Annual Review of Developments in Instructions

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I. Introduction

This article discusses recent developments in the law regarding a military judge's instructions to panel members.[1] Cases decided by the Court of Appeals for the Armed Forces (CAAF) during its 2013-2014 term,[2] as well as important decisions published by service courts during the same period, are discussed. The *Military Judges' Benchbook* (*Benchbook*),[3] which is regularly updated to incorporate the newest statutory and case law developments, is the primary resource for drafting instructions. This article discusses updates on offenses and defenses instructions, evidentiary and trial counsel argument instruction issues, and sentencing instructions. The article ends with an overview of the changes made by the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2014.[4]

II. Instructions on Offenses and Defenses

The Appellate Standard of Review for Failing to Instruct on an Element

In *United States v. Payne*,[5] the CAAF addressed the level of specificity required by counsel when making an objection to proposed elemental instructions in order to adequately preserve an error for appellate review.[6] In *Payne*, the accused was charged with, among other offenses, attempting to persuade a minor to create child pornography in violation of Article 134, Uniform Code of Military Justice (UCMJ).[7] The specification, however, was not "a model of clarity," and the military judge proposed and ultimately instructed the panel on the elements of the offense of soliciting a minor to create child pornography in violation of Article 134, UCMJ.[8] The defense counsel generally objected to the military judge's proposed instructions alleging the instructions were incorrect but declining to outline any specific deficiencies or propose alternate instructions.[9] During the objection, defense counsel stated:

> [W]e object to your instructions because we do not believe that the government in its pleadings identified the offenses to which you are listing elements. . . . [W]e believe that these [proposed] elements are not necessarily a fair parsing of what was pled . . . . [W]e have a duty to candor towards a tribunal and to identify any errors and give you a forthright answer, but we also have a competing duty to [the accused] and not to assist the government or even the bench in perfecting elements in charges against him if we think that there's, perhaps, a right way to do this. And therefore, we simply say that we don't believe that the court has been able, due to the nature of the pleadings, to properly identify if these are offenses and if so, what those elements would be.[10]

To adequately preserve error for appellate review, the CAAF held the level of specificity required in a counsel's objection to a proposed instruction is the same level required when making an evidentiary objection.[11] A counsel must provide "argument sufficient to make the military judge aware of the specific ground for objection, 'if the specific ground was not apparent from the context.'"[12] The defense counsel, by failing to provide the military judge with alternate elements or specific objection, was trying to preserve error while at the same time "refusing to assist the military judge in correcting any alleged instructional error at the trial level."[13] The CAAF determined under those facts

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[1] The Manual for Courts-Martial requires the military judge to instruct members (jurors) on questions of law and procedure, findings, and sentencing. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 801(a)(5), 920 and 1005 [hereinafter MCM].

[2] The 2013 term began on September 1, 2013 and ended on August 31, 2014.

[3] U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK (10 Sep. 2014) [hereinafter BENCHBOOK].

[4] National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66.

[5] 73 M.J. 19 (C.A.A.F. 2014).

[6] *Id.* at 23. *See* R.C.M. 920(f) ("Failure to object to an instruction or to omission of an instruction before the members close to deliberate constitutes waiver of the objection in the absence of plain error. The military judge may require the party objecting to specify of what respect the instructions given were improper.").

[7] *Id.* at 21.

[8] *Id.* at 22, 24.

[9] *Id.* at 21.

[10] *Id*. at 21-22.

[11] *Id.* at 23.

[12] *Id.* at 23. (citing United States v. Datz, 61 M.J. 37, 42 (C.A.A.F. 2005) (quoting Military Rule of Evidence 103(a)(1))).

[13] *Id.* at 23.

that the defense waived any error in the absence of plain error.[14]

The court then reviewed the case under a three prong plain error analysis where "the accused 'has the burden of demonstrating that: (1) there was error; (2) the error was plain or obvious; and (3) the error materially prejudiced a substantial right of the accused.'"[15] In deciding to apply this plain error analysis, the court rejected the argument that a military judge's failure to instruct on every element of an offense was per se prejudicial.[16] In announcing this position, the CAAF affirmatively overruled its prior precedent that a failure to instruct on an element of an offense was per se prejudicial.[17] If a military judge fails to instruct on an element of an offense, the appellate courts must review the entire record as a whole to determine whether the substantial rights of the accused were materially prejudiced and whether the error was harmless beyond a reasonable doubt.[18] In affirming the case, the CAAF found that the defense did not contest the elements upon which the military judge failed to instruct and that the evidence on those elements was overwhelming.[19]

Payne is a landmark case. The court clarified the specificity required when making an objection to preserve an instruction error on appeal and expressly overruled its prior holding that a military judge's failure to provide an element instruction constituted per se prejudice. In *Payne*, the CAAF was unwilling to find preserved error when the defense counsel generally objected to the elemental instructions but offered no specific objection or solution to assist the military judge. In essence, the defense counsel's failure to assist the military judge perpetuated the error, making the CAAF unwilling to allow defense a more favorable standard of review on appeal.

Instructing Based on Panel Question—United State v. Long

After providing findings instructions in a rape case, the panel president asked the military judge to legally define "competent" person.[20] The panel president told the military judge that the question about competence related to the victim's alcohol consumption.[21] Although the victim testified she was tired, drunk, stumbling, and her alcohol consumption made it more difficult to resist the accused, the victim never stated she was incapacitated and the government's case centered on a rape by force theory.[22] The accused argued that the victim consented.[23] In instructing on a consent defense, the military judge told the panel "'consent' means words or overt acts indicating a freely given agreement to the sexual conduct by a competent person."[24] The specific offense Benchbook instruction, however, did not provide guidance on a person's competence in relation to potential alcohol consumption.

The military judge called a hearing outside the presence of the members to discuss the president's question and to determine whether to instruct the panel on a portion of the definition of consent related to alcohol consumption under the offense of aggravated sexual contact.[25] Defense counsel objected to the military judge's proposal and then requested, in the alternative, an instruction on the entire definition of consent under the offense of aggravated sexual contact.[26] The military judge provided the entire instruction reasoning:

> I think as [the president of the panel] has clearly indicated, his concern is whether or not somebody who is intoxicated or has been drinking is a competent person to give consent. So, I think that this instruction that I propose to give helps the members understand what someone's level of intoxication would mean with respect to consent. I think if I don't give the instruction the members are going to be left hanging in the wind to decide whether or not somebody who is drunk can consent. I mean this instruction makes clear that somebody who is drunk can consent, as long as they're not substantially incapable of understanding the conduct at issue. So, I think it is a helpful instruction and that's why I'm going to give it to the members.[27]

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[14] *Id.* at 23. *See* RCM 902(f).

[15] *Id.* at 24-25 (citing United States v. Tunstall, 72 MJ 191, 193-94 (C.A.A.F. 2013) (quoting United States v. Girouard, 70 M.J. 5, 11 (C.A.A.F. 2011)).

[16] *Id.* at 25.

[17] *Id.* (citing Neder v. United States, 527 U.S.1, 8, 119 S. Ct. 1827, 144 L. Ed. 35 (1999)) (holding the Supreme Court *Neder* ruling that structural error does not occur from a failure to instruct on an element warrants applying a harmless beyond a reasonable doubt standard as opposed to finding prejudice per se when a military judge fails to instruct on an element).

[18] *Id.* at 25.

[19] *Id.* at 25-26.

[20] United States v. Long, 73 M.J. 541 (A.C.C.A. 2014). The accused was also charged with aggravated sexual assault and assault consummated by a battery based on the same factual situation. *Id*.

[21] *Id.* at 544.

[22] *Id.* at 543.

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.*

The Army Court of Criminal Appeals (ACCA) found that the military judge did not err in providing an additional instruction on competence in response to a panel question.[28] In upholding the conviction, the court considered not only a military judge's duty to properly and fully instruct the members but also that the Benchbook provided instructions and definitions derived from the same statute and Article as the charged rape offense.[29]

The *Long* court focused on the military judge's obligation to ensure the members are "fully equipped to resolve those questions of fact necessary for proper resolution of the charges before them for judgment."[30] When faced with a tough panel question on a definition to which the law provided no further guidance and which the Benchbook provided no further instruction, the military judge adopted the Benchbook instruction from a closely aligned offense under the same Article. When left with the alternative of leaving the members "hanging in the wind" or providing guidance, the ACCA appears to defer to the military judge's decision to instruct from a related Benchbook instruction.

False Official Statements

Three recent CAAF cases have necessitated changes to the Benchbook instruction for false official statement offenses in violation of Article 107, UCMJ.[31] In *United States v. Spicer*, the CAAF delineated what constitutes an "official" statement for purposes of an Article 107, UCMJ violation.[32] A statement is "official" under Article 107, UCMJ in three situations:

> (1) where the speaker "make[s] a false official statement in the line of duty or … the statement bears a clear and direct relationship to the speaker's official duties"; (2) where the listener "is a military member carrying out a military duty at the time the statement is made"; or (3) where the listener "is a civilian who is performing a military function at the time the speaker makes the statement."[33]

In reaching this conclusion, the CAAF reasoned that the legislative history and the purpose of Article 107, UCMJ was to criminalize statements that only involve a military function.[34] Therefore, making a false statement to a civilian law enforcement officer, when the civilian officer is not assisting military authorities and the speaker is not discussing an official duty, does not create an "official" false statement in violation of Article 107, UCMJ.

In *Spicer*, the accused told a civilian detective that a babysitter kidnapped his son.[35] Upon further questioning, the accused told the civilian detective the babysitter story was a lie.[36] The accused said that he was told to lie by a drug dealer who had taken the accused's baby in order to ensure the accused's silence after he witnessed a drug deal.[37] A panel convicted the accused for lying about the babysitter and the drug dealer stories.[38] In dismissing the false official statement convictions, the court found the accused's statements did not relate to his military duties and were not made to a civilian detective conducting a joint investigation with military officials.[39] The speaker and the hearer lacked a nexus to a military function at the time of the statement.[40]

Similarly in *United States v. Capel*, the accused lied to a civilian detective about whether the accused had used another service member's debit card.[41] The CAAF found the accused's statement was not "official" because it did not relate to any of the accused's specific military duties and the civilian detective did not notify any military authorities regarding the statement.[42] The CAAF noted "while theft among military personnel can certainly impact unit morale and good order and discipline, it is the relationship of the statement to a military function at the time it is made – not the offense of larceny itself—that determines whether the statement falls within the scope of Article 107, UCMJ. . . ."[43]

Based on *Spicer* and *Capel*, the definition of "official" for false official statements contained in Benchbook instruction 3-31-1 now states:

> A statement is official when the maker is either acting in the line of duty or the statement directly relates to the maker's

[28] *Id.* at 545.

[29] *Id.*

[30] *Id.*

[31] *See* United States v. Passut, 73 M.J. 27 (C.A.A.F. 2014); United States v. Capel, 71 M.J. 485 (C.A.A.F. 2013); United States v. Spicer, 71 M.J. 470 (C.A.A.F. 2013); BENCHBOOK, *supra* note 3, para. 3-31-1.

[32] *Spicer*, 71 M.J. at 473.

[33] *Capel*, 71 M.J. at 487, fn.3. (citation omitted).

[34] *Spicer*, 71 M.J. at 473.

[35] *Id.* at 472.

[36] *Id.*

[37] *Id.*

[38] *Id.* at 471.

[39] *Id.* at 475.

[40] *Id.*

[41] United States v. Capel, 71 M.J. 485, 486 (C.A.A.F. 2014).

[42] *Id.* at 487.

[43] *Id.*

> official military duties, or where the receiver is either a military member carrying out a military duty when the statement is made or a civilian necessarily performing a military function when the statement is made.[44]

In *United States v. Passut*, the CAAF then further considered the issue of whether statements to Army and Air Force Exchange Service (AAFES) employees were "official" under Article 107, UCMJ.[45] In that case, the accused cashed several checks at the AAFES shopette by providing various AAFES employees an incorrect social security number."[46] The CAAF looked at whether AAFES's unique role to the military would support a finding that AAFES employees were conducting a military function by cashing the accused's checks.[47] The court found "AAFES – which is governed by service regulations and whose profits are fed back into the military—[has] a relationship sufficient to establish a military function."[48] The following factors were significant in the court's holding: (1) AAFES is a Department of Defense nonappropriated fund instrumentality with its proceeds supporting Morale, Welfare, and Recreation programs; (2) members of the armed forces make key decisions regarding AAFES operations; (3) Army and Air Force regulations direct procedures regarding the cashing of checks at AAFES; and (4) prior case law supported the position that AAFES performs a military function.[49] In response to *Passut*, the Benchbook was updated to include an instruction that "AAFES employees who are in the performance of their duties are considered to be performing a military function."[50]

Special Defense Instructions

In *United States v. Davis*, the CAAF reviewed a military judge's duty to sua sponte instruct on any special defense raised at trial.[51] In *Davis*, panel members heard diverging testimony regarding the charged offenses which occurred at the accused's residence.[52] The accused testified, in part: (1) that another Soldier, who had previously received permission to stay at the accused's residence, attempted to reenter the home after leaving because of an argument with the Soldier's girlfriend; (2) that during the reentry the accused told the Soldier to leave and pushed him away; (3) that the Soldier then approached the doorway again and swung at the accused; and (4) that the accused then pulled a weapon from his back pocket and pointed it at the Soldier.[53] Ultimately, the panel members convicted the accused of simple assault with an unloaded firearm.[54]

The issue on appeal was whether the military judge erred by failing to provide a defense of property instruction when the trial defense counsel did not request such instruction.[55] Military judges are required to sua sponte instruct on any affirmative defense if "some evidence" of the issue is raised without regard to the source or credibility of that evidence.[56] The CAAF found that the accused raised "some evidence" of a possible property defense during his testimony by stating that he was worried about what would happen to his property if the other Soldier knocked the accused out and that the accused wanted the Soldier to leave the accused's property.[57] Although the military judge provided a self-defense instruction, the CAAF found the military judge erred by failing to also sua sponte provide a defense of property instruction.[58] The CAAF stated, "Although R.C.M. 916 does not expressly list defense of property as a special defense, this Court and its predecessor have long recognized defense of property as an available defense in the military justice system."[59]

After finding error, the CAAF then applied a "harmless beyond a reasonable doubt standard—i.e. could a rational panel have found [the accused] not guilty if they had been instructed properly."[60] The CAAF recognized that two possible theories for a defense of property instruction existed—imminent threat to property and preventing/ejecting a trespasser.[61] In order to assert an imminent threat to property defense the accused must have an objective reasonable belief that his property was in imminent danger and a subjective actual belief the amount of force he used was reasonable.[62] In order to assert a preventing/ejecting trespasser property defense the accused may only use as much force as is reasonable to get the

[44] BENCHBOOK, *supra* note 3, para. 3-31-1.

[45] United States v. Passut, 73 M.J. 27 (C.A.A.F. 2014).

[46] *Id.* at 28.

[47] *Id.*

[48] *Id.* at 31.

[49] *Id.* at 30-31.

[50] BENCHBOOK, *supra* note 3, para. 3-31-1, n. 2.1.

[51] United States v. Davis, 73 M.J. 268 (C.A.A.F. 2014). *See* RCM 920(e)(3)(outlining that "instructions of findings shall include: . . . (3) [a] description of any special defense under R.C.M. 916 in issue.").

[52] Davis, 73 M.J. at 269-70.

[53] *Id.* at 270.

[54] *Id.*

[55] *Id.*

[56] *Id.* at 272.

[57] *Id.* at 272-73.

[58] *Id.* at 273.

[59] *Id.* at 272, fn. 5 (citations omitted).

[60] *Id.* at 273.

[61] *Id.* at 271.

[62] *Id.*

person to leave after allowing a reasonable time period for the person to leave.[63] The CAAF, holding the military judge's error harmless beyond a reasonable doubt, determined a rational panel could not have found the accused's actions reasonable under either theory.[64] In making its ruling the CAAF not only relied on a review of the evidence but also noted that the military judge had given a closely aligned self-defense instruction which the panel rejected.[65]

Military judges must remain mindful of the sua sponte obligation to instruct on special (affirmative) defenses in the absence of a trial defense counsel request or a specific listing of that defense in RCM 916. "Some evidence" presented on a special defense, without consideration of the source or credibility, will trigger the need for a possible sua sponte instruction by the military judge after a discussion with the defense counsel regarding the proposed instruction.

Insanity Defense versus Involuntary Intoxication

While the defense of lack of mental responsibility (more commonly known as the insanity defense) is an affirmative defense,[66] it is rarely successfully asserted. One need not think long or hard to recall individuals for whom the defense has not been successful—Jeffrey Dahmer,[67] Ted Bundy,[68] David Berkowitz (also known as the "Son of Sam")[69]—just to name a few.

Like many others, the accused in *United States v. MacDonald* [70] was ultimately unsuccessful at asserting the insanity defense. However, the evidence presented in *MacDonald* also raised the defense of involuntary intoxication. The military judge declined to give an involuntary intoxication instruction, finding that the instruction for lack of mental responsibility was sufficient.[71] On appeal, the CAAF addressed the interesting issue of whether the test for the insanity defense and the test for the defense of involuntary intoxication are substantially the same or, at a minimum, sufficiently similar.[72]

Private First Class George MacDonald began taking the smoking cessation drug, Chantix, one month prior to attacking and fatally stabbing another Soldier.[73] The attack was completely unprovoked. After he was apprehended, the accused waived his rights and admitted stabbing the Soldier. In his confession, he stated that he "was someone else, something was wrong," that he "wanted[ed] help," . . . [this] wasn't me."[74]

The defense theory of the case was that Chantix was a key factor in the accused's "homicidal outburst."[75] At the time that the Food and Drug Administration (FDA) approved Chantix in May 2006, the most common side effects were nausea, changes in dreams, constipation, gas, and vomiting.[76] In November 2007, the FDA issued an update stating that "suicidal thoughts and aggressive and erratic behavior" had been reported in Chantix patients.[77] The warnings continued to escalate[78] and culminated in the FDA issuing a Black Box warning[79] in July 2009 stating that all patients taking Chantix should be watched for

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[63] *Id.*

[64] *Id.*

[65] *Id.* at 273.

[66] An affirmative defense does not deny "that the accused committed the objective acts constituting the offense charged" but denies "wholly or partially, criminal responsibility for those acts." MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 916(a) (2012).

[67] *Other Notorious Insanity Cases,* FRONTLINE, http://www.pbs.org/wgbh/pages/frontline/shows/crime/trial/other.html.

[68] *Ted Bundy Biography,* BIO., http://www.thebiographychannel.co.uk/biographies/ted-bundy.html.

[69] *Other Notorious Insanity Cases, supra* note 66.

[70] 73 M.J. 426 (C.A.A.F. 2014).

[71] *Id*. at 433-34.

[72] The granted issues were as follows:

> Whether the Army Court of Criminal Appeals erred in determining that that the military judge's error in quashing a subpoena issued to Pfizer, Inc., to produce relevant and necessary documents regarding clinical trials, adverse event reports, and post-market surveillance of the drug varenicline was harmless beyond a reasonable doubt.
>
> Whether the military judge abused his discretion in denying a defense requested instruction on involuntary intoxication, and erred in failing to instruct the members on the effect of intoxication on appellant's ability to form specific intent and premeditation.

Id. at 427.

The CAAF decided this case on Issue II and did not reach Issue I. *Id.*

[73] *Id*. at 429. At the time of the attack, the accused was just 19 years old. He had been selected for an appointment to the United States Military Academy Preparatory School and had no history for violent behavior. The accused did not even know the victim.

[74] *Id*. at 429.

[75] *Id*. at 431.

[76] *Id* at 430.

[77] *Id*.

[78] In May 2008, the FDA issued another warning urging patients to "stop taking Chantix and to call their doctor right away" if they noticed "agitation, depressed mood, or changes in behavior" that were not typical. It was also noted that Chantix may worsen current psychiatric illness and cause old psychiatric illnesses to reoccur." *Id*.

[79] The Black Box warning is the strongest FDA warning level before a drug is pulled from the market. *Id*. at 431.

neuropsychiatric symptoms and that patients had reported "changes in mood (including depression and mania), psychosis, hallucinations, paranoia, delusions, homicidal ideation, hostility, agitation, [and] anxiety . . . ."[80]

At trial, it was uncontroverted that the accused had Chantix in his system at the time of the stabbing.[81] The defense called several expert witnesses to establish the defense.[82] The most compelling expert testimony was testimony that the accused was suffering from "substance intoxication" caused by Chantix which caused him to have the equivalent of a psychotic break at the time that he committed the offense.[83]

Based on the evidence presented, the defense requested an instruction on involuntary intoxication.[84] Both the defense and the government proposed an involuntary intoxication instruction, but the military judge declined to give such an instruction, finding that his instruction on mental responsibility was sufficient.[85]

A panel convicted the accused of all charges and sentenced him to a reprimand, reduction to E-1, total forfeitures, confinement for life without eligibility for parole, and a dishonorable discharge.[86] The Army Court of Criminal Appeals (ACCA) found the military judge erred in failing to give the instruction but that the error was harmless because the military judge's instruction on mental responsibility and partial mental responsibility were sufficiently equivalent to the instruction on involuntary intoxication.[87]

The CAAF agreed with the ACCA and found that the military judge had a *sua sponte* duty to instruct on the affirmative defense of involuntary intoxication but disagreed with the ACCA's determination that the error was harmless.[88]

In arguing to the CAAF, the government relied on *United States v. Hensler*[89] wherein the CAAF stated "[i]nvoluntary intoxication is treated like legal insanity" and "is defined in terms of lack of mental responsibility"[90] to argue that the tests for mental responsibility and involuntary intoxication are the same. However, the CAAF found that the facts of *Hensler*[91] were dissimilar to the facts in *MacDonald*.[92]

The CAAF's analysis really turned on the authority behind *Hensler*, *United States v. F.D.L.*,[93] which established a two-part test for involuntary intoxication: "First, that there was an involuntary ingestion of an intoxicant. And second, due to this ingestion, [the] defendant was unable to appreciate the nature and quality or wrongfulness of his acts."[94]

In applying this two-part test, the CAAF easily found that the accused's ingestion had been involuntary. Chantix was a medically prescribed drug and there was no evidence to show that he should have been aware of its side effects in taking the drug.[95] Just as easily, the CAAF found that there was some evidence that the accused did not appreciate the nature and quality of his acts. Several experts testified that the accused was "under the influence of a drug" and several witnesses testified regarding his disposition during the stabbing.[96]

The CAAF reasoned that the defense of lack of mental responsibility is "substantially different" from the defense of involuntary intoxication.[97] The former requires that the

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[80] *Id*.

[81] *Id*.

[82] *Id*. One forensic psychiatrist testified that Chantix raises the level of dopamine in the brain and "probably has one of the most profound effects on human emotion and behavior." *Id*. He further elaborated that increases in dopamine can cause agitation, irritability, anxiety, depression and that if you "keep turning it up and up you can get manic; keep turning it up and up you can get psychotic," and that the effects are worse if the patient has underlying mental health issues. *Id*. Another expert testified that the accused had a schizoid personality that predated the stabbing. There was further testimony that the Department of Defense and other federal agencies had banned the use of Chantix by aircraft personnel. *Id*.

[83] *Id*.

[84] *Id*.

[85] *Id*. The military judge reasoned that Chantix was just an explanation for his mental condition and that it did not make a difference whether the accused's mental condition was caused by Chantix or not.

[86] *Id.* at 434.

[87] See *id*. at 428 and 435.

[88] *Id*. at 435.

[89] 44 M.J. 184 (C.A.A.F. 1996).

[90] *Id*. at 437 (quoting *Hensler*, 44 M.J. at 188).

[91] The accused in *Hensler* was charged with conduct unbecoming an officer and fraternization. The accused argued that the combination of drugs, the introduction of alcohol, her personality traits, and her depression caused her to lack mental responsibility. The military judge did not instruct on the defense of involuntary intoxication but gave the standard insanity instruction. However, he tailored the instruction to reference involuntary intoxication and he also instructed that "alcoholism and chemical dependency" is a medically recognized disease. The CAAF affirmed the findings and sentence in Hensler's case. *Id*. at 436-37.

[92] In *MacDonald*, the military judge referenced neither "involuntary intoxication" nor the effects of Chantix in his instructions. 73 M.J. 426.

[93] 836 F.2d 1113 (8th Cir. 1988).

[94] *MacDonald*, 73 M.J. at 437 (referencing *F.D.L*, 838 F.2d at 1117).

[95] *Id.* at 437-38.

[96] *Id*. at 438.

[97] *Id*.

accused suffered from some mental disease or defect while the latter requires that the accused involuntary ingested an intoxicant.[98] There was no way to determine if the panel even considered the second prong (i.e., that the accused was unable to appreciate the nature and quality or wrongfulness of his acts) since the panel, as instructed, may not have determined that the accused suffered from a serious mental disease or defect at the time of the stabbing.[99]

The CAAF also found that the evidence of the accused's ability to form premeditated intent was not so overwhelming that the accused was not prejudiced by the error.[100] The CAAF concluded that the military judge erred and that the error was not harmless beyond a reasonable doubt. The findings and sentence were set aside.[101]

MacDonald is helpful on several fronts. One, it clarifies the CAAF's holding in *Hensler*, and leaves no doubt that the tests for mental responsibility and involuntary intoxication are substantially different. Second, it reminds counsel that each side has a vested interest in ensuring that the military judge properly instructs the panel members and that counsel can help the military judge by proposing tailored instructions. Third, military judges are reminded that they must take great care in tailoring their instructions to the specific case.

III. Evidence

"Human Lie Detector" Testimony

The CAAF again held that a military judge's failure to provide a curative instruction on human lie detector testimony required reversal.[102] In *United States v. Knapp*, an agent from the Air Force Office of Special Investigation (AFOSI) testified regarding his investigative interview of the accused.[103] The accused initially told the AFOSI agent that the victim consented to sexual activity but, in the middle of the sexual encounter, she lost consciousness and he immediately stopped touching her.[104] Multiple hours into the investigative interview, the accused told the AFOSI agent that the victim was unconscious at the beginning of the sexual activity and did not consent.[105] The defense asserted at trial that the victim consented and the accused only "confessed" to the AFOSI agent because of a prolonged investigative interview.[106]

The AFOSI agent testified on direct and cross-examination that he was "trained to pick up on nonverbal discrepancies" and the accused's nonverbal cues during the interview indicated deception.[107] Defense counsel did not object to this testimony.[108] On redirect examination, the AFOSI agent said "large red sun blotches" appeared on the accused's face when he spoke about the "actual incident."[109] At this time, defense counsel made a human lie detector objection.[110] The military judge overruled the objection after obtaining the trial counsel's agreement to not "draw an inference from the response."[111] Although the military judge provided the panel with the instruction regarding the general credibility of witnesses, the military judge at no stage of the trial addressed or provided an instruction regarding the AFOSI agent's "human lie detector" testimony.[112]

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[98] *Id*.

[99] *Id*. at 438-39.

[100] *Id*. at 439. The same evidence that the Government argued was indicative of mental responsibility (i.e., that the accused carried a double-edged knife, fleeing the scene, showering after the attack, etc.) could also be construed as evidence of an "uncontrolled 'homicidal ideation'" induced by Chantix.

[101] *Id*.

[102] United States v. Knapp, 73 M.J. 33 (C.A.A.F. 2014). *See* United States v. Kasper, 58 M.J. 314 (C.A.A.F. 2003) (holding the government's introduction of "human lie detector" testimony regarding the accused through a law enforcement agent was plain error because the accused's credibility was a central issue).

[103] *Id.* at 34.

[104] *Id.*

[105] *Id.*

[106] *Id.* at 35.

[107] *Id.* The AFOSI agent stated the accused would not make eye contact with the agent so it indicated to the agent that some form of deception was going on. *Id.*

[108] *Id.*

[109] *Id.*

[110] *Id.*

[111] *Id.*

[112] *Id.* The military judge gave the standard Benchbook Instruction 7-7-1, Credibility of Witnesses, to the panel. The military judge stated:

> You have the duty to determine the believability of the witnesses. In performing this duty you must consider each witness's intelligence, ability to observe and accurately remember, sincerity, and conduct in court, friendships and prejudices. Consider also the extent to which each witness is either supported or contradicted by other evidence; the relationship each witness may have with either side; and how each witness might be affected by the verdict. In weighing discrepancies between witnesses, you should consider whether they resulted from an innocent mistake or a deliberate lie. Taking all these matters into account, you should then consider the probability of each witness's testimony and the inclination of the witness to tell the truth. The believability of each witness's testimony should be your guide in evaluating testimony, not the number of

Although the defense objected during redirect examination, the CAAF held the defense's failure to timely object during the direct and cross-examination of the AFOSI agent warranted a plain error review.[113] The CAAF, in holding that plain error existed, asserted its precedent that "[i]f a witness offers human lie detector testimony, the military judge must issue prompt cautionary instructions to ensure that the members do not make improper use of such testimony."[114] The court further found material prejudice to the accused's substantial rights because the ultimate issue of the victim's consent centered on the accused's truthfulness and his testimony had been improperly discredited by the AFOSI agent's assertion that his expertise allowed him to discern that the accused was lying from his demeanor.[115] In reversing the case, the CAAF focused on the AFOSI agent's improper usurpation of the panel's mandate to determine a witness's credibility and truthfulness.[116]

From *Knapp* we glean that, if a law enforcement agent's testimony refers to the accused's truthfulness and the military judge fails to instruct the panel to disregard "human lie detector" testimony, it appears the CAAF will find plain error and prejudice. Prior CAAF precedent combined with the *Knapp* ruling creates a perception that this type of error is plain and per se prejudicial.[117] Judge Baker, in his dissent in *Knapp*, raises the issue of the CAAF's apparent trend to find this testimony per se prejudicial stating "unless we are going to treat the introduction of human lie detector evidence as per se prejudicial or structural in nature, which we have not before done, I do not see how the introduction of this evidence materially prejudiced a substantial right of [this] accused."[118] Judge Baker asserted that the following case facts did not warrant a finding of material prejudice: (1) the accused confessed; (2) the evidence corroborating the confession was overwhelming; (3) the defense introduced the entire investigative interview video where the AFOSI agents suggested on multiple occasions that they did not believe the accused; (4) the accused testified allowing the members to judge his credibility and demeanor; and (5) the government did not reference the AFOSI's testimony in closing argument.[119] With the arguable weight of those facts against a finding of material prejudice, *Knapp* further exemplifies the CAAF's lack of tolerance for "human lie detector" testimony.

Military practitioners must closely monitor a law enforcement agent's testimony for any potential "human lie detector" testimony. The CAAF has recognized that "[w]e are skeptical about whether any witness could be qualified to opine as to the credibility of another."[120] Military practitioners should also remember that "human lie detector" testimony is not only potentially problematic when offered by a lay witness law enforcement agent but also if it is offered by an expert witness.[121]

IV. Argument

Prosecutorial Misconduct

> *The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty . . . whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor . . . . But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.*[122]

In *United States v. Frey*,[123] the trial counsel, attempting to prosecute his case with earnestness and vigor as described by the Supreme Court above, unintentionally struck a foul blow by implying that the accused was a serial child molester. Unfortunately, the military judge's instruction to the panel only compounded the error.

A panel found Staff Sergeant Frey guilty of sexual contact and of engaging in a sexual act with RK, a child who

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witnesses called. These rules apply equally to the testimony given by the accused.

Id.

[113] *Id.*

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

[115] *Id.* at 37.

[116] *Id.*

[117] *See* United States v. Knapp, 73 M.J. 33 (C.A.A.F. 2014); United States v. Kasper, 58 M.J. 314 (C.A.A.F. 2003).

[118] Knapp, 73 M.J. at 38.

[119] *Id.*

[120] United States v. Petersen, 24 M.J. 283, 284 (C.M.A. 1987).

[121] *See* United States v. Brooks, 64 M.J. 325 (C.A.A.F. 2007) (finding the government expert's testimony suggesting there was better than a ninety-eight percent probability that the child sexual assault victim was telling the truth was the functional equivalent of vouching for the victim's truthfulness, implicating the very concerns underlying the prohibition against human lie detector testimony). *See also* United States v. Birdsall, 47 M.J. 404 (C.A.A.F. 1998); United States v. Palmer, 33 M.J. 7 (C.M.A. 1991); United States v. Petersen, 24 M.J. 283 (C.M.A. 1987).

[122] Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 1314 (1935).

[123] 73 M.J. 245 (C.A.A.F. 2014).

had not attained twelve years.[124] During the defense sentencing argument, the counsel argued that there was no evidence that the accused had ever committed a similar crime to the charged offense.[125] In rebuttal argument, the trial counsel stated that "the Defense Counsel said, 'there's no evidence before you that he's ever done anything like this before.' And there is no evidence before you. But think what we know, common sense, ways of the world, about child molesters."[126]

Defense counsel objected and the trial counsel stated that "I'm just arguing ways of the world."[127] The military judge overruled the objection. Prior to panel deliberations, the military judge reminded the members that arguments by counsel are not evidence and that the accused should only be sentenced for the crimes that he had been convicted of. But the military judge also instructed the members "it was appropriate for them to apply their 'commonsense [sic] and knowledge of the ways of the world whether or not in your particular case that involves any implication suggested by counsel.'"[128]

The panel sentenced the accused to a dishonorable discharge, eight years of confinement, forfeiture of all pay and allowances, and reduction to E-1.[129] On appeal, the Air Force Court of Criminal Appeals (AFCCA) found that while the trial counsel's argument was improper, the accused was not materially prejudiced by the improper argument.[130] The CAAF then considered whether AFCCA erred in finding the trial counsel's argument to be harmless error.[131]

In examining whether the accused was prejudiced by the trial counsel's misconduct, the CAAF considered the factors set forth in *United States.v. Fletcher*[132]: "(1) the severity of the misconduct, (2) the measures adopted to cure the misconduct, and (3) the weight of the evidence supporting the conviction."[133]

The CAAF found that the misconduct was severe. The trial counsel asked that the members consider information not in evidence to conclude that the accused was a serial child molester who would reoffend.[134] The CAAF concluded that "one is hard pressed to imagine many statements more damaging . . . ."[135] The first *Fletcher* factor favored the accused.

Turning to the second *Fletcher* factor, the CAAF found that the military judge's curative instructions actually made matters worse.[136] In overruling the defense objection and in reiterating to them that it was "appropriate for them to 'apply their commonsense [sic] and knowledge of the ways of the world,'"[137] the military judge invited the members to substitute their own knowledge for evidence.[138] Furthermore, the CAAF noted that evidence of recidivism requires expert testimony, empirical research, etc., and cannot be resolved by common sense or knowledge of the ways of the world.[139] The second *Fletcher* factor also favored the accused.

In examining the last *Fletcher* factor, the CAAF concluded that the weight of the evidence supporting the sentence weighed heavily in the government's favor.[140] The maximum period of confinement for the accused's offenses was life without parole. The panel sentenced the appellant to eight years confinement.[141] Notwithstanding the improper comment, the trial counsel's overall argument was "powerful and proper."[142] Finally, in the CAAF's estimation, none of the accused's sentencing evidence could mitigate RK's testimony or the actual note she wrote to her father concerning the offenses that was admitted into evidence. The CAAF was confident that the accused was sentenced based on the evidence presented and not on the trial counsel's improper comments.[143]

Although the central issue in *Frey* dealt with prosecutorial misconduct, *Frey* is also instructive on exactly what the term "ways of the world" actually encompasses. After all, everyone has a different life experience; a different lens through which the world is viewed; a different take on things. From *Frey*, one gleans that the term "'ways of the

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[124] *Id*.

[125] *See id*.

[126] *Id*.

[127] *Id*.

[128] *Id*.

[129] *Id*.

[130] *Id*.

[131] The CAAF agreed with the AFCCA that the trial counsel's argument was improper. *Id*. at 249.

[132] 62 M.J. 175, 184 (C.A.A.F. 2005).

[133] *Frey*, 73 M.J. at 249 (quoting, *Fletcher*, 62 M.J. at 184.)

[134] *Id*.

[135] *Id*.

[136] *Id*.

[137] *Id*. at 249-50.

[138] *Id*. at 250.

[139] *Id*.

[140] *Id*. at 251.

[141] *Id*.

[142] *Id*.

[143] *Id*.

world' refers to court members' evaluation of lay testimony, defenses, and witness credibility."[144]

United States v. Hornback[145] is another case this term that dealt with prosecutorial misconduct. In *Hornback*, the military judge's "early and often" actions and instruction to the panel ameliorated prosecutorial misconduct.

Private Hornback pled not guilty to using spice, using Xanax, false official statement, larceny, solicitation, using provoking speech, and communicating threats.[146] To prove its case, the government called eleven witnesses. Out of these eleven witnesses, the government elicited or attempted to elicit improper character evidence testimony from nine of them.[147] Over the course of the trial, the military judge held multiple Article 39a sessions addressing the impermissible questioning. He even allowed the trial counsel to practice her questioning outside of the presence of panel members. At some point, he specifically told the trial counsel what questions she could ask. But despite the military judge's admonitions and instructions, the trial counsel continued to ask impermissible questions. Each time, the military judge instructed the panel to disregard the witnesses' answer.[148]

During closing argument, the trial counsel argued that the "[t]he accused is like a criminal infection that is a plague to the Marine Corps. . . . [T]he command has taken . . . action in the form of these charges before you . . . The government is confident that you will find him guilty beyond a reasonable doubt." [149] The military judge *sua sponte* stopped the trial counsel and had the panel agree and respond affirmatively that they understood that the convening authority was not expecting a certain outcome in the accused's case and that they would disregard the impermissible character evidence heard over the course of the trial.[150]

The panel sitting as a special court-martial convicted the accused of one specification each of using spice, signing a false official statement, and larceny of military property. On appeal, the CAAF considered whether prosecutorial misconduct occurred, and if so, was the accused prejudiced?

The CAAF found that the trial counsel's "repeated and persistent" elicitation of improper testimony despite repeated and persistent defense objections and admonitions by the military judge amounted to prosecutorial misconduct even though she had no malicious intent.[151]

Similar to *Frey*, the CAAF examined the *Fletcher* factors[152] in determining whether the trial counsel's arguments prejudiced the accused's substantial rights.

The CAAF found the trial counsel's misconduct to be "sustained and severe, " but that the military judge's curative measures of calling multiple Article 39(a), UCMJ sessions, repeatedly issuing curative instructions, and having the members agree that they would follow his instructions, ameliorated the trial counsel's misconduct.[153]

In examining the weight of the evidence supporting the conviction, the CAAF looked at what the accused was ultimately convicted of—signing a false official statement, larceny, and using spice.[154] The evidence regarding the false official statement and larceny, which were unrelated to the drug charges, was strong while the evidence regarding the spice use was not as strong but was still substantial.[155] The CAAF felt quite confident that the accused was not prejudiced, particularly since the panel appeared to follow the military judge's instruction in finding the accused not guilty of other weaker drug charges.[156]

United States v. Hornback has a lesson for everyone—"act early and often." Judges act early and often to ameliorate misconduct by counsel.[157] Defense counsel object early and as often as needed. Do not wait for the military judge to cure a defect; if you do, the issue may be forfeited on appeal.[158] Trial counsel, seek help early and often before trial, particularly if inexperienced. Supervisors, mentor your counsel early and often. Do not leave your counsel, particularly the inexperienced, alone to flounder

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[144] *Id*. at 250. So for instance, based on the ways of the world, one can infer that a punch to the head can cause serious bodily injury while one cannot infer that prior drug use indicates another drug use.

[145] 73 M.J. 155 (C.A.A.F. 2014).

[146] *Id*. at 156.

[147] *Id*.

[148] *See id*. at 158-59.

[149] *Id*.

[150] *Id*.

[151] *Id*. at 160.

[152] *Fletcher,* 62 M.J. 175. The *Fletcher* factors are: (1) the severity of the misconduct, (2) the measures adopted to cure the misconduct, and (3) the weight of the evidence supporting the conviction. *Id.* at 184.

[153] *Hornback*, 73 M.J. at 161.

[154] *See id*.

[155] *Id*. The Government's first two witnesses testified that they saw the accused smoking what the accused identified as spice.

[156] *Id*. The accused was acquitted of wrongfully using Xanax, larceny (different specification), solicitation, using provoking speech, and communicating threats. *Id*. at 156.

[157] *See id*. at 161 (where the CAAF commends the military judge for leaving "no stone unturned in ensuring that the members considered only admissible evidence" and for acting "early and often to ameliorate trial counsel's misconduct." *Id*.)

[158] *See id*. at 159 (On appeal, the accused argued that the trial counsel committed additional instances of misconduct during her opening statement and closing argument although the defense did not object at trial. The CAAF found that the defense had not shown that those statements constituted plain error.)

during a trial.[159]

V. Sentencing

Rule for Courts-Martial 1001(c)(1) allows the defense to present matters in rebuttal and in extenuation and mitigation.[160] One common vehicle for eliciting such evidence is through the accused's unsworn statement. Often in cases involving sexual assault, an accused will mention in his unsworn statement the fact that he will have to register as a sex offender pursuant to Department of Defense Instruction 1325.07.[161] While the right of allocution is virtually unfettered, a military judge may place collateral consequences[162] mentioned during an accused's unsworn statement into the proper context for members.[163] In *United States v. Talkington*,[164] the CAAF addresses whether the military judge erred in instructing the panel that sex offender registration is a collateral matter that it should essentially disregard in its sentencing deliberations.

An enlisted panel found Airman First Class Talkington guilty of attempted aggravated sexual assault and attempted abusive sexual contact.[165] During his unsworn statement, the accused stated, "I will have to register as a sex offender for life. . . . I am not very sure what sort of work I can find."[166]

The military judge instructed the panel, *inter alia*: (1) evidence of possible sex offender registration is inadmissible except in an unsworn statement, (2) sex offender registration is a collateral consequence that should not be a part of their deliberations, and (3) use of this information is problematic.[167] The defense counsel objected to the instruction on the grounds that the instruction went too far in that it implied that the panel members should give evidence of possible sex offender registration "very little weight"[168] and that *United States v. Grill*[169] said nothing about giving the panel a limiting instruction regarding collateral matters addressed in the accused's unsworn statement. The military judge overruled the objection.[170] The panel sentenced the accused to eight months confinement, a bad-conduct discharge, total forfeitures, and reduction to E-1. The AFCCA affirmed the findings and the sentence.[171]

On appeal to the CAAF, the defense argued that the military judge abused his discretion in instructing the panel members that sex offender registration was irrelevant in fashioning its sentence. First, defense argued that sex offender registration is no longer a collateral matter under the recent CAAF case, *United States v. Riley,*[172] and that consideration of sex offender registration was now required.[173] In *Riley*, the CAAF held that "in the context of a guilty plea inquiry, sex offender registration consequences can no longer be deemed a collateral consequence of the plea."[174]

The defense urged the CAAF to extend their holding in *Riley* to apply to sentencing, but the CAAF reasoned that *Riley* was different: it was a guilty plea and the dispositive issue was whether her plea was a knowing plea. The CAAF declined extending its holding in *Riley*, finding no reason to do so, since nothing about the sentence impacted the requirement to register as a sex offender once convicted.[175]

Second, the defense argued that the effect of sex offender registration, much like the impact of a punitive discharge on retirement benefits, is "a direct and proximate consequence of the sentence"[176] and that the military judge abused his discretion by instructing the members to disregard it as a collateral matter. But again, the CAAF disagreed, finding a major difference between the two. The loss of retirement benefits is a possible result of the sentence

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[159] *See id*. at 160. The CAAF intimates that the trial counsel's superiors should have been present in court to assist her (stating "[a]lthough one may wonder what her supervisors were doing during the course of Appellant's trial . . . .)

[160] MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1001 (2012).

[161] U.S. DEP'T OF DEF., INSTR. 1325.07 ADMINISTRATION OF MILITARY CORRECTIONAL FACILITIES AND CLEMENCY AND PAROLE AUTHORITY enclosure 2, appendix 4 (March 2013).

[162] A collateral consequence is "[a] penalty for committing a crime, in addition to the penalties included in the criminal sentence. *United States v. Miller*, 63 M.J. 452, 457 (C.A.A.F. 2006).

[163] *See* United States v. Grill, 48 M.J. 131-32 (C.A.A.F. 1998).

[164] 73 M.J. 212 (C.A.A.F. 2014).

[165] *Id*. The accused touched the victim's breast and penetrated her vagina while he believed she was sleeping.

[166] *Id*. at 213.

[167] *Id*. at 214.

[168] *Id*.

[169] *Grill*, *supra* note 113. In *United States v. Grill*, the CAAF held that it was error for the military judge to refuse to allow the appellant to mention in his unsworn statement that his co-conspirators received leniency.

[170] *Talkington*, 73 M.J. at 214.

[171] *Id*.

[172] 72 M.J. 115, 116-17 (C.A.A.F. 2013). In *Riley*, the accused pled guilty to kidnapping, not knowing and not being advised that she would have to register as a sex offender. The CAAF found that her plea was not a "knowing, intelligent act[ ] done with sufficient awareness of the relevant circumstances and likely consequences" and found her plea to be improvident.

[173] *Talkington*, 73 M.J. at 216.

[174] *Id*. (quoting *Riley*, 72 M.J. at 121.).

[175] *Id*. at 216-17.

[176] *Id*. at 215.

whereas sex offender registration is a result of the conviction itself. No matter the sentence, the accused would still have to register as a sex offender once he stood convicted.[177]

Talkington is important because it confirms for practitioners that sex offender registration remains a collateral matter outside the context of a guilty plea inquiry. While an accused may mention the requirement to register as sex offender during his unsworn statement, the military judge, in his discretion, may give an instruction to place the unsworn statement in its proper context.[178] Practitioners should further note that the *Benchbook* instruction regarding an accused's unsworn statement has been updated to conform to the CAAF's holding in *Talkington*.[179]

VI. National Defense Authorization Act for Fiscal Year 2014

In addition to the CAAF and courts of criminal appeals' jurisprudence, the NDAA for FY 2014[180] also impacted the ever-varying landscape of instructions. Prior to the NDAA for FY 2014, the convening authority had the power under Article 60, UCMJ, to lessen the findings or sentence in any case.[181] Now, in light of the increased scrutiny of the military's processing of sexual assault cases, the NDAA for FY 2014 greatly limits these powers. For offenses occurring on or after June 24, 2014, the convening authority cannot dismiss an offense nor reduce the offense to a lesser-included offense (a) if the offense carries an authorized maximum punishment greater than two years confinement, (b) if the adjudged sentence includes a punitive discharge or confinement greater than six months, or (c) if the offense involved is rape, forcible sodomy, or bestiality.[182]

The NDAA for FY 2014 also imposes a mandatory minimum sentence of a dismissal or dishonorable discharge for penetrative sexual offenses: rape or sexual assault of a child, forcible sodomy, and any attempts of the aforementioned.[183] If the offense carries a mandatory minimum sentence, the convening authority cannot disapprove, commute, or suspend the sentence unless the trial counsel recommends such because of the accused's substantial assistance in another case. In these cases, the convening authority may only reduce a dishonorable discharge to a bad-conduct discharge.[184]

All parties should be vigilant in ensuring that the convening authority has not overstepped these new limits particularly when negotiating pretrial agreements. Ultimately, military judges bear the responsibility of ensuring that all parties have a shared understanding of the operation of the quantum on the sentence. The *Benchbook* has been updated with a note that reminds military judges of the new limits on a convening authority's power and also prompts them to thoroughly review the terms of the quantum with the accused during the providence inquiry.[185]

Other updates to the *Benchbook* based on the NDAA for FY 2014 include the addition of mandatory minimum sentences and associated references where applicable (see above discussion regarding mandatory discharges),[186] as well as the repeal of the offense of consensual sodomy, while including an instruction on the newly created offense of bestiality.[187]

VII. Conclusion

The 2014 term of court covered a variety of instructions—from common instructions on attempt, the scope of unsworn statements, and prosecutorial misconduct—to the uncommon instructions on involuntary intoxication and defense of property. The 2014 term of court also clarified important, recurring issues like the fact that sex offender registration remains a collateral matter and that the "ways of the world" does not mean that panel members can substitute their own life experiences for the evidence presented or not presented. Additionally, the 2014 NDAA impacted instructions by limiting the convening authority's previously unfettered authority under Article 60, UCMJ, by establishing mandatory minimum sentences in some cases, and by repealing an old offense while creating a new one.

Nevertheless, this annual installment of developments in instructions would be remiss if it did not remind practitioners and judges alike of the one principle that

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[177] *Id*. at 217.

[178] *Id*. at 218.

[179] BENCHBOOK, *supra* note 3, para. 2-6-11.

[180] National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66.

[181] *See* UCMJ art. 60 (2012).

[182] *See* National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1702.

[183] *See* National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1705.

[184] *See* National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1702

[185] *See* BENCHBOOK, *supra* note 3, para. 2-4-2 and 2-6-24..

[186] *See* BENCHBOOK, *supra* note 3, para. 2-2-4, 2-5-1, 2-5-19, 2-5-22, and 8-2-4.

[187] *See* BENCHBOOK, *supra* note 3, para. 3-51-1, 3-51-2, and 3-51-3. The Benchbook also includes a change regarding forcible sodomy offenses occurring after December 26, 2013 based on the NDAA for FY 2014. The NDAA for FY 2014 states forcible sodomy can occur either "by force or without consent." *See* National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1707. This change allows a forcible sodomy offense occurring after December, 26 2013 to be charged as occurring either "by force and without consent," or "by force," or "without consent." *See* BENCHBOOK, *supra* note 3, para. 3-51-2.

remains constant: the importance of the *Benchbook*. In typical fashion, many of the developments discussed in this article have already been addressed by appropriate changes in the *Benchbook*. Adherence to the *Benchbook* increases the likelihood that those who follow it can successfully navigate the ever-varying landscape of instructions to members.[188]

[188] *See Annual Review of Developments in Instructions*, Colonel R. Peter Masterton, Colonel David Robertson, and Colonel Wendy P. Daknis, ARMY LAW, Dec 2013 at 14.