Discovery and Sentencing—2008 Update

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

Introduction

As in years past, the 2008 Court of Appeals for the Armed Forces (CAAF) reviewed the full spectrum of military criminal law issues in sixty-five published cases.[1] Several of those cases involved discovery and sentencing issues. This article examines the CAAF cases as well as several service court cases. Part one addresses discovery, particularly the issue of post-trial evidence, the destruction of evidence, *in-camera* review and defense access to evidence. Part two briefly highlights the two main CAAF cases addressing presentencing issues concerning aggravation evidence and rebuttal evidence.

Discovery

"The trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe."[2] Article 46, Uniform Code of Military Justice (UCMJ) is the heart and soul of the military discovery system.[3] The military courts have stated that Article 46 provides more extensive rights of discovery than even the Constitution.[4] Rule for Courts-Martial (RCM) 701 implements Article 46 and explicitly includes items that are material to the preparation of the defense.[5]

In *United States v. Webb*, the CAAF provides guidance to counsel regarding the post-trial discovery of material evidence, prior to authentication of the record, and a military judge's options.[6] In addition to *Webb*, the service courts had several instructive cases this past term. The Air Force Court of Criminal Appeals (AFCCA) published two cases pertaining to discovery. In *United States v. Terry*[7] the AFCCA decided an issue involving the destruction of evidence and in *United States v. Cossio*[8] the court considered whether a writ of *error coram vobis* was the appropriate forum to request post trial relief for an alleged *Brady*[9] violation. In *United States v. Wuterich* (*Wuterich II*), the CAAF reviewed the 2008 Navy-Marine Corps Court of Criminal Appeals (NMCCA) decision involving in camera review procedure.[10] Lastly, in *United States v. Walker* the NMCCA discussed the issue of defense access to evidence.[11]

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[1] *See* Court of Appeals for the Armed Forces, 2008 Term of Court Opinions, http://www.armfor.uscourts.gov/2008Term.htm (last visited Mar. 13, 2009).

[2] UCMJ art. 46 (2008).

[3] *Id.* art. 46.

[4] *See* United States v. Eshalomi, 23 M.J. 12, 24 (C.M.A. 1986); United States v. Adens, 56 M.J. 724, 731 (A. Ct. Crim. App. 2002); United States v. Guthrie, 53 M.J. 103, 105 (C.A.A.F. 2000).

[5] MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 701(a)(2) (2008) [hereinafter MCM]. The Supreme Court in *Brady v. Maryland* held that due process under the U.S. Constitution requires the Government to disclose to defense evidence that is material to either guilt or punishment, irrespective to the good faith or bad faith of the prosecution. 373 U.S. 83, 87 (1963). Other Supreme Court cases expanded the rule to include evidence that is favorable to the accused or impeaches a government witness. *See* Banks v. Dretke, 540 U.S. 668 (2004); Strickler v. Greene, 527 U.S. 263, 281 (1999); Kyles v. Whitley, 514 U.S. 419 (1995); United States v. Bagley, 473 U.S. 667 (1985); Giglio v. United States, 405 U.S. 150 (1972).

[6] 66 M.J. 89 (C.A.A.F. 2008).

[7] 66 M.J. 514 (A.F. Ct. Crim. App. 2008).

[8] No. 36206 2008 CCA LEXIS 70 (A.F. Ct. Crim. App. Feb. 15, 2008).

[9] *Brady*, 373 U.S. at 87 (holding that the government suppression of evidence favorable to an accused violates due process where the evidence is material to either guilt or to punishment, irrespective of the good faith or bad faith of the prosecution).

[10] 67 M.J. 63 (C.A.A.F. 2008).

[11] 66 M.J. 721 (N-M. Ct. Crim. App. 2008).

Post-Trial Discovery

In some cases, intentional or non-intentional government suppression of evidence may prevent defense counsel from discovering favorable evidence until after the completion of trial. Once defense counsel becomes aware of the evidence, he must decide how to respond. In cases where the court-martial convening authority has not approved the record of trial, defense counsel may petition the military judge to consider the evidence and request a new trial. Specifically, a military judge may, under RCM 1102,[12] call an Article 39(a)[13] session "for the purpose of inquiring into, and when appropriate, resolving any matter that arises after trial that substantially affects the legal sufficiency of any findings of guilty or the sentence."[14] A military judge may do this anytime prior to authentication of the record.[15]

This issue arose in *United States v. Webb* where Defense became aware of the existence of evidence they requested from the Government after sentencing but prior to the authentication of record.[16] Staff Sergeant (SSgt) Webb, U.S. Air Force, consented to a urinalysis.[17] Technical Sergeant (TSgt) Herring observed SSgt Webb provide the sample.[18] The sample tested positive for a metabolite of cocaine.[19] Based on the results of the urinalysis, the Government charged SSgt Webb with a single use of cocaine.[20] Prior to trial, defense requested discovery of any evidence that affected any witness's credibility, this request included prior disciplinary actions.[21] In preparation for trial, the Government counsel interviewed TSgt Herring and discovered that he previously received nonjudicial punishment under Article 15, UCMJ.[22] The trial counsel neither requested any additional information about the nonjudicial punishment nor disclosed this information to defense.[23]

During the trial on the merits, trial counsel offered a stipulation of expected testimony from TSgt Herring as part of the Government's case-in-chief to establish the custody of the urine specimen.[24] Based on this and other evidence, a general court-martial convicted SSgt Webb of using cocaine.[25] Approximately two weeks after trial, the trial counsel received information that TSgt Herring had previously received nonjudicial punishment for making a false official statement, making a false claim, and larceny.[26] The trial counsel disclosed the information to defense the following day.[27]

Upon receiving the evidence, defense counsel moved for a post-trial hearing under Article 39(a), UCMJ and for a new trial.[28] Defense argued that this evidence was material to their defense in that it impeached the credibility of TSgt Herring, a key Government witness.[29] The military judge granted the defense motions for the post-trial hearing and for a new trial.[30]

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[12] MCM, *supra* note 5, R.C.M. 1102(b)(2).

[13] UCMJ art. 39 (2008).

[14] MCM, *supra* note 5, R.C.M. 1102(b)(2).

[15] *Id.* After authentication of the record, UCMJ Article 73 permits an accused to petition the Judge Advocate General for a new trial on the grounds of newly discovered evidence or fraud on the court. UCMJ art. 73. This article applies after the convening authority approves a court-martial sentence.

[16] 66 M.J. 89 (C.A.A.F. 2008).

[17] *Id.* at 90.

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *Id.* at 91.

[30] *Id.*

The military judge made his ruling prior to authentication of the record.[31] The Government appealed under Article 62, UCMJ.[32]

Both the AFCCA and CAAF agreed with the military judge's ruling.[33] The CAAF held "that the military judge had authority to consider the request for a new trial" and that the "military judge did not abuse her discretion in ordering a new trial."[34] When discussing the issue, the CAAF looked to *United States v. Scaff* where they noted that Article 39(a), UCMJ allowed a military judge "to take such action after trial and before authenticating the record as may be required in the interest of justice."[35] In *Scaff*, the court stated "that, until the military judge authenticates the record of trial, he may conduct a post-trial session to consider newly discovered evidence and, in proper cases, may set aside findings of guilty and the sentence."[36] In *Webb*, the CAAF held that Article 39(a), UCMJ grants the military judge the authority to resolve matters that arise after trial that "substantially affect the legal sufficiency of any findings of guilty."[37] Specifically, the CAAF stated "We confirm our conclusion in *Scaff*. Prior to authentication, a military judge has authority under Article 39(a), UCMJ, 'to convene a post-trial session to consider newly discovered evidence and to take whatever remedial action is appropriate.'"[38]

The CAAF held that not only did the military judge have the authority to order a new trial, but also that the military judge did not abuse her discretion.[39] As discussed previously, the Government must disclose evidence favorable to the accused.[40] Favorable evidence is evidence material to the guilt or punishment of the accused[41] and includes evidence that impeaches a Government witness.[42] Furthermore, the language of RCM 701(a)(2)(A) specifically states that upon request, trial counsel must allow the defense to inspect any documents, within military control, that are "*material to the preparation of the defense*."[43] Material to the preparation of the defense includes evidence "that would assist the defense in formulating a defense strategy."[44]

Since the Government charged SSgt Webb with a single specification of using cocaine based solely on a urinalysis, the Government had to prove that the urine sample tested was in fact SSgt Webb's by showing a continuous chain of custody.[45] This requirement highlights the importance of TSgt Herring's testimony as the observer. Evidence of TSgt Herring's previous untruthful conduct could have established reasonable doubt as to the guilt of SSgt Webb.[46] Based on this evidence, the defense counsel may have altered his trial strategy such as recommending the accused not testify.[47] Accordingly, the CAAF held that the Government's failure to disclose the evidence undermined the confidence in the outcome of the trial and the error was not harmless beyond a reasonable doubt.[48]

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[31] *Id.*

[32] *Id.*; United States v. Webb, No. 2007-01 (A.F. Ct. Crim. App. May 10, 2007).

[33] *Webb*, 66 M.J. at 91.

[34] *Id.* (citing *Webb*, No. 2007-01, at *4).

[35] 29 M.J. 60, 65 (C.M.A. 1989) (citing United States v. Griffith, 29 M.J. 42 (C.M.A. 1988)) (holding that a military judge could grant a motion for a finding of not guilty post trial if he decided the evidence was legally insufficient).

[36] *Id.* at 65.

[37] *Webb*, 66 M.J. at 91 (quoting MCM, *supra* note 5, R.C.M. 1102(b)(2)). The court also reaffirmed that Article 73, UCMJ, does not apply prior to authentication of the record. *Id.*

[38] *Id.* at 92 (citing *Scaff*, 29 M.J. at 66).

[39] *Id.*

[40] Brady v. Maryland, 373 U.S. 83, 87 (1963).

[41] *Id.*

[42] United States v. Bagley, 473 U.S. 667, 676 (1985).

[43] *Webb*, 66 M.J. at 92 (quoting MCM, *supra* note 5, R.C.M. 701(a)(2)(A) (emphasis added)).

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] *Id.* at 93.

As demonstrated in *Webb*, a post-trial hearing under Article 39(a) is a proper venue to address a discovery violation prior to the authentication of the record.[49] Through this venue a military judge may take necessary remedial action. In *United States v. Cossio*, the AFCCA addressed the options available to the accused when the discovery violation does not become apparent until after authentication of the record of trial.[50] In *Cossio*, the AFCCA looked at a similar potential discovery violation that came to the defense attention after the completion of appellate review of the record of trial.[51]

A military judge found Airman First Class Jose Cossio, Jr. guilty of stealing U.S. currency, improperly obtaining another person's social security number with intent to use that number to commit larceny, and communicating a threat at a general court-martial.[52] The AFCCA affirmed the conviction in 2006 and the CAAF denied review in January 2007.[53] On 14 November 2007, the defense petitioned the AFCCA to issue a writ of *error coram vobis*,[54] claiming a *Brady* violation[55] by Government during the initial trial.[56] The Government failed to disclose that a Government witness, Senior Airman (SrA) MHT, pled *nolo contendere* to four separate misdemeanor worthless check charges under Florida law prior to the accused's trial.[57] Defense argued that SrA MHT's *nolo contendere* pleas were material evidence and the Government's failure to disclose was an error of constitutional dimension warranting relief.[58]

The AFCCA began by determining the standard of review. The AFCCA found authority to issue an extraordinary writ in the All Writs Act.[59] A writ of *coram nobis*[60] does not substitute for an appeal.[61] The basis for granting a writ of *coram nobis* is a demonstration of error of fact unknown at the time of trial, that is fundamentally unjust in character and which would probably have altered the outcome of the trial had it been known.[62] Defense argued that Government's failure to disclose SrA MHT's nolo contendere pleas rose to this standard.[63] The court stated that for the accused to obtain relief under the writ of *coram vobis* the court "must find a 'probability' the outcome of the challenged proceedings would have been different had the trial defense counsel been aware of the pleas in question."[64]

The AFCCA then reviewed the record of trial and found overwhelming evidence of the accused's guilt.[65] In particular, the court found that defense counsel's primary trial strategy focused on minimizing the accused's conduct.[66] In addition, the court found that the defense did significantly undermine SrA MHT's credibility by highlighting his admission to repeated larcenies by fraud.[67] The AFCCA held that even though defense counsel could have used the unrelated *nolo contendere* pleas

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[49] *Id.* at 92.

[50] No. 36206, 2008 CCA LEXIS 70, at *2 (A.F. Ct. Crim. App. Feb. 15, 2008).

[51] *Id.*

[52] *Id.* at *1.

[53] *Id.* at *2, *review denied*, 66 M.J. 381 (C.A.A.F. 2008).

[54] *Error coram vobis* means "Error in the proceedings 'before you'; words used in a writ of error directed by an appellate court to the court which tried the cause." BLACK'S LAW DICTIONARY 377 (abr. 6th ed. 1991). *Error coram nobis* means "Error committed in the proceedings 'before us.'" *Id*. At the appellate level, writs of *error coran vobis* and writs of *error coran nobis* are used almost interchangeably. *Cossio*, 2008 LEXIS 70, at *3 n.2.

[55] *See* Brady v. Maryland, 373 U.S. 83 (1963). Defense argued that the Government failed to disclose evidence that was material to the guilt or punishment of the accused. *Id.* This is now referred to as a *Brady* violation.

[56] *Cossio*, 2008 LEXIS 70, at *3.

[57] *Id.*

[58] *Id.*

[59] 28 U.S.C. § 1651(a) (2006).

[60] The court uses the terms *nobis* and *vobis* interchangeably. *See Cossio*, 2008 LEXIS 70, at *3.

[61] *Id.* (citing United States v. Frischholz, 36 C.M.R. 306, 309 (C.M.A. 1966)).

[62] *Id.* at *5.

[63] *Id.*

[64] *Id.* at *6.

[65] *Id.*

[66] *Id.*

[67] *Id.* at *7.

to four bad checks to further attack the credibility of SrA MHT, the "evidence would not have 'probably' altered the findings or the sentence."[68] The AFCCA denied the defense writ of *error coram vobis*.[69]

Although a writ of *error coram vobis* is a proper venue to address a discovery violation after the completion of appellate review, the defense must overcome a significant evidentiary standard to obtain relief—that the probability of the outcome of the trial would have been different.[70] Cossio failed to meet that standard and the court denied his writ. But what happens when the appellate courts send a case back down for a new trial and the evidence was inadvertently destroyed? The AFCCA considered this issue in *United States v. Terry*.[71]

Lost or Destroyed Evidence

The duty to disclose evidence implies a duty to preserve the evidence.[72] In *United States v. Kern*, the Court of Military Appeals stated that "[t]he Government has a duty to use good faith and due diligence to preserve and protect evidence and make it available to an accused."[73] The court further stated that when "the evidence is not 'apparently' exculpatory, the burden is upon the accused to show that the evidence possessed an exculpatory value that was or should have been apparent to the Government before it was lost or destroyed."[74] The accused must also show that he could not "obtain comparable evidence by other reasonably available means."[75] Later in *United States v. Manuel*, the CAAF stated that a military judge must also address whether a regulatory standard applied and if that standard was intended to confer a substantial right on the servicemember.[76] The previous case law dealt with cases where evidence was lost or destroyed prior to trial. In *United States v. Terry*, the Government lost and destroyed the evidence in question after the trial but prior to the completion of the appellate review.[77]

A general court-martial convicted SSgt Keith M. Terry of violating a lawful no-contact order and raping a female Airman.[78] The CAAF found error on an unrelated issue, set aside the findings and sentence, and authorized a rehearing.[79] Prior to the rehearing, in an Article 39(a) session the military judge granted a defense motion to dismiss the rape charge and specification because the evidence had been destroyed or otherwise disposed of.[80] The Government appealed the decision pursuant to Article 62, UCMJ.[81]

The victim accused SSgt Terry, a medical technician, of raping her during an ultrasound examination.[82] During the first trial, the defense primarily argued that the victim consented to the sexual intercourse.[83] During the initial investigation into the rape allegations, the Air Force Office of Special Investigations (AFOSI) took several items of forensic evidence into

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[68] *Id.*

[69] *Id.* at *8; United States v. Cossio, No. 36206 2008 CCA LEXIS 70 (A.F. Ct. Crim. App. Feb. 15, 2008), *review denied*, 66 M.J. 381 (C.A.A.F. 2008).

[70] *See Cossio*, 2008 LEXIS 70, at *4.

[71] 66 M.J. 514 (A.F. Ct. Crim. App. 2008).

[72] 1 FRANCIS A. GILLIGAN & FREDRIC I. LEDERER, COURT-MARTIAL PROCEDURES 11–55 (3d ed. 2007).

[73] 22 M.J. 49, 51 (C.M.A. 1986); *see also* California v. Trombetta, 467 U.S. 479, 489 (1984).

[74] *Kern*, 22 M.J. at 51–52; *see also Trombetta*, 467 U.S. at 489.

[75] *Kern*, 22 M.J. at 52; *see also Trombetta*, 467 U.S. at 489.

[76] 43 M.J. 282, 288 (C.A.A.F. 1995). The CAAF stated that the destruction of the accused's positive urine sample one month after testing violated an Air Force regulation and a Department of Defense directive. *Id.* The lower court did not abuse their discretion when they suppressed the positive results and concluded that the standards for preserving samples conferred a substantial right on the accused. *Id.* The CAAF also noted that the urinalysis result was the only evidence of the accused's wrongful use of cocaine, and that the urine sample was of central importance to the defense. *Id.* Furthermore, the court noted that the loss of this evidence was particularly significant due to the controversy as to the nanogram level in the specimen. *Id.*

[77] 66 M.J. 514 (A.F. Ct. Crim. App. 2008).

[78] *Id.*

[79] *Id.* at 515.

[80] *Id.*

[81] *Id.*

[82] *Id.*

[83] *Id.*

custody.[84] The AFOSI agents also took photographs from the surveillance system which they returned to the surveillance system custodian prior to the first trial when they found no evidentiary value in them.[85] Also during the initial investigation, the investigators sent the victim's underwear and a vaginal swab taken from her to the Nebraska State Patrol Crime Lab for testing.[86] The laboratory identified semen on both the vaginal swab and the underwear; the DNA matched the semen to the accused.[87] The suspected bodily fluids taken from the scene were also tested (the whole sample was consumed in the testing) and found to have the accused's DNA.[88] The AFOSI agents destroyed or otherwise disposed of these items prior to the second trial.[89]

At the pretrial Article 39(a) session, the military judge found that the Government had not acted in "bad faith" when AFOSI agents destroyed and disposed of the evidence.[90] But, the military judge did conclude that the lack of due diligence to preserve and protect the evidence and to make it available to the accused resulted in the accused being denied his discovery rights and thus denied his constitutional right to a fair trial.[91] As a result, the military judge granted the defense motion to dismiss the rape charge and specification.[92] The military judge stated that he could not determine if the missing evidence contained exculpatory material.[93]

The Government appealed the military judge's ruling under Article 62(a)(1), UCMJ.[94] Upon review, the AFCCA held that the military judge abused his discretion by granting the motion to dismiss.[95] The AFCCA agreed with the military judge that the evidence may have contained exculpatory material, but found that the evidence on its face was only potentially useful, not clearly exculpatory.[96] The court determined that because the Government did not act in bad faith and that the items were not clearly exculpatory; the destruction of the items did not violate the accused's constitution right to due process.[97]

Next, the AFCCA considered whether the Government's suppression violated RCM 703(f)(2).[98] Rule for Court-Martial 703(f)(2) does not require the Government to have acted in bad faith.[99] "An accused need only to establish that such evidence 'is of such central importance to an issue that it is essential to a fair trial' and 'there is no adequate substitute for such evidence.'"[100] The court applied RCM 703(f)(2) to each individual piece of evidence that was lost or destroyed. With each piece of evidence, the court determined that the evidence was either too speculative to be of central importance to an

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[84] *Id.* at 516. The forensic evidence included specimens from a clean sweep of the crime scene consisting of a cotton swab and glass vial; a sexual assault protocol kit, clothing of the victim obtained from a sexual assault protocol kit; a cardboard box containing suspected bodily fluids taken from the chair at the end of the examination table in the room where the alleged assault occurred; one sexual assault kit taken from the victim; a cardboard box containing suspected bodily fluids taken on a cotton swab and one glass vial; clothing items seized from the accused; three condoms; and a three page handwritten document. *Id.*

[85] *Id.*

[86] *Id.*

[87] *Id.*

[88] *Id.*

[89] *Id.*

[90] *Id.*

[91] *Id.* at 517.

[92] *Id.*

[93] *Id.*

[94] *Id.* The court in an Article 62 appeal may only review matters of law. UCMJ art. 62 (2008). The appellate court is bound by the factual determination of the military judge except if the determination is unsupported by the record or clearly erroneous. *Terry*, 66 M.J. at 517.

[95] *Terry*, 66 M.J. at 520.

[96] *Id.* at 517.

[97] *Id* at 518; *see also* California v. Trombetta, 467 U.S. 479 (1984); Arizona v. Youngblood, 488 U.S. 51 (1988). The Court articulated three criteria an accused must meet to establish a violation of his due process rights under the 14th Amendment: (1) the evidence must possess an exculpatory value that was apparent before the evidence was destroyed; (2) the evidence must be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means; and (3) the accused must show that law enforcement acted in bad faith when they lost or destroyed such evidence. *Terry*, 66 M.J. at 517.

[98] MCM, *supra* note 5, R.C.M. 703(f)(2).

[99] *Terry*, 66 M.J. at 518.

[100] *Id.* (quoting United States v. Madigan, 63 M.J. 118 (C.A.A.F. 2006)).

issue essential to a fair trial (e.g. the lost surveillance photos), or the accused could obtain comparable evidence by other reasonably available means (e.g. clothing, underwear, vaginal swab, condoms, and bodily fluids taken from the chair).[101] Additionally, the AFCCA stated that the defense failed to provide a reasonable theory to show how the individual pieces of evidence could have benefitted Terry's case.[102] When AFCCA made their decision, they took into account that the accused admitted to three different witnesses that he had sexual intercourse with the victim.[103] In addition, the court found that the main dispute at trial was whether the sexual intercourse was without consent and by force.[104] Under those facts, the court found that the lost or destroyed evidence only confirmed that sexual intercourse occurred and were therefore not of central importance to the trial.[105]

Subsequently, the AFCCA decided whether the loss of so much evidence was in and of itself so detrimental that the accused could not obtain a fair trial.[106] On these facts, the court after reviewing the written briefs, hearing arguments, and researching and reflecting on the issues, found that dismissal of the charges was not appropriate.[107] The AFCCA determined that the lost and destroyed evidence was not of central importance to an issue of the trial and that there was adequate substitute for some of the lost and destroyed evidence so that the impact of the collective loss did not rise to a prejudicial impact on the accused.[108] The AFCCA vacated the military judge's ruling and sent the case back for further proceedings.[109]

The important take-away from this case is that the court will consider each piece of destroyed or lost evidence individually and then in the context of all the evidence. Defense counsel must establish that the evidence is of central importance to an element in the case and that there is no adequate substitute.[110]

In Camera Review

Rule for Court-Martial 701(f) states that privileges and protections set forth in other rules (e.g. Military Rules of Evidence (MRE) 301) are not subject to disclosure.[111] The military judge may conduct an in camera inspection to determine whether counsel must disclose that evidence to the opposing party.[112] Courts rely on the in camera review to balance the government's interest in maintaining the confidentiality of records of certain categories with the accused's right to present a defense and confront witnesses. Courts use the in camera review when they consider medical treatment records, disciplinary records, records of minors, even an Inspector General's report of inquiry.[113] In *United States v. Rivers* the CAAF noted that defense is not entitled to unrestricted access to government information.[114] The CAAF stated that "[w]here a conflict arises between the defense search for information and the Government's need to protect information, the appropriate procedure is '*in camera* review' by a judge."[115] In *Wuterich II*, the CAAF reviewed the issue of whether a military judge abused his discretion when he granted the news agency's request to quash the subpoena without conducting an *in camera* review of evidence.[116]

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[101] *Id.* at 519.

[102] *Id.*

[103] *Id.*

[104] *Id.*

[105] *Id.*

[106] *Id.* at 520.

[107] *Id.* The AFCCA stated that they would not hesitate to approve a dismissal of the charges or to make such a ruling in the appropriate case. *Id.*

[108] *Id.*

[109] United States v. Terry, 66 M.J. 514 (A.F. Ct. Crim. App. 2008), *review denied*, 66 M.J. 380 (C.A.A.F. 2008).

[110] *Id.* at 519.

[111] MCM, *supra* note 5, R.C.M. 701(f) ,701(f) analysis, at A21-34.

[112] *See id.* R.C.M. 701(g), 703(f)(4)(c).

[113] *See* United States v. Reece, 25 M.J. 93, 95 (C.M.A. 1987); United States v. Sanchez, 50 M.J. 506 (A.F. Ct. Crim. App. 1999).

[114] 49 M.J. 434, 437 (C.A.A.F. 1998).

[115] *Id.*

[116] *Wuterich II*, 67 M.J. 63, 65 (C.A.A.F. 2008).

The Government charged SSgt Frank Wuterich with dereliction of duty and voluntary manslaughter of Iraqi civilians during military operations in Haditha, Iraq.[117] After the preferral of charges, the accused participated in an interview with a *CBS News* correspondent.[118] CBS aired the interview on a *60 Minutes* broadcast.[119] During this interview, SSgt Wuterich described the events before, during, and after the explosion of the roadside bomb.[120] The Government issued a subpoena to *CBS News* for "any and all video and/or audio tape(s) to include outtakes and raw footage."[121] In response, CBS provided the Government with the publicly aired footage, but refused to provide any audio-video material that had not been broadcast citing a "news-gathering" privilege under the First Amendment and subsequently filed a motion to quash the subpoena.[122] Without having the other non-broadcasted video/audio tapes to review, the military judge concluded that these videos/audio (referred to as outtake tapes) were not necessary and cumulative of the evidence already in the government's possession.[123] The military judge granted CBS's motion to quash the subpoena.[124] Based on the military judge's ruling, the Government filed an interlocutory appeal pursuant to Article 62, UCMJ.[125]

The NMCCA vacated the military judge's ruling and remanded the case for further proceedings.[126] Both SSgt Wuterich and *CBS Broadcasting* appealed the NMCCA ruling and the CAAF granted review.[127] The CAAF held that the NMCCA erred when they declined to consider SSgt Wuterich's filings on the grounds that he had no standing to participate in the government's appeal.[128] As a result, the CAAF vacated the NMCCA decision and directly reviewed the decision of the military judge.[129]

The CAAF reviewed the military judge's decision to quash the subpoena on CBS by considering that the outtake material contained the majority of SSgt Wuterich's discussion with CBS of the events surrounding charged offenses and only CBS possesses those tapes.[130] The CAAF stated that what CBS might find to be relevant and important may not be what the parties and court find to be relevant and necessary at trial.[131] The court found that the outtakes of the CBS interview "constitute a potentially unique source of evidence that is not necessarily duplicated by any other material."[132] As a result, the CAAF determined that the military judge abused his discretion when he granted *CBS*'s motion to quash the subpoena without conducting an in camera review of the outtake tapes.[133] The CAAF did not determine whether a qualified newsgathering privilege protected the outtake material.[134]

The CAAF stated that even if a qualified privilege exists, it "would not preclude an in *camera* review pursuant to RCM 703(f)(4)(C) under the circumstances" of this case.[135] In this case, the military judge is prevented from making a proper

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[117] *Id.*

[118] *Id.*

[119] *Id.*

[120] *Id.* Although the record does not indicate how long the interview lasted it does reflect that it lasted for several hours of which only approximately thirty minutes were broadcasted. *Id.*

[121] *Id.*

[122] *Id.* at 66.

[123] *Id.* at 67.

[124] *Id.*

[125] *Id.*

[126] *Wuterich I*, 66 M.J. 685, 691–92 (N-M. Ct. Crim. App. 2008).

[127] *Wuterich II*, 67 M.J. 63, 64.

[128] *Id.* at 69.

[129] *Id.* at 79. The CAAF first reviewed whether the government could appeal the military judge's decision under Article 62, UCMJ and determined that they could because the military judge's decision had a "direct effect on whether the outtakes would be excluded from consideration at the court-martial." *Id.* at 40.

[130] *Id.* at 76.

[131] *Id.*

[132] *Id.* at 78.

[133] *Id.*

[134] *Id.*

[135] *Id.* at 79.

evaluation of necessity "without reviewing the outtakes for content and context."[136] As such, the CAAF held that before the military judge may entertain any further hearing on the motion to quash "the military judge alone will inspect the requested materials *in camera*."[137] At that time the military judge may consider whether a qualified newsgathering privilege exists under MRE 501(a)(4)[138] and if it does whether it would apply to this case.[139] As in past cases, an in camera review is the proper mechanism for resolving an evidentiary dispute involving a claim of privilege.

In *Wuterich II*, the CAAF considered issues surrounding government access to evidence. In *United States v. Walker*, the NMCCA considered issues surrounding defense access to evidence.[140]

Defense Expert Witness' Access to Evidence

As stated in the beginning of this article, the UCMJ specifically states that the Defense and Government will have an equal opportunity to speak with witnesses and examine evidence.[141] Rule for Court-Martial 701(a)(1) identifies which items the Government must provide copies to the defense and RCM 701(a)(2) identifies which items the Government must permit the defense to inspect. Specifically, RCM 701(a)(2)(B) requires the Government to provide defense with the opportunity to inspect any scientific test or experiments.[142] The rule does not articulate a requirement for Government to provide defense with the opportunity to conduct their own test. The remaining question is whether the language of Article 46 grant, the accused an inherent right to conduct such tests. The NMCCA considered this issue in *United States v. Walker*.[143]

A general court-martial convicted Lance Corporal (Lcpl) Wade Walker of premeditated murder and other related charges and sentenced him to death.[144] Lance Corporal Walker was charged with murdering two Marines with a shotgun on two different days.[145] Defense counsel requested access to the physical evidence for defense expert testing but the trial counsel denied the request.[146] Defense sought relief from the military judge who also denied the request stating that the defense must demonstrate that there was some flaw in the Government's testing procedure.[147] The Government allowed the defense experts look at the evidence but did not allow them to handle it.[148]

The NMCCA addressed the issue of whether the military judge's refusal to allow the defense experts to conduct independent testing of the physical evidence denied Lcpl Walker equal access to the evidence in violation of Article 46, UCMJ.[149] The NMCCA held that the military judge erred, and the error affected the accused's constitutional due process rights.[150] However, the court held the error in this case was harmless beyond a reasonable doubt.[151]

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[136] *Id.*

[137] *Id.*

[138] MCM, *supra* note 5, MIL. R. EVID. 501(a)(4) (stating a person may claim a privilege provided within the principles of common law that are generally recognized in the federal district courts under Federal Rule of Evidence 501 so long as the rule is practicable and not contrary or inconsistent with the rules in the military justice system).

[139] *Wuterich II*, 67 M.J. at 79.

[140] 66 M.J. 721 (N-M. Ct. Crim. App. 2008).

[141] UCMJ art. 46 (2008).

[142] MCM, *supra* note 5, R.C.M. 701(a)(2)(B).

[143] 66 M.J. at 721.

[144] *Id.* at 723.

[145] *Id.*

[146] *Id.*

[147] *Id.*

[148] *Id.* at 742.

[149] *Id.*

[150] *Id.* at 743.

[151] *Id.* at 747.

The NMCCA looked both to Article 46, UCMJ and to the federal courts who have ruled that the Constitution requires that the Government provide defense with the opportunity to perform independent testing of the physical evidence.[152] The court also looked to *United States v. Robinson*[153] where CAAF affirmed a military judge's denial of a defense request to make the government retest evidence.[154] In *Robinson*, the CAAF noted that the evidence had been made available to the defense for independent testing by their experts.[155]

In *Walker*, the NMCCA found that the military judge clearly erred by holding the defense to an incorrect standard.[156] The court then determined that the forensic evidence was material and relevant to the case and the defense experts should have been afforded equal access absent a showing by the Government as to why that could or should not be allowed.[157] The NMCCA stated that "[t]o affirm the impacted findings we must conclude that the testimony of the Government experts regarding the physical evidence introduced at trial was of minimal or no consequence in light of the testimony of the other Government witnesses."[158]

To that end, the NMCCA found that the government based their case almost entirely on eye witness testimony and circumstantial evidence corroborating that testimony and placing the accused at the scene of the conspiracy and at the scene of the murders.[159] The court stated that after viewing the case in its entirety, "and even under the heightened scrutiny afforded in a death penalty case, the circumstantial evidence of the appellant's guilt to these offenses was overwhelming,"[160] and that the forensic evidence had little impact on the findings.[161]

The court also noted that the defense failed to state how retesting of the physical evidence in this case would have helped the accused overcome the overwhelming evidence of his guilt of both offenses.[162] "[E]ven though 'death is different,' not even speculation has been offered as to how such retesting might have produced results that could have altered the members' findings."[163] Accordingly, the NMCCA held that the Government's denial of retesting was clearly improper, but that the error was harmless beyond a reasonable doubt because the circumstantial evidence was overwhelming; the forensic evidence was not central to the Government's case; and the accused's defense did not rely upon the Government's forensic evidence.[164]

Given the high standard of review, that the error must be harmless beyond a reasonable doubt, Government should grant defense experts an opportunity to conduct their own testing on forensic evidence unless they have solid grounds to object. For example, if defense does not articulate why the testing is material and relevant or if government needs the entire sample for their own testing.

The CAAF and service court cases discussing discovery emphasized the importance of trial counsel following through on discovery requests. *Webb*,[165] *Cossio*,[166] *Terry*,[167] and *Walker*[168] all deal with evidence within the Government's control

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[152] *Id.* at 742. *See generally* Warren v. State, 288 So.2d 826 (Ala. 1973); Barnard v. Henderson, 514 F.2d 744, 746 (5th Cir. 1975) ("Fundamental fairness is violated when a criminal defendant . . . is denied the opportunity to have an expert of his choosing . . . examine a piece of critical evidence . . . .").

[153] 39 M.J. 88 (C.M.A. 1994).

[154] *Id.* at 90; *Walker*, 66 M.J. at 743.

[155] *Robinson*, 39 M.J. at 90; *Walker*, 66 M.J. at 743.

[156] *Walker*, 66 M.J. at 743.

[157] *Id.* at 744.

[158] *Id.*

[159] *Id.*

[160] *Id.*

[161] *Id.*

[162] *Id.* at 746.

[163] *Id.* at 747.

[164] *Id.*

[165] United States v. Webb, 66 M.J. 89 (C.A.A.F. 2008).

[166] United States v. Cossio, No. 36206, 2008 CCA LEXIS 70 (A.F. Ct. Crim. App. 2008).

[167] United States v. Terry, 66 M.J. 514 (A.F. Ct. Crim. App. 2008).

[168] *Walker*, 66 M.J. at 721.

that was either suppressed or not made available to defense. These cases highlight the importance of Government due diligence in dealing with evidence and discovery. *Wuterich II*[169] demonstrates the importance and usefulness of in camera review. It is an essential tool in a military judge's kit bag and both parties have an interest in ensuring the MJ conduct such review in appropriate cases. Next this article highlights the two important CAAF cases regarding sentencing.

Sentencing

This past term the CAAF looked at two cases involving presentencing issues. Their holdings are similar to last year in that they re-emphasize the law. In the first case, *United States v. Maynard*,[170] the CAAF decided an issue concerning aggravation evidence, and the second case, *United States v. Bridges*,[171] the court addressed an issue involving rebuttal evidence.

Aggravation Evidence

The purpose of Government aggravation evidence is to show the charged offense in the most serious light.[172] Rule for Court-Martial 1001(b)(4) permits the Government to present evidence of aggravating circumstances that directly relate to or result from the offenses for which the accused has been found guilty.[173] Last year, in *United States v. Hardison*, the CAAF stated that "[t]he 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 offense of which the accused has been convicted."[174] To keep aggravation evidence out, defense counsel must either object on the basis that the evidence is not directly related to or resulting from the crimes the accused was convicted or that the evidence violates MRE 403.[175] If defense does not make the objection, then on appellate review the court will only look for plain error. In *United States v. Maynard*, the court reviewed an issue regarding aggravation evidence under the plain error doctrine because defense counsel did not make an objection on the record.[176]

Pursuant to Specialist (SPC) Robert Maynard's pleas, a military judge sitting alone convicted him of absence without leave.[177] Specialist Maynard voluntarily returned after a thirteen month absence without leave (AWOL).[178] During the government's presentencing case, SPC Maynard's platoon sergeant testified that while he was inventorying SPC Maynard's room, the only personal property he came across was a display of two items.[179] One item was a pin that said "I hate my job."[180] And the other was a "piece of paper with some [a]nti-American propaganda, 'I hate Bush, the Commander-in-Chief' and 'Fahrenheit 9/11' stuff."[181] Defense counsel did not object and the military judge did not provide any limiting instructions.[182] On recross, the witness testified that he never heard the accused make any anti-American statements or display any images or signs about President Bush.[183]

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[169] *Wuterich II*, 67 M.J. 63 (C.A.A.F. 2008).

[170] 66 M.J. 242 (C.A.A.F. 2008).

[171] 66 M.J. 246 (C.A.A.F. 2008).

[172] *See* United States v. Hardison, 64 M.J. 279, 283 (C.A.A.F. 2007).

[173] MCM, *supra* note 5, R.C.M. 1001(b)(4).

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

[175] MCM, *supra* note 5, MIL. R. EVID. 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by consideration of undue delay, waste of time or needless presentation of cumulative evidence.").

[176] 66 M.J. 242, 244 (C.A.A.F. 2008).

[177] *Id.* at 242.

[178] *Id.* at 243.

[179] *Id.*

[180] *Id.*

[181] *Id.* (quoting First Sergeant Guerrero).

[182] *Id.*

[183] *Id.*

Staff Sergeant Brian Nelson, a defense witness on mitigation, testified during Government's cross-examination that he had a political conversation with SPC Maynard and that SPC Maynard made the statement that the President had lied to him.[184] Defense counsel did not object and the military judge did provide any limiting instructions to the panel.[185] During SPC Maynard's unsworn statement he told the panel that "while he enjoyed politics and liked to have conversations about politics, his feelings about the President went no farther than conversation. He stated that he was 'not anti-American, by no means' and agreed that he was not involved with 'staging any rallies or flags or any of those things.'"[186] He informed the panel that he went AWOL because he could not handle the stress that he attributed to his platoon sergeant's leadership style.[187]

During sentencing arguments, trial counsel argued that the accused went beyond making political statements because he went AWOL and left the piece of paper that had anti-American statements on it.[188] Defense did not object but requested an Article 39(a), UCMJ session.[189] During the Article 39(a) session, defense counsel told the military judge that he did not make an objection during the Government's argument because he wanted to avoid placing an emphasis on the uncharged misconduct.[190] The trial concluded without the defense counsel making an objection or requesting a limiting instruction.[191]

The military judge determined that trial counsel elicited proper aggravation testimony and that his comments during argument were proper.[192] As such, the military judge did not comment on the Government's aggravation evidence. However, the military judge did issue an instruction reminding the panel to only sentence the accused for the offense of which he had been found guilty.[193]

On appeal, defense counsel argued that evidence of SPC Maynard's political beliefs did not directly relate to his AWOL offense and was therefore not proper aggravation evidence.[194] Defense also argued that the evidence did not meet the standards of MRE 403 in that the evidence was more prejudicial than probative.[195] Government argued that the evidence "directly related to Maynard's attitude towards his crime and his lack of rehabilitative potential."[196]

Using the plain error standard, the CAAF assumed, without deciding, that even if SPC Maynard was correct as to his allegation of error, the error was not clear and obvious. The court took into account the defense counsel's decision not to object to the testimony.[197] Furthermore, the court found that defense counsel addressed the issue on cross examination, re-direct, and during the accused's unsworn testimony.[198] However, the CAAF acknowledged defense counsel's tactical decision in declining to make an objection during the Article 39(a) session.[199]

The CAAF held that SPC Maynard failed to establish that the testimony elicited from the witnesses concerning his political beliefs was obviously erroneous, if erroneous at all.[200] Because the court did not find error, they did not address the prejudice prong.[201] The CAAF affirmed the decision of the Army Court of Criminal Appeals.[202]

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[184] *Id.*

[185] *Id.*

[186] *Id.* at 243–44.

[187] *Id.* at 244.

[188] *Id.*

[189] *Id.*

[190] *Id.*

[191] *Id.*

[192] *Id.* Since defense counsel did not make an objection and the military judge did not raise an issue sua sponte, the military judge did not conduct an MRE 403 balancing test. *Id*. at 244 n.3.

[193] *Id.* at 244.

[194] *Id.*

[195] *Id.*

[196] *Id.* at 245.

[197] *Id.*

[198] *Id.*

[199] *Id.*

[200] *Id.*

Maynard provides a good example of the necessity for defense counsel to make their objection on record and the necessity to request that the military judge conduct an MRE 403 balancing. Although the CAAF did not specifically address whether government presented proper aggravation evidence, the evidence does appear to directly relate to or result from SPC Maynard's AWOL.

Rebuttal Evidence

Just as in the case-in-chief, during sentencing, the defense counsel must keep in mind that Government can present evidence to rebut matters presented by the defense.[203] Rule for Court-Martial 1001(d) also provides defense the opportunity to present surrebuttal.[204] The military judge has the discretion to decide how long rebuttal and surrebuttal may continue.[205] Defense witnesses, to include the accused, may "open the door" for the government to present evidence that would otherwise be inadmissible.[206] When defense counsel "opens the door" they are permitting expansive rebuttal which can include evidence of specific past acts of misconduct, otherwise inadmissible records of nonjudicial punishment, and adverse duty performance.[207] The key for government rebuttal evidence is that it must actually "explain, repel, counteract or disprove the evidence introduced by the opposing party."[208] The Government may also rebut statements of fact made by the accused in an unsworn statement.[209] In *United States v. Bridges* (*Bridges II*), the court reviewed an issue of Government evidence used to rebut defense mitigation evidence.[210]

A special court-martial convicted the accused, Fireman Machinery Technician Carl Bridges pursuant to his pleas of insubordinate conduct toward a superior petty officer, wrongful use of controlled substances, and breaking restriction.[211] The defense presentencing case consisted of the accused's unsworn statement and letters offered in mitigation from family and friends who wrote favorably regarding the accused's character and rehabilitative potential.[212]

During the accused's unsworn statement, he told the military judge that "I learned more about life in the past year and the time that I've spent in the Coast Guard than any other part of my life."[213] In one of the letters entered as mitigation evidence, the accused's father wrote that

> although his son had "made some poor choices and used bad judgment on more than one occasion," he had "grow[n] up quite a bit over the last several months." The [accused's] father added that "[t]he whole experience of being in the Coast Guard (even in the brig) has helped him grown and develop as a man."[214]

In rebuttal, the Government offered a letter from the officer-in-charge of the brig where the accused was in pretrial confinement.[215] The officer-in-charge wrote that the accused "had 'displayed a negative attitude while in confinement,

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[201] *Id.* The court did not address whether the evidence's probative value outweighed its prejudicial effect under MRE 403. *See* MCM *supra* note 5, MIL R. EVID. 403. *Maynard*, 66 M.J. at 245.

[202] *Id.*

[203] MCM, *supra* note 5, R.C.M. 1001(d).

[204] *Id.* R.C.M. 1001(d).

[205] *Id.* R.C.M. 1001(d).

[206] 2 GILLIGAN & LEDERER, *supra* note 72, at 23–72.

[207] *Id.*

[208] United States v. Wirth, 18 M.J. 214, 218 (C.M.A. 1984) (quoting United States v. Shaw, 26 C.M.R. 47 (C.M.A. 1958) (Ferguson, J. dissenting)).

[209] *See* United States v. Manns, 54 M.J. 164, 165 (C.A.A.F. 2000). "I have tried throughout my life, even during childhood, to stay within the laws and regulations of this country," was held to be a statement of fact and could be rebutted by evidence of the accused's admission to marijuana use. *Id*. *Compare* United States v. Cleveland, 29 M.J. 361 (C.M.A. 1990), *with Manns*, 54 M.J. at 166 ("Although I have not been perfect, I feel that I have served well and would like an opportunity to remain in the service . . . ."). The court determined that the statement was more in the nature of an opinion, "indeed, an argument;" therefore, not subject to rebuttal. *Id*.

[210] 66 M.J. 246 (C.A.A.F. 2008).

[211] *Id.*

[212] *Id.* at 247.

[213] *Id.*

[214] *Id.*

consistently displaying an uncooperative attitude toward Brig staff as well as appearing to have a negative influence on his peers.'"[216] The letter further mentioned that the discipline and review board recently determined that the accused had violated several prison regulations.[217] Lastly the letter writer mentioned that the brig staff placed the accused in segregation for disobedience, disrespect, staff harassment, and provoking words and gestures.[218] Defense counsel objected to this letter on the grounds that the letter was not proper rebuttal evidence, that it contained improper aggravation evidence, and that the prejudicial value significantly outweighed any probative value.[219] The military judge admitted the letter without comment.[220]

On appeal, the Coast Guard Court of Criminal Appeals (CGCCA) held that the military judge did not err in admitting the letter.[221] The lower court concluded that the letter was proper rebuttal evidence because it put the father's letter "in perspective by offering a different viewpoint."[222] The court also determined that probative value was not outweighed by the danger of unfair prejudice to the accused.[223] The CGCCA affirmed the findings and sentence. The CAAF granted review on the issue of whether the military judge abused his discretion by admitting on rebuttal extrinsic evidence of specific acts of misconduct.[224] The CAAF held, without deciding whether the brig letter was erroneously admitted, that the letter was not prejudicial under Article 59(a), UCMJ.[225] This case demonstrates just one way defense "opens the door" to Government rebuttal.

Many times defense counsel is faced with a double edge sword regarding defense sentencing evidence. The attorney must weigh the benefits of certain evidence with the risk of that evidence opening the door to unwanted otherwise inadmissible evidence. *Bridges II* provides a good example of those circumstances.[226] When preparing their sentencing case, defense counsel must always take into account potential government rebuttal. If defense counsel elect not to present certain evidence to avoid opening the door on rebuttal, that decision should be memorialized in a memorandum for record. This will protect defense counsel from later challenges on appeal.

Conclusion

This year the court reminds us of the importance that discovery plays in ensuring justice. The courts continue to remind counsel that Government must be duly diligent in their duties and that military judges have the necessary tools to ensure justice ensues. This year's CAAF cases regarding sentencing demonstrate the issues defense counsel must weigh when preparing their sentencing case. As always, preparation, whether you are trial counsel or defense counsel, is the key to a solid case.

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[215] *Id.*

[216] *Id.*

[217] *Id.*

[218] *Id.*

[219] *Id.*

[220] *Id.*

[221] United States v. Bridges (*Bridges I*), 65 M.J. 531, 534–35 (C.G. Ct. Crim. App. 2007), *aff'd* 66 M.J. 246 (C.A.A.F. 2008).

[222] *Id.* at 534.

[223] *Id.*

[224] *Bridges II*, 66 M.J. at 247.

[225] UCMJ art. 60 (2008) ("The findings and sentence of a court-martial shall be reported promptly to the convening authority after the announcement of the sentence. Any such submission shall be in writing.").

[226] *Bridges II*, 66 M.J. at 246.