A View from the Bench
Aggravation Evidence—Adding Flesh to the Bones of a Sentencing Case

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Why is a fundamental knowledge of aggravation evidence important to the military trial practitioner? A trial counsel who fails to present cogent, material aggravation evidence usually presents a skeletal sentencing case, starkly devoid of the facts necessary to support a fair and appropriate sentence. Conversely, a defense counsel who fails to object to inadmissible aggravation evidence makes it more difficult to obtain relief for his client, both at trial and on appeal. The military judge would prefer counsel to formulate, in advance of trial, the respective arguments supporting admission of aggravation evidence or objections against admission of such evidence. To do so, however, a trial counsel must investigate, research, and present a sentencing case with discernment and vigor, and a defense counsel must know when and why to object.

Rule for Court-Martial (RCM) 1001(b)(4)

Just as it is the defense counsel's duty to zealously represent the accused, it is the trial counsel's responsibility to strike hard and fair blows in the interest of justice by introducing proper aggravation evidence.[1]

> Courts-martial, like their civilian-judge counterparts, can only make intelligent decisions about sentences when they are aware of the full measures of the loss suffered by all the victims, including the family and the close community. This, in turn, cannot be fully assessed unless the court-martial knows what has been taken.[2]

Rule for Courts-Martial 1001(b)(4) permits a trial counsel to "present evidence as to any aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty."[3] Such evidence includes matters of financial, social, psychological, and medical impact on the victim of an offense "and evidence of significant adverse impact on the mission, discipline, or efficiency of the command directly and immediately resulting from the accused's offense."[4]

What Is "Directly Relating To or Resulting From?"

"Directly relating to or resulting from the offenses of which the accused has been found guilty," by definition, does not mean tangentially related. Rather, government counsel must show that the accused's offense played a *material role* in bringing about the effect alleged, and a military judge should not admit the evidence if an independent, intervening event played the important part in bringing about the argued effect. For example, in *United States v. Rust*, an obstetrician was derelict in his duty by failing to examine an expectant mother who had symptoms of premature labor.[5] As a result of the dereliction, the baby was born prematurely and later died. Five days later, the woman's lover, and the baby's putative father, strangled the woman to death and then committed suicide by shooting himself. A suicide note found with the bodies was subsequently received in evidence over defense objection. On appeal, the court held that admission of the suicide note was

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[1] In *Berger v. United States*, Justice George Sutherland wrote:

> [A prosecutor in Federal Court] is the representative not of an ordinary part to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and who interest, therefore, in a criminal prosecution is not that is shall win a case, but that justice 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—indeed, he should do so. 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.

295 U.S. 78, 88 (1935).

[2] United States v. Pearson, 17 M.J. 149, 152 (C.M.A. 1984).

[3] MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1001(b)(4) (2005) [hereinafter MCM].

[4] *Id*.

[5] United States. v. Rust, 41 M.J. 472 (1995).

error and set aside the sentence. The court stated the phrase "directly relating to or resulting from the offenses"[6] imposes a higher standard than mere relevance. In other words, an accused is not responsible for a never ending chain of causes and effects. While MAJ Rust was negligent when he failed to examine the woman, his negligence did not *cause* the woman's paramour to kill her and commit suicide, which was found to be the independent result of a disturbed mind.[7]

The Army Court of Criminal Appeals further discussed the concepts of proximate cause and forseeability in *United States v. Stapp*.[8] A fifteen-year-old runaway girl and Private Jason Stapp spent the night in his barracks room. They eventually parted company but the girl stayed with other Soldiers in the unit for several more days. The girl was later taken into custody and turned over to her parents after someone notified the authorities the girl was staying in the barracks. Private Stapp was subsequently convicted of violating a general order prohibiting underage overnight visitors in the barracks. The minor's mother testified for the government in sentencing that the Soldiers she dealt with when recovering her daughter's belongings from the barracks treated this as a "joke" and were playing a "long cat-and-mouse game." The accused, however, was not among them. The Army court held that it was error to allow the mother to testify about her "bitter" frustrations with the unit since the accused had nothing to do with the woman's difficulties in recovering her daughter's belongings or the obstructive behavior of apparently independent actors.[9]

"Syndrome evidence" is generally admissible as evidence of a specific harm caused by an accused's acts.[10] Interestingly, conditions such as rape trauma syndrome and post-traumatic stress disorder are generally considered "directly related" even though the victim may not yet have exhibited symptoms of or experienced physical, emotional or psychological harm.[11] For example, in *United States v. Hammer*,[12] an expert witness in a child molestation case testified that "child victims of sexual abuse are at a higher risk of suffering long-term effects of the abuse . . . and that the [accused's] crimes put the victim at greater risk for psychological disorders in the future."[13] The defense argued the testimony should have been excluded as too speculative because the victim was not exhibiting any adverse symptoms at the time of the testimony. The Air Force Court of Criminal Appeals affirmed the conviction and sentence, holding testimony that child victims of sexual abuse are generally at increased risk of suffering long-term psychological and emotional disorders is admissible as "directly related to" evidence even though there is no indication of actual impact to the individual.[14]

What about when the victim cannot be specifically identified, as in a child pornography case? The "[a]bsence of evidence is not evidence of absence."[15] Thus, evidence can still be sufficiently "direct" to qualify as impact evidence despite the lack of an identified victim. In *United States v. Anderson*, the trial counsel offered part of a U.S. Senate Report concluding that children depicted in such images generally experience physical and psychological harm.[16] The military judge overruled a defense objection that the report was too attenuated to qualify as aggravation evidence. On appeal, the Air Force appellate court found no error, holding that, while the relationship to the offenses must be "direct," there is no requirement that victim impact be limited to matters that have already occurred. The court agreed that RCM 1001(b)(4) does not require child pornography victims be identified and the impact on the unnamed or unidentified children used in the production of the pornography possessed by the accused is proper aggravation.[17]

Uncharged misconduct is not automatically admissible. It must still be "directly related to or resulting from an offense of which the accused has been found guilty."[18] When there is a continuous course of conduct involving the same or similar crimes, the same victims, or a similar location, uncharged misconduct evidence is almost always relevant to show the true

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[6] *Id*. at 478.

[7] *Id.*

[8] United States v. Stapp, 60 M.J. 795 (Army Ct. Crim. App. 2004).

[9] *Id.*

[10] United States v. Hammer, 60 M.J. 810 (A.F. Ct. Crim. App. 2004).

[11] *See, e.g.*, United States v. Stark, 30 M.J. 329 (1990); United States v. Hammond, 17 M.J. 218 (1984).

[12] 60 M.J. 810, 829 (A.F. Ct. Crim. App. 2004).

[13] *Id.* at 829.

[14] *Id*.

[15] *See* CARL SAGAN, THE DRAGONS OF EDEN: SPECULATIONS ON THE EVOLUTION OF HUMAN INTELLIGENCE (1978).

[16] United States v. Anderson, 60 M.J. 548 (A.F. Ct. Crim. App. 2004).

[17] *Id*. at 556.

[18] R.C.M. 1001(b)(4), MCM.

impact of crimes upon the victims.[19] For example, in *United States v. Tanner*, the accused was convicted of sexually abusing his ten-year-old biological daughter. During the sentencing proceedings, over defense objection, the judge admitted evidence the accused had previously molested his fifteen-year-old-stepdaughter. [20] On appeal, the Court of Appeals for the Armed Forces (CAAF) held that "evidence of a prior act of child molestation 'directly relates to' the offense of which the accused has been found guilty and is therefore relevant during sentencing."[21] In fact, prior acts of child molestation appear to now enjoy nearly a presumption of admissibility in presentencing, unless the court determines the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members.

What About Mission Impact Evidence?

Once again, the government must show that there is a direct, logical connection between the offense and the mission impact evidence offered. In *United States v. Bungert*, the accused offered to identify eleven Coast Guardsmen who were allegedly using drugs in return for a favorable deal.[22] The trial counsel called witnesses on sentencing to testify that, as a result of the accused's allegations, the command was locked down, a base-wide urinalysis was conducted, flight operations were cancelled, maintenance operations were shut down, and agents spent sixty to seventy hours on the investigation. However, the investigation did not turn up any evidence that any of the individuals identified by the accused had ever used illegal drugs. In his closing, the trial counsel argued that the baseless allegations took up valuable time and resources. The CAAF held that testimony concerning the command's response to the accused's false allegations in this case directly resulted from the various offenses and properly admitted into evidence.[23]

The government, however, should not attempt to disguise as "aggravation" evidence the court-martial's detrimental impact on a unit. In *United States v. Stapp*,[24] the first sergeant testified that his unit was administratively burdened by the court-martial process, stating that several Soldiers had to leave their duties to attend the accused's trial. The Army court held that this evidence can never be used as mission impact evidence since it would allow the government to argue that an accused should be punished more harshly because his court-martial inconvenienced the unit, an event over which the accused has no control. Evidence of the administrative burden of the court-martial process, such as providing escorts to accompany the accused to and from interviews with his counsel or having to produce witnesses to testify at trial, is ordinarily not considered mission impact evidence attributable to the accused.[25]

Conclusion

Military trial practitioners who understand the purpose and scope of aggravation evidence will help ensure that the fact finder gets not only the bones of the case but also the flesh. A well-presented sentencing case on both sides will result in a fairer trial and lead to an appropriate sentence.

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[19] United States v. Nourse, 55 M.J. 229 (2001) (citing United States v. Mullens, 29 M.J. 398 (1990)).

[20] *See* United States v. Tanner, 63 M.J. 445 (2006).

[21] *Id* at 449.

[22] 62 M.J. 346 (2006).

[23] *See* MCM, *supra* note 3, MIL. R. EVID 103.

[24] *See* United States v. Stapp, 60 M.J. 795 (Army Ct. Crim. App. 2004).

[25] *Id.* at 801.