of the circumstances, SrA Freeman's confession was voluntary.[81]

The most important lesson trial and defense counsel can take from *Freeman* is that the totality of circumstances test applied by military judges is highly fact dependent and susceptible to differing interpretations. Once voluntariness is put at issue, the de novo standard of appellate review requires both trial and defense counsel to thoroughly document the details of the particular characteristics of the accused and the details of the interrogation in the record of trial. In *Freeman*, the evidence that the AFOSI agents gave SrA Freeman several breaks, opportunities for refreshment, and did not engage in overly aggressive interrogation techniques was critical to both the trial judge and the appellate courts' determination that SrA Freeman's will was not overborne despite the length of the interview.

United States v. Wheeler[82]

From June through December 2002, Ship's Serviceman First Class (SH1) (E-6) Wheeler was a Sailor on the USS *Belleau Wood* during a deployment to the Western Pacific.[83] As storekeeper on the ship, SH1 Wheeler's responsibilities included tracking financial transactions, such as soft drink sales.[84] In keeping with good financial accounting systems, SH1 Wheeler handled the accounting of funds and another sailor, SH1 Jones, actually handled the cash collected from the soda machines.[85] At the end of the deployment an audit reconciling records of sodas sold verses cash received revealed more than a $10,000 deficit.[86]

Suspicion quickly led investigators to SH1 Wheeler, who described his accounting system but denied any wrongdoing.[87] Approximately eight months later, SH1 Wheeler's supervisors ordered him to report to the Naval Criminal Investigative Service for another interview regarding the theft.[88] During the course of a ten-hour interview with SA Meulenberg, SH1 Wheeler submitted to three or four polygraph examinations.[89] After each of the first two or three examinations, SA Meulenberg told Wheeler that the results of the polygraph were "inconclusive."[90] After the final polygraph, SA Meulenberg told SH1 Wheeler that the results of the examination revealed that he was being "deceptive."[91]

At this point, SA Meulenberg's interview techniques became more confrontational. Special Agent Meulenberg told SH1 Wheeler that he was lying.[92] Later, SH1 Wheeler claimed that SA Meulenberg led him to believe that he could be convicted upon the results of the failed polygraph even without any confession and that if he admitted his guilt SA Meulenberg could make things better for him.[93] Wheeler also claimed that SA Meulenberg told him the results of his polygraphs would not be given to his command if he confessed.[94] As a result of this interrogation, SH1 Wheeler signed a statement in which he

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[80] *Id.*; *see also* United States v. Ellis, 57 M.J. 375, 379 (C.A.A.F. 2002) (holding that a confession elicited after an investigator told the accused that there was sufficient evidence to arrest both he and his wife for child abuse and that their children might be removed from their home and placed in foster care was voluntary under the totality of the circumstances).

[81] *Freeman*, 65 M.J. at 457.

[82] 66 M.J. 590 (N-M. Ct. Crim. App. 2008).

[83] *Id.* at 591.

[84] *Id.*

[85] *Id.*

[86] *Id.*

[87] *Id.*

[88] *Id.*

[89] *Id.* The CAAF noted that the record is unclear whether SH1 Wheeler actually took three or four polygraph examinations. *Id.* at 591 n.2.

[90] *Id.* at 591.

[91] *Id.*

[92] *Id.*

[93] *Id.*

[94] *Id.*

admitted that he and SH1 Jones had stolen the soda funds and that he had personally received between $5000 and $6000 in stolen money.[95]

Prior to trial, SH1 Wheeler moved to suppress his confession as involuntary under Rule for Court-Martial (RCM) 906.[96] At the suppression hearing, SA Meulenberg denied telling SH1 Wheeler that he could be convicted based upon the results of his polygraph and that if he confessed the results would not be turned over to his chain of command.[97] Special Agent Muelenberg admitted that he told SH1 Wheeler that if he confessed he would be given the opportunity to apologize and "look like a good person that made a one-time mistake."[98] The trial judge denied SH1 Wheeler's motion to suppress.[99]

The defense then submitted a motion in limine to permit introduction of evidence related to the polygraph examinations at the trial before members for the purpose of demonstrating the involuntariness of the subsequent confession.[100] The defense argued that "information about the polygraph would not be admitted to find the truth or falsity" of the polygraph itself, but "to show what may have motivated a false confession."[101]

The prosecution opposed the defense motion in limine, arguing that MRE 707 prohibited the introduction of any evidence from a polygraph examination.[102] Specifically, the trial counsel pointed to the plain language of MRE 707(a), which states: "[n]otwithstanding any other provision of law, the results of a polygraph examination, the opinion of the polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence."[103] While the trial counsel conceded that SH1 Wheeler had "a right to discuss the circumstances of an interrogation," he maintained that MRE 707 prohibited any reference to the polygraph examination itself.[104] In the alternative, the Government argued that if SH1 Wheeler were allowed to discuss the polygraph examinations, the Government should have the right to present rebuttal evidence in the form of testimony from the polygraph examiner and the actual results.[105]

The military judge denied the defense motion and ruled that the polygraph evidence sought by SH1 Wheeler was inadmissible under MRE 707 and the Supreme Court case of *United States v. Scheffer*.[106] Describing his rationale in his findings of fact and conclusions of law, the military judge stated that admission of any "polygraph evidence to show its bearing on the accused's state of mind presents a double-edged sword, inviting rebuttal evidence concerning the scientific reliability of the test and the specific test results in this case, including the fact that the accused apparently failed the last test."[107] In response to the defense's argument that the reliability of the polygraph and the validity of the polygraph results were irrelevant to the voluntariness of SH1 Wheeler's confession, the military judge disagreed, stating that the "decision to provide a statement to explain adverse test results is probative only if he honestly believed that the test results were reliable."[108] In sum, the military judge held that any introduction of polygraph evidence would needlessly bog the trial down in questions surrounding the scientific reliability of polygraphs and infringe upon credibility assessments that were the province of the fact-finder.[109]

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[95] *Id.* at 591–92.

[96] MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 906 (2005) [hereinafter 2005 MCM].

[97] *Wheeler*, 66 M.J. at 591.

[98] *Id.* (citation omitted).

[99] *Id.* at 592.

[100] *Id.*

[101] *Id.* (citation omitted).

[102] *Id.*

[103] 2005 MCM, *supra* note 96, MIL. R. EVID. 707(a).

[104] *Wheeler*, 66 M.J. at 592.

[105] *Id.*

[106] 523 U.S. 303 (1998).

[107] *Wheeler*, 66 M.J. at 592.

[108] *Id.*

[109] *Id.*

The military judge did permit the defense to present evidence about non-polygraph circumstances surrounding SH1 Wheeler's confession, to include "a general reference to the accused belief that [SA Meulenberg] had confronted him with evidence of guilt which the accused felt was inaccurate and compelled him to dispute by making an 'absurd' confession."[110] The confession was the only direct evidence of SH1 Wheeler's guilt introduced by the Government at trial. Ship's Serviceman First Class Wheeler was duly convicted of conspiracy to commit larceny and larceny.[111]

Reviewing the trial judge's decision using an abuse of discretion standard, the NMCCA ruled that the military judge erred in denying SH1 Wheeler's motion in limine because MRE 707 was unconstitutional as applied "to the narrow circumstances presented in this case."[112] In providing its justification for its ruling, the NMCCA relied on the Supreme Court case of *United States v. Scheffer*.[113]

The facts of *Scheffer* involved an appellant who had sought to introduce evidence of an exculpatory polygraph and the opinion of a polygraph expert in order to bolster the credibility of his "innocent ingestion" defense to a charge of wrongful use of methamphetamines.[114] Relying on MRE 707, the trial judge excluded all evidence of the polygraph.[115] The CAAF overruled the trial judge's decision and held "[a] *per se* exclusion of polygraph evidence, offered by an accused to rebut an attack on his credibility . . . violates his Sixth Amendment right to present a defense"[116] The Supreme Court reversed the CAAF's decision and held that, while a defendant has a Sixth Amendment right to present a defense, that right "is subject to reasonable restrictions" imposed by state or federal rules in the form of rules "excluding evidence from criminal trials."[117] The Court held that the trial judges application of MRE 707 did not abridge Airman Scheffer's right to present a defense.[118]

The NMCCA noted that the *Scheffer* opinion was a deeply split Supreme Court opinion.[119] Justice Thomas, writing for a four-justice plurality, found that MRE 707 served three legitimate governmental interests[120]: (1) it helps exclude unreliable evidence (i.e., polygraph examinations);[121] (2) it preserved jurors' role as the sole determiners of credibility and guilt;[122] and (3) it avoided litigation over issues other than the guilt or innocence of the accused at trial (i.e., a battle of the experts over the reliability of polygraph evidence).[123] Comparing the plurality opinion with another four justices who agreed with the plurality's holding that MRE 707 was "not so arbitrary or disproportionate that it is unconstitutional,"[124] the NMCCA noted that the concurring justices doubted the wisdom of a per se prohibition on polygraph evidence.[125] The concurring justices specifically disavowed the plurality holding that allowing polygraph evidence would invade the province of the finder of fact or that allowing such evidence would lead to the litigation of collateral issues at trial.[126]

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[110] *Id.* (citation omitted).

[111] *Id.* at 590. Wheeler's adjudged and approved sentence included five months of confinement, forfeiture of $500.00 pay per month for a period of ten months, reduction to E-1, and a bad-conduct discharge. *Id.*

[112] *Id.* at 593.

[113] 523 U.S. 303 (1998).

[114] *Id.* at 305.

[115] *Id.*

[116] *Id.* at 306 (quoting United States v. Scheffer, 44 M.J. 442, 445 (C.A.A.F. 1996)).

[117] *Id.* at 308.

[118] *Id.* at 317.

[119] United States v. Wheeler, 66 M.J. 590, 593 (N-M. Ct. Crim. App. 2008).

[120] *Scheffer*, 523 U.S. at 309. The four justices were Justices Thomas, Scalia, Souter, and Chief Justice Rehnquist. *Id.* at 305.

[121] *Id.* at 309.

[122] *Id.* at 313–14.

[123] *Id.*

[124] *Id.* at 318. The four justices were Justices Kennedy, O'Connor, Ginsburg, and Breyer. *Id.*

[125] United States v. Wheeler, 66 M.J. 590, 594 (N-M. Ct. Crim. App. 2008).

[126] *Id.* at 593–94.

Attempting to reconcile these divergent opinions, the NMCCA concluded that "it is clear that a majority of eight justices believed [MRE] 707 was not unconstitutional as applied to the facts of Scheffer's case."[127] Allowing for the lone dissenter, Justice Stevens,[128] the NMCCA stated that the *Scheffer* opinion left at least five justices who believed MRE 707 could be unconstitutional when applied to different facts.[129]

When applying the consistent thread of reasoning in the Supreme Court's differing opinions in *Scheffer* to the facts presented in *Wheeler*, the NMCCA found that the trial judge's application of MRE 707 to prevent the introduction of polygraph by the defense to demonstrate the involuntary nature of Wheeler's confession denied him his Sixth Amendment right to present a defense.[130] The court emphasized that, unlike *Scheffer*, SH1 Wheeler was unable to testify himself about relevant factual matters related to the polygraphs that led to his confession.[131] Also unlike the accused in *Scheffer*, SH1 Wheeler did not attempt to bolster his own credibility by introducing an exculpatory polygraph or a polygraph expert to explain the test results.[132] In short, because the military judge's application of MRE 707 prevented SH1 Wheeler from attacking the voluntariness of his own statement, the NMCCA found that the military judge's application of MRE 707 was "disproportionate to the purposes [the rule was] designed to serve."[133]

While the *Wheeler* decision is good news for Navy-Marine Corps defense counsel, its usefulness to the rest of the services will be in dispute until the CAAF explicitly addresses this use of polygraph evidence at trial. While defense counsel may find hope in the fact that the CAAF ruled in favor of allowing the defense to use exculpatory polygraphs in its 1996 *Scheffer* opinion (that was subsequently overturned by the Supreme Court in 1998),[134] none of those judges remain on the court. Until the CAAF resolves this issue, resourceful defense counsel will at least have an example of persuasive case law to argue in favor of the introduction of the existence of a polygraph examination to challenge the voluntariness or reliability of an accused's otherwise admissible statement.

Re-Initiation of Questioning after a Suspect Has Invoked His Miranda/Article 31 Rights

In 1966, the Supreme Court decided the landmark case of *Miranda v. Arizona*.[135] The Supreme Court held that prosecution could not use any statement stemming from a custodial interrogation unless it could show that the accused had made a knowing, voluntary and intelligent waiver of his rights against self-incrimination following an explicit warning that he had the right: (1) to remain silent, (2) to be informed that any statement made by him may be used as evidence against him, and (3) to the presence of an attorney.[136] This rights warning requirement, not previously required under the Fifth Amendment, was designed as a prophylactic device to protect a putative defendant's right against self-incrimination at trial by insuring that he understood his self-incrimination rights during the pre-trial investigative stage of a criminal prosecution.[137]

Despite similar protections provided to servicemembers under Article 31 of the UCMJ, in 1967 the Court of Military Appeals held that *Miranda* applied to military interrogations in the 1967.[138] Unlike the warnings required in *Miranda*,

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[127] *Id.* at 594.

[128] *Scheffer*, 523 U.S. at 318. Justice Stevens believed that there was a stark inconsistency between the Government's argument that polygraph results are inherently inaccurate one the one hand and their extensive use throughout the Government on the other.

[129] *Wheeler*, 66 M.J. at 594. The *Scheffer* concurrence stated that "I doubt, though, that the rule of *per se* exclusion is wise, and some later case might present a more compelling case for introduction of the testimony than this one does." *Scheffer*, 523 U.S. at 318.

[130] *Wheeler*, 66 M.J. at 594.

[131] *Id.*

[132] *Id.*

[133] *Id.* (quoting *Scheffer*, 523 U.S. at 315–15 (citation omitted)).

[134] *Scheffer*, 523 U.S. at 317.

[135] 384 U.S. 436 (1966).

[136] *Id.* at 444.

[137] *Id.* at 457–58.

[138] *See* United States v. Tempia, 37 C.M.R. 249 (C.M.A. 1967).

Article 31 does not give a suspect the right to counsel but does require that he be advised of the "nature of accusation."[139] Moreover, *Miranda* warnings are only required in custodial interrogation settings,[140] where as Article 31 warnings are required anytime a person subject to the UCMJ intends to "interrogate, or request any statement from, an accused or a person suspected of an offense."[141]

Whether a suspect's *Miranda* or Article 31 rights have been violated depends upon what right (i.e., the right to silence or right to counsel) was exercised by the suspect and the response of the law enforcement. When a suspect asserts his right to remain silent, "the interrogation must cease"[142] and the suspect's right to "cut off questioning"[143] must be "scrupulously honored."[144] However, while the suspect's right to end questioning must be honored, the Supreme Court has held that a mere assertion of the right to remain silent does not operate as a blanket prohibition on further questioning.[145] In the case of *Michigan v. Mosley*, the Supreme Court found that the suspect's right to end questioning was "scrupulously honored" when the arresting officer stopped questioning a robbery suspect after he invoked his *Miranda* right to remain silent and a little over two hours later, a second officer re-advised the suspect of his rights and when the suspect waived them, questioned him on the incident.[146]

In contrast, a suspect's invocation of his right to counsel requires that "the interrogation must cease until an attorney is present."[147] This requirement for counsel presence was further clarified in the Supreme Court case of *Edwards v. Arizona*.[148] In *Edwards*, the Court held that once a suspect has expressed his desire to deal with the police only through counsel, he "is not subject to further interrogation until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police."[149]

What constitutes the initiation of "further communication, exchanges, or conversations with the police" is a matter of some controversy and a great deal of subjective opinion based on the facts of a particular case. In the case of *Oregon v. Bradshaw*, the Supreme Court declared that:

> There are some inquiries, such as a request for a drink of water or a request to use a telephone that are so routine that they cannot be fairly said to represent a desire on the part of an accused to open up a more generalized discussion relating directly or indirectly to the investigation. Such inquiries, or statements, by either an accused or police officer, relating to routine incidents of the custodial relationship, will not generally "initiate" a conversation in the sense in which the word is used in *Edwards.*[150]

If the accused's conversation with law enforcement crosses the line set by *Bradshaw*, the *Edwards* rule still requires that any subsequent waiver of the right to counsel must be shown to "not only be voluntary, but also constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege."[151] This brings us to the recent CGCCA case of *United States v. Bonilla.*[152]

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[139] UCMJ art. 31(b) (2008).

[140] *Miranda*, 384 U.S. at 444 (defining custodial interrogation as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way").

[141] *Id.*

[142] *Id.* at 474.

[143] Mosely v. Michigan, 423 U.S. 96, 103 (1975).

[144] *Id.* at 104.

[145] *Id.* at 103–04.

[146] *Id.* at 104–05.

[147] *Miranda*, 384 U.S. at 474.

[148] 451 U.S. 477 (1981).

[149] *Id.* at 484–85.

[150] 462 U.S. 1039, 1045 (1983).

[151] *Edwards*, 451 U.S. at 482.

[152] 66 M.J. 654 (2008).

United States v. Bonilla[153]

As the CGCCA opinion points out, the "[a]ppellant's short Coast Guard career was not without problems."[154] On 25 January 2005, Seaman (SN) (E-3) Bonilla found himself being interrogated by two agents of the Coast Guard Investigative Service (CGIS) at Coast Guard Sector New York.[155] The agents suspected him of using and distributing marijuana.[156] In March of 2005, charges were preferred alleging violations of Articles 86 and 112a.[157]

Before the charges could be brought to trial, the CGIS office in New York City received information that led them to believe that SN Bonilla had made threats to kill his senior chief at Sector New York.[158] Agents from CGIS called Coast Guard Police Department (CGPD) representatives at Sector New York and requested that they detain SN Bonilla until their arrival.[159] The CGPD officers were not told why they were being asked to detain SN Bonilla.[160]

The Sector New York CGPD officers quickly tracked down, apprehended, and handcuffed SN Bonilla and took him to the CGPD office.[161] Shortly after arriving at the CGPD office at 1700, CGPD Officer Hamel advised SN Bonilla of his Article 31, UCMJ rights.[162] During the advisement, Officer Hamel was unable to tell SN Bonilla what crime he was suspected of having committed because Officer Hamel had not been told.[163]

Officer Hamel later testified that he did not read Bonilla his rights in preparation for questioning him, but only because SN Bonilla kept making unsolicited statements.[164] Seaman Bonilla said he understood his rights and said that he wanted his lawyer and that he did not want to speak to Officer Hamel.[165] Despite his stated desire for an attorney and to remain silent, SN Bonilla repeatedly asked CGPD officers words to the effect of, "Why am I here?"[166] The CGPD officer replied that he did not know and that CGIS agents were on their way.[167]

When CGIS agents did arrive at approximately 1715, they did not immediately interview the accused.[168] Instead, the CGIS agents focused on interviewing potential witnesses to SN Bonilla's threats.[169] When the CGIS agents did make contact with SN Bonilla at 2154 hours, he had remained handcuffed and had not received any food or water since his apprehension, a period of almost five hours.[170]

When the two CGIS agents entered the room where SN Bonilla was being held, they knew he had been advised of his rights and had requested a lawyer.[171] Because of this, they did not direct any questions toward SN Bonilla.[172] Instead, they

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[153] *Id.*

[154] *Id.* at 656.

[155] *Id.*

[156] *Id.*

[157] *Id.*

[158] *Id.* at 657.

[159] *Id.*

[160] *Id.*

[161] *Id.*

[162] *Id.*

[163] *Id.*

[164] *Id.*

[165] *Id.*

[166] *Id.*

[167] *Id.*

[168] *Id.*

[169] *Id.*

[170] *Id.*

[171] *Id.*

engaged in idle conversation with each other about the case.[173] One of the agents later testified that they hoped their conversation would result in SN Bonilla reinitiating further discussions about his case.[174] Their hopes were soon rewarded when after about five minutes, SN Bonilla asked one of the agents, "Sir, can I ask what this is about?"[175]

The CGIS agents said they could not discuss the case unless he agreed to waive his rights.[176] Seaman Bonilla agreed to waive his rights and the agents prepared the necessary paperwork, which informed SN Bonilla of the offense he was alleged to have committed.[177] At 2219 hours, SN Bonilla read the rights waiver, said he understood what he was signing and signed the form.[178] The CGIS agents interviewed SN Bonilla until 0200 the following morning.[179] During the course of the interview, SN Bonilla was offered several opportunities to get food and a beverage and was unhandcuffed to take one or two smoke breaks.[180] Between 0200 and 0250 SN Bonilla completed a statement in which he admitted to communicating a threat toward a senior chief.[181]

At trial, SN Bonilla moved to suppress his confession claiming that the tactics used by the CGIS agents resulted in an unlawful interrogation or its functional equivalent.[182] Specifically, SN Bonilla felt that the CGIS agents violated his *Edwards* right to counsel by engaging in conduct that was likely to evoke an incriminating response.[183] In a reconsideration en banc, the CGCCA disagreed, finding that while the CGIS agents' conduct was borderline, the court could not conclude that it amounted to an unlawful interrogation.[184]

Ultimately, the CGCCA's determination of this case hung on the answers to two questions. First, did the CGIS agents' conversation in the presence of SN Bonilla after his request for counsel represent an "interrogation" within the definition of Article 31 and the Fifth Amendment?[185] Second, did Bonilla voluntarily waive his right to counsel as understood in *Edwards* and its progeny?[186]

Addressing the first question, the CGCCA acknowledged that while Government agents cannot engage in conduct reasonably likely to elicit an incriminating response, the court could not conclude that the CGIS agents crossed that line in SN Bonilla's case.[187] The court pointed to the fact that SN Bonilla was not threatened, no compelling pressure was placed on him beyond ordinary custody, and the CGIS agents used no pleas to conscience or ploys the CGIS agents knew would likely result in an incriminating response.[188] While the CGIS agents hoped their conduct would result in SN Bonilla re-initiating his conversation, the court reasoned that the determination of whether words or actions were reasonably likely to elicit an incriminating response turns on "the perceptions of the suspect, rather than the intent of the police."[189]

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[172] *Id.*

[173] *Id.*

[174] *Id.*

[175] *Id.*

[176] *Id.*

[177] *Id.*

[178] *Id.*

[179] *Id.*

[180] *Id.*

[181] *Id.*

[182] *Id.* at 656.

[183] *Id.*

[184] *Id.* 658. On February 2008, the CGCCA affirmed the findings and sentence, with one judge dissenting. Major Bonilla's request for reconsideration en banc resulted in this opinion. *Id.* at 656.

[185] *Id.* 658.

[186] *Id.*

[187] *Id.* at 659.

[188] *Id.*

[189] *Id.* (quoting Rhode Island v. Innis, 466 U.S. 291, 301 (1980)).

Turning to the second question, the CGCCA believed that all the evidence showed that SN Bonilla voluntarily, knowingly, and intelligently waived his rights before giving his confession.[190] The evidence the court relied upon included the fact that SN Bonilla signed a properly prepared rights advisement form which contained the crimes he was suspected of having committed as well as his rights under *Miranda*.[191] The court also looked at the particular characteristics of SN Bonilla and concluded that he was a mature man of twenty-two who possessed a general education development and a familiarity with the criminal investigative process based upon earlier problems with law enforcement found in the trial record.[192]

The three judges dissenting in SN Bonilla's case were highly critical of the majority's finding that the CGIS agents conduct in the interview room with SN Bonilla did not amount to interrogation.[193] The dissent focused in on the fact that, pursuant to the Supreme Court decision in *Rhode Island v. Innis*,[194] interrogation must be defined as words or actions, except those normally incident to arrest and custody, that law enforcement should know are reasonably likely to elicit an incriminating response.[195] Looking at the facts of this case, both the concurring and dissenting opinions agreed that the CGIS agents' self-avowed efforts to encourage SN Bonilla to re-initiate his conversations with law enforcement violated his rights under Article 31, UCMJ.[196]

Both the concurring and dissenting opinions pointed out that while the majority believed SN Bonilla's request to know why he had been arrested was a voluntary reinitiating of his conversations with law enforcement in accordance with *Innis*, the military character of the interrogation should have changed their analysis.[197] Both opinions pointed out that unlike civilians who are warned pursuant to *Miranda*, SN Bonilla was entitled to know what offense he was suspected of committing under Article 31, UCMJ.[198] When SN Bonilla was advised of his Article 31 rights by the arresting CGPD agent, he was not told of what he was accused of because the CGPD agent did not know.[199] As a result, when the CGIS agents later engaged in a conversation between themselves about SN Bonilla's case in SN Bonilla's presence, they were knowingly exploiting this prior defective Article 31 rights advisement.[200] When SN Bonilla obligingly asked, "Sir, can I ask what this is about?"[201] in response to the CGIS conversation, he was merely inquiring into what he should have already been told.[202] As a result of the defective rights advisement and its deliberate exploitation by the CGIS agents, both the concurrence and dissent believed SN Bonilla's subsequent statement should be considered the fruit of an unlawful interrogation.[203]

Claiming the Privilege Against Self-Incrimination During Cross-Examination

When an accused takes the stand voluntarily, he waives his privilege against self-incrimination with respect to the matters to which he testifies.[204] The accused does not, however, waive his privilege against self-incrimination with respect to uncharged misconduct at an entirely different time and place.[205] Despite the continuing right to assert the privilege against

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[190] *Bonilla*, 66 M.J. at 659.

[191] *Id.*

[192] *Id.*

[193] *Id.* at 660–62. Judge Felicetti and Jude Pepper wrote a separate dissent from Chief Judge McClellend's dissent on the suppression issue. *Id.* at 662–63.

[194] 446 U.S. 291 (1980).

[195] *Id.* at 301.

[196] *Bonilla*, 66 M.J. at 660–62

[197] *Id.*

[198] UCMJ, art. 31(b) (2008).

[199] *Bonilla*, 66 M.J. at 657.

[200] *Id.* at 660–62

[201] *Id.* at 657.

[202] *Id.* at 660–662.

[203] *Id.*

[204] MCM, *supra* note 5, MIL. R. EVID. 301(e).

[205] United States v. Castillo, 29 M.J. 145, 154 (C.M.A. 1989).

self-incrimination during trial, neither a testifying accused nor any other witness may use their invocation of the right against self-incrimination to thwart effective cross-examination, particularly on issues of credibility.[206]

Military Rule of Evidence 301(f)(2) states that "[i]f a witness asserts the privilege against self-incrimination on cross-examination, the military judge, upon motion, may strike the direct testimony of the witness in whole or in part, *unless the matters to which the witness refuses to testify are purely collateral.*"[207] If a witness does invoke his right against self-incrimination by refusing to ask a question on direct or cross-examination, MRE 301(f)(1) states that the witness's "refus[al] to answer [the] question cannot be considered as raising any inference unfavorable to either the accused or the government."[208] How these rules work in an actual court-martial is seldom seen in practice, but an Army Court of Criminal Appeals case from the last court term provides a good illustration of how the rules should be applied.

United States v. Matthews[209]

Specialist (SPC) Matthews's trouble with the law arose out of his suspicion that his wife was having an affair.[210] Conspiring with two other soldiers, Staff Sergeant (SSG) Gibson and Private First Class (PFC) Lozado, SPC Matthews confronted Sergeant (SGT) Freeman at SPC Matthews' home and accused him of facilitating his wife's affair with another Soldier.[211] When SGT Freeman denied SPC Matthews' allegations, SPC Matthews retrieved a pistol from under his living room couch.[212] When SGT Freeman attempted to hastily exit the residence he was grabbed by SSG Gibson and PFC Lazado, who pushed him back into the living room where SPC Matthews pistol whipped him from behind.[213] In the following altercation, SPC Matthews held his pistol to SGT Freeman's bleeding head and, ultimately, fired a shot that drew military police to the residence.[214] Specialist Mathews was subsequently arrested and charged with, among other things, an aggravated assault upon a non-commissioned officer.[215]

At his court-martial, before a military judge alone, SPC Matthews called SSG Gibson, one of his co-conspirators, as a witness during his case-in-chief.[216] Staff Sergeant Gibson testified under a grant of limited immunity for his participation in the events for which SPC Matthews was charged.[217] After testifying favorably toward the defense, SSG Gibson was cross-examined by the Government.[218]

The trial counsel attempted to impeach SSG Gibson's testimony by asking him a series of questions about his alleged involvement in previous misconduct unrelated to offenses for which SPC Matthews had been charged.[219] Specifically, trial counsel asked SSG Gibson three things. Had he falsified an academic transcript and altered a physical fitness scorecard to enhance his promotion packet?[220] Were charges ever preferred against him as a result?[221] Finally, had he submitted a request

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[206] *See* MCM, *supra* note 5, MIL. R. EVID. 301(e); United States v. Richardson, 15 M.J. 41, 46 (C.M.A. 1983) ("To allow an accused to offer evidence from witnesses whose veracity and powers of observation could not be tested adequately by cross-examination would grant him a privilege to mislead the trier of fact.").

[207] MCM, *supra* note 5, MIL. R. EVID. 301(f)(2) (emphasis added).

[208] *Id.* MIL. R. EVID. 301(f)(1).

[209] 66 M.J. 645 (C.A.A.F. 2008).

[210] *Id.* at 646.

[211] *Id.*

[212] *Id.*

[213] *Id.*

[214] *Id.* at 645.

[215] *Id.*

[216] *Id.* at 645–46.

[217] *Id.* at 647.

[218] *Id.* at 646–47.

[219] *Id.* at 647.

[220] *Id.* at 647 n.4.

[221] *Id.*

for discharge in lieu of court-martial which the convening authority had approved?[222] In response to each of these questions, SSG Gibson invoked his Fifth Amendment privilege against self-incrimination.[223]

Based upon SSG Gibson's assertion of his self-incrimination rights, the trial counsel argued that she could not conduct a meaningful cross-examination and asked the military judge to excuse the witness and strike his direct testimony from the record.[224] The military judge denied the trial counsel's request and the cross-examination continued with SSG Gibson invoking his Fifth Amendment privilege on thirteen occasions.[225]

The military judge, over defense objection, permitted the trial counsel to comment on SSG Gibson's invocation of his Fifth Amendment privilege against self-incrimination during her rebuttal argument on findings.[226] The military judge justified his decision by relying on the "interest of justice" exception to MRE 512(a)(2).[227] The military judge subsequently found SPC Matthews guilty of the aggravated assault.[228]

After the military judge announced his findings, he stated that in weighing different witnesses' testimony he found SSG Gibson's testimony, among others, to be untruthful.[229] The military judge described the methods he used to arrive at his opinion that SSG Gibson's testimony was untruthful and made no reference to SSG Gibson's repeated invocation of his Fifth Amendment privilege against self-incrimination.[230]

On appeal to the ACCA, SPC Mathews challenged the trial judge's decision to allow the trial counsel to comment on SSG Gibson's invocation of his self-incrimination rights.[231] Reviewing the judge's decision, the ACCA determined that the military judge referred to the wrong rule of evidence when determining that the trial counsel could comment on SSG Gibson's testimony.[232] The ACCA pointed out that while MRE 512 permits a military judge to allow comment on witness's invocation of a privilege "in the interests of justice,"[233] it only applies to the privileges enumerated in the MRE 500-series.[234] The ACCA declared that the military judge should have applied the more specific, and therefore move controlling, MRE 301.[235] Military Rule of Evidence 301 contains no "in the interests of justice" exception and requires an absolute prohibition on drawing any adverse inference from the invocation of an accused or witness's invocation of his Fifth Amendment protections.[236]

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[222] *Id.*

[223] *Id.* at 647.

[224] *Id.*

[225] *Id.*

[226] *Id.*

[227] 2005 MCM, *supra* note 96, MIL. R. EVID. 512(a)(2).

> The claim of a privilege by a person other than the accused whether in the present proceeding or upon a prior occasion normally is not a proper subject of comment by the military judge or counsel for any party. An adverse inference may not be drawn therfrom except when determined by the military judge to be required by the interests of justice.

Id.

[228] *Id.*

[229] *Id.*

[230] *Id.* at 647–48. Unfortunately for the appellate history of this case, the military judge did make an ex parte, off-the-record comment to the defense team that he had considered SSG Gibson's invocation in determining his credibility. This resulted in a post-trial *DuBay* hearing. *Id. at* 648.

[231] *Id.* Specialist Matthews also alleged that the military judge drew an adverse inference based on those comments, but that issue will not be addressed in this article.

[232] *Id.* at 650.

[233] 2005 MCM, *supra* note 96, MIL. R. EVID. 512(a)(2).

[234] *Matthews*, 66 M.J. at 651. The 500-series of the MREs include the lawyer-client privilege, the communications to clergy privilege, the husband-wife privilege, and the psychotherapist-patient privilege. *See* 2005 MCM, *supra* note 96, MIL. R. EVID. 501–512.

[235] *Matthews*, 66 M.J. at 651.

[236] *Id.*

The ACCA also found that the military judge should have granted the trial counsel's request that SSG Gibson's direct testimony be stricken from the record.[237] Looking to MRE 301, the court observed that a military judge may strike a witness's direct testimony if, under cross-examination, the witness asserts his Fifth Amendment privilege and the matters on which the witness refuses to testify are not purely collateral.[238] The term "purely collateral" is not defined within the rule, but has been defined in case law as either issues that are not germane to the accused's trial or matters of trustworthiness and credibility.[239] In other words, the *Matthews* court reiterated the fact that "[c]ourts have consistently held credibility issues are not collateral matters for either party, but rather key concerns of the truth seeking process."[240]

In SPC Matthews's case, the ACCA determined that SSG Gibson's credibility as a witness was certainly not collateral.[241] Trial counsel's questions to SSG Gibson regarding his falsification of academic transcript and the alteration of his physical fitness results for a promotion packet, if true, would be central to his character for truthfulness and therefore, patently not collateral.[242] As a result, the court held that the trial judge should have granted the trial counsel's request to strike SSG Gibson's direct testimony.[243]

The *Matthews* case provides an excellent review of the rules surrounding the invocation of the right against self-incrimination by an accused or witness on cross-examination. As the ACCA emphasized in its opinion, military judges must insure that neither the defense nor prosecution are allowed to use the Fifth Amendment or, in the case of the defense, the Sixth Amendment's Due Process Clause, to present testimony and block cross-examination in such a way that only a half-truth is presented to the fact-finder.[244] The other lesson that can be drawn from the *Matthews* case is that "questions relating to offenses that reflect on the credibility and veracity as a witness" are never collateral matters.[245] Finally, *Matthews* reiterates MRE 301(f)(1)'s absolute prohibition on commenting on or drawing any negative inference from a witness's decision to invoke his Fifth Amendment right against self-incrimination. The only permissible remedy in such a situation is striking some or all of a witness's direct testimony in accordance with MRE 301.

Conclusion

While the past court term was not generous in the number of self-incrimination cases decided, the quality of issues presented by those cases more than made up for the lack of quantity. Continuing to watch the CAAF's approach in the cases of *Wheeler*,[246] *Bonilla*,[247] and *Matthews*,[248] will hopefully provide further guidance in self-incrimination law over the next year.

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[237] *Id.* at 651 n.11.

[238] MCM, *supra* note 5, MIL. R. EVID. 512(a)(2).

[239] United States v. Moore, 36 M.J. 329 (C.M.A. 1993); United States v. Richardson, 15 M.J. 41, 44 (C.M.A. 1983) ("And as long as the subject matter of cross-examination is germane to the direct examination or relates to the witness' credibility, cross-examination may extend to areas of self incrimination.").

[240] *Matthews*, 66 M.J. at 649.

[241] *Id.* at 651.

[242] *Id.*

[243] *Id.*; *see also* Davis v. Alaska, 415 U.S. 308, 316 (1974) ("Cross-examination is the principle means by which the believability of a witness and the truth of his testimony are tested."). *Id.* at 316; Chambers v. Mississippi, 410 U.S. 284 (1973) (holding that to prevent cross-examination "calls into question the ultimate 'integrity of the fact-finding process.'"). *Id.* at 295.

[244] *Matthews*, 66 M.J. at 650 n.10.

[245] *Id.* at 651.

[246] 66 M.J. 590 (N-M. Ct. Crim. App. 2008).

[247] 66 M.J. 654 (C.G. Ct. Crim. App. 2008).

[248] 66 M.J. 645 (A. Ct. Crim. App. 2008) .