THE ARMY LAWYER

Headquarters, Department of the Army

Department of the Army Pamphlet 27-50-352
May 2002

Military Justice Symposium—Volume II

Truth Is Stranger than Fiction: A Year in Professional Responsibility
Major David H. Robertson

Recent Developments in Unlawful Command Influence: "I really didn't say everything I said!"
Lieutenant Colonel James F. Garrett

New Developments in the Law of Discovery: When Is Late Too Late, and Does Article 46, UCMJ, Have Teeth?
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New Developments in Search and Seizure: More Than Just a Matter of Semantics
Lieutenant Colonel Michael R. Stahlman

Recent Developments in Sentencing: Tying Up Loose Ends
Major Tyler J. Harder

CLE News

Current Materials of Interest

Criminal Law Subject Index

Correction—Advice on Clemency and Parole Eligibility: Contrary to a recently published article in *The Army Lawyer*,[1] "[i]n cases in which the prisoner has been sentenced *to confinement for life*, the [prisoner is elibible for release on parole when requested by the prisoner, and when] the prionser *has served at least 20 years of confinement*."[2] This provision applies only to "those prisoners in which any act with a finding of guilty occurred 30 days after January 16, 2000."[3] Additionally, paragraph 6.16.6 of Department of Defense Instruction 1325.7 dated 17 July 2001, detailing eligibility for clemency consideration, supercedes the information published in the December 2001 *The Army Lawyer.*[4]

1. *See* Major Jeff Walker, *The Principal Consequences of a Court-Martial Conviction*, ARMY LAW., Dec. 2001, at 1, 6.

2. U.S. DEP'T OF DEFENSE, INSTR. 1325.7, ADMINISTRATION OF MILITARY CORRECTIONAL FACILITIES AND CLEMENCY PAROLE AUTHORITY para. 6.17.1 (17 July 2001) (emphasis added).

3. *Id.* para. 6.17.1.2.3.

4. *Compare id.* para. 6.16.6, *with* Walker, *supra* note 1, at 6 n.2.

Editor, Captain Erik L. Christiansen
Technical Editor, Charles J. Strong

The Army Lawyer (ISSN 0364-1287, USPS 490-330) is published monthly by The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia, for the official use of Army lawyers in the performance of their legal responsibilities. Individual paid subscriptions to *The Army Lawyer* are available for $29 each ($36.25 foreign) per year, periodical postage paid at Charlottesville, Virginia, and additional mailing offices (see subscription form on the inside back cover). POSTMASTER: Send any address changes to The Judge Advocate General's School, U.S. Army, 600 Massie Road, ATTN: JAGS-ADL-P, Charlottesville, Virginia 22903-1781. The opinions expressed by the authors in the articles do not necessarily reflect the view of The Judge Advocate General or the Department of the Army. Masculine or feminine pronouns appearing in this pamphlet refer to both genders unless the context indicates another use.

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Issues may be cited as ARMY LAW., [date], at [page number].

Truth Is Stranger than Fiction: A Year in Professional Responsibility 1
Major David H. Robertson

Recent Developments in Unlawful Command Influence: "I really didn't say everything I said!" 13
Lieutenant Colonel James F. Garrett

New Developments in the Law of Discovery: When Is Late Too Late, and Does Article 46, UCMJ, Have Teeth? 18
Major Christina E. Ekman

New Developments in Search and Seizure: More Than Just a Matter of Semantics 31
Lieutenant Colonel Michael R. Stahlman, United States Marine Corps

Recent Developments in Sentencing: Tying Up Loose Ends 44
Major Tyler J. Harder

CLE News 59

Current Materials of Interest 62

Criminal Law Subject Index 64

Individual Paid Subscriptions to *The Army Lawyer* ..... Inside Back Cover

Truth Is Stranger than Fiction:[1] A Year in Professional Responsibility

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Introduction

The case facts that confronted the Court of Appeals for the Armed Forces (CAAF) and the service courts in the area of professional responsibility this past year ranged from the mundane to the bizarre. The corrective guidance in the court's opinions was not only directed at the all-too-familiar appellate target, the defense counsel, but also included the trial counsel and the military judge. With these trial participants providing their missteps and misdeeds as a backdrop, the appellate courts took the opportunity to address various areas of professional responsibility, including judicial bias, judicial conduct, candor to the tribunal, prosecutorial misconduct, conflict of interest, and of course, the ever-present ineffective assistance of counsel.

This article reviews some of the more educational and entertaining cases of the past year. It does so in hopes of adding flesh to some of the bare-bones rules of professional responsibility, while at the same time illustrating some of the interpersonal dynamics that can occur both inside and outside of the courtroom. Additionally, this article draws some practical guidance from these cases to help counsel and military judges avoid the pitfalls to which their contemporaries fell victim.

The Rules of Professional Responsibility

The ethical rules governing the conduct of Army lawyers, both military and civilian, and of non-government lawyers appearing before Army tribunals are contained in the *Army's Rules of Professional Conduct for Lawyers*.[2] The Rules establish a framework of ethical conduct for these lawyers to follow while performing their official duties.[3] Army lawyers are simultaneously bound by the ethical rules of their state licensing authority.[4] Additionally, judges, counsel, and court-martial clerical support personnel must comply with the American Bar Association (ABA) Standards for Criminal Justice, unless these rules conflict with the military's ethical rules. Finally, judges are additionally bound by the 1972 ABA Code of Judicial Conduct (now the ABA Model Code of Judicial Conduct) when its rules are not in conflict with the military's rules.[5] The goal of these rules and standards is not only to protect clients, but also to protect third parties with whom the lawyers deal, and to enhance the public's confidence in the judicial system.

The CAAF had to apply a broad range of standards contained in the references mentioned above in its first two cases of its 2002 term. In both *United States v. Quintanilla*[6] and *United States v. Butcher*,[7] the court confronted the issue of judicial conduct creating an appearance of bias.

Judicial Conduct and Impartiality

In *Quintanilla*, the CAAF ruled that the military judge had abused his discretion when he failed to recuse himself sua sponte after his actions created the appearance of bias. The appellant in this case was charged with several offenses arising out of his sexual conduct with three civilian teenage boys and two male soldiers. One of these victims was JB, a nineteen year-old civilian who, after the sexual encounters, moved out of the appellant's house and into the home of his employer, Mr. Bernstein.[8]

At trial, the government called JB as its second witness. After several members of the government failed to persuade JB to enter the courtroom and testify, the military judge, on his own initiative, exited the courtroom and proceeded to where the

1. Anonymous, *quoted in* JOHN BARTLETT, FAMILIAR QUOTATIONS 403 n.3 (Little, Brown & Co., 16th ed. 1992) ("Truth is stranger than fiction, but not so popular.").

2. U.S. DEP'T OF ARMY, REG. 27-26, LEGAL SERVICES: RULES OF PROFESSIONAL CONDUCT FOR LAWYERS (1 May 1992) [hereinafter AR 27-26].

3. For a detailed analysis of the Army's current rules and the history behind their development and adoption, see Major Bernard P. Ingold, *An Overview and Analysis of the New Rules of Professional Conduct for Army Lawyers*, 124 MIL. L. REV. 1 (1989).

4. AR 27-26, *supra* note 2, R. 8.5(f).

5. U.S. DEP'T OF ARMY, REG. 27-10, LEGAL SERVICES: MILITARY JUSTICE para. 5-8 (20 Aug. 1999) [hereinafter AR 27-10].

6. 56 M.J. 37 (2001).

7. 56 M.J. 87 (2001).

8. *Quintanilla*, 56 M.J at 46.

witnesses were waiting. He did this on two separate occasions.[9] In each instance, the military judge dealt with Mr. Bernstein and JB. His interceding in the effort to get JB to the witness stand was motivated by his frustration over the lengthy delay in getting the case to trial,[10] as well as delays during the trial itself.[11] Unfortunately, due to the military judge's failure to ensure a complete disclosure of the facts in the record of trial, it is unclear what exactly occurred during each of the encounters; however, the CAAF was able to fill in some of the missing facts through the use of documents and statements gathered after the trial.[12]

The record does show that at some point, Mr. Bernstein expressed his concern to government counsel and to the military judge about the timing of JB's testimony and how JB would be treated by the defense on cross-examination. He also made it known that neither he nor JB was under subpoena, and that they would walk out of the courthouse if their concerns were not addressed.[13] During an emotional exchange between the military judge and Mr. Bernstein, the military judge threatened him with a finding of contempt if he continued to interfere with JB's testimony.[14] Additionally, the military judge initiated physical contact by placing his hands on Mr. Bernstein's chest.[15] Finally, during one of the two encounters, the military judge walked in on Mr. Bernstein while he was in the process of contacting the Commander, III Corps, to complain about his treatment at the hands of government counsel and the military judge. At this point, the military judge informed Mr. Bernstein that he did not "give a f*** . . . about what [the commander of III Corps] did or said," or words to that effect.[16]

During one of the court recesses, the military judge informed the trial counsel that Mr. Bernstein had made an ethical complaint against him (the military judge), and that this issue would therefore have to be addressed on the record by calling Mr. Bernstein as a witness. The trial counsel expressed his concern

9. *Id*. at 48.

10. *Id*. at 47. "Appellant was arraigned on May 7, 1996, and pretrial motions and related proceedings were considered on August 10 and 19. A variety of circumstances delayed commencement of trial on the merits, including a lengthy, defense-requested continuance to accommodate the schedules of both civilian and military defense counsel." *Id*.

11. *Id.* The military judge admonished the trial counsel for not having "his witnesses organized so that the court-martial would 'not have to wait 10 minutes between witnesses.'" *Id*. Additionally, when the defense counsel requested a delay for the purposes of interviewing the first government witness, CS, the military judge "expressed concern about further delay, noting that 'witnesses in cases like this do tend to be a little reluctant, a little frail; and we had them waiting all morning.'" *Id*. at 53. Later in the trial, when recounting the confrontation with Mr. Bernstein for the record, the military judge noted that "[i]t was [his] goal at that point to move the trial along." *Id.* Finally, the military judge had the following conversation on the record with Mr. Carlson, the civilian defense counsel (CDC):

> MJ: Mr. Carlson, I want you to think for just a moment about this entire trial.
>
> CDC: Yes, sir.
>
> MJ: What is the only time that I've gotten on the lawyers in this case? Truly. I mean, nitpicky stuff, but what's the only thing I've really gotten on the lawyers about? Efficiency.
>
> CDC: Yes, sir.
>
> MJ: Okay. I told you guys why you needed a reason at 9:00 when we put the members together. I told you when a witness takes the stand and before the first question is asked people want another reason to talk for an hour. The fact that I want to move this trial along got me the great pleasure of having Mr. Bernstein slander my reputation in the military. I beat on Captain Schwind [trial counsel] to pick up the pace and move on, and I've done that with you, but less frequently, Okay.
>
> CDC: Yes, sir, and I will.

Id. at 55.

12. *See id*. at 69-76.

13. *Id*. at 50–53.

14. *Id*. at 51.

15. *Id.* at 50. This physical contact has been characterized numerous different ways depending on who was doing the characterizing and in what forum they were doing the characterizing. The military judge described it variously as "patted [Mr. Bernstein] on the shoulder," *id*. at 50; "tapped [Mr. Bernstein]—thumped [Mr. Bernstein] on the chest with an open hand, man—mano a mano," *id*. at 54; "simply pat [Mr. Bernstein] twice," "appropriate" touching "in order to calm the situation," *id*. at 72; and "positive, friendly, and encouraging" contact, *id*. Mr. Bernstein described it in court as an "offensive touching," *id*. at 50, and "like a father" would touch, *id*. at 54, and out of court as "hit [Mr. Bernstein] on the shoulder," *id*. at 57; "smacked [Mr. Bernstein] on the left hand side of [Mr. Bernstein's] chest four times," *id*. at 63; and "smacked the left side of [Mr. Bernstein's] chest four or five times with an open hand," *id*. at 74. The trial counsel stated that the military judge "patted Bernstein on the shoulder and told him to clam down." *Id*. at 73. In his statement to the military police, JB recalled that the "judge hit him on the chest about three or four times." *Id.* at 74.

16. *Id*. at 54.

about the potential adverse effect that this in-court confrontation would have on the quality of Mr. Bernstein's subsequent testimony on the merits. To avoid this problem, the trial counsel asked the military judge if Mr. Bernstein could testify on the merits before confronting him with the issue of the ethical complaint. The military judge agreed to this request; however, neither defense counsel were present for this conversation, and the military judge made no disclosure about it to the defense.[17]

Later in the trial, the defense sought to make the confrontation between the military judge and Mr. Bernstein the subject of a stipulation-of-fact. The trial counsel resisted signing this document based on his conclusion that portions of it were not relevant. The trial counsel also pointed out that if the military judged ruled that the confrontations were relevant to the merits of the case, it would make the military judge a material witness.[18] When faced with the possibility of being called as a witness in the case, the military judge issued an erroneous warning to trial counsel by telling him that "[i]f you call me, you get to try this case all over again, and you get to figure out whether or not you want to wrestle with double jeopardy."[19] As the parties wrestled with this issue, the military judge suggested to the defense that the term "military judge" in the stipulation-of-fact be changed to either "court official," "senior field grade judge advocate," or "senior field grade member of the Judge Advocate General's Corps." The defense declined to adopt any of these suggested changes.[20]

One of the unresolved factual issues in the case is whether the civilian defense counsel (CDC) was present during the confrontations. The military judge asserted that he brought the CDC with him when he left the courtroom.[21] In a post-trial affidavit, the CDC denied being present during any of the military judge's dealings with JB and Mr. Bernstein.[22]

In deciding *Quintanilla*, the CAAF first addressed the issue of whether the defense waived the appearance of bias when it failed to raise the issue at trial.[23] The court noted that for a party to waive this issue, the waiver must be "preceded by a full disclosure on the record of the basis for disqualification."[24] Here, the CAAF found that because the military judge "failed to fulfill his fundamental responsibility" of ensuring that the record of trial was complete and coherent, this condition was not met.[25] Therefore, it would be inappropriate to conclude that the defense knowingly waived this issue.[26] Thus, the court then turned its attention to the issue of the appearance of bias.[27]

The CAAF found that several actions by the military judge had created the appearance of bias. One such act was his over-involvement in securing the testimony of JB before ascertaining the facts or being asked for assistance by the government. Another was his failure to ensure that the record of trial set forth a complete account of the proceedings and events, both in and out of court. Many of his in-court conversations were with unidentified spectators in the courtroom that involved cryptic and incomplete references to unidentified matters and events. His account of the out-of-court activities was either incomplete, as in the case of a Rule for Courts-Martial (RCM) 802 session and his interactions with Mr. Bernstein, or completely missing, as in the case of his ex parte discussion with the trial counsel.[28]

In examining the nature of this ex parte discussion with the trial counsel, the CAAF noted that it involved a strategic decision on the order of questioning a witness, and it was therefore more than a mere administrative discussion. The court concluded that the military judge's failure to disclose to the defense the existence and nature of this discussion added to the appearance of bias.[29]

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17. *Id.* at 75.

18. *Id.* at 64-65.

19. *Id.* at 65.

20. *Id.*

21. *Id.* at 70.

22. *Id.* at 70, 73.

23. *See id.* at 77.

24. *Id.* (quoting MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 902(e) (2000) [hereinafter MCM] (allowing parties to waive an appearance of bias on the part of the military judge as defined under RCM 902(a)).

25. *Id.*

26. *Id.*

27. *See id.* at 78 (construing MCM, *supra* note 24, R.C.M. 902(a)).

28. *Id.* at 79.

29. *Id.*

Finally, the CAAF focused on the impact of the stipulation-of-fact. The court concurred with the trial counsel's in-court determination that its admission impermissibly put the military judge in the position of being a witness in the case, a witness whose credibility would be weighed against the credibility of another witness, Mr. Bernstein.[30]

Based on these findings, the court had little trouble concluding that the military judge should have disqualified himself due to an appearance of bias created by his actions. On the issue of whether reversal was an appropriate remedy,[31] the CAAF felt that it could not make this decision yet due to the incomplete record of events. As such, the court requested a post-trial hearing[32] to gather additional facts to fill in the missing pieces of the puzzle.[33]

In *United States v. Butcher*,[34] the CAAF reviewed whether the military judge should have recused himself after the defense objected to his ex parte social interactions with the trial counsel during the trial. One of these social interactions involved the military judge and his wife attending a party at the trial counsel's house during the weekend recess in the trial. All attorneys in the local judicial circuit had been invited to this party. Although other defense attorneys attended the party, appellant's defense counsel did not.[35] The party lasted approximately two hours, and there were no discussions about the appellant's case, other than a comment by the military judge that the trial had lasted longer than he had anticipated.[36]

Based on a suggestion that arose during the party, the judge secured the trial counsel as his doubles partner in a tennis match against another couple the following day. The match lasted less than two hours. The tennis participants discussed tennis and other social subjects, but did not discuss the appellant's case.[37]

In *Butcher*, the CAAF reaffirmed that when reviewing a judge's decision on recusal, the appropriate standard of review is abuse of discretion.[38] In reviewing the judge's actions, the CAAF stated that it would "assume, without deciding, that the military judge should have recused himself."[39] The court then applied the three *Liljeberg* factors[40] to decide whether the conviction warranted a reversal. In deciding against reversal, the CAAF found that (1) "the risk of injustice to the parties" was greatly diminished because the judge's actions took place after the presentation of evidence and discussion of instructions on the merits, and that the military judge's subsequent actions in the case "were few in number and not adverse to the appellant;"[41] (2) "the risk that denial of relief will produce injustice in other cases" was unlikely, because judges are "highly sensitive" to the problems caused by out-of-court contact with the parties during litigation; therefore, there was no need to send them a message by reversing this case;[42] and (3) "the risk of undermining the public's confidence in the judicial process" was not a danger because the judge's conduct did not involve an intimate or personal relationship, extensive interaction, and came late in the trial.[43]

30. *Id*. at 80.

31. Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847 (1988). The Supreme Court, noting that presence of the appearance of bias alone does not mandate reversal, set out a three-part test for determining if reversal is an appropriate remedy. *See id.* at 864; *infra* note 40.

32. *See, e.g*., United States v. Dubay, 37 C.M.R. 411 (C.M.A. 1967).

33. *Quintanilla*, 56 M.J. at 81. The CAAF sought to have the record fully developed as to (1) what actually happened in the confrontations between the military judge and Mr. Bernstein, (2) what transpired in the ex parte conversation, (3) the nature and significance of Mr. Bernstein's alleged threat to testify for the defense, (4) what details defense counsel knew at trial about these occurrences, and (5) whether these occurrences affected the trial and charges involving RW. *Id.*

34. 56 M.J. 87 (2001).

35. *Id.* at 89. The circuit defense counsel had a policy that prohibited his defense counsel from engaging in social activities with opposing counsel during an ongoing trial. *Id*.

36. *Id.*

37. *Id.*

38. *Id.* at 90. Appellant asked the CAAF to use the de novo standard of review. The court noted that only the Seventh Circuit uses such a standard and that the appellant failed to demonstrate why the majority position should be replaced with the minority position. *Id*. at 90-91.

39. *Id*. at 92.

40. Liljeberg v. Health Servs. Acquisition Corp., 486 U.S 847, 864 (1988). In deciding whether to reverse a conviction on the basis of a lack of judicial impartiality, the Supreme Court concluded that "it is appropriate to consider [1] the risk of injustice to the parties in the particular case, [2] the risk that denial of relief will produce injustice in other cases, and [3] the risk of undermining the public's confidence in the judicial process." *Id*.

41. *Butcher*, 56 M.J. at 92.

42. *Id.* at 93.

43. *Id*.

The CAAF again faced the issue of judicial impartiality in *United States v. Jones*.[44] The appellant in *Jones* claimed, for the first time on appeal, that one of the service court judges should have recused himself because, before becoming an appellate court judge, he had been the Director of the Appellate Government Division of the Navy-Marine Corps Appellate Review Activity while appellant's case was on appeal at the service court. During this time, the appellate defense counsel filed numerous motions for enlargements of time. The first seven of these were unopposed by the government. In response to the appellant's last two motions for enlargements of time, the government filed motions in opposition.[45]

The CAAF reviewed the appellate judge's actions for abuse of discretion, and applied the plain error standard because the appellant had not raised the issue until this appeal. Additionally, based on the facts of this case, the CAAF decided to apply the actual prior involvement theory rather than the vertical imputation theory.[46] The former theory, as its name suggests, requires that the attorney in question have had actual involvement in the case. The court cautioned that this was not necessarily the standard it would apply to all such cases.[47]

After scrutinizing the facts of the case under both an appearance of bias standard and an actual bias standard,[48] the CAAF affirmed the lower court's ruling. The CAAF was persuaded by the unrebutted facts that the appellate judge had no direct involvement with appellant's case, and that while he was the Director he gave no guidance on the filing of the opposition motions. After concluding that the filing of such opposition motions was "perfunctory" and "mechanical," and merely contained "rote" assertions, the court ruled that the appellate judge's impartiality could not reasonably be questioned, and therefore he was not required to recuse himself.[49]

Interestingly, this was the second time the CAAF had to rule on an appeal based on the prior position of this appellate judge.[50] Although the court declined to reverse the conviction in that case also, it could not conceal its annoyance at having to address this easily avoidable issue twice. The CAAF noted, for all appellate judges, that this whole issue "can be readily avoided in the future if judges appointed to the lower courts after prior appellate division service would recuse themselves from all cases that were pending during their tenure in the division." [51]

The CAAF was not the only appellate court that dealt with the issue of judicial impartiality over the past year. In *United States v. Reed*,[52] the Army Court of Criminal Appeals (ACCA) addressed the issue of when a military judge would be disqualified from sitting on a case due to a personal financial interest.[53]

In *Reed*, the military judge convicted the appellant pursuant to his pleas of charges stemming from an insurance fraud scheme. The appellant had conspired with a German body shop owner to vandalize the appellant's car. The appellant then filed a false insurance claim with his carrier, United States Automobile Association (USAA). After collecting the insurance money from his false claim, the appellant and the German national decided to expand the scope of their conspiracy by vandalizing other soldier's cars in the appellant's housing area. The appellant would then recommend his co-conspirator's body shop to the victims. In exchange for these business refer-

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44. 55 M.J. 317 (2001).

45. *Id.* at 318.

46. *Id.* at 319.

> The Federal Courts of Appeals have applied two different approaches to evaluating whether a judge who previously served as a U.S. Attorney may preside over a case investigated by the U.S. Attorney's office during his or her tenure as the head of that office. The Ninth Circuit has applied a "vertical imputation" theory under which the knowledge and actions of subordinates are attributed to the U.S. Attorney, holding that "[a] United States District Judge cannot adjudicate a case that he or she as United States Attorney began." United States v. Arnpriester, 37 F.3d 466, 467 (1994). By contrast, the Tenth Circuit has interpreted the phrase "participated as counsel" in [28 U.S.C. § 455(b)(3)] as connoting activity by the individual and has held that a judge is not required to recuse himself absent a specific showing of actual prior involvement with the case. United States v. Gipson, 835 F.2d 1323 (1988), *cert. denied*, 486 U.S. 1044 (1988).

Jones, 55 M.J. at 319.

47. *Id*. at 321.

48. *Id*. at 319 (stating that 28 U.S.C. § 455 governs the recusal of appellate court judges).

49. *Id*. at 320.

50. *See* United States v. Lynn, 54 M.J. 202 (2000).

51. *Jones*, 55 M.J. at 321.

52. 55 M.J. 719 (Army Ct. Crim. App. 2001).

53. *Id*. at 720.

rals, the German national agreed to complete the repairs on the appellant's vehicle.[54]

During the sentencing phase of the court-martial, the trial counsel put on aggravation evidence through the testimony of a USAA claims handler. This claims handler testified that false claims increased company expenses and impaired USAA's competitive advantage. He further testified that because USAA was a member-owned company, fraudulent claims could potentially lower member dividends and raise premiums.[55]

At the conclusion of this testimony, the military judge disclosed to the parties that he had been a member of USAA for about eighteen years. He then gave both sides a chance to conduct voir dire on him based on this disclosure. The military judge stated on the record that he did not feel he was a victim of the appellant's crimes. Additionally, he felt his status as a USAA policyholder had not affected his previous findings nor would it affect his ability to determine a fair and appropriate sentence. When provided the opportunity at trial, both sides declined to challenge the military judge. In his closing argument on sentencing, the trial counsel argued that the military judge should consider the impact that appellant's crimes had on USAA policyholder's by stating that "every member's dividend was reduced in some small degree by this offense."[56]

In deciding the issues raised in this case, the ACCA addressed and quickly dismissed appellant's complaint that the military judge had failed to disclose his policyholder status in a timely manner. The court noted that they found "nothing improper or erroneous by this military judge's failure to disclose his policyholder status until a potential ground for his disqualification unfolded with the government's presentation of (the claim adjuster's) testimony."[57]

The ACCA next turned its attention to the issue of the military judge's impartiality. In addressing this issue, the court first looked at whether actual bias existed as defined under RCM 902(b)(5)(B).[58] After considering the "essentially nonexistent" impact the military judge's decision would have on a company with USAA's tremendous financial assets and numerous members, the ACCA concluded that "the [military judge's] interests could not reasonably be affected by the outcome of the trial."[59]

Although the court declined to find that the appellant had waived the issue of the appearance of bias under RCM 902(a), it did point out that the defense, after conducting voir dire on the military judge about his policyholder status, had declined to challenge him. The ACCA deemed this choice to reflect the defense counsel's "satisfaction that the military judge's impartiality was not compromised by his policyholder status."[60] Instead, the court dealt with the appearance of bias issue briefly by concluding that under the facts of this case, "there was no reasonable basis for questioning the military judge's impartiality."[61]

Interestingly, the ACCA judges astutely raised the issue of their own USAA policyholder status sua sponte.[62] Applying the same analysis as they did to the trial judge, the ACCA judges concluded that they had no financial interests that would be substantially affected by the outcome of the case. As an additional assurance, the judges reaffirmed their pledge to be impartial when deciding the appellant's case.[63]

The lessons military judges can draw from these four cases range from the obvious to the subtle. While the *Reed* and *Jones* cases provide specific, fact-driven guidance, the *Quintanilla* and *Butcher* cases contain broader lessons for military judges. To suggest that the important lessons for military judges to take away from *Quintanilla* are that they should not curse at or "initiate physical contact" with trial witnesses would be unenlightening and insulting. Rather, *Quintanilla* and *Butcher* serve to remind military judges that their conduct during a trial, both in-court and out-of-court, is constantly scrutinized by trial participants and the public. What the military judge might view as steps necessary to ensure the smooth execution of a trial or as an innocent social interaction, others might interpret as a show of partiality to one side in the litigation. Additionally, military

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* at 721.

58. *See id.* at 722. Rule for Courts-Martial 902(b)(5)(B) states that a military judge shall disqualify himself when "the military judge know[s he has] an interest, financial or otherwise, that could be substantially affected by the outcome of the proceeding." MCM, *supra* note 24, R.C.M. 902(b)(5)(B).

59. *Jones*, 55 M.J. at 723.

60. *Id.* at 722.

61. *Id.* at 723.

62. *Id.* at 721 n.3.

63. *Id.*

judges should keep in the forefront of their minds what their role is in the trial process, and knowing this, resist the temptation to overly assist a floundering advocate during trial, no matter how tempting it might be.[64] Canon 3 of the ABA Model Code reminds judges that it is their responsibility to be "patient, dignified and courteous to litigants, jurors, witnesses, lawyers, and others," and to avoid "words or conduct [that would] manifest bias or prejudice."[65]

Prosecutorial Conduct

In *United States v. Adens*,[66] the ACCA examined the issue of prosecutorial misconduct through the sub-issue of nondisclosure of evidence to opposing counsel. Here, the appellant was charged with wrongful use of cocaine. The government's case rested on the testimony of a registered source and the results of a scientific hair analysis done on the appellant that demonstrated chronic cocaine use.[67]

Part of the defense trial strategy involved exploiting an inconsistency in the evidence dealing with the hair sample kits. The government witnesses all testified that only one hair collection box was used to take a sample from the appellant; however, the lab report stated that the lab had received two collection boxes. The defense planned to introduce into evidence a sample hair collection kit that contained only one box, thereby supporting its theory that the sample that tested positive was from an individual other than the appellant.[68]

Unknown to the defense, the government had hair collection kits that came from the same batch as the kit used on the appellant and that contained two collection boxes.[69] The government planned to lie-in-wait while the defense presented its theory at trial, and then use its kits in rebuttal to "torpedo" the defense case.[70]

The defense had previously filed an ongoing discovery request for all real evidence that the government intended to offer on the merits, and for any evidence that may be of benefit to the defense at trial.[71] Although the government had been in possession of these kits before trial, the trial counsel failed to notify the defense of their existence, therefore effectively denying the defense the opportunity to inspect this evidence.

When the military judge questioned the trial counsel about when he had become aware of the existence of these kits, the trial counsel initially responded that it was not until after the defense counsel's opening statement.[72] When later challenged on this assertion, the trial counsel admitted that he had misspoken earlier and that he had actually known about the kits before trial. This belated revelation prompted the military judge to chastise the trial counsel on the record and to refer the matter to the trial counsel's staff judge advocate to investigate whether the trial counsel's "less than candid" comments to the court amounted to a violation of *Army Regulation* (*AR*) *27-26, Rules of Professional Conduct for Lawyers*, Rule 3.3 (candor toward the tribunal).[73]

After analyzing the accused's right to discovery under both constitutional and statutory authority, the ACCA ruled that these kits were discoverable and that the trial counsel had violated the rules of discovery by not notifying the defense of their existence.[74] In reversing the findings and sentence, the court concluded that the trial counsel's actions had violated a substantial right of the accused, that the accused had been materially prejudiced, and that the military judge had failed to give a curative instruction to the panel.[75]

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64. *See* MCM, *supra* note 24, R.C.M. 801(a)(3) discussion. "The military judge should prevent unnecessary waste of time and promote the ascertainment of truth, but must avoid undue interference with the parties' presentations or the appearance of partiality." *Id.*

65. ABA MODEL CODE, CANON 3 (2000 ed.).

66. 56 M.J. 724 (Army Ct. Crim. App. 2002).

67. *Id.* at 725.

68. *Id.*

69. *Id.* at 728.

70. *See id.* at 728-29.

71. *Id.* at 726-27.

72. *Id.* at 729.

73. *Id.* at 730.

74. *Id.* at 733-34. For an in-depth analysis of the discovery issues raised in this case, see Major Christina E. Ekman, *New Developments in the Law of Discovery: When Is Late Too Late, and Does Article 46, UCMJ, Have Teeth?*, ARMY LAW., May 2002, at 18.

75. *Adens*, 56 M.J. at 734-35.

The ACCA did not rest their opinion on the issue of discovery alone. The court used this case as an opportunity to remind trial counsel of their unique ethical obligations as prosecutors. After citing to relevant case law and regulatory guidance that condemn the type of conduct that the trial counsel engaged in, the court closed by providing all trial counsel with the following sage guidance: "Considering the purposes behind the broad military discovery rule and the intent of the rules of professional responsibility, the successful trial counsel will engage in full and open discovery at all times and will scrupulously avoid gamesmanship and trial by ambush, which have no place in Army courts-martial."[76]

It is difficult to draw a lesson from *Adens* for trial counsel that is more salient and succinct than that given by the court in the statement above. Taking a step back to look at the broader role of the prosecutor in the military justice system, all trial counsel will do well to remember that they are "not simply an advocate but [are] responsible to see that the accused is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence,"[77] and that, as prosecutors, they have a special duty as "ministers of justice" not to impede the truth.[78]

Conflict of Interest

In *United States v. Beckley*,[79] the CAAF found that the Office of the Staff Judge Advocate's "heavy-handed" dealings with the civilian defense counsel (CDC) over what it perceived as a conflict of interest were not the cause of the CDC's request to withdraw from representing the accused. Rather, the CDC withdrew because of an actual conflict of interest in his representation of the appellant.[80]

In *Beckley*, the appellant had been ordered by his chain-of-command to have no contact with his estranged wife. He disobeyed this order, prompting his wife to call the military police for intervention. During one of the appellant's attempts to visit his wife at their quarters, a suspicious fire broke out. As a result, both parties became suspects in a Criminal Investigation Command investigation for arson of their quarters.[81]

The appellant's wife had previously retained the CDC's law firm to represent her in a divorce action against the appellant. During her consultation with a lawyer from the CDC's firm, she discussed her marital situation, child custody and support issues, and matters pertaining to the fire. The appellant later consulted and retained the CDC to represent him in his criminal case. When the CDC discovered this conflict of interest, his firm returned part of the wife's money to her and informed her that they could no longer represent her; however, the appellant's wife refused to waive any conflict of interest caused by the firm's previous representation of her.[82]

When this conflict came to the government's attention, the chief of military justice informed the CDC that if he refused to withdraw voluntarily from the appellant's case, the government would file a grievance with The Judge Advocate General of the Army and with the CDC's State Bar.[83]

In analyzing the ethical issues raised in this case, the CAAF cited Rule 1.7 of *AR 27-26*, which states: "A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless . . . each client consents after consultation."[84] Although the CAAF did not go into a detailed analysis of how the firm's prior representation would be "directly adverse" to the appellant, the trial judge did. He explained to the appellant, on the record, that the CDC

> may not be able to cross-examine appellant's wife if she was called to testify, to conduct voir dire on anything dealing with his wife's testimony, to present evidence that would discredit appellant's wife or impeach her testimony, and to argue in opening and closing statements "any matters that have been presented concerning" appellant's wife.[85]

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76. *Id*. at 735.

77. AR 27-26, *supra* note 2, R. 3.8 cmt. (addressing the special responsibilities of trial counsel).

78. Bennett L. Gershman, *The Prosecutor's Duty to Truth*, 14 GEO. J. LEGAL ETHICS 309 (2001).

79. 55 M.J. 15 (2001).

80. *Id*. at 25.

81. *Id*. at 16.

82. *Id*. at 17.

83. *Id*. at 18.

84. *Id*. at 23 (quoting AR 27-26, *supra* note 2, R. 1.7).

85. *Id*.

Despite these warnings, the appellant still wished to have the CDC represent him at trial. The CDC eventually asked that the military judge allow him to withdraw from the case, and after a lengthy colloquy on the record with the CDC as to his motivation for seeking to withdraw, the military judge granted this request.[86]

The appellant based his appeal on the fact that he was denied his choice of counsel under the Sixth Amendment, and that his CDC had withdrawn due to threats from the local OSJA, and not because of any actual ethical concerns. The CAAF disagreed with the appellant's claim. Based on the nature of the attorney-client relationship between the appellant's wife and the CDC's law firm, her entanglement in the criminal charges facing the appellant, and her refusal to waive any conflict, the court concluded that "[the CDC] had an actual conflict of interest for which he was required to withdraw."[87]

The Comment to Rule 1.7 (Conflict of Interest: General Rule), *AR 27-26*, reminds practitioners that "[l]oyalty is an essential element in the lawyer's relationship to a client" and that this loyalty is "impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests."[88] All counsel owe their clients the core duty of being their zealous advocate. As such, counsel must be constantly vigilant to avoid conflicts that can restrict or undermine this duty.

Ineffective Assistance of Counsel

In *United States v. Morris*,[89] the appellant claimed that his defense counsel was ineffective because his defense counsel was in an "inactive status" with his state bar at the time of trial. The appellant further claimed that his defense counsel "perjured himself" when he asserted on the record that he was qualified under Article 27(b), UCMJ.[90]

The Navy-Marine Court of Criminal Appeals (NMCCA) reaffirmed the position previously taken by the CAAF that an "inactive bar status of a judge advocate does not in and of itself constitute a deprivation of the right to counsel."[91] In *Morris*, the NMCCA noted that there was no evidence that the defense counsel was not in good standing with his state bar, but that, in fact, the letter the appellant submitted from the defense counsel's state bar indicated that the defense counsel had faithfully complied with the state's bi-annual registration requirements.[92]

In tersely dismissing the appellant's claim that his defense counsel had perjured himself and perpetrated a fraud on the court, the NMCCA stated that it found "*absolutely no support* for [this] allegation."[93] In doing so, the court could not hide its distain for the appellate defense counsel's flippant and baseless attack on the trial defense counsel's ethical conduct. In addressing this ethical allegation, the NMCCA issued forth its own warning to all counsel:

> We caution against making allegations that trial participants committed criminal and ethical violations absent solid proof that such violations occurred. Such charges are very serious and should not be alleged in a hyperbolic fashion as the appellate defense counsel has done in this case. Indeed, to do so comes dangerously close to an ethical violation. *See* Rules of Professional Conduct, Candor Toward the Tribunal.[94]

86. *Id.* at 18-23.

87. *Id.* at 25.

88. AR 27-26, *supra* note 2, R. 1.7 cmt.

89. 54 M.J. 898 (N-M. Ct. Crim. App. 2001).

90. *Id*. at 903. Article 27(b), UCMJ, states:

> Trial counsel or defense counsel detailed for a general court-martial—
>
> (1) must be a judge advocate who is a graduate of an accredited law school or is a member of the bar of a Federal court or of the highest court of a State; or must be a member of the bar of a Federal court or of the highest court of a State; and
>
> (2) must be certified as competent to perform such duties by the Judge Advocate General of the armed force of which he is a member.

UCMJ art. 27(b) (2000).

91. *Morris*, 54 M.J. at 903 (citing United States v. Steele, 53 M.J. 274, 278 (2002) (holding that a CDC practicing before a court-martial was not per se ineffective due to his inactive state bar status)).

92. *Id.*

93. *Id*.

94. *Id.* at 903 n.7.

The appellant in *United States v. Oliver*[95] was found guilty of several charges stemming from his alteration of a hotel receipt and subsequent submission of a false claim against the government. As part of their criminal investigation, agents from the Naval Criminal Investigative Service (NCIS) interviewed the appellant. After waiving his rights, the appellant made several incriminating admissions. When the agents asked the appellant if he would reduce the substance of the interview to writing, he refused and requested a lawyer.[96]

During the appellant's trial, one of the NCIS special agents testified not only about the content of the interview, but also about the appellant's refusal to sign a written statement and his request for a lawyer. The defense counsel did not object to this testimony, nor did the military judge sua sponte interject or give a curative instruction.[97]

The NMCCA found that the agent's latter testimony was obvious error. In doing so, the court found that the defense counsel was "deficient" when he failed to object to "clearly inadmissible" evidence. Additionally, the NMCCA could "discern no possible strategic or tactical reason not to object."[98] Based on the other overwhelming evidence of the appellant's guilt, however, the court concluded that the appellant was not prejudiced, and therefore it declined to grant any relief on this ground.[99]

Oliver serves to remind defense counsel not only of the importance of ensuring that they are well-versed on the rules of evidence, but also of remaining attentive and vigilant throughout the trial. During trial, as trial counsel are attempting to admit evidence, defense counsel should ask themselves two questions: are there legal grounds for keeping the evidence out, and if there are, are there strategic reasons to let the evidence in anyway? The NMCCA answered these questions for the defense counsel in *Oliver* with "yes" and "no," respectively.

The CAAF examined the issue of ineffective assistance of counsel in the post-trial phase of a court-martial in *United States v. Gilley.*[100] In *Gilley,* the appellant was convicted of six specifications of indecent assault and one specification of assault and battery of his three stepchildren.[101] In his appeal, the appellant claimed that his defense counsel was ineffective because his defense counsel submitted inflammatory letters from the appellant's family members to the convening authority as part of the appellant's post-trial clemency matters,[102] without consulting the appellant.[103]

The most vitriolic of the letters came from the appellant's father. The appellant's father referred to the appellant's ex-wife and stepchildren as the "no good whore and her bastard kids," and the wife individually as "a lying tramp whore who wouldn't know a decent person if they kicked her in the ass and give [sic] her a new set of brains, which she doesn't have."[104] He derided the court-martial proceedings as a "kangaroo court."[105] Additionally, he accused the Air Force of contriving the court-martial as a way to save money by not having to pay his son retirement pay.[106] He referred to the military, Air Force lawyers, the jury, the judge, and the Air Force's "high ranks" collectively as a "bunch of low-lifed [sic] bastards," "dumb asses," and "a chicken-shit bunch."[107] Finally, he thought they all should face a "firing squad," and he hoped that they would "burn in hell."[108]

In his affidavit, the appellant claimed that his defense counsel never discussed the content of his father's letter with him,

95. 56 M.J. 695 (N-M. Ct. Crim. App. 2001).

96. *Id.* at 698.

97. *Id.* at 700.

98. *Id.* at 703.

99. *Id.* at 704-05.

100. 56 M.J. 113 (2001).

101. *Id.* at 114. The appellant was sentenced to a dishonorable discharge, confinement for ten years, total forfeiture of pay and allowances, and reduction to E-1. The convening authority approved the adjudged sentence. *Id.*

102. *See generally* MCM, *supra* note 24, R.C.M. 1105-1106.

103. *Gilley,* 56 M.J. at 124.

104. *Id.* at 119 (brackets in original).

105. *Id.*

106. *Id.* The appellant's father refers to his son's "18 years of service" in the letter. *Id.*

107. *Id.* (brackets in original).

108. *Id.*

other than to inform him that the letter contained some curse words and that his defense counsel was trying to get the appellant's father to rewrite it. Additionally, the appellant stated that he never directed his counsel to include the letter in his clemency package.[109]

The CAAF described the father's letter variously as "acerbic," "a scathing diatribe," and a "scathing denouncement of the system and its participants."[110] Although the court reaffirmed that tactical and strategic post-trial decisions are within the control of the defense counsel, it could find no possible "positive spin" that the defense could have placed on the father's letter. The court also found that the inclusion of the appellant's mother and brother's negative letters compounded the prejudicial impact of the father's.[111]

After applying the test for effectiveness of counsel announced in *United States v. Polk*[112] to the defense counsel's actions and facts of this case, the CAAF found that all three of the *Polk* prongs had been met.[113] In reaching its decision that the appellant had been denied effective assistance of counsel, the court concluded that the defense counsel had failed to evaluate the letters to determine if they were appropriate to submit to the convening authority. Also, they could find no reasonable explanation for the inclusion of these letters, and the decision to use them fell "measurably below the performance . . . [ordinarily expected] of fallible lawyers."[114] Finally, the CAAF determined that by sending these letters to the convening authority, the defense counsel "may have dashed appellant's 'last best chance' for sentencing relief," and that absent these letters, the appellant might have been granted some clemency.[115]

Gilley illustrates for defense counsel the importance of fulfilling the ethical duties of competence and communication that they owe to their clients. An essential part of competently handling a case entails thoroughness, preparation, and the employment of "methods and procedures" appropriate to achieve the goals of the representation.[116] With post-trial submissions, this means defense counsel should carefully review all documents they plan to submit to ensure the submissions will individually and collectively have a positive effect on their clients' chances for clemency.

The duty of communication is fulfilled when lawyers keep their clients informed about the status of their case so that the client can make informed decisions about the objectives of the representation and the methods best suited to achieve them.[117] This duty is often difficult enough to achieve pre-trial for busy defense counsel. It becomes even more difficult when the trial is over and the defense counsel's attention is naturally focused on the next trial on the docket. This diminished focus on post-trial matters is often compounded when the client is in confinement and difficult to contact. The appellate courts, however, have made it clear that the ethical standard owed to post-trial clients is not lower than that owed to pre-trial clients.[118]

Defense counsel should make a habit of calling their post-trial clients shortly after their arrival to confinement to check on them, answer any questions, and discuss plans for seeking

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109. *Id.* at 120.

110. *Id.* at 124.

111. *Id.*

112. 32 M.J. 150 (C.M.A. 1991).

113. *Gilley*, 56 M.J. at 124 (construing *Polk*, 32 M.J. at 153). The court adopted the following three-pronged test to determine if the presumption of counsel competency had been overcome:

> (1) Are appellant's allegations true; if so, "is there a reasonable explanation for counsel's actions"?
>
> (2) If the allegations are true, did defense counsel's level of advocacy fall "measurably below the performance . . . [ordinarily expected] of fallible lawyers"? and
>
> (3) If a defense counsel was ineffective, is there "a reasonable probability that, absent the errors" there would have been a different result?

Id. (quoting *Polk*, 32 M.J. at 153) (brackets in original).

114. *Id*. (quoting *Polk*, 32 M.J. at 153) (brackets in original).

115. *Id.* at 125.

116. AR 27-26, *supra* note 2, R. 1.1. "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation." *Id*.

117. *Id.* R. 1.4. This Rule states: "(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information. (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions about the representation." *Id.*

118. *See* United States v. Carter, 40 M.J. 102 (C.M.A. 1994); United States v. Fluellen, 40 M.J. 96 (C.M.A. 1994).

clemency. Once defense counsel have completed their proposed post-trial submissions, they should send them, complete with all enclosures, to their clients for review and approval. Any disagreements over their content can hopefully be worked out over the phone; however, like testifying at trial, it is the client who has the ultimate say in what matters he wants and does not want submitted to the convening authority on his behalf.[119]

Conclusion

While reading through the strange and entertaining facts contained in this year's professional responsibility cases, counsel and judges should not lose sight of the important lessons to be gleaned from them. Baseball great Yogi Berra once said, "You can observe a lot by watching."[120] Counsel and military judges should apply this maxim when reading professional responsibility cases and articles.[121] Learning from the missteps of others can help current counsel and judges avoid the pitfalls that ensnared their predecessors and can help to ensure that the rights of the client, as well as the integrity of the military justice system, are maintained.

119. *See* United States v. Hicks, 47 M.J. 90 (1997); United States v. Lewis, 42 M.J. 1 (1995).

120. BARTLETT, *supra* note 1, at 754 n.12.

121. Major Charles H. Rose III, *Professional Responsibility: Peering Over the Shoulder of Trial Attorneys*, ARMY LAW., May 2001, at 11.

Recent Developments in Unlawful Command Influence: "I really didn't say everything I said!"[1]

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Like last year,[2] there is good news in the world of unlawful command influence (UCI). All was quiet on the UCI front over the last year. Of course, quiet is relative. Although the Court of Appeals for the Armed Forces (CAAF) did not see much UCI action last year, significant UCI issues are winding their way along the appellate road, having passed through the service courts' gate posts. Of particular note are two issues: implied bias and pretrial statements. This article addresses these issues in the context of *United States v. Stoneman*,[3] *United States v. Weisen*,[4] and *United States v. Simpson*.[5]

Implied Bias: *Stoneman* and *Weisen*

The public became the center of discussion this past year in the area of UCI, particularly concerning implied bias of panel members. Although covered in detail in last year's symposium,[6] the Army Court of Criminal Appeal's (ACCA's) decision in *United States v. Stoneman*[7] regained significance as a UCI case because the CAAF granted review,[8] and more importantly, because the CAAF decided *United States v. Wiesen*.[9]

What is implied bias?[10] More specifically, can court members ignore comments of superiors regarding military justice matters? First, a distinction must be made. Actual bias is viewed through the eyes of the court members, while implied bias is viewed through the objective eyes of the public focusing on the appearance of fairness of the military justice system.[11] The trial judge in *Stoneman* noted the CAAF's holding in *United States v. Youngblood*,[12] which recognized the inherent balancing act between "the commander's responsibility for discipline and the 'subtle pressures that can be brought to bear by command in military society.'"[13] These "subtle pressures" are at the heart of the analysis when determining the implied bias of a court member.

The CAAF has long recognized the principle of implied bias.[14] The court has also noted that the principle gains more scrutiny if grounded in a UCI claim.[15] An early case illustrative

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1. YOGI BERRA, THE YOGI BOOK 9 (1998). Pretrial statements made by convening authorities and senior military officials concerning military justice issues are often cloaked with the appearance of command influence. Thus, individuals find themselves in the unenviable position of having to retract or explain their statements, much like Yogi Berra did when asked about famous quotes attributed to him.

2. *See* Colonel Robert A. Burrell, *Recent Developments in Unlawful Command Influence*, ARMY LAW., May 2001, at 1.

3. 54 M.J. 664 (Army Ct. Crim. App. 2000).

4. 56 M.J. 172 (2001).

5. 55 M.J. 674 (Army Ct. Crim. App. 2001).

6. *See* Burrell, *supra* note 2, at 7-8.

7. 54 M.J. at 664.

8. United States v. Stoneman, 56 M.J. 147 (2001).

9. 56 M.J. at 177.

10. *See generally* MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 912 (2000).

11. United States v. Napoleon, 46 M.J. 279, 283 (1997) (citing United States v. Daulton, 45 M.J. 212 (1996); United States v. Dale, 42 M.J. 384, 386 (1995)).

12. 47 M.J. 338 (1997).

13. *Stoneman*, 54 M.J. at 668 (citing *Youngblood*, 47 M.J. at 341).

14. United States v. Harris, 13 M.J. 288 (C.M.A. 1982).

15. *Youngblood*, 47 M.J. at 341.

of implied bias based on UCI is *United States v. Zagar*.[16] In *Zagar*, the command's staff judge advocate (SJA) briefed the entire court-martial panel the day before trial. During voir dire, court members described the briefing as an "orientation about the new court-martial manual"[17] and stated that the SJA had explained that the case had been through three levels of review, thus, "the man accused had done this crime."[18] Although the court members unequivocally denied any bias as a result of the SJA's briefing, the Court of Military Appeals disagreed. The court rejected the contention that it was bound by the members' voir dire responses.[19] Relying on federal implied bias case law, the court reasoned that "jurors are human and not always conscious to what extent they are in fact biased or prejudiced and their inward sentiments can not always be ascertained."[20]

Trial practitioners and SJAs should remember the facts of *Stoneman*. The brigade commander declared war on command and leadership failures. In an e-mail message to the entire brigade leadership, he stated:

> I'm sick of leaders getting DUIs, abusing their position, being lazy. . . . I am sick of hearing about leaders who are morally and spiritually bankrupt. I am declaring war on leaders like this. . . . If leaders don't lead by example, and practice self-discipline, then the very soul of our Army is at risk. No more PSGs getting DUIs, no more NCOs raping female soldiers, no more E7s coming up "hot" for coke, no more stolen equipment, no more "lost" equipment . . .—all of this is BULLSHIT, and I'm going to CRUSH leaders who fail to lead by example, both on and off duty.[21]

Although aimed at a noteworthy objective, the brigade commander's method and word choice to communicate his frustrations to the entire brigade leadership caused Specialist (SPC) Stoneman to raise several concerns at his subsequent court-martial. The military judge denied the motion to stay the proceedings until all members of the brigade were removed from the panel.[22] In doing so, the military judge disagreed with the defense assertion that the panel members were tainted with implied bias. The military judge cited the responses of the members during voir dire. She specifically addressed implied bias from the public's view: "I think [the public] would see that these members represent the finest traditions of the United States Army as court members . . . and I think everyone heard [the members] say loudly and clearly that they will discharge their responsibilities as court members and vote in accordance with their conscience."[23]

In *United States v. Weisen*,[24] the CAAF found that the military judge had abused his discretion when he denied a defense challenge for cause against the president of a court-martial.[25] The president of the ten-member panel was the brigade commander for six of the members.[26] The defense counsel exercised his peremptory challenge against the panel president while preserving the issue for appeal.[27] During voir dire, the members stated under oath that they would not be influenced by the fact that their commander was the president, and the president swore he would not expect deference in the deliberation room. Accordingly, the defense did not challenge the president or the rest of the panel on grounds of actual bias. The defense, however, did challenge the panel composition based on implied bias. Thus, the CAAF viewed the issue in *Wiesen* as one of "public perception and the appearance of fairness in the military justice system."[28]

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16. 18 C.M.R. 34 (C.M.A. 1955).

17. *Id*. at 37.

18. *Id*. at 36.

19. *Id*. at 38.

20. *Id*. (citing Stone v. United States, 113 F.2d 70 (6th Cir. 1940)). Several Supreme Court cases also discuss the doctrine of implied bias. *See, e.g*., Smith v. Phillips, 455 U.S. 209 (1982); Dennis v. United States, 339 U.S. 162 (1955); Crawford v. United States, 212 U.S. 183 (1909). Other military cases discuss the doctrine as well. *See, e.g*., United States v. Armstrong, 54 M.J. 51 (2000); United States v. Rome, 47 M.J. 467 (1998); United States v. Gerlich, 45 M.J. 309 (1996); United States v. Nigro, 28 M.J. 415 (C.M.A. 1989).

21. United States v. Stoneman, 56 M.J. 674, 676 (Army Ct. Crim. App. 2000).

22. *Id*. at 666.

23. *Id*. at 668.

24. 56 M.J. 172 (2001).

25. *Id*. at 177.

26. *Id*. at 173-74.

27. *Id*. at 174.

Judge Baker, writing for the majority, stated that Weisen's court-martial created the "wrong atmosphere" in the eye of the public.[29] The CAAF determined that a member of the public would have "serious doubts" with the military justice system when a brigade commander could be the panel president with sufficient members of his command on the panel to comprise enough votes for a finding of guilty.[30] In fact, the majority further stated that "public perception of the military justice system may nonetheless be affected by more subtle aspects of military life" and "an objective public might ask to what extent, if any, does deference (also known as respect) for senior officers come into play?"[31]

Although not raised in a UCI context, *Weisen* raises implied bias issues that the CAAF may address in its forthcoming review of *Stoneman*. If an objective member of the American public (1) read SPC Stoneman's brigade commander's e-mail message expressing the commander's frustration, (2) knew of the subsequent leader training attended by several panel members on the same subject, (3) understood five members of the brigade were empanelled, and (4) knew this occurred about thirty days before SPC Stoneman's court-martial, would that member of the public have "serious doubts" about the military justice system? The answer, at least in terms of *Weisen*, seems to be yes.

Pretrial Statements: *United States v. Simpson*

In July 2001 the ACCA decided the well-publicized Aberdeen Proving Ground (APG), Maryland, case of *United States v. Simpson*.[32] Among the significant issues raised in the case were unlawful influence claims resulting from "extensive" pretrial statements made by high-ranking individuals.[33]

Charges involving sexual misconduct with trainees were preferred against Staff Sergeant (SSG) Delmar Simpson, a drill sergeant, on 8 October 1996. The APG command issued a press release outlining an investigation into allegations of sexual activity between cadre (drill sergeants and a commissioned officer) and trainees in an advanced individual training unit.[34] The command issued the release at a press conference in which the Commander, U.S. Army Ordnance Center and School, announced that the misbehavior was "the worst thing I've ever come across in thirty years of service."[35]

The case became a lightning rod for a "nationwide media blitz."[36] The Secretary of Defense, the Secretary of the Army, the Assistant Secretary of the Army for Manpower and Reserve Affairs (ASA (M&RA)), the Army Chief of Staff, and the Chairman of the Joint Chiefs of Staff made public statements regarding the APG cases.[37] Among the statements was one by the ASA (M&RA) in which she stated that there was no such thing as consensual sex between a drill sergeant and a trainee.[38] Additionally, the Secretary of the Army ordered the Department of the Army Inspector General to investigate command responsibility for the "sex scandal," and he created a Senior Review Panel to examine gender relations in the Army, both directives occurring before SSG Simpson's court-martial.[39] Further, during a congressional delegation's visit to APG, several members of Congress issued statements, including a Maryland Senator who demanded that the Secretaries of Defense and the Army "severely" punish wrongdoers.[40]

At a two-day pretrial hearing four and a half months after the press conference, the defense was unable to present any evidence of actual UCI.[41] The military judge then allowed "vigorous and extensive" voir dire of the court members.[42] Both the government and defense explored possible taint stemming from

28. *Id*. at 175.

29. *Id*. at 176.

30. *Id*.

31. *Id*.

32. 55 M.J. 674 (Army Ct. Crim. App. 2001).

33. *Id*. at 678-79. Unlawful command influence issues and evidence comprised four volumes of the record of trial. The evidence included newspaper articles, transcripts of press conferences, letters from members of Congress, videotaped news reports, interviews of senior military officials, and editorial cartoons. *Id*. at 679.

34. *Id*.

35. *Id*. at 680. The commander, a major general, was not the general court-martial convening authority. *Id.*

36. *Id*.

37. *Id*.

38. *Id*. at 688.

39. *Id*. at 685.

40. *Id*. at 682. The defense produced no evidence that the Senator's demand was communicated through the chain of command to the general court-martial convening authority, accused's chain of command, or court members. *Id*.

pretrial statements, media reports, and influence from superiors. Each member stated during individual voir dire that the member had the "ability to decide the case based on the evidence, [and all the members] denied feeling influenced or pressured."[43] After reaching findings of guilty and pursuant to Simpson's pleas, the members sentenced Simpson to a dishonorable discharge, confinement for twenty-five years, forfeiture of all pay and allowances, and reduction to the lowest enlisted grade.[44]

The ACCA decided the issues raised by SSG Simpson on appeal using the *Biagase-Stombaugh* factors.[45] The court first looked at the allegation that the actions of the Secretary of the Army raised the issue of UCI. The court rejected this assertion out of hand. The court found the Secretary of the Army's directives did not meet the first prong of the *Biagase-Stombaugh* test because neither directive was UCI.[46]

The court next turned its attention to the pretrial statements made by senior ranking military members and reviewed these statements in light of the proximate cause factor.[47] The court granted the defense's assertion that pretrial publicity, if "engineered" by those with the "mantle of command authority" with the intent to orchestrate a certain result, may be UCI.[48] Publicity by itself, however, is not a "get out of jail free" card.[49] The court noted that SSG Simpson's claims were general and not tied to specific results at the court-martial.[50] Accordingly, the defense failed to show the nexus between the pretrial statements and the outcome at trial. The court, in fact, noted that the "vast majority" of the pretrial statements made by senior officials were "balanced and fair."[51]

The ACCA then looked at potential UCI in the charging process and the court-martial itself.[52] The defense did not produce, nor did the court find, any evidence of command influence tainting the preferral or referral process as a result of pretrial statements or other superior influence in the case.[53] The court additionally addressed the possibility of apparent UCI on the referral process. After reviewing the testimony of the special and general courts-martial convening authorities, the court found no nexus between the statements of the senior officials and the decision to refer the case to a general court-martial.[54]

As stated earlier, the military judge allowed the defense to extensively voir dire potential panel members. The members "disavowed" any influence as a result of the pretrial publicity and pretrial statements.[55] Not confined to the panel members' "self-proclaimed impartiality," the ACCA looked for evidence of UCI and its impact on the members.[56] The court noted several factors, including deliberation time, frequent panel questions of witnesses, verdicts of not guilty to several

41. *Id*. at 683.

42. *Id*. at 684.

43. *Id*.

44. *Id*. at 678.

45. *Id*. at 684-86 (citing United States v. Biagase, 50 M.J. 143 (1999); United States v. Stombaugh, 40 M.J. 208 (C.M.A. 1994)). The methodology for review of UCI issues at trial is that "the defense must: (1) show facts which, if true, constitute unlawful command influence; (2) show that the proceedings [will be] unfair; and (3) that the unlawful command influence [will be] the cause of the unfairness." *Id*. at 685-86 (quoting *Biagase*, 50 M.J. at 150 (citing *Stombaugh*, 40 M.J. at 213)). The burden then shifts to the government to "prove beyond a reasonable doubt: (1) that the predicate facts do not exist; (2) that the facts [exist but] do not constitute unlawful command influence; or (3) that the unlawful command influence . . . [will not] affect the findings and sentence." *Id*. at 686 (quoting *Biagase*, 50 M.J. at 151). The appellate review of UCI issues closely relates to the *Biagase* trial methodology in that it uses the same factors while applying a retrospective view of unfairness and cause, as opposed to the prospective *Biagase* view. *See id.* at 684-85.

46. *Id*. 685-86. Judge Vowell, writing for the court, stated that "transmuting [the Secretary of the Army's] appropriate concern and action into unlawful command influence requires alchemy the appellant does not possess." *Id*. at 686.

47. *Id*.

48. *Id*. at 687.

49. *Id*. (citing United States v. Calley, 46 C.M.R. 1131, 1156-57 (1973)).

50. *Id*. at 686.

51. *Id*. at 687.

52. *Id*. at 689.

53. *Id*. Charges were preferred about a month before the initial press conference announcing the investigation. *Id*.

54. *Id*.

55. *Id*. at 690.

specifications, and a "lenient" sentence, in reaching its determination that UCI did not taint the panel box.[57]

Conclusion

What do *Stoneman*, *Weisen*, and *Simpson* provide trial practitioners facing UCI issues? Foremost, human emotions and high-profile, high-interest courts-martial will always cultivate pretrial statements. From the defense perspective, *Stoneman* and *Simpson* illustrate the inherent difficulties for defense counsel to meet the burden in *Biagase*. Absent a stroke of luck, the defense will likely be left holding the bag after panel members proclaim complete freedom from bias, intimidation, and influence. This may be true, even if apparently egregious pretrial statements made by superiors are swirling around the court-martial. Defense counsel should reach into the bag and pull out the *Weisen* implied bias argument used successfully in the "non-unlawful command influence" case. Counsel should argue through the "eyes of the public" and must be prepared to articulate a tangible unfairness in the court-martial.

Concurrently, government counsel must be aware that emotions and interests are imbedded in the military justice system. Given this fact, trial counsel and SJAs should assist commanders and convening authorities with resisting the temptation to speak about a case making its way though the system. Counsel should advise commanders of the uncomfortable position of explaining to troops and subordinate commanders what the commanders really meant. In the same light, government counsel must also understand the need for higher headquarters to gather information about potential high-interest cases. Counsel and SJAs must protect the military justice system when this occurs by ensuring that information only flows upward, with no directives or "suggestions" flowing downhill. This precaution further insulates subordinate commanders and potential panel members, thereby reducing the potential for UCI.

56. *Id*. (citing United States v. Calley, 46 C.M.R. 1131, 1160-61 (A.C.M.R. 1973)).

57. *Id*.

New Developments in the Law of Discovery: *When Is Late Too Late, and Does Article 46, UCMJ, Have Teeth?*

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"The prudent prosecutor will resolve doubtful questions in favor of disclosure." . . . Such disclosure will serve to justify the trust in the prosecutor as "the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done."[1]

Introduction

One of the hallmarks of our civilian justice system is the "special role played by the American prosecutor in the search for truth in criminal trials."[2] In the military criminal justice system, this special role is even more pronounced. Article 46, Uniform Code of Military Justice (UCMJ), mandates equal access to the evidence, placing an additional burden on the government.[3] Rule for Courts-Martial (RCM) 701 implements Article 46.[4] The purpose of the military's broad discovery rules, and specifically RCM 701, is "to promote full discovery to the maximum extent possible consistent with legitimate needs for nondisclosure [for example, Military Rule of Evidence (MRE)] 301; Section V] and to eliminate 'gamesmanship' from the discovery process."[5]

A trial counsel's good faith is generally irrelevant when a discovery issue arises. The best way for trial counsel to avoid potential disaster is to understand and follow both the constitutional and the statutory rules. Likewise, the defense counsel who understands these rules will be better equipped to represent the military accused effectively throughout the court-martial process. To this end, both trial and defense counsel, *particularly* the trial counsel, must understand significant new developments in the law of discovery. This article endeavors to assist counsel in understand these new developments and their implications for the military trial practitioner.

In any court-martial, the constitutional due process discovery requirements set out in the *Brady v. Maryland*[6] line of cases apply, as do Article 46, UCMJ; RCM 701; RCM 703; and other discovery rules triggered by particular facts and circumstances. A critical distinction in this area of court-martial practice is the difference between the constitutional discovery requirements and the statutory requirements that flow from Article 46, as reflected in RCM 701 and RCM 703.

This article first touches on the constitutional analysis, principally embodied in *Brady v. Maryland*, focusing on *Leka v. Portuondo*,[7] a federal court of appeals case addressing time requirements imposed by the *Brady* line of cases on government disclosure of favorable evidence. Second, to highlight the distinction between constitutional and statutory discovery requirements, this article addresses the impact of Article 46 on military discovery practice, focusing on a split between the Air Force and Army Courts of Criminal Appeals, as well as a Court of Appeals for the Armed Forces (CAAF) interlocutory order that sheds some light on the potential resolution of this conflict.

When Is Late Too Late—Timeliness of *Brady* Disclosures

According to the Supreme Court, a *Brady* due process violation has three important components. First, the evidence at issue must have been favorable to the defendant.[8] Favorable evidence is evidence that either negates guilt, reduces the

1. Kyles v. Whitley, 514 U.S. 419, 439 (1995) (quoting United States v. Agurs, 427 U.S. 97, 108 (1976); Berger v. United States, 295 U.S. 78, 88 (1935)).

2. Strickler v. Green, 527 U.S. 263, 281 (1999).

3. UCMJ art. 46 (2000). "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." *Id*. (emphasis added).

4. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 701(a)(6) (2000) [hereinafter MCM].

5. *Id*. R.C.M. 701 analysis, app. 21, at A21-32.

6. 373 U.S. 83 (1963).

7. 257 F.3d 89 (2d Cir. 2001).

8. *Brady*, 373 U.S. at 87.

degree of guilt, or reduces the punishment that should be imposed in a given case.[9] Such evidence can be either exculpatory or impeachment evidence.[10] Second, the government must have failed to disclose the favorable evidence.[11] Third, this nondisclosure must have prejudiced the defendant; that is, the undisclosed evidence must have been material to either guilt or punishment.[12]

The *Brady* rule attempts to ensure that defendants in the United States receive fair trials.[13] *Brady* requires the government to disclose favorable evidence, regardless of whether the defense has requested it.[14] This requirement also imposes an affirmative duty on the prosecutor to search for such evidence.[15] Although the *Brady* line of cases discusses, in depth, concepts such as materiality, favorable evidence, and triggers for the disclosure requirement, it has never established a particular timeline. *Leka v. Portuondo*[16] provides some helpful insight into this issue.

Leka v. Portuondo

In *Leka v. Portuondo*, the Court of Appeals for the Second Circuit tackled the issue of the timeliness for *Brady* disclosures.[17] The Supreme Court of New York, Kings County, convicted the appellant of one count of second-degree murder and two counts of criminal possession of a weapon for the 12 February 1988 shooting death of his relative, Rahman Feratia.[18] The State's case centered on the eyewitness testimony of two people who happened to be walking down the street when the shooting began.[19] According to the appellant's *Brady* claim, there were three other eyewitnesses, all of whom the police had interviewed, and whose stories contradicted the couple's testimony. One of these three witnesses was an off-duty New York City Police Department officer, Wilfredo Garcia.[20] Officer Garcia's testimony would have been favorable to the defense theory of misidentification;[21] however, despite the nature of Officer Garcia's potential testimony, the State did not disclose Officer Garcia's name until three business days before trial. The defense had requested discovery twenty-two months before the scheduled trial date.[22] This timeline became critical to the court's analysis.[23]

The court began its analysis by applying the first prong of *Brady*; that is, by determining whether the undisclosed evidence was favorable to the defense. In this case, Officer Garcia's potential testimony was favorable to the defense.[24] The court then applied the second *Brady* prong; that is, the court determined whether the government failed to disclose this favorable evidence, even though it ultimately disclosed Officer Garcia's name to the defense. In answering this question, the court considered both the substance and the timeliness of the

9. *Id*. at 87, 88.

10. United States v. Bagley, 473 U.S. 667, 676 (1985); Giglio v. United States, 405 U.S. 150, 154 (1972).

11. *Brady*, 373 U.S. at 87.

12. *Id*; *see also* Strickler v. Green, 527 U.S. 263 (1999).

13. *Bagley*, 473 U.S. at 675.

14. United States v. Agurs, 427 U.S. 97 (1976).

15. Kyles v. Whitley, 514 U.S. 419 (1995).

16. 257 F.3d 89 (2d Cir. 2001).

17. *Id*.

18. *Id*. at 91. At the time of the shooting, the victim and the appellant were involved in a bitter child custody dispute over the victim's two grandchildren. *Id*.

19. *Id*. at 91-92. As the couple walked down the street, they saw a car pull up, and the shooting started. The woman had noticed the car just a few moments earlier and remembered the driver because the driver's face was bandaged. She later identified the appellant as the passenger. Upon hearing the shots, the couple dove behind some parked cars. The man lifted his head twice to see what was happening. The first time, he saw an arm holding a gun sticking out of the car's passenger window. The second time, he saw a man, whom he later identified as the appellant, standing in the street shooting downward. *Id*.

20. *Id*. at 92. Although the defense identified three witnesses who were not disclosed, the court limited its opinion to the State's *Brady* violation *vis-à-vis* Officer Garcia. *Id*. at 97-98.

21. *Id*. at 99. Officer Garcia was in his second floor apartment, looking out his window for a friend who was coming over. When he heard the gunfire, he looked in the direction of the sound and saw a white car pull up in front of a man in the street. Officer Garcia said that he saw muzzle flashes coming from the passenger side of the vehicle and saw a bus drive around the white car. He ran into his bedroom to get his off-duty weapon and heard other shots. He looked out the window again and saw more muzzle flashes coming from the passenger side of the white car. He ran out of his apartment and heard more gunfire as he ran down the steps of his building. By the time Officer Garcia got to the main floor of the building, the shooting was over; by the time he left the building, the white car was gone. This took about fifteen to twenty seconds. Outside on the street, Officer Garcia saw a man lying in front of his car, a black revolver next to his body. *Id*. at 92-93.

22. *Id*. at 93.

disclosure. The State argued that disclosure of Officer Garcia's name and address alone, although close to the trial date, gave the defense enough information and time to investigate adequately. The court disagreed.[25] From the beginning of the case, the prosecutor knew what Officer Garcia had seen. Based on this fact, as well as the favorable nature of the evidence, the court decided that the State had suppressed information that it was required to turn over to the defense.[26]

In discussing the issue of timely disclosure, the court acknowledged that neither *Brady* nor its progeny established a strict timetable for favorable evidence disclosures. In fact, *Brady* permits disclosure of certain evidence during and even after trial.[27] Again, a critical question was when the prosecutor learned of the evidence. Also important to the inquiry was whether or not, under the circumstances, the defense had a sufficient opportunity to use the evidence once the State disclosed Officer Garcia's name.[28] The State argued that the defense had time to interview Officer Garcia in the business days leading up to trial and that the defense bore full responsibility for its "bungled" interview attempt. The court remained unconvinced, pointing out that the late disclosure had "created the hasty and disorderly conditions under which the defense was forced to conduct its essential business" in the first place.[29] The unfortunate circumstances of the defense attempt to interview Officer Garcia demonstrated why delayed disclosure of evidence diminishes its value to the defense.[30]

The court readily acknowledged that the *Brady* material that the State actually disclosed could have led to exculpatory or impeachment evidence; however, it went on to say that the defense could only have developed the evidence through further investigation, which the time constraints effectively prevented.[31] The court explained that *Brady* envisions the defense having a real opportunity to use with some degree of calculation and forethought favorable evidence that the government discloses. In this case, the State effectively foreclosed any possibility that the defense could call Officer Garcia to the stand with any responsible degree of forethought and planning.

Opting not to address the potential prosecutorial misconduct, the court held that the State did not make sufficient disclosure in sufficient time to afford the defense an adequate opportunity to use the evidence. Leaving open the possibility that more thorough disclosure may have satisfied *Brady*, the court held that the prosecutor had disclosed too little, too late. This constituted "suppression" under the *Brady* standard.[32] "It is not enough for the prosecutor to avoid active suppression of favorable evidence; *Brady* and its progeny require disclosure."[33]

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23. The appellant was arrested and charged with the murder on 8 March 1988. The case went to trial on 26 February 1990. At a pretrial hearing on 21 February 1990, three business days before the scheduled trial date, the prosecutor finally identified Officer Garcia to the defense, but mentioned neither Officer Garcia's inability to positively identify the appellant nor the fact that he had information favorable to the defense. During the unsuccessful plea negotiations, the State referred to Officer Garcia, without disclosing his name, claiming that he could positively identify the appellant as the shooter. A week after identifying Officer Garcia to the defense, the prosecutor requested a protective order, alleging to the court that the defense had tried to trick Officer Garcia into talking to them. The judge's remedy prevented the defense from interviewing Officer Garcia in the short time between the late disclosure and the trial date. *Id*. at 94-95.

24. *Id*. at 99. In deciding that this evidence was favorable to the defense, the court explained in detail why Officer Garcia's testimony would cast serious doubt on the testimony of both prosecution eyewitnesses at trial. First, if the shooting started as the car pulled over, it was not likely that the trigger puller was the same person identified by one of the eyewitnesses. According to the government eyewitness, this person had been idly joking immediately before the shooting started. Second, if the victim had also fired shots, it was unlikely that the person identified by one of the eyewitnesses as shooting downward was the appellant. *Id*.

25. *Id*.

26. *Id*. at 103. In reaching its decision on this point, the court made the following specific findings: (1) that in plea negotiations the State singled Officer Garcia out as a key witness who was able to positively identify the appellant without disclosing his name; (2) that Officer Garcia's observations would have undermined both prosecution eyewitnesses' testimony; (3) that Officer Garcia's police training in observation skills would likely have caused jurors to credit his testimony; (4) that after the prosecution identified Officer Garcia to the defense, it successfully prevented the defense from interviewing him; and (5) that the prosecution never disclosed the true nature of Officer Garcia's testimony to the defense. *Id*. at 98-99.

27. *Id*. at 100 (citing Imbler v. Pachtman, 424 U.S. 409, 427 n.25 (1976)).

28. *Id*.

29. *Id*. at 101.

30. *Id*.

31. *Id*. The court pointed out that at this late stage in the trial process, new information can throw a carefully thought out and prepared defense case into disarray. Further, once the trial starts, defense resources are brought to bear on the trial, not on investigation. *Id*. at 101-03.

32. *Id*. The court also applied the third prong of *Brady*, concluding that the suppressed evidence was material to the defense. *Id*. at 103-07. That analysis is beyond the scope of this portion of the article.

33. *Id*. at 103.

Implications for the Military Practitioner

Although only persuasive authority, *Leka v. Portuondo* is an important reminder for counsel that disclosure must be both complete and timely. This is particularly important to the trial counsel in a busy jurisdiction, juggling cases at various stages of development.[34] The trial counsel must ensure that evidence is disclosed in a timely fashion and that there is an obvious paper trail, maintained in the original case file, proving that the evidence was disclosed.[35] If undisclosed evidence is allowed to pile up until the eve of trial, attempts to salvage the case will likely fail. Of course, the best solution is to timely disclose.

Does Article 46, UCMJ, Have Teeth?

While it is critical that counsel understand the *Brady* line of cases and the constitutional due process implications of nondisclosure, these cases do not encompass the entire body of knowledge necessary to succeed in military discovery practice. Article 46, UCMJ, the RCMs implementing Article 46, and the corresponding body of military case law are interrelated with *Brady*, but also distinct. In military practice, it is possible for the government to violate RCM 701 and Article 46, UCMJ, without violating *Brady* and committing a constitutional due process violation. Rule for Courts-Martial 701(a)(6) is based on *Brady v. Maryland*.[36] Rule for Courts-Martial 701(a)(2), while consistent with *Brady*, is not limited to favorable evidence; it requires disclosure of evidence material to the defense.[37]

Even with the differences, however, the first step in addressing a military discovery issue must be the constitutional analysis. To lay the foundation for the discussion of *United States v. Figueroa*,[38] *United States v. Adens*,[39]and *United States v. Kinney*,[40] this article next discusses the Supreme Court's materiality analysis in *United States v. Bagley*.[41] The focus is on the third component of a *Brady* violation; that is, whether the undisclosed evidence was material either to the defendant's guilt or punishment.[42] The article then addresses *United States v. Hart*,[43] a 1990 Court of Military Appeals (COMA) decision addressing the impact of Article 46, UCMJ, on military discovery practice, as well as some later cases that confuse the *Hart* materiality standard. Against this backdrop, the article finally

34. In that situation, it is important that the trial counsel "touch" each case file at least weekly, talk to the investigators regularly about cases and review their case files, interview all witnesses, and, most importantly, track evidence that is favorable to the defense that must be disclosed. Checklists are very helpful in this regard. Of course, the work does not end there.

35. The necessity of tracking documents is not limited to *Brady* evidence, of course. Both trial and defense counsel should never turn discovery over without attaching a transmittal document, listing what is being provided, the date, and requiring the receiving party's signature. This will eliminate confusion over what happened during discovery.

36. MCM, *supra* note 4, R.C.M. 701(a)(6) analysis, app. 21, at A21-33. This rule requires the trial counsel to,

> as soon as practicable, disclose to the defense the existence of evidence known to the trial counsel which reasonably tends to: (A) Negate the guilt of the accused of an offense charged; (B) Reduce the degree of guilt of the accused of an offense charged; or (C) Reduce the punishment.

Id. R.C.M. 701(a)(6).

37. *See id*. R.C.M. 701(a)(2).

> *Documents, tangible objects, reports.* After service of charges, upon request of the defense, the Government shall permit the defense to inspect:
>
> (A) Any books, papers, documents, photographs, tangible objects, buildings, or places, or copies of portions thereof which are within the possession, custody, or control of military authorities, *and which are material to the preparation of the defense* or are intended for use by the trial counsel as evidence in the prosecution case-in-chief at trial, or were obtained from or belong to the accused; and
>
> (B) Any results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, which are within the possession, custody, or control of military authorities, the existence of which is known or by the exercise of due diligence may become known to the trial counsel, *and which are material to the preparation of the defense* or are intended for use by the trial counsel as evidence in the prosecution case-in-chief at trial.

Id. (emphasis added).

38. 55 M.J. 525 (A.F. Ct. Crim. App. 2001).

39. 56 M.J. 724 (Army Ct. Crim. App. 2002).

40. No. 00-0633/AR, 2001 CAAF LEXIS 1553 (Sept. 28, 2001) (interlocutory order).

41. 473 U.S. 667 (1985).

42. *See supra* notes 8-12 and accompanying text.

43. 29 M.J. 407 (C.M.A. 1990).

addresses the current state of the law and the resulting implications for practitioners.

Brady v. Maryland suggests that the standard for determining the materiality of favorable evidence not disclosed by the government can vary, depending on the facts and circumstances of the particular case.[44] In *United States v. Bagley*,[45] the Supreme Court identified a two-pronged test to be applied. If there is prosecutorial misconduct, undisclosed favorable evidence will be deemed material to the defense unless the failure to disclose is harmless beyond a reasonable doubt.[46] In all other cases, regardless of the specificity or existence of a defense discovery request, the undisclosed favorable evidence will be deemed material to the defense if there is a *reasonable probability* that, had the evidence been disclosed, the result at trial would have been different. The court defined *reasonable probability* as a probability sufficient to undermine confidence in the result of the trial.[47]

In articulating this standard, the Supreme Court specifically rejected holding the government to a higher "harmless beyond a reasonable doubt" standard, even when the government ignores a specific defense discovery request. [48] Again, in all of these cases, the Supreme Court was examining potential violations of a defendant's constitutional due process rights. Additionally, just as *Brady* did not establish a strict timeline for disclosure of favorable evidence, these decisions left open the issue of evidence that is unfavorable but still material to the defense.

In *United States v. Hart*,[49] the COMA addressed the issue of nondisclosure of evidence specifically requested by a military accused, focusing first on the constitutional analysis flowing from the *Brady* line of cases, and then addressing the impact of Article 46, UCMJ.[50] Following *Hart*, it appeared that Article 46 held the government to a higher standard than *Brady* and *Bagley*. Thus, violations of Article 46 would have consequences not found in civilian practice.[51] *Hart* suggests that both a constitutional and a statutory analysis are necessary in cases involving government failure to disclose favorable evidence to the defense.[52]

In the years since *Hart*, confusion has developed regarding both the necessity for a separate, statutory analysis in discovery cases and the appropriate standard of review in such cases.[53] In two recent cases, *United States v. Figueroa*[54] and *United States v. Adens*,[55] the Army and Air Force Courts of Appeals wrestled with this issue, reaching two very different results. The CAAF has also tangentially addressed this issue in *United States v. Kinney*,[56] shedding some light on this split of authority.

United States v. Figueroa

In *United States v. Figueroa*,[57] the Air Force Court of Criminal Appeals (AFCCA) examined the government duty to disclose favorable information to the defense when the defense has made a specific RCM 701 request for such disclosure. Determining the failure to disclose to be error, the court held that the undisclosed evidence was not material because there was no reasonable probability that, had the evidence been disclosed, the result at trial would have been different.[58]

On 20 July 1999, the appellant was randomly selected to provide a urine sample as part of the Air Force drug-testing program at Vandenberg Air Force Base (AFB) in California. His urine tested positive for the metabolite of cocaine at 56,717 nanograms per milliliter (ng/ml). The urine analysis was con-

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44. United States v. Agurs, 427 U.S. 97, 104 (1976) (construing Brady v. Maryland, 373 U.S. 83 (1963)); *see also Hart*, 29 M.J. at 409.

45. 473 U.S. 667 (1985).

46. *Id*. at 697-80. If the government can meet the burden of proof, then a defendant's due process rights were not violated by the improper withholding of evidence. *Id*.

47. *Id*. at 682. If there is no reasonable probability that the result at trial would have been different, then the defendant's due process rights were not violated by the improper withholding of evidence. *Id*.; *see also* Strickland v. Washington, 466 U.S. 668, 694 (1984).

48. *Bagley*, 427 U.S. at 682. The court reasoned that a higher standard of materiality was unnecessary even when the defense had made a specific request for the undisclosed evidence because under *Strickland* the reviewing court could consider directly any adverse effect that resulted from the suppression in light of the totality of the circumstances. *Id.* at 682-83.

49. 29 M.J. 407 (C.M.A. 1990).

50. *Id*. In *Hart*, the government failed to disclose DNA test results that were favorable to the accused, as well as the assault victim's inability to identify his assailant in a photographic lineup. There was no specific defense request for discovery. The primary issue at trial was the attacker's identity. The court specifically agreed with Judge Gilley and the court below that under Article 46 a military accused had much broader discovery rights than most civilian defendants. The court went on to say that "where the Government fails to disclose information pursuant to a specific request, the evidence will be considered 'material unless failure to disclose' can be demonstrated to 'be harmless beyond a reasonable doubt.'" *Id*. at 410 (quoting United States v. Hart, 27 M.J. 839, 842 (A.C.M.R. 1989)). In the absence of a specific request, the failure to disclose would only be material if there "'is a reasonable probability' that a different verdict would result from disclosure of the evidence." *Id*. (quoting *Hart*, 27 M.J. at 842).

51. *Id*. at 410.

52. *Id*. at 409-10; *see also* United States v. Green, 37 M.J. 88, 90-91 (C.M.A. 1993) (Wiss, J., concurring).

ducted at the Air Force drug-testing laboratory at Brooks AFB.[59] On 31 August 1999, the appellant's defense counsel made a discovery request, specifically requesting exculpatory evidence, evidence tending to negate the accused's guilt, and "evidence of a derogatory nature concerning the Brooks AFB drug-testing laboratory."[60] Less than two months later, the appellant provided another urine specimen for testing as part of a one-hundred percent unit inspection. This specimen, also sent to the Brooks AFB laboratory, tested positive for the metabolite of cocaine at 951 ng/ml.[61]

On 13 December 1999, the appellant was convicted, according to his pleas, of two specifications alleging wrongful use of cocaine and one specification of absence without leave. He was sentenced to a bad-conduct discharge, confinement for five months, and forfeiture of $500 pay per month for five months.[62] After trial, while preparing post-trial clemency submissions, the defense counsel obtained a report of investigation (ROI), dated 28 January 2000, from the drug-testing laboratory. The ROI cast doubt on the forensic integrity of urinalysis samples tested by one of the technicians. Several other documents were attached to the ROI, including the following: a 5 November 1999 letter de-certifying a technician who had performed part of the testing on both of the appellant's urine samples, a 19 November 1999 letter denying that same technician access to the Gas Chromatography/Mass Spectrography Laboratory area, and a 29 November 1999 letter restricting his access to the investigations room. The ROI concluded that while the samples handled by this technician were analytically sound, they had been forensically compromised.[63]

On appeal, the defense argued that the government failed to disclose evidence that was material to the defense, and that had this evidence been disclosed, there likely would have been a different result at trial.[64] The AFCCA's analysis started with a discussion of Article 46, UCMJ, and RCM 701(a)(2) and (6), as well as the *Brady* line of cases. The key question for the court was whether the withheld evidence was "material to the preparation of the defense."[65] Previous cases stated that both impeachment and exculpatory evidence could be material.[66] The court next addressed the issue of due diligence and the scope of a trial counsel's duty to search for information favorable to the accused. According to *United States v. Williams*,[67] this duty to search extends beyond the trial counsel's own files

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53. *Green*, 37 M.J. at 88. In *Green*, the defense made a specific request for evidence that the government failed to disclose. The majority held that "[i]f we have a 'reasonable doubt' as to whether the result of the proceeding would have been different, we grant relief. . . . If, however, we are satisfied that the outcome would not be affected by the new evidence, we would affirm." *Id*. at 90 (citation omitted).

In his concurring opinion, Judge Wiss pointed out that the burden is actually the reverse of what the majority articulated. According to Judge Wiss, the court had already recognized the broader discovery rights available to a military accused in *Hart*, when the majority agreed with Judge Gilley from the Army court that

> [w]here prosecutorial misconduct is present or where the Government fails to disclose information pursuant to a specific request, *the evidence will be considered "material unless failure to disclose' can be demonstrated to 'be harmless beyond a reasonable doubt.*" Where there is no request or only a general request, the failure will be "material only if there is a reasonable probability that" a different verdict would result from disclosure of the evidence.

Id. at 91 (Wiss, J., concurring) (quoting *Hart*, 29 M.J. at 410 (citations omitted)). *See also* United States v. Williams, 50 M.J. 436 (1999); United States v. Morris, 52 M.J. 193 (1999); United States v. Stone, 40 M.J. 420 (C.M.A. 1994).

54. 55 M.J. 525 (A.F. Ct. Crim. App. 2001).

55. 56 M.J. 724 (Army Ct. Crim. App. 2002).

56. No. 00-0633/AR, 2001 CAAF LEXIS 1553 (Sept. 28, 2001) (interlocutory order).

57. 55 M.J. at 525.

58. *Id*. at 530-31.

59. *Id*. at 526. The Department of Defense cutoff for the metabolite of cocaine is 100 ng/ml.

60. *Id*. at 527.

61. *Id*. at 526.

62. *Id*.

63. *Id*. at 527.

64. *Id*.

65. *Id*. at 528 (citing United States v. Bagley, 473 U.S. 667, 676 (1985)).

66. *Id*. (citing United States v. Watson, 31 M.J. 49, 54-55 (C.M.A. 1990); *Bagley*, 473 U.S. at 676 (1985)).

to (1) files of law enforcement authorities who investigated the misconduct underlying the criminal charges, (2) investigative files in related cases, and (3) other files specifically designated in the defense discovery request.[68] The court then correctly laid out the test for prejudicial error under the *Brady* line of cases,[69] concluding that *Brady* was not violated.[70]

Applying the law to the facts of *Figueroa*, the AFCCA found that the government erred in failing to disclose the various memorandums to the defense. The court then applied the constitutional due process test set out in *Bagley.* To apply the test, the court considered all of the evidence in the case and the likely impact of the undisclosed memorandums on that evidence had the government properly disclosed them. Ultimately, the court concluded that even if the memorandums had been properly disclosed, there was no reasonable probability that the result of the trial would have been different. The court pointed out that given the overwhelming evidence against him, the appellant would probably have pled guilty even if he had known about the memoranda. The court also specifically found that there would have been no reasonable probability that the result of the trial would have been different even if the appellant had pled not guilty.[71]

The opinion becomes confusing, as the AFCCA wrestled with the issue of a separate, statutory analysis requirement under Article 46, UCMJ. The court characterized *Hart* as "raising the argument" that a higher standard of review was warranted when the government does not disclose evidence that is the subject of a specific defense discovery request.[72] As the AFCCA correctly noted, the Supreme Court talked about this issue at length in *Bagley* and *Agurs*. The AFCCA seems to have concluded that Article 46 is effectively indistinguishable from the constitutional due process analysis required by *Brady.* This conclusion ignores the COMA holding that the higher standard applied in such a situation flowed directly from the higher standard imposed by Article 46, *not* from the *Brady* line of cases.[73]

In *Figueroa*, the AFCCA correctly pointed out that in *Bagley*, the Supreme Court specifically rejected a higher standard of review in cases involving specific defense discovery requests.[74] The problem with the AFCCA's position is that the Supreme Court was simply addressing the constitutional due process analysis, not the higher standard imposed by Article 46, UCMJ. Thus, the Supreme Court's rejection of the higher standard of review does not apply when a court is applying the Article 46 statutory analysis. Once a court determines that government failure to disclose favorable evidence to an accused did not violate constitutional due process rights, the court must then apply the statutory analysis set out in *Hart* before resolving the discovery issue.

In *Figueroa*, even if the AFCCA had done an Article 46 analysis, the outcome would likely have been the same. The problem is, in a case involving government violation of Article 46, but with no corresponding constitutional due process or *Brady* issue, this misapplication of the law would be more likely to result in a bad decision because an Article 46 violation does not necessarily constitute a *Brady* violation. *United States v. Adens*[75] is just such a case.

United States v. Adens

The accused in *Adens* was convicted, contrary to his pleas, of wrongful use of cocaine. The convening authority approved the adjudged sentence to a bad-conduct discharge.[76] On appeal, the Army Court of Criminal Appeals (ACCA) held that

> trial counsel's failure to disclose material tangible objects as soon as practicable after discovery, along with the military judge's failure to give the members a curative instruction to disregard the already admitted testimony concerning the undisclosed evidence, materially prejudiced appellant's substantial right under Article 46, UCMJ, to have equal opportunity to the evidence

67. 50 M.J. 436 (1999).

68. *Id.* at 441.

69. This is the constitutional analysis to be applied when evidence that is both favorable and material to the defense has been improperly withheld.

70. *Figueroa*, 55 M.J. at 528.

71. *Id*. at 528-31.

72. *Id*.

73. United States v. Hart, 29 M.J. 407, 409-10 (C.M.A. 1990). Notably, *Hart* was a unanimous decision.

74. *Figueroa*, 55 M.J. at 528 (citing United States v. Bagley, 473 U.S. 667, 682 (1985); United States v. Green, 37 M.J. 88 (C.M.A. 1993)).

75. 56 M.J. 724 (Army Ct. Crim. App. 2002).

76. *Id.* at 725.

> against him, prejudicing his trial strategy and materially affecting both his counsel's presentation of the defense case and his credibility in front of the members.[77]

The government case against the appellant consisted of a registered government source's testimony and expert's testimony regarding the analysis of appellant's pubic hair samples. The government source was also a cocaine user. From the start, it became clear that a large part of the defense strategy was to either exclude or discredit the results of the scientific tests on the appellant's hair samples.[78] The central issue in the trial was whether the hair taken from the appellant was put in one or two ring-sized boxes.[79]

A controversy raged over this point. The litigation packet reported that the drug-testing laboratory received two ring-sized boxes, each containing the appellant's hair samples; however, during the pretrial hearings, the witnesses who were in the room when the appellant's hair sample was taken all testified that it was put in one ring-sized box. Further, two laboratory employees testified that their hair collection kits only contained one small hair sample box.[80]

Before opening statements, the defense admitted into evidence a sample hair collection kit that contained only one collection box. The defense had obtained this collection kit from the drug-testing laboratory. The defense had already made an ongoing request for discovery, specifically asking to inspect all real evidence that the government intended to offer at trial on the merits.[81] In spite of this request, the trial counsel waited until the government's case-in-chief to disclose that it had four hair sample collection kits in its possession. The Criminal Investigative Division (CID) had received these hair sample collection kits from the drug-testing laboratory in the same mailing envelope with the kit used to collect the appellant's pubic hair samples.[82] Each of these collection kits contained two ring-sized boxes for pubic hair collection.[83]

During the government's case-in-chief, on re-direct examination of a CID agent, the trial counsel elicited testimony regarding the four remaining hair sample collection kits and their contents. In the Article 39(a), UCMJ, session that immediately followed, the defense moved for a dismissal based on prosecutorial misconduct because of the trial counsel's failure to disclose this material physical evidence.[84] This failure to disclose was addressed at several additional Article 39(a) sessions.[85]

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77. *Id*. at 726.

78. *Id*. at 725. The issue appears to have first surfaced on 30 March 1998, during an Article 39(a) session, when the defense alleged that the Criminal Investigation Division may have tampered with the hair sample or contaminated it with someone else's. *Id*. at 726.

79. *Id*.

80. *Id*. at 727.

81. *Id.* at 726-27. The civilian defense counsel submitted the defense discovery request on 3 January 1998. It specifically cited to Article 46, UCMJ, RCM 702, Military Rule of Evidence 304(d)(1), and *Brady v. Maryland*. *Id*. at 726. Although the request should have cited to RCM 701 rather than RCM 702, the court found that it was clear from the title and content of the document, as well as from the government's response to the defense discovery request, that the government understood what the request meant. *Id*. at 726 n.2. The request included "any and all information which may be or become of benefit to the accused in preparing or presenting his defense at trial" and "the opportunity to inspect all real evidence that the government intends to offer at trial on the merits." *Id*. at 726-27.

82. *Id*. at 725. The timeline is very important.

On 18 July 1998, after visiting the CID evidence room, the trial counsel verified that two ring-sized boxes, not one, had been shipped to the drug-testing laboratory. On 20 July the defense counsel offered into evidence a collection kit that contained one ring-sized pubic hair sample collection box. On 21 July the parties began presenting evidence on the defense motion to suppress appellant's hair because the box or boxes had been tampered with. That afternoon, while court was still in session, the Funded Legal Education Program (FLEP) Officer who was assisting the trial counsel got the four hair sample collection kits that had come in the same mail envelope as the one used to collect the appellant's samples from CID. He passed a note to this effect to the trial counsel in court. After court had recessed for the night, the trial counsel and the FLEP examined the boxes and discussed their significance to the case. The trial counsel instructed the FLEP to verify the collection kits' authenticity and to figure out how to get them admitted into evidence. *Id*. at 727-28.

On 22 July the military judge admitted into evidence the defense collection kit that contained only one ring-sized box for hair samples. Later that day, the trial with members began. The trial counsel made his opening statement without mentioning the number of boxes in the collection kits. The defense counsel did discuss the issue in the opening statement. After opening statements, a CID agent testified about the collection of the appellant's hair sample. After direct examination of the agent, the court recessed for the night. The trial counsel did not disclose the existence of the four collection kits to the military judge or to the defense counsel. On 23 July the defense counsel cross-examined the CID agent regarding the number of boxes used to collect the pubic hair samples. On re-direct examination, the CID agent testified that the four collection kits that CID had received in the same mail envelope with the kit used to take the appellant's sample contained two ring-sized boxes. *Id*. at 728-29.

83. *Id*. at 725. The ACCA made very detailed findings of fact regarding the timeline, starting with the 8 January 1997 search authorization obtained from CID to seize the pubic hair samples, and ending with the military judge's ruling on the defense motion for a mistrial on 27 July 1998, after the government's failure to disclose the existence of the hair sample collection kits came to light. *See id*. at 726-30.

84. *Id*. at 729.

At the final session, the military judge announced extensive findings of fact, concluding that the trial counsel's failure to disclose the material evidence was error, but that a mistrial was not warranted. As a remedy, the military judge made the assistant trial counsel the lead counsel and prohibited the government from presenting any evidence regarding the four hair sample collection kits. Further, the government could not present evidence that the CID office had received five collection kits in the same envelope, one of which was used to collect the appellant's hair sample, and that each of these kits contained two small hair sample collection boxes. The military judge did not instruct the panel members to disregard the CID agent's earlier testimony regarding the four unused collection kits.[86]

The ACCA addressed several important discovery issues in this case: (1) whether the Article 46, UCMJ, guarantee to "equal opportunity to obtain evidence," as implemented in the RCMs, is a substantial right of a military accused; (2) the nature of a trial counsel's duty to disclose physical evidence under RCM 701(a)(2); and (3) how a military judge must remedy the situation when evidence withheld in violation of Article 46 makes its way in front of a military panel. A detailed discussion of each of these issues is required.

Does Article 46, UCMJ, Constitute a Substantial Right Under Article 59(a), UCMJ?[87]

The ACCA started its analysis of the Article 46 issue by explaining that *Adens* was unique in that it did not implicate *Brady* because the withheld evidence was material but not favorable to the defense. Because of this, the court found no constitutional error.[88] From here, the court launched into the statutory analysis, pointing out that a military accused has much broader discovery rights than those available under the Constitution.[89]

According to the ACCA, the issue of whether Article 46 imposes a heavier burden on the government than the Constitution has never been fully resolved.[90] The ACCA attributed this to courts generally resolving discovery issues by (1) findings of no prejudice,[91] (2) determinations of harmless error or no reasonable doubt as to the validity of the proceedings,[92] or (3) reversal for constitutional error.[93] Most discovery cases involve withholding favorable, material evidence under *Brady.* In this situation, because an Article 46 violation necessarily includes all constitutional due process violations, no separate statutory analysis is necessary.

Recognizing the importance of Article 46, UCMJ, the ACCA held that

> equal opportunity to obtain evidence under Article 46, UCMJ, as implemented . . . [in the RCMs] is a "substantial right" of a military accused within the meaning of Article 59(a), UCMJ, independent of due process discovery rights provided by the Constitution. Accordingly, violations of a soldier's Article 46, UCMJ, rights that do not amount to constitutional error under *Brady* and its progeny must still be tested under the material prejudice standard of Article 59(a), UCMJ.[94]

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85. *Id*. at 729-30.

86. *Id.* During these sessions, the trial counsel made several different statements regarding when he became aware of the four additional hair sample collection kits, and when he realized their materiality to the case. On four different occasions, the trial counsel told the military judge that he did not know until after opening statements that CID had four unused collection kits. *Id*. at 730. For a detailed discussion of the professional responsibility implications of trial counsel's statements, see Major David Robertson, *Truth Is Stranger than Fiction: A Year in Professional Responsibility,* ARMY LAW., May 2002, at 1.

87. Article 59(a), UCMJ, states that "[a] finding or sentence of court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused." UCMJ art. 59(a) (2000).

88. *Adens*, 56 M.J. at 731.

89. *Id*. (citing United States v. Eshalomi, 23 M.J. 12, 24 (C.M.A. 1986); United States v. Enloe, 35 C.M.R. 228, 230 (C.M.A. 1965); UCMJ art. 46; MCM, *supra* note 4, R.C.M. 701, 703). This part of the opinion provides insight into the discovery rules, their legislative history, why they exist, and the benefits of open discovery.

90. *Id*. at 732. In the author's opinion, the COMA squarely addressed the issue in *United States v. Hart*, 29 M.J. 407 (C.M.A. 1990), as Judge Wiss pointed out in his concurring opinion in *United States v. Green*, 37 M.J. 88, 90-91 (C.M.A. 1993).

91. *Adens*, 56 M.J. at 732 (citing United States v. Guthrie, 53 M.J. 103, 105-06 (2000)).

92. *Id*. (citing United States v. Stone, 40 M.J. 420, 421 (C.M.A. 1994); *Green*, 37 M.J. at 90-91; United States v. Watson, 31 M.J. 49, 55 (C.M.A. 1990); *Hart*, 29 M.J. at 410).

93. *Id*. (citing United States v. Romano, 46 M.J. 269, 273 (1997); *Eshalomi*, 23 M.J. at 28).

94. *Id*.

What Does RCM 701(a)(2) Really Require of Trial Counsel?

Recognizing that the President promulgated RCM 701(a)(2) to implement Article 46, the ACCA closely examined RCM 701(a)(2), paying particular attention to the materiality language.[95] The trial counsel argued to the military judge that according to the Air Force Court of Military Review (AFCMR) in *United States v. Trimper*,[96] RCM 701(a)(2) did not require the government to disclose the four remaining hair sample collection kits because they were rebuttal evidence.[97] *Trimper* holds that "rebuttal evidence is not discoverable under R.C.M. 701 unless it is exculpatory in nature or material to punishment."[98] What the *Adens* trial counsel neglected to tell the military judge was that in the COMA opinion affirming the AFCMR's decision, the court specifically stated that while unfavorable to the defense, the positive urinalysis was material to the preparation of the defense and thus should have been disclosed by the trial counsel, even though he did not plan to use it in the government's case-in-chief.[99] Perhaps in the interest of clarity, the COMA wrote:

> We respectfully disagree with our sister court's narrow interpretation that the term "material to the preparation of the defense" in R.C.M. 701(a)(2) (A) and (B) is limited to exculpatory evidence under the *Brady* line of cases and hold that our sister court's decision in *Trimper* should no longer be followed in Army courts-martial. There is no language in R.C.M. 701, or in its analysis, indicating any intent by the President to limit disclosure under Article 46, UCMJ, to constitutionally required exculpatory matters. As noted above, R.C.M. 701 is specifically intended to provide "for broader discovery than is required in Federal practice," (R.C.M. 701 Analysis, at A21-22), and unquestionably is intended to implement an independent statutory right to discovery under Article 46, UCMJ.[100]

This was, in effect, a restatement of existing law. The court went on to explain how the trial counsel had violated RCM 701(a)(2). Because the existence and configuration of the four additional hair sample collection kits was unquestionably material to the preparation of the defense, whether the government intended to use this evidence in its case-in-chief, in rebuttal, or not at all was irrelevant.[101]

Did the Error Materially Prejudice the Accused's Substantial Right to a Fair Trial, or Were the Military Judge's Remedies Enough?

Finally, the ACCA focused on whether the failure to disclose was material in *Adens*. First, the court clarified the issue that seems to have confounded the courts of military review in the years following the *Hart* decision. According to the ACCA, "when a trial counsel fails to disclose information pursuant to a specific request or when prosecutorial misconduct is present, the evidence is considered material unless the government can show that failure to disclose was harmless beyond a reasonable doubt."[102]

In determining whether the failure to disclose was material, the ACCA focused on the remedies implemented by the military judge. The court found that the steps taken by the military judge, which included (1) removing the trial counsel from the lead counsel role; (2) keeping the government from admitting any evidence of the four unused hair sample collection kits; and (3) excluding all references to the fact that CID had originally received five hair sample collection kits, all of which contained two ring-sized boxes for the pubic hair samples, were insufficient without a curative instruction to the members.[103] Under

95. *Id*. at 731-34.

96. 26 M.J. 534 (A.F.C.M.R. 1988), *aff'd*, 28 M.J. 460 (C.M.A. 1989), *cert. denied*, 493 U.S. 965 (1989).

97. *Adens*, 56 M.J. at 733. The accused in *Trimper*, an Air Force judge advocate, was convicted of wrongfully using cocaine. After testing positive on a unit urinalysis, Captain (CPT) Trimper commissioned his own urinalysis at a local civilian hospital, which also came back positive. Captain Trimper also told a co-worker about both positive urinalyses. Although the government discovered both the positive civilian urinalysis and the statement to the co-worker, the government never disclosed either piece of evidence to the defense. At trial, when CPT Trimper claimed that he had never used drugs of any kind on his direct examination, thus putting his character as a nonuser of drugs in issue, the government brought in both the urinalysis and the statement as rebuttal evidence. The AFCMR decided that RCM 701(a)(2)(A) and (B) only require a trial counsel to disclose exculpatory evidence and evidence that the government intends to offer in its case-in-chief. *Trimper*, 26 M.J. at 536.

98. *Trimper*, 26 M.J. at 537.

99. United States v. Trimper, 28 M.J. 460, 468 (C.M.A. 1989), *cert. denied*, 493 U.S. 965 (1989).

100. *Adens*, 56 M.J. at 733.

101. *Id*. With regard to the first violation of RCM 701(a)(2), the court specifically found that the trial counsel knew that this evidence was material to the defense case two days before he personally learned about the existence of the four unused hair sample collection kits. The court also found that the trial counsel intentionally withheld disclosure until after opening statements and cross-examination of the CID agent to gain the maximum tactical advantage from the evidence. *Id*. at 733-34.

102. *Id.* at 733.

the circumstances, the military judge had a sua sponte duty to issue the curative instruction, even though the panel members had heard no mention of the four hair sample collection kits for five days.[104]

The ACCA explained that if the members considered the prohibited evidence that had already come in through the CID agent's testimony, the defense's credibility would undoubtedly have been undermined. Further, if the defense failed to execute either prong of its two-pronged defense of unreliability of the scientific hair sample testing because of chain of custody problems or tampering, the government would be able to prove its case beyond a reasonable doubt. Before the undisclosed evidence of the four hair sample collection kits came in through the CID agent's testimony, this was a viable defense; however, after it came before the members, the defense was no longer credible. This being the case, the court held that the appellant's substantial rights to a fair trial and to have equal access to the evidence against him were materially prejudiced by the government's nondisclosure of material physical evidence and by the military judge's failure to give a curative instruction to the members to disregard the testimony that the government presented regarding the four unused collection kits.[105]

Why Does All of This Matter?

Army trial practitioners, particularly trial counsel, must take heed of the *Adens* case. At least in the Army, Article 46, UCMJ, has teeth. For staff judge advocate offices taking a more "hard line" approach to discovery, the *Adens* opinion has serious implications. By recognizing Article 46 as a substantial right, and by mandating a separate statutory analysis, the ACCA has given Article 46 sharp teeth. On the positive side, *Adens* reinforces the benefits of the wide-open discovery policy in the military.

First, the *Adens* holding regarding the AFCMR *Trimper* opinion is a restatement of existing law rather than a new development. In light of the COMA opinion in *Trimper*, as well as the plain language of RCM 701(a)(2), this restatement likely applies to the Air Force and the other services as well. Trial counsel must be careful not to assume that potential rebuttal evidence in the form of documents, reports, or tangible evidence that is not favorable to the defense is not material to the preparation of the defense, as contemplated by RCM 701(a)(2). This also brings up the point that counsel on both sides of the courtroom need to be very thorough in their research and careful in the representations they make to military judges regarding case law.

Second, trial counsel must be mindful of the *Adens* requirement that the military judge give cautionary instructions sua sponte, along with other remedies that may be imposed to rectify a breach of the discovery rules, when evidence undisclosed in violation of either constitutional due process requirements or Article 46 makes its way to the panel. It is now clear that without such an instruction, the ACCA cannot determine whether an accused's substantial right to a fair trial was materially prejudiced and will err on the side of caution.

Third, *Adens* specifies that the Article 46 right to equal access to evidence is a substantial right under Article 59(a), UCMJ.[106] This means that even when a discovery issue does not result in a constitutional due process violation, a separate statutory analysis is required, and if an accused's right to equal access under Article 46 was violated, the findings or the sentence in that case could be set aside.

Finally, *Adens* articulates the standard for determining whether government failure to disclose evidence to the defense was material. It is now clear that in the Army, if there is a specific defense request for information, or if there is prosecutorial misconduct, and evidence is not disclosed to the defense, that failure will generally be deemed material unless the government can prove that the failure to disclose was harmless beyond a reasonable doubt.[107] This can be a significant hurdle for the government to overcome. In light of *Hart*, this standard is likely to apply to *all* failures to disclose evidence to the defense, not just failures to disclose physical evidence material to the preparation of the defense under RCM 701(a)(2).[108] If there is no specific defense request, the failure to disclose will be material only if there is a reasonable probability that, had the evidence been disclosed, the result of the trial would have been

103. *Id*. at 734.

104. *Id*. The failure to give the instruction was, in the court's words, "understandable." *Id*.

105. *Id*. at 734-35.

106. *Id.* at 732.

107. *See id*. at 733.

108. *See id*. at 732-33. Throughout this discussion, the term *material* has been used in two completely different contexts. In the context of constitutional due process violations and *Brady*, "material" refers to prejudice suffered by the defendant as a result of government nondisclosure. Specifically, was the undisclosed evidence material to the defendant's guilt or punishment? In other words, "material" refers to the effect of that failure on the accused's substantial right to a fair trial. *See* United States v. Bagley, 473 U.S. 667, 678-83 (1985). In the context of *Hart* and the statutory analysis, "material" also refers to the prejudice suffered by the defendant because of the government nondisclosure. United States v. Hart, 29 M.J. 407, 410 (C.M.A. 1990). Finally, in the context of RCM 701(a)(2), "material to the preparation of the defense" refers to the type of evidence that the government must disclose and is not limited to the favorable evidence that is constitutionally required to be disclosed. *Adens*, 56 M.J. at 733.

different.[109] Trial counsel must approach specific defense requests for information with care.

In light of the split between the Army and Air Force courts in *Figueroa* and *Adens* regarding the analysis of a discovery issue, the CAAF should clarify the issue. The real question is whether Article 46 provides a military accused greater discovery rights than a civilian defendant. If so, the discovery issue analysis should not end with the determination that there is no constitutional due process violation. Rather, a separate statutory analysis should be required to ensure that this substantial right was not violated to the prejudice of the military accused. Further, the CAAF should also clearly articulate the exact standard to be applied, as the COMA did in *Hart*. The interlocutory opinion the CAAF issued in *United States v. Kinney*[110] gives some insight into how the court might approach this issue in the future.

United States v. Kinney

In *Kinney*, the CAAF issued an interlocutory order on 28 September 2001, requiring the government to answer additional questions certified by the court regarding National Criminal Information Center (NCIC) checks.[111] Although the CAAF ultimately issued a summary disposition in the case,[112] the interlocutory order provides interesting insight into the CAAF's view of discovery issues.

The appellant in *Kinney* was convicted, contrary to his pleas, by a general court-martial of rape and adultery and was sentenced to a dishonorable discharge, confinement for two years, and reduction to the lowest enlisted grade. The appellant and the victim, one of his squad members, lived in the same barracks in Korea. They apparently had no social or personal relationship before the rape.[113]

The appellant's pretrial discovery request included a request for "[a]ny derogatory information, including criminal history or prior disciplinary record, for any witness the Government intends to call on the merits or on sentencing."[114] The defense specifically asked for "a criminal records check and a NCIC" check on nine potential prosecution witnesses.[115] The appellant later reduced his request to cover only two prosecution witnesses, one of whom was the victim. The trial counsel checked the personnel files of the witnesses and conducted a criminal records check (CRC) of the military criminal records, but refused to conduct the requested NCIC check. Initially, the military judge ordered the NCIC check; however, at a later Article 39a session, the trial counsel argued that the government did not have a responsibility to perform NCIC checks on potential prosecution witnesses, and that the steps already taken were sufficient. In response, the defense counsel argued that the NCIC checks were necessary because the victim's credibility was a critical factor in the case and because there were rumors that the other government witness had been involved in a prior sexual assault.[116]

Ultimately, the military judge denied the defense motion for NCIC checks on the victim and the other government witness. According to the military judge, the government had been duly diligent in granting the defense access to the witnesses' military files and to the chain of command. At the same time, the defense had not articulated any reasonable likelihood that the NCIC checks would reveal material information.[117] Rather, the defense appeared to be on a classic fishing expedition.

The CAAF stated in its order that "[o]ne of the hallmarks of the military justice system is that it provides an accused with a broader right of discovery than required by the Constitution . . . or otherwise available to federal defendants in civilian trials under Federal Rules of Criminal Procedure twelve and sixteen."[118] The CAAF then discussed both Article 46 and RCM 701 and the duties that they impose on the government, as well as the standard for due diligence set out in *United States v. Williams*.[119] The court pointed out that when the government disputes the relevance or necessity of disclosure or asserts a privilege, one course of action is to submit the material to the

109. *Adens*, 56 M.J. at 733.

110. No. 00-0633/AR, 2001 CAAF LEXIS 1553 (Sept. 28, 2001) (interlocutory order).

111. *Id.* at *12-15.

112. United States v. Richard A. Kinney, No. 00-0633/AR (C.A.A.F. Feb. 7, 2002) (summary disposition) (unpublished).

113. United States v. Kinney, No. 9800451 (Army Ct. Crim. App. June 6, 2000) (unpublished). The ACCA reviewed the case pursuant to Article 66, UCMJ. The appellant alleged factual insufficiency. The ACCA affirmed the findings and the sentence. *Id.*

114. *Kinney*, 2001 CAAF LEXIS 1553, at *6-7.

115. *Id.* at *7.

116. *Id.* at *7-8.

117. *Id.* at *9-10.

118. *Id.* at *1.

military judge for inspection and for a ruling in accordance with RCM 701(g)(2).[120]

The CAAF also discussed the standard under *Brady* and *Bagley* to determine whether a government failure to provide the defense with evidence that should be disclosed rises to the level of a constitutional due process violation. This, of course, is the "reasonable probability" standard set out in *Bagley.*[121] Citing to *Hart* and *Green*, the CAAF acknowledged that "the prosecution faces a heavier burden in the military justice system to sustain a conviction when evidence has been withheld,"[122] and it quoted language from *Green* discussing a reasonable doubt standard.[123] Interestingly, the quoted passage from *Green* is precisely the language Judge Wiss referred to in his concurring opinion as reversing the burden set out by the majority in *Hart.*[124] The page cited to in *Hart*, page 410, which Judge Wiss held out in his concurring opinion in *Green* as setting the correct standard,[125] says that when the government fails to disclose information in response to a specific request, the evidence will be considered material unless failure to disclose can be demonstrated to be "harmless beyond a reasonable doubt."[126]

The CAAF's opinion is only interlocutory; however, it is important because it gives practitioners an idea of where the CAAF stands on the issues of (1) whether Article 46 places a greater burden on the government to sustain convictions when the government has withheld evidence from the defense and (2) what that specific standard might be. There appears to be a higher standard; however, the issue identified by E. J. O'Brien in last year's article on new developments[127] apparently still exists and needs clarification, especially in light of the *Figueroa* and *Adens* decisions.

Practitioners and military judges need to understand the standard. In particular, defense counsel must know whether violations of specific discovery requests could result in potential windfalls to their clients on appeal. Trial counsel need to understand what is expected of them when they receive specific requests, as well as the consequences for not honoring the requests. Military judges must likewise know what standards will be applied on appeal. For the Army, in the wake of *Adens*, there is greater clarity, although it is still unclear how the CAAF would rule on this issue.

Conclusion

Discovery in the military justice system is a potential minefield for the military practitioner. Trial and defense counsel must work to understand both the constitutional and statutory rules that apply to discovery practice. Likewise, military judges, who regulate discovery practice under RCM 701(g), must have a clear understanding of the rules and the standards applied to discovery issues on appeal. To this end, the CAAF should strive to clarify those rules and standards when confusion arises in the service courts of appeal. Such is the situation in the wake of the *Figueroa* and *Adens* decisions. In the absence of clear standards, discovery practice more closely resembles a guessing game than the practice of law. Ultimately, both the accused's right to a fair trial and the credibility of the UCMJ are at issue.

119. 50 M.J. 436, 441 (1999).

120. *Kinney*, 2001 CAAF LEXIS 1553, at *5.

121. *See id*. (citing Brady v. Maryland, 373 U.S. 83, 87 (1963); United States v. Bagley, 473 U.S. 667, 682 (1985)).

122. *Id*. (citing United States v. Green, 37 M.J. 88, 90 (C.M.A. 1993); United States v. Hart, 29 M.J. 407, 410 (C.M.A. 1990)).

123. *See id*. at *5-6.

124. *Compare id*. at *5 *with Green*, 38 M.J. at 91 (Wiss, J., concurring).

125. *Green*, 38 M.J. at 91 (Wiss, J., concurring).

126. *Hart*, 29 M.J. at 441.

127. Major Edward J. O'Brien, *New Developments in Discovery: Two Steps Forward, One Step Back*, ARMY LAW., Apr. 2000, at 38.

New Developments in Search and Seizure: More Than Just a Matter of Semantics

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Introduction

Law is experience developed by reason and applied continually to further experience.[1]

Fourth Amendment[2] law has changed dramatically over the last several years. The change has been subtle because there have been only a handful of significant cases each year. The dramatic but gradual evolution of search and seizure jurisprudence over this period has not followed any logical pattern, particularly in recent cases decided by the Supreme Court. In addition, the results of a variety of cases were unexpected. In just this past year, the final outcome of several cases defied most predictions from scholars and practitioners.[3]

This article addresses these and other recent decisions from the Supreme Court and the Court of Appeals for the Armed Forces (CAAF), covering a wide range of Fourth Amendment issues. The outcomes in the cases do not represent any common theme or trend. In several cases, however, the final result came down to an interpretation of just one word or phrase.[4] In the practice of law, the meaning of a single word routinely makes a significant difference. In the words of Felix Frankfurter, former Associate Justice of the Supreme Court, "All our work, our whole life is a matter of semantics, because words are the tools with which we work, the material out of which laws are made, of which the Constitution was written. Everything depends on our understanding of them."[5]

Terrorism Legislation

The terrorist attacks on 11 September 2001 generated significant changes in legislation. Foremost among these legislative changes was the USA PATRIOT Act,[6] signed into law by the President on 26 October 2001. The coverage of the Act is extensive. Generally, it broadens the power of federal law enforcement and intelligence officers to track Internet communications; to intercept the content of oral, wire, and electronic communications; and to provide more disclosure to other agencies.[7] From a force protection standpoint, the Act enhances the ability of commanders in all services to maintain operational and installation security. Although the full impact of the Act has yet to be seen, legal advisers at major commands and installations need to be familiar with the Act and aware of its implications.[8]

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1. Roscoe Pound, *quoted in* CHRISTIAN SCI. MONITOR, Apr. 24, 1963, *reprinted in* JAMES B. SIMPSON'S CONTEMPORARY QUOTATIONS (1988), *available at* http://www.lexis.com (all sources/references/collected quotations).

2. U.S. CONST. amend. IV.

3. Most notable of these cases are *Kyllo v. United States*, 533 U.S. 27 (2001), discussed *infra* notes 31-56 and accompanying text, and *United States v. Green*, 55 M.J. 76 (2001), discussed in last month's *The Army Lawyer* in Lieutenant Colonel Michael R. Stahlman's article, *New Developments on the Urinalysis Front: A Green Light in Naked Urinalysis Prosecutions?*, ARMY LAW., Apr. 2002, at 14.

4. *See* Saucier v. Katz, 533 U.S. 194 (2001) (finding lower court's fusion of two distinct inquiries involving qualified immunity analysis was error despite nearly identical wording of each inquiry). Although the main text of this article does not discuss *Saucier v. Katz*, military practitioners should still be aware of the case. In short, it involves the "use of force" by military police on a military installation during a celebration at the Presidio in San Francisco. *Id.* at 197-98. The case has implications for military practitioners advising military police and other law enforcement officials on arrests, reasonable use of force, and the extent of qualified immunity. *See also* United States v. Carter, 54 M.J. 414 (2001) (holding that "substantial basis" has different meanings in the context of reviewing probable cause determinations and application of the good faith exception to the exclusionary rule), discussed *infra* notes 109-26 and accompanying text.

5. Felix Frankfurter, *quoted in* READER'S DIGEST, June 1964 (responding to a counsel's comment that a challenge from the bench was "just a matter of semantics"), *reprinted in* SIMPSON, *supra* note 1.

6. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272.

7. *See id.* For a comprehensive review of the changes, see Charles Doyle, *Terrorism: Section by Section Analysis of the USA PATRIOT Act*, Congressional Research Service (CRS) Report for Congress, the Library of Congress (Dec. 10, 2001), *available at* http://www.fpc.gov/CRS_REPS/tssa1210.pdf.

8. Section 104 of the Act is one example of its significant impact on the military. It provides a statutory exception to the Posse Comitatus Act, 18 U.S.C.S. § 1385 (LEXIS 2002), allowing the armed forces to assist in emergencies involving "other" weapons of mass destruction (previously the exception was just for emergencies involving biological, chemical, or nuclear weapons). *See* USA PATRIOT Act of 2001, § 104.

Computers

Private use of government computers is one area of Fourth Amendment law that makes most judge advocates very uneasy. Do service members have a reasonable expectation of privacy when they use government computers for private communications or personal matters?[9] What are the limits, if any, for government agents monitoring service members' use of government computers? Unfortunately, few military cases have addressed these questions. Even worse for military practitioners, the knowledge base in this area of the law is limited, and service regulations provide little clarification.[10]

In a recent article, Lieutenant Commander Rebecca A. Conrad, U.S. Navy, shed considerable light on this subject.[11] Specifically, she addressed recent CAAF opinions dealing with use of government computers in the context of the Fourth Amendment, along with applicable statutes and service regulations. Her article is a "must-read" for military practitioners. She ultimately concludes that service members only have, at best, a limited expectation of privacy in their private use of government computers.[12] More importantly, she provided practitioners with an excellent resource to answer most computer-related questions that raise Fourth Amendment concerns. She also made several recommendations on how the government should proceed when monitoring service members' use of government computers.[13]

United States v. Gallo

United States v. Gallo[14] was the only reported case this past year from any military appellate court which addressed a computer-related search under the Fourth Amendment.[15] Airman First Class Gallo was convicted of dereliction of duty and violating several federal child pornography statutes. He was sentenced to forty-two months' confinement, a dishonorable discharge, total forfeitures, and reduction to E-1. The Air Force Court of Criminal Appeals (AFCCA) set aside one specification involving possession of child pornography and affirmed the remaining findings.[16]

The CAAF granted review to consider whether the Fourth Amendment was violated when special agents executed a warrant to search Gallo's off-post quarters based solely on an affidavit from a U.S. Customs agent. Before executing the warrant, Gallo's supervisor had examined Gallo's workstation and computer because Gallo's work performance had declined. The supervisor observed some sexually explicit images on Gallo's computer, which led to Gallo's supervisor issuing him a letter of reprimand for his misuse of government property. Several months later, an Internet service provider (ISP) informed an Air Force computer security monitor that someone was trading child pornography on a government computer. The monitor traced this lead to Gallo's workstation. The security monitor then provided this information to special agents from the Office of Special Investigations (OSI), and they obtained a search authorization to make a copy of Gallo's (government) hard drive.[17]

Based on 262 images of child pornography found on Gallo's government hard drive, and because, according to Gallo's supervisor, Gallo had a personal computer at his home, the OSI agents contacted a U.S. Customs agent for assistance in getting a search warrant for Gallo's off-post quarters.[18] Ultimately, a federal magistrate issued a warrant to search Gallo's home and

9. This assumes that the service member is using the government computer in accordance with the *Joint Ethics Regulation*. *See generally* U.S. DEP'T OF DEFENSE, DIR. 5500.7R, JOINT ETHICS REGULATION (C3, 12 Dec. 1997).

10. A major reason for much of the confusion in this area stems from Military Rule of Evidence (MRE) 314(d). Military Rule of Evidence 314(d) states in part that "[g]overnment property may be searched under this rule unless the person to whom the property is issued or assigned has a reasonable expectation of privacy therein at the time of the search." MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 314(d) (2000) [hereinafter MCM]. Arguably, a service member could have a reasonable expectation of privacy when using a government issued computer for private use, depending on the circumstances of the use.

11. *See* Lieutenant Commander Rebecca A. Conrad, *Searching for Privacy in All the Wrong Places: Using Government Computers to Surf Online*, 48 NAVAL L. REV. 1 (2001), *available at* http://www.jag.navy.mil/html/njs.htm.

12. *Id.* at 4.

13. *See id.* at 52-54 (recommending more training to recognize when computer monitoring is authorized, thorough screening of systems administrators, and limiting content monitoring of e-mail communications).

14. 55 M.J. 418 (2001).

15. One service court opinion was published after the author submitted this article for publication. *See* United States v. Greene, 56 M.J. 817 (N-M. Ct. Crim. App. 2002) (interlocutory appeal) (reversing military judge's ruling to suppress evidence obtained following the consensual search and seizure of the accused's personal computer and computer disks).

16. *Gallo*, 55 M.J. at 419. The AFCCA also reassessed the appropriateness of the sentence, but nevertheless affirmed the entire sentence approved by the convening authority. *See* United States v. Gallo, 53 M.J. 556, 569 (A.F. Ct. Crim. App. 2000).

17. *Gallo*, 55 M.J. at 419. The court did not discuss the appropriateness of the search authorization and subsequent copying of the hard drive. Because the computer and hard drive were government issued, a strong argument exists that the search authorization was unnecessary based on MRE 314(d). *See* MCM, *supra* note 10, MIL. R. EVID. 314(d). Unfortunately, the opinion does not provide any facts about the extent of Gallo's authorization to use the computer for personal matters.

personal computer based entirely on the customs agent's affidavit. The affidavit included the fact that Gallo had a personal computer at his residence and included facts related to the child pornography discovered on his government-issued hard drive.[19] The remaining information in the affidavit, however, consisted primarily of the customs agent's general conclusions about pedophiles.[20]

The CAAF examined these facts to decide whether the federal magistrate's probable cause determination was proper. Specifically, the court addressed the issue of "whether there was a 'substantial basis' upon which the federal magistrate judge could have found probable cause to believe a search of appellant's residence would uncover child pornography."[21] The analysis required the court to look at the nexus between the information in the affidavit and the probability that the child pornography would be found in Gallo's home.[22] The magistrate's consideration of Gallo's incriminating statement to his supervisor complicated the nexus analysis because Gallo's supervisor had not informed Gallo of his rights under Article 31, UCMJ. The court assumed that use of this incriminating statement was improper and looked at the remaining facts to see if they were sufficient to support the magistrate's probable cause determination.[23]

Ultimately, the CAAF found that the nexus requirement was satisfied and that probable cause supported execution of the warrant. In terms of nexus, the court gave considerable weight to the customs agent's lengthy experience in law enforcement and child pornography investigations. The court also considered the pictures found on Gallo's government computer; that he fit the definition of a pedophile; and that he had traded, uploaded, and downloaded child pornography on his government computer. The court found that "[b]ased on these factors, it is reasonably probable that appellant would keep and work on this material [at his home]."[24]

The court also concluded that even if probable cause was lacking due to an insufficient nexus between the information and Gallo's home, the good faith exception to the exclusionary rule would apply.[25] A major factor that supported the good faith exception was that the customs agent's affidavit was much more than a bare-bones statement. The customs agent provided the reasons for his conclusions and the extent of his experience in law enforcement. Furthermore, the customs agent supported his affidavit with information from the OSI agents who had retrieved a copy of the child pornography stored on Gallo's government hard drive.

Judge Gierke and Judge Effron disagreed with the majority. They concluded that the federal magistrate did not have a "substantial basis" for his probable cause determination and that the good faith exception did not apply because the affidavit was merely conclusory.[26] They viewed the customs agent's experience differently. Based on his experience, they believed the agent should have provided the magistrate with concrete evidence, instead of mainly conclusions. In support, they noted that the majority went against its own previous advice that officials making probable cause determinations need to be provided with the images of child pornography.[27] No images were provided to the federal magistrate in *Gallo.*[28]

Gallo has many valuable lessons for military practitioners. Foremost, judge advocates need to provide their supported commands with regular training on basic legal concepts, such as when and how to give Article 31 rights. In addition, even

18. *Id*. at 420. Gallo's supervisor got this information from Gallo after OSI agents had asked Gallo's supervisor if Gallo had a computer at home. Gallo's supervisor did not advise Gallo of his rights under UCMJ article 31. The agents did not ask Gallo's supervisor for this information. *Gallo*, 53 M.J. at 559.

19. *Gallo*, 55 M.J. at 421.

20. *Id.* at 420.

21. *Id.* at 422 (citing United States v. Carter, 54 M.J. 414, 421 (2001)). The issue of "substantial basis" in *Carter* is discussed *infra* notes 119-26 and accompanying text.

22. *Gallo*, 55 M.J. at 421 (citing MCM, *supra* note 10, MIL. R. EVID. 315(f)(2)). The court also addressed whether the information provided to the magistrate was stale. The court determined that the information was not stale because most of it was less than a month old. *Id*. at 422. The opinion does not provide the actual dates relied on by the court, but the AFCCA opinion provides dates which enable evaluation of the timeliness of the information. *See Gallo*, 53 M.J. at 559. The CAAF did point to several federal circuit cases, which permitted the use of information more than six-months old to seize pornography on computer hard drives. *Gallo*, 55 M.J. at 422 (citing United States v. Hay, 231 F.3d 630 (9th Cir. 2000) (six months); United States v. Lacy, 119 F.3d 742 (9th Cir. 1997) (ten months)).

23. *Gallo*, 55 M.J. at 421.

24. *Id.* at 422.

25. *Id.* (citing United States v. Lopez, 35 M.J. 35 (C.M.A. 1992)).

26. *Id*. at 423-24 (Gierke, J., joined by Effron, J., dissenting).

27. *Id*; *see* United States v. Monroe, 52 M.J. 326, 332 (2000) (advising that it would have been preferable to provide commander making probable cause determination with actual images of child pornography or a detailed description of the images).

28. *Gallo*, 55 M.J. at 424.

though it did not occur in *Gallo*, criminal investigators should not use military personnel with little or no law enforcement training to gather information the investigators otherwise cannot obtain. Although the actions of Gallo's supervisor did not nullify an otherwise lawful search authorization, the better practice would have been to avoid asking Gallo to provide incriminating information without a proper rights advisement.

The second lesson for practitioners relates to when they should get a search authorization to obtain information on a government computer. Although the CAAF did not address whether OSI needed an authorization to search Gallo's government computer, the court's silence seems to be tacit approval of the OSI's decision. Even if the court did not intend this implication, practitioners would be wise to follow the actions of the OSI investigators in *Gallo* by getting a search authorization when in doubt. Although a strong argument exists that service members do not have a reasonable expectation of privacy in their government-issued computers, this area of Fourth Amendment law in the military is still uncharted.

The next important lesson from *Gallo* is drawn from the dissent. Although the majority found no abuse of discretion by the military judge in denying the defense suppression motion, the federal magistrate should have been provided with images from Gallo's hard drive or a detailed description of the images. The magistrate relied entirely upon the conclusions in the affidavit that the images were child pornography and therefore illegal. When the sufficiency of evidence to establish probable cause is borderline, providing a magistrate or commander with actual images may make the difference. As the CAAF previously advised in *United States v. Monroe*,[29] the better practice is to provide officials making probable cause determinations with actual images instead of just assertions or conclusions.[30]

The final lesson from *Gallo* is that practitioners need to locate their child pornography experts and talk to them well before a child pornography case raises its ugly head. Aside from the problems with properly charging child pornography violations, child pornography cases have many other pitfalls. As in *Gallo*, most child pornography cases involve computers. Invariably, these cases seem to have significant Fourth Amendment questions. Most experts in child pornography investigations have the training and experience in proper search and seizure methods to assist practitioners with navigating these dangerous waters. *Gallo* is a good example of when the experience of a child pornography expert buoyed an otherwise bare bones affidavit.

Reasonable Expectations of Privacy: Using New Technology

Kyllo v. United States

When law enforcement officials use new technology to enhance their ability to fight crime, the Fourth Amendment always gets mixed up in the fray. The best example of this is the case that established the foundation for modern search and seizure jurisprudence, *Katz v. United States*.[31] In *Katz*, the Supreme Court signaled the beginning of the end to its long line of precedent that looked at the Fourth Amendment landscape through the lens of "trespass" doctrine, protecting against physical invasions of property as opposed to the privacy interests of people.[32] Government agents in *Katz* used a wireless listening and recording device that they placed on a public telephone booth. The Court concluded, to the surprise of many, that the government's use of the eavesdropping device violated Katz's privacy rights under the Fourth Amendment.[33] As in *Katz*, the Supreme Court broke new ground in Fourth Amendment law with its decision in *Kyllo v. United States*.[34]

Kyllo confronted the Court with whether law enforcement use of a thermal imaging device to look at the outside of a private home was a "search." Kyllo was suspected of growing marijuana in his home. Agents for the U.S. Department of the Interior obtained a thermal imager and scanned Kyllo's home for excessive infrared radiation.[35] Normally, marijuana plants require high-intensity lamps to grow indoors. These lamps emit considerable amounts of infrared radiation, which in most cases, a thermal imaging device can detect. The agents scanned Kyllo's home and determined that the "roof over the garage and a side wall of the home were relatively hot compared to the rest of the home and substantially warmer than neighboring homes."[36] Armed with this information, tips from informants, and Kyllo's high utility bills, the agents obtained a search warrant from a federal magistrate judge. The subsequent search

29. 52 M.J. at 326.

30. *See id.* at 332; *see also* Major Walter M. Hudson, *The Fourth Amendment and Urinalysis: Facts (and More Facts) Make Cases*, ARMY LAW., May 2000, at 17 (discussing *United States v. Monroe*, 50 M.J. 550 (A.F. Ct. Crim. App. 1999), in light of the AFCCA's caution that the case was "borderline" and that the better practice would be to provide actual images of child pornography).

31. 389 U.S. 347 (1967).

32. *Id.* at 351-53.

33. *Id.* at 350-53.

34. 533 U.S. 27 (2001).

35. *Id.* at 29.

revealed Kyllo was growing over 100 marijuana plants in his basement.[37]

Kyllo unsuccessfully moved at trial to exclude evidence obtained under the warrant, claiming that the use of the thermal imaging device was improper.[38] After several trips between the U.S. District Court for the District of Oregon and the Court of Appeals for the Ninth Circuit, the case was affirmed.[39] The Ninth Circuit found that Kyllo did not have a subjective expectation of privacy because he did not conceal the heat that was being emitted.[40] The Supreme Court disagreed with the Ninth Circuit, holding that "[w]here, as here, the Government uses a device that is not in general public use, to explore details of a private home that would previously have been unknowable without physical intrusion, the surveillance is a 'search' and is presumptively unreasonable without a warrant."[41]

The Court's analysis began with a discussion of what constitutes a "search" under the Fourth Amendment. The focus of the analysis was whether the scan of Kyllo's home was like an external visual inspection or more intrusive. The Court's concern was that as technology has improved, the potential for government intrusion into the private lives of individuals has increased without any proportionate increase in protection under the law.[42] As technology has improved, so has the risk of eroding bedrock protections under the Fourth Amendment. To limit this erosion, at least in terms of privacy in the sanctity of a home, the Court decided to draw a bright line.[43]

The Court drew the bright line at the entrance to Kyllo's home.[44] Although the agents used a passive device that did not physically intrude into the home, they gathered information they otherwise could not have obtained unless they had entered Kyllo's home. The Court reversed the Ninth Circuit and remanded the case to "determine whether, without the evidence [provided by the device], the search warrant issued in this case was supported by probable cause—and if not, whether there is any other basis for supporting admission of the evidence that the search pursuant to the warrant produced."[45]

Four Justices joined in dissent. Their concern was that the majority's bright line was too broad and simply not supported by the facts. In the dissent's view, the majority opinion is "not only unprecedented but also quite difficult to take seriously. Heat waves, like aromas that are generated in a kitchen, or in a laboratory or opium den, enter the public domain if and when they leave a building."[46] Much of the dissent focuses on distinguishing "through-the-wall" versus "off-the-wall" surveillance. The former "gives the observer or listener direct access to information in a private area, [while off-the-wall surveillance provides only] the thought processes used to draw inferences from information in the public domain."[47]

Surveillance of the outside of Kyllo's home provided information that was open to the public, raising the inference that Kyllo was using high-intensity lamps to grow marijuana as the agents suspected. The agents did not "physically" intrude into Kyllo's home. The dissent, like the majority, would draw a bright line at Kyllo's front door, but only when sense-enhancing technology "provides the functional equivalent of actual presence in the area being searched."[48] The broad reach of the majority's rule raises the danger of potentially prohibiting sense-enhancing methods that the Court has already approved, such as dogs trained to sniff out drugs, explosives, or other contraband. The dissent points to clearly established precedent from the Court that "a dog sniff that 'discloses only the presence or absence of narcotics' does 'not constitute a search within the meaning of the Fourth Amendment,' and it must fol-

36. *Id.* at 30.

37. *Id.*

38. *Id.*

39. *Id.* at 30-31.

40. *Id.* at 31.

41. *Id.* at 40.

42. *Id.* at 34.

43. *Id.* at 40.

44. *Id.* In stark contrast to its expressed concern in *Kyllo* to protect the sanctity of a home, the Court nevertheless approved the search of a home in another case this year that was conducted without a warrant or probable cause. In *United States v. Knights*, 122 S. Ct. 587 (2001), the Court held "that the warrantless search of [Knight's home] supported by reasonable suspicion and authorized by a condition of probation, was reasonable within the meaning of the Fourth Amendment." *Id.* at 593.

45. *Kyllo*, 533 U.S. at 40.

46. *Id.* at. 43-44 (Stevens, J., joined by Rehnquist, C.J., O'Connor and Kennedy, JJ., dissenting).

47. *Id.* at 41.

48. *Id.* at 47.

low that sense-enhancing equipment that identifies nothing but illegal activity is not a search either."[49]

Finally, the dissent criticizes the majority's limitation of its rule to technology not generally available to the public. "[T]he contours of [the Court's] new rule are uncertain because its protection apparently dissipates as soon as the relevant technology is 'in general public use.'"[50] How much use by the general public is enough? The majority avoided answering this question by merely brushing off the dissent's legitimate concern in a footnote, saying "[t]hat quarrel . . . is not with us but with this Court's precedent," and "[g]iven that we can quite confidently say that thermal imaging is not 'routine,' we decline in this case to reexamine that factor."[51]

Kyllo has several important implications for the military. First, *Kyllo* clearly signals an end to the use of thermal imagers and similar devices by law enforcement officials during surveillance of private homes without a warrant or search authorization. Fortunately, not many service members or civilian personnel have marijuana plantations like Kyllo's in government housing. Legal advisers still need to remain alert, however, for military police or military criminal investigators using any sense-enhancing technology for surveillance in base housing areas and other locations that have greater expectations of privacy. At the very least, staff judge advocates and trial counsel should include *Kyllo* in their training with supported commands and law enforcement detachments. In addition, to ensure compliance with the *Kyllo* majority's bright-line rule, government counsel need to find out what technology law enforcement officials use on and off the installation.

Another important implication of *Kyllo* relates to the dissent's concerns. The case was decided on 11 June 2001, well before the tragic events of 11 September. What if law enforcement officials suspect that someone possesses a dangerous virus, bacteria, or even worse, a nuclear weapon in a home or residential area?[52] A suspicion is not enough to establish the probable cause necessary to obtain a search warrant. Under these circumstances, can law enforcement use sense-enhancing technology that merely detects the presence of dangerous emissions outside the home or residential area? The answer is "no" based on *Kyllo*; they must have a warrant supported by probable cause.[53]

The problem now is that the Court has drawn a bright (and broad) line supported by the Constitution. Any attempt to narrow the scope of *Kyollo* may tread on fundamental Fourth Amendment rights, at least in terms of the majority's interpretation. As the dissent suggests, "It would [have been] far wiser to give legislators an unimpeded opportunity to grapple with these emerging issues rather than to shackle them with prematurely devised constitutional constraints."[54] To the extent that legislators will or can narrow the scope of *Kyllo*, in the wake of September 11, the significant threat posed by terrorist activities and their means or weapons of mass destruction warrant at least some response.

The final and most important impact of *Kyllo* concerns what the decision does not address. Because the bright line was drawn at the entrance of Kyllo's home, it ended at his back door. The majority was compelled to reach its decision because the case involved the privacy of a home, which is "'[a]t the very core' of the Fourth Amendment."[55] What impact does *Kyllo* have on law enforcement activity outside a home? The answer depends on the area and specific target of the surveillance. If police are looking for an escaped prisoner or a crime suspect fleeing apprehension at night in a public area, *Kyllo* does not limit police from using a thermal imaging device or any other similar visual aid. On the other hand, *Kyllo* may extend beyond the home in areas with similar expectations of privacy. The lesson for practitioners, however, is to review *Kyllo's* concerns when advising law enforcement officials who contemplate using new or even existing technology for surveillance or other law enforcement purposes.[56]

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49. *Id*. at 47-48 (citing United States v. Place, 462 U.S. 696, 707 (1983)). The problem with this argument is that Kyllo's home was the target of the surveillance, not his suitcase in an airport or other public area as were the circumstances in *Place*.

50. *Id*. at 47.

51. *Id*. at 39 n.6.

52. *See id*. at 48.

53. Obviously, lethal types of bacteria and viruses along with nuclear material pose considerable public safety and national security concerns that would raise several exceptions to the probable cause and warrant requirements. *See, e.g*., Indianapolis v. Edmond, 531 U.S. 32, 44 (2000) (discussing situations where a roadblock would be permissible, the Court stated that "the Fourth Amendment would almost certainly permit an appropriately tailored roadblock set up to thwart an *imminent terrorist attack* or to catch a dangerous criminal who is likely to flee by way of a particular route" (emphasis added)). *See also* MCM, *supra* note 10, MIL. R. EVID. 314(i) (permitting warrantless searches without probable cause in emergency circumstances to save lives or related purposes), 315(g) (allowing warrantless searches based on probable cause during certain exigent circumstances).

54. *Id*. at 51.

55. *Id*. at 31 (quoting Silverman v. United States, 365 U.S. 505, 511 (1961)).

56. For an excellent article on the practical implications of *Kyllo*, readers are encouraged to review Thomas D. Colbridge, Kyllo v. United States*: Technology Versus Individual Privacy*, 70 F.B.I. L. ENFORCEMENT BULL. 10 (2001), *available at* http://www.fbi.gov/publications/leb/2001/october2001/oct01p25.htm.

Fourth Amendment Exceptions: Vehicle Stops[57]

This past year the Supreme Court decided three cases involving vehicle stops.[58] These cases are important for military practitioners because military courts have published very few decisions on this subject. One area particularly devoid of military precedent involves brief investigatory stops of motor vehicles based on reasonable suspicion. As noted recently by the Air Force Court of Criminal Appeals (AFCCA) in *United States v. Robinson*,[59] "there is little military case law on this matter."[60] The cases discussed in this section help fill the void caused by a lack of similar cases in the military. In addition, they provide practitioners with an excellent perspective on the Supreme Court's present view of the law involving vehicle stops.

Probable Cause and Warrantless Arrests: Arkansas v. Sullivan

In the per curiam opinion of *Arkansas v. Sullivan*,[61] the Supreme Court reaffirmed its decision in *United States v. Whren*[62] that "subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."[63] A police officer stopped Sullivan for speeding and having an improperly tinted windshield.[64] When viewing Sullivan's drivers license, the officer recognized Sullivan as a suspect in an ongoing narcotics investigation. After Sullivan opened his door while looking for his vehicle registration, the officer noticed a rusted hatchet on the floorboard of Sullivan's car. The officer arrested Sullivan and put him in a squad car. During an inventory search of Sullivan's car, the officer found a bag containing methamphetamine and various items of drug paraphernalia. Sullivan was charged with a variety of offenses stemming from the initial stop and evidence subsequently found in his car.[65]

At trial, Sullivan moved to suppress this evidence, claiming that the search conducted by the officer was just a sham or pretext. The trial court granted Sullivan's motion to suppress. The Arkansas Supreme Court affirmed the trial court's decision and denied the State's request for a rehearing.[66] The Arkansas Supreme Court declined to follow *Whren* because it believed much of that opinion was dicta. The Arkansas Supreme Court agreed with the trial judge that "'the arrest was pretextual and made for the purpose of searching Sullivan's vehicle for evidence of a crime,' and observed that 'we do not believe that *Whren* disallows' suppression on such a basis."[67]

The Supreme Court strongly disagreed with the Arkansas Supreme Court's decision to disregard *Whren*. Although *Whren* involved a search following a traffic stop instead of a search following a custodial arrest, it still controlled the analysis in *Sullivan*. Moreover, the Supreme Court found that the lower court concluded incorrectly that it could provide greater protection than Supreme Court precedent involving constitutional rights. The Court reiterated its precedent that while

> "a State is free *as a matter of its own law* to impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitutional standards," it "may not impose such greater restrictions as a matter of *federal constitutional law* when this Court specifically refrains from imposing them."[68]

57. "Vehicle stops" in the context of the Fourth Amendment encompass a wide variety of search and seizure topics. The term is used here to generally orient the reader to warrant and probable cause exceptions, or both, under the Fourth Amendment, and more specifically to cases involving motor vehicles.

58. The first two cases discussed herein concern "stops" based on probable cause under the motor vehicle exception to the warrant requirement. The last case discussed in this section, *United States v. Arvizu*, 122 S. Ct. 744 (2002), involves a brief "*Terry* stop" of a vehicle based on less than probable cause (that is, a reasonable suspicion). *See generally* Terry v. Ohio, 392 U.S. 1 (1968).

59. 56 M.J. 541 (A.F. Ct. Crim. App. 2001).

60. *Id.* at 544.

61. 532 U.S. 769 (2001).

62. 517 U.S. 806 (1996).

63. *Sullivan*, 532 U.S. at 772 (citing *Whren*, 517 U.S. at 813).

64. *Id.* at 769.

65. *Id.* at 770.

66. *Id.*

67. *Id.* at 771 (quoting Arkansas v. Sullivan, 11 S.W.3d 526, 552 (2000)). In addition, the Arkansas Supreme Court said that, "even if it were to conclude that *Whren* precludes inquiry into an arresting officer's subjective motivation, 'there is nothing that prevents this court from interpreting the U.S. Constitution more broadly that the United States Supreme Court, which has the effect of providing more rights.'" *Id.* (quoting *Sullivan*, 11 S.W.3d at 552).

68. *Id.* at 772 (quoting Oregon v. Hass, 420 U.S. 714, 719 (1975) (citations omitted)).

Justice Ginsburg, concurring in *Sullivan*, agreed that the majority opinion was in accord with precedent. She noted the Arkansas Supreme Court's concern that "[v]alidating [the officer's] arrest would accord police officers disturbing discretion to intrude on individuals' liberty and privacy;"[69] however, she concurred because "this Court has held that such exercises of official discretion are unlimited by the Fourth Amendment."[70] She also requested that the Court reconsider its decision in *Atwater v. Lago Vista*,[71] discussed below.[72]

Atwater v. Lago Vista

In *Atwater*, the Supreme Court answered the long-standing question of whether police can make an arrest for minor offenses.[73] The Court held that "[i]f an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender."[74]

Ms. Atwater was driving with her two adolescent children in Lago Vista, Texas.[75] Neither she nor her children were wearing seatbelts, a violation of Texas law.[76] A Lago Vista police officer observed the seatbelt violation and stopped Ms. Atwater. The officer had previously given her a warning for a similar offense. As the officer approached Ms. Atwater, he allegedly yelled that she was going to jail and directed her to provide him with her driver's license and proof of insurance, both of which she did not have. He called for backup to make an arrest and had Ms. Atwater give her distraught children to a friend who lived nearby. The officer placed Ms. Atwater under arrest, handcuffed her, and drove her to the police station, where she had her mug shot taken and was jailed for an hour before being released on bond. She later pled no contest to misdemeanor seatbelt charges and paid a fifty-dollar fine.[77]

Ms. Atwater filed a suit under 42 U.S.C. § 1983 against the officer and others for her arrest and subsequent treatment, claiming a violation of her right to be free from unreasonable seizure under the Fourth Amendment.[78] The Supreme Court ultimately concluded that, although her arrest was "humiliating," it was "not so extraordinary as to violate the Fourth Amendment."[79] The Court determined that the arrest was reasonable, in large part because the Texas statute in question authorized police officers to make arrests without a warrant for minor traffic violations.[80] The majority noted that all fifty states and the District of Columbia have similar statutes.[81]

Although *Atwater* was a slim (five to four) majority opinion, it nevertheless answered an important and nagging question in Fourth Amendment law. In doing so, the Court disregarded Ms. Atwater's argument "for a modern arrest rule, one not necessarily requiring violent breach of the peace, but nonetheless forbidding custodial arrest, even upon probable cause, when conviction could not ultimately carry any jail time and when the government shows no compelling need for immediate detention."[82] The Court's problem with her argument was that it "would not only place police in an almost impossible spot, but would guarantee increased litigation over many of the arrests that would occur," and her "various distinctions between per-

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69. *Id.* at 772-73 (Ginsburg, J., joined by Stevens, O'Connor, & Breyer, JJ., concurring).

70. *Id.* at 773.

71. 532 U.S. 318 (2001).

72. *See Sullivan*, 532 U.S. at 773. Justice Ginsburg premised her request on whether *Atwater* results in "anything like an epidemic of unnecessary minor-offense arrests." *Id*. (citing *Atwater*, 532 U.S. at 353).

73. Previously, the Court had only intimated its belief that arrests for even minor criminal offenses were authorized, stating that "the standard of probable cause 'applie[s] to all arrests, without the need to balance the interests and circumstances involved in particular situation.'" *Atwater*, 532 U.S. at 354 (citing Dunaway v. New York, 442 U.S. 200, 208 (1979)).

74. *Id.*

75. *Id*. at 323.

76. *Id*. at 323-24. Under Texas law, a police officer has the authority to "'arrest without warrant a person found committing a violation' of these seatbelt laws, although it permits police to issue citations in lieu of arrest." *Id*. at 323 (quoting TEX. TRAN. CODE. ANN. §§ 543.001, 543.003-.005 (1999)).

77. *Id.* at 324.

78. *Id.* at 325.

79. *Id*. at 354-55.

80. *Id.* at 343.

81. *Id.* at 344. An appendix to the opinion summarizes all the statutes. *See id*. at 355-60.

82. *Id.* at 346.

missible and impermissible arrests for minor crimes strike us as 'very unsatisfactory line[s]' to require police officers to draw on a moment's notice."[83]

Justice O'Connor's spirited attack of the majority brings to light the significant implications of the opinion. She stated that "[j]ustifying a full arrest by the same quantum of evidence that justifies a traffic stop—even thought the offender cannot ultimately be imprisoned for her conduct—defies any sense of proportionality and is in serious tension with the Fourth Amendment's proscription of unreasonable seizures."[84] She proposed a rule that

> would require that when there is probable cause to believe that a fine-only offense has been committed, the police officer should issue a citation unless the officer is "able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the additional] intrusion" of a full custodial arrest.[85]

Finally, she warned that "[s]uch unbounded discretion [authorized by the majority opinion] carries with it grave potential for abuse," and that "[a]fter today, the arsenal available to any officer extends to a full arrest and the searches permissible concomitant to that arrest."[86]

Atwater is important for military practitioners because it clearly signals that officials acting in a law enforcement capacity have the authority to make a full arrest for even minor traffic violations consistent with applicable statutes. Flowing from that authority, the officers may then conduct a search incident to the arrest. In the military, the search incident to apprehension exception to the probable cause requirement of the Fourth Amendment is expressed in MRE 314(g).[87]

Reasonable Suspicion: United States v. Arvizu

From the standpoint of "new developments," the significance of *United States v. Arvizu*[88] lies more with its facts than on any new twists or changes in the law. For practitioners confronted with a question involving a motor vehicle stop based on reasonable suspicion, the law is well settled.[89] The problem, though, is that the facts vary dramatically among these "vehicle stop" cases. "[I]n many instances the factual 'mosaic' analyzed for a reasonable-suspicion determination would preclude one case from squarely controlling another."[90] Accordingly, practitioners need to go beyond one or even a few published cases to determine whether the facts in any single case amount to reasonable suspicion. *Arvizu* provides a good set of facts along with the Supreme Court's analysis on how those facts adequately raised a reasonable suspicion.

A U.S. Border Patrol agent stopped Arvizu in a remote part of southeastern Arizona.[91] A subsequent search of Arvizu's minivan revealed over 100 pounds of marijuana. Arvizu moved to suppress the evidence found in his minivan, claiming that the agent did not have a reasonable suspicion to make the stop.[92] The trial judge denied Arvizu's motion to suppress, but the Court of Appeals for the Ninth Circuit reversed this decision. The Supreme Court agreed with the trial judge, holding that "[t]aken together, [the factors supporting the agent's stop] sufficed to form a particularized and objective basis for [the agent to stop] the vehicle, making the stop reasonable within the meaning of the Fourth Amendment."[93]

In *Arvizu*, the Supreme Court reviewed numerous factors representing the "totality of the circumstances" to determine whether the agent's suspicion had an adequate basis. Initially, the agent was told that a vehicle had set off a sensor in a particular remote area, suggesting to him the driver might be trying to avoid a border checkpoint. The time of day suggested the same because drug smugglers were known to make their dash across the border from Mexico during the periodic shift changes of the agents. The agent was informed that a drug

83. *Id.* at 350 (quoting Carroll v. United States, 267 U.S. 132, 157 (1925)).

84. *Id.* at 364 (O'Connor, J., joined by Stevens, Ginsburg, and Breyer, JJ., dissenting).

85. *Id.* at 366 (citing Terry v. Ohio, 392 U.S. 1, 21 (1968)).

86. *Id.* at 372.

87. *See* MCM, *supra* note 10, MIL. R. EVID. 314(g).

88. 122 S. Ct. 744 (2002).

89. When the basis for the stop is "reasonable suspicion" that criminal activity is afoot, the standard of review is whether "under the totality of the circumstances" the officer had a "'particularized and objective basis' for suspecting legal wrongdoing." *Id.* at 750 (citing United States v. Sokolow, 490 U.S. 1, 7 (1989); United States v. Cortez, 449 U.S. 411, 417-48 (1981)).

90. *Arvizu*, 122 S. Ct. at 751.

91. *Id.* at 747-48.

92. *Id.* at 750.

smuggler had set off the same sensor several weeks earlier using the same route as Arvizu's vehicle. The agent went to an area where he believed he would intercept the vehicle and waited.[94]

Arvizu's minivan soon approached, and it appeared to be similar to vehicles normally used by drug smugglers. The van slowed down considerably as it approached the agent's position on the road. As the van passed, the agent noticed five individuals inside. Although the agent was in plain view, Arvizu appeared stiff, and he did not look at the agent as he drove by. Based on the agent's experience, drivers normally look in the direction of border patrol agents and give them a friendly wave. The agent also noticed in the back of the van two children whose knees appeared to be higher than normal, as if something was underneath their feet. The agent pulled in behind the van, and the children began to periodically wave their hands mechanically and in unison while looking forward. Arvizu then signaled that he was turning, turned the signal off, and then back on again as he made an abrupt turn.[95]

The direction of the turn was significant for the agent because it was the last turnoff that would avoid the nearby border checkpoint. In addition, the unprepared roads in the area were normally used only by four-wheel drive vehicles. Finally, the agent checked the license number of the van. It was registered to an address just blocks away from the border in an area known to be used by drug smugglers. At this point the agent stopped Arvizu, asked him for permission to search his van, and Arvizu consented. The agent found over 100 pounds of marijuana in a bag under the children's feet.[96]

Criticizing the Ninth Circuit's approach to reviewing these factors in light of binding precedent, the Supreme Court said the lower court departed "sharply from the teachings of these cases," and its "view that it was necessary to 'clearly delimit' an officer's consideration of certain factors to reduce 'troubling . . . uncertainty,' also runs counter to our cases and underestimates the usefulness of the reasonable-suspicion standard in guiding officers in the field."[97] The Ninth Circuit's approach was to view each factor individually to determine its appropriateness. Finding many of the factors to be merely innocent conduct, the court determined the agent had an insufficient basis to make the stop. The Supreme Court agreed that many of the factors were innocent, but viewed under the totality of the circumstances together with reasonable inferences they raised based on the agent's training and experience, the factors amounted to a reasonable suspicion that Arvizu was engaged in illegal activity.[98]

Although *Arvizu* provides no "new developments," the decision is still important for practitioners because it is one more fact pattern from the Supreme Court to add to the overall body of law dealing with reasonable suspicion and vehicle stops. As discussed in the introduction to this section, no single case in this area of Fourth Amendment law will usually be enough to answer a question involving reasonable suspicion in a pending case; however, read in conjunction with other precedent, *Arvizu* will provide practitioners with answers in most cases. Moreover, *Arvizu* gives the field a good perspective on the Court's current interpretation of its own precedent. In the near future, *Arvizu* may determine the outcome in a recent Air Force vehicle stop case, *United States v. Robinson*.[99]

Roadblocks: Another Look at *Indianapolis v. Edmond*

In 2000, the Supreme Court decided *Indianapolis v. Edmond*,[100] discussed in last year's Military Justice Symposium, Volume II.[101] In *Edmond*, the Court found that the City of Indianapolis's checkpoint program for the interdiction of narcotics violated the Fourth Amendment because its primary purpose was "indistinguishable from the general interest in crime control."[102] The implications of *Edmond* for military

93. *Id.* at 753.

94. *Id.* at 748-49.

95. *Id.* at 749.

96. *Id.* at 749-50.

97. *Id.* at 751 (citations omitted).

98. *Id.* at 752.

99. 56 M.J. 541 (A.F. Ct. Crim. App. 2001), *petition for review granted*, No. 02-0148/AF, 2002 CAAF LEXIS 394 (Apr. 24, 2002).

100. 531 U.S. 32 (2000).

101. *See* Major Michael R. Stahlman, *New Developments in Search and Seizure: A Little Bit of Everything*, ARMY LAW., May 2001, at 20, 25-26. *Edmond* is discussed again this year because the author received a considerable number of inquiries from the field regarding the decision's practical implications in the military. Further discussion of the case will assist practitioners questioning the applicability of *Edmond* to military practice.

102. *Edmond*, 531 U.S. at 48. The primary purpose of the checkpoint program was unquestionable because a lighted sign cautioned motorists that they were approaching a "NARCOTICS CHECKPOINT ____ MILE AHEAD, NARCOTICS K-9 IN USE, BE PREPARED TO STOP." *Id*. at 35-36. Furthermore, the city conceded that its primary purpose was for the interdiction of illegal narcotics. *Id.* at 40.

commanders and their legal advisers go beyond just roadway checkpoints on an installation. In the military, commanders have broad discretion to conduct inspections for a wide range of purposes. Military Rule of Evidence 313(b) states, in part:

> An "inspection" is an examination of the whole or part of a unit, organization, installation, vessel, aircraft, or vehicle, including an examination conducted at entrance and exit points, conducted as an incident of command the primary purpose of which is to determine and to ensure the security, military fitness, or good order and discipline of the unit, organization, installation, vessel, aircraft, or vehicle . . . . An inspection also includes an examination to locate and confiscate unlawful weapons and other contraband . . . . Inspections may utilize any reasonable natural or technological aid and may be conducted with or without notice to those inspected.[103]

Despite this broad authority of commanders to conduct "inspections," *Edmond* needs to be considered when implementing or reviewing installation and unit policies. In other words, legal advisers need to ensure that the primary purpose for any "inspection" program at any unit level comports with *Edmond* in light of MRE 313(b). Labels that suggest that the primary purpose is for anything related to general crime control or drug interdiction must be avoided. Instead, descriptions or labels of inspection programs must include language provided in MRE 313(b). More importantly, judge advocates need to routinely advise their commanders, for example, that their urinalysis inspection programs are for unit readiness, military fitness, and good order and discipline, instead of tools to get rid of the "druggies."[104]

To many this may sound like "just a matter of semantics." Fortunately, *Edmond* dispels these critics. In the text of the opinion and in a footnote, the Court clearly signaled that certain administrative searches are not affected by its opinion. Sobriety and border checkpoints, searches at airports and government buildings, and by implication, military inspections, remain valid.[105] The distinguishing factor is that these intrusions serve an important government purpose that outweighs individual privacy interests. Furthermore, the Court avoided deciding whether a checkpoint with a proper primary purpose to check the sobriety of drivers, for example, will still be proper if it has a secondary purpose of drug interdiction.[106] Although this portion of the Court's discussion should not be read as a green light to use sobriety checkpoints as a subterfuge for drug interdiction, the Court's deliberate avoidance of this issue seems to suggest that it would be proper to have a valid sobriety checkpoint that has a secondary or collateral purpose of drug interdiction.[107]

Finally the Court cautioned that "the purpose inquiry . . . is to be conducted only at the programmatic level and is not an invitation to probe the minds of individual officers acting at the scene."[108] In other words, when a question involving the primary purpose of a checkpoint or inspection confronts military practitioners, the inquiry focuses on the commander's primary purpose and not on what the officials conducting the inspection believe is the primary purpose.

Exceptions to the Exclusionary Rule: Good Faith

United States v. Carter

Among the handful of Fourth Amendment cases decided by military appellate courts this past year, *United States v. Carter*[109] is the most important. In *Carte*r, the CAAF addressed whether probable cause supported a seizure authorization and, if not, whether the good faith exception to the exclusionary rule applied.[110] More importantly, the CAAF provided clear guidance concerning its interpretation of what constitutes a "substantial basis" for probable cause determinations as distinguished from application of the good faith exception under MRE 311(b)(3)(B).[111]

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103. MCM, *supra* note 10, MIL. R. EVID. 313(b).

104. *But see* United States v. Davis, 54 M.J. 690 (A.F. Ct. Crim. App. 2001), *petition for review denied*, 55 M.J. 238 (2001) (finding no abuse of discretion in military judge's ruling that results of urinalysis specimen were admissible despite Air Force Instruction that directed "urinalysis testing for illegal drug and narcotic use" for medical screening of pretrial detainees during inprocessing).

105. *Id*. at 47-48.

106. *Id*. at 47 n.2.

107. *See* United States v. Davis, 270 F.3d 977, 979-80 (D.C. Cir. 2001); *see also* United States v. Gudmundson, No. S29944, 2001 CCA LEXIS 349 (A.F. Ct. Crim. App. Dec. 6, 2001) (unpublished) (finding a proper primary purpose under MRE 313(b) for installation commander's urinalysis program even though he had knowledge of a rave party scheduled in the local community).

108. *Edmond*, 531 U.S. at 48.

109. 54 M.J. 414 (2001).

110. *Id*. at 418.

On the morning of 25 September 1996, Captain (CPT) Carter was the Battle Captain for his unit's tactical operations center in Kuwait.[112] The victim, First Lieutenant (1LT) CV, was asleep at around 0425 when she woke up and felt a watery substance on her face. At the same time she noticed an unidentified man over her with his knees pinning her upper body to the ground and his crotch toward her face. She got out of her sleeping cot and chased after the unidentified male, shouting for him to stop. Several unit guards joined in the chase of the unidentified male they described only as tall and black, wearing a battle dress uniform, no headgear, and no load bearing equipment.[113] Eventually, the unidentified male got away. At some point, 1LT CV wiped the watery substance she believed to be semen on her shirt and on the ground.[114]

Several other witnesses saw or heard the chase and provided information to Special Agent (SA) Hazell, U.S. Army Criminal Investigation Division (CID). No witnesses, including the victim, could identify CPT Carter as the assailant. Captain Carter denied committing the assault during several interviews with SA Hazell in Kuwait. At some point after 25 September, CPT Carter returned to his parent unit at Fort Hood, Texas. Special Agent Hazell's report of investigation was provided to SA Voos at Fort Hood. Eventually, SA Voos sought a search authorization to obtain a blood sample and other evidence from CPT Carter. Special Agent Voos presented an affidavit to a magistrate at Fort Hood which included the information provided to SA Voos by SA Hazell, a description of CPT Carter, a statement that semen stains were found on the victims shirt, and a general description of the units and field site in Kuwait. The magistrate, Lieutenant Colonel Hunter, concerned with the lack of detail in the affidavit, asked SA Voos additional questions and relied on his own knowledge and experience to approve the search authorization. The magistrate limited the authorization to the drawing of CPT Carter's blood.[115]

At his trial, CPT Carter moved to suppress the test results of his blood sample, claiming that the facts supporting the authorization did not amount to probable cause. The military judge denied the motion, but found that it was a "close call."[116] Captain Carter was convicted of various charges stemming from the assault on 1LT CV, and he was sentenced to a dismissal, five years' confinement, and total forfeitures.[117]

Noting the preference for warrants, particularly when there is a close call concerning probable cause, the CAAF avoided deciding whether the military judge abused his discretion in denying CPT Carter's motion to suppress. Instead, the court concluded that the search authorization was executed in good faith.[118] Although the court dodged resolving the probable cause issue, the opinion provides practitioners with an excellent overview of the law in this area. More importantly, however, the court identified a crucial distinction involving the "substantial basis" standard for probable cause determinations and "substantial basis" as it applies to the good faith exception under MRE 311(b)(3)(B).[119] In addition to identifying the distinction, the CAAF gave practitioners a clear roadmap as to how to apply "substantial basis" in both instances.

First, "substantial basis" as it applies to the review of a magistrate's probable-cause determination under *Illinois v. Gates*[120] "examines the information supporting the request for a search authorization through the eyes of a judge evaluating the magistrate's decision. In this context, the search authorization will be upheld if the judge determines that the issuing magistrate had a 'substantial basis' for determining the existence of probable cause."[121]

Second, "[w]hen the issue is whether the good faith exception should be invoked, MRE 311(b)(3)(B) uses 'substantial basis' to describe the absence of the first and third exceptions to good faith outlined in [*United States v. Leon*, 468 U.S. 897, 922 (1984)]."[122] In this context, "'substantial basis' as an element of good faith examines the affidavit and search authorization through the eyes of a reasonable law enforcement official executing the search authorization."[123] The rule "is satisfied if

111. *See id*. at 421-22.

112. *Id.* at 416.

113. *Id*. at 415.

114. *Id.* at 415-16.

115. *Id*. at 416-17.

116. *Id*. at 417. The military judge noted that SA Voos did not withhold any information, provided both inculpatory and exculpatory evidence, and did not try to explain any conflicts in the evidence. The military judge also found that the authorization was executed in good faith. *Id*.

117. *Id*. at 415.

118. *Id.* at 419.

119. *See id*. at 421-22. As noted by the court, "the phrase 'substantial basis' has different meanings, depending on the issue involved." *Id*. at 422.

120. 462 U.S. 213, 238 (1983).

121. *Carter*, 54 M.J. at 422.

the law enforcement official had an objectively reasonable belief that the magistrate had a 'substantial basis' for determining the existence of probable cause."[124]

Applying this analysis, the CAAF determined that, "even if [the magistrate] did not have a 'substantial basis' for determining the existence of probable cause, the military judge did not abuse his discretion by denying the motion to suppress, because all the elements of the good faith exception were satisfied."[125] As an aside, the court noted that this problem with the dual use of

> "substantial basis" underscores the risks inherent in codifying evolving constitutional issues. We suggest that the problem might be alleviated if the rules were written in more flexible language with respect to situations where the President did not intend to set forth specific military rules but, instead, intended to follow evolving civilian practice.[126]

Conclusion

The practice of law is more than just a matter of semantics, particularly in several Fourth Amendment cases decided over the past year covering a wide gamut of search and seizure issues. Whether deciphering the meaning of "substantial basis," divining what constitutes "reasonable suspicion," or splitting hairs when looking at what is "reasonable" under the Fourth Amendment, military practitioners must realize that even subtle differences in a legal standard or use of a phrase or word in a particular context may determine the outcome of a case.

Although the cases discussed in this article do not represent any clear trends, several opinions from the Supreme Court established new standards or bright-line rules that resolved significant and previously unanswered questions. In addition, the CAAF provided several opinions that brought considerable clarity to some cloudy principles involving rules of evidence and binding case authority. Through the experience of evolving Fourth Amendment jurisprudence this past year, military practitioners have gained a wide variety of new tools with which to work the machinery that constitutes the military justice system.

122. *Id*. at 419-20, 422.

123. *Id*. at 422.

124. *Id*.

125. *Id*.

126. *Id*. at 421 n.3.

Recent Developments in Sentencing: Tying Up Loose Ends

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Introduction

Every year is a busy year when it comes to recounting the annual cases that addressed sentencing issues. The past year was filled with court decisions at all levels that addressed sentencing issues from all services. To say there was a common theme or trend is difficult, maybe impossible. There appeared to be a concentrated effort by the Court of Appeals for the Armed Forces (CAAF), however, to tie up and clarify some areas of sentencing. This article discusses the year's most important military sentencing cases and is divided into four major sections: the government's case in aggravation, the defense's case in extenuation and mitigation, sentencing arguments, and sentencing instructions. The first three sections of this article involve pre-sentencing procedure, and most of the cases discussed in the article fall within some aspect of the pre-sentencing phase.

The rules governing pre-sentencing procedures are generally found in Rule for Courts-Martial (RCM) 1001.[1] The purpose of the pre-sentencing case is to provide matters that will aid the court in determining an appropriate sentence for the accused. The sequence in presenting that evidence begins with the government presenting matters listed in RCM 1001(b),[2] followed by the defense presenting evidence in extenuation and mitigation under RCM 1001(c).[3] If desired, rebuttal by the government and surrebuttal by the defense is permitted, and then both sides have an opportunity to present a sentencing argument.[4]

After presentation of the pre-sentencing evidence and the sentencing arguments of counsel, the trial moves into the sentencing phase. The military judge provides sentencing instructions to the court members, and following proper deliberation, the members determine an appropriate sentence.[5] The fourth section of this article, provides a review of the significant decisions in the area of sentencing instructions.

The Government Case in Aggravation

Any evidence the government introduces in its pre-sentencing case must fall within one of five categories listed in RCM 1001(b).[6] The first category is the accused's service data from the charge sheet,[7] which the trial counsel simply provides to the court at the beginning of the government's pre-sentencing case. This category receives little attention; however, various court decisions addressed the four remaining categories this past year. This section discusses the more significant decisions addressing those categories.[8]

Personal Data and Character of Prior Service

The second category of government pre-sentencing evidence is the "personal data and character of prior service of the accused" and is found in RCM 1001(b)(2).[9] The rule specifically allows the trial counsel to "obtain and introduce from the personnel records of the accused evidence of the accused's mar-

1. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1001 (2000) [hereinafter MCM].

2. *Id.* R.C.M. 1001(b).

3. *Id.* R.C.M. 1001(c).

4. *Id.* R.C.M. 1001(d), (g). Rule for Courts-Martial 1001(d) provides for rebuttal and surrebuttal. *See id.* R.C.M. 1001(d). Although not discussed in this article, one CAAF decision this past year addressed rebuttal. *See* United States v. Hursey, 55 M.J. 34 (2001) (abuse of discretion to allow noncommissioned officer in charge (NCOIC) of base legal office to testify in rebuttal that accused was late for his own court-martial in which NCOIC was unable to say whether the accused was at fault). Rule for Courts-Martial 1001(g) provides for sentencing argument. *See* MCM, *supra* note 1, R.C.M. 1001(g); *infra* notes 99-123 and accompanying text.

5. MCM, *supra* note 1, R.C.M. 1005-1007.

6. *Id.* R.C.M. 1001(b). Those five categories are RCM 1001(b)(1), Service data from the charge sheet; 1001(b)(2), Personal data and character of prior service of the accused; 1001(b)(3), Evidence of prior convictions; 1001(b)(4), Evidence in aggravation; and 1001(b)(5), Evidence of rehabilitative potential. *Id*.

7. *Id.* R.C.M. 1001(b)(1).

8. This article does not address rehabilitative potential evidence under RCM 1001(b)(5) because there were no significant CAAF opinions on this subject. One service court opinion this past year that touches upon RCM 1001(b)(5), however, is *United States v. Bish*, 54 M.J. 861 (A.F. Ct. Crim. App. 2001), *petition for grant of review denied*, 55 M.J. 371 (2001) (euphemism rule does not appear to apply to defense). *But cf.* United States v. Hoyt, No. ACM 33145, 2000 CCA LEXIS 180 (A.F. Ct. Crim. App. July 5, 2000), *petition for grant of review denied*, 54 M.J. 365 (2000) (improper for either prosecution or defense to offer an opinion regarding whether to return an accused to his unit); United States v. Ramos, 42 M.J. 392 (1995) (suggesting the euphemism rule may apply to the defense).

ital status; number of dependents, if any; and character of prior service."[10] This rule was at issue in *United States v. Anderson.*[11]

In *Anderson*, the accused was convicted of an unauthorized absence and wrongful use of marijuana.[12] During its pre-sentencing case, the government offered as a military personnel record a document purporting to approve the accused's request for discharge in lieu of trial by court-martial.[13] The defense objected to the admissibility of the document under Military Rule of Evidence (MRE) 410(a)(4),[14] arguing that the document was derived from a statement made in the course of negotiations in a previous case against the accused. The military judge admitted the document into evidence, holding that it did not fall within the scope of MRE 410 because the document was not related to the charges before the court-martial. On appeal, the Navy-Marine Court of Criminal Appeals (NMCCA) held that the "correspondence pertaining to an administrative discharge in lieu of court-martial was admissible as a personnel record [and] that it was not within the ambit of MRE 410 because it did not pertain to the charges before the court-martial."[15]

The CAAF disagreed with the service court, reemphasizing several points from *United States v. Vasquez*,[16] a case with a similar issue decided five months before *Anderson*. First, MRE 410 does not just protect the plea-bargaining statements made in relation to offenses pending before the court-martial at which they are offered. It protects plea-bargaining statements made in relation to any offense still pending. Second, the charges giving rise to an administrative discharge in lieu of trial are still pending until the accused receives an executed discharge. Third, MRE 410 must be interpreted broadly to support the policy behind the rule, which is to encourage a "flow of information during the plea-bargaining process."[17] Finally, although RCM 1001(b)(2) permits the introduction of information from the accused's personnel records, "it does not provide blanket authority to introduce all information that happens to be maintained in the accused's personnel records."[18]

What distinguishes *Anderson* from *Vasquez* is the absence of an actual admission of guilt. In *Vasquez*, the government had sought to introduce the accused's request for an administrative discharge in lieu of trial for a previous 212-day unauthorized absence that was not charged at trial. Accompanying the request for discharge was an admission by the accused that he was guilty of the unauthorized absence.[19] No admission of guilt accompanied the document offered by the trial counsel in *Anderson.* The court in *Anderson*, however, found this distinction irrelevant. The CAAF stated that the accused's request for discharge in lieu of trial was "tantamount to a statement because admission of guilt 'was an integral part of the . . . discharge process.'"[20] The CAAF held that the earlier charges that formed the basis of the request for discharge were still pending because the accused had not yet "received the benefit of his bargain in the earlier case," that is, an executed discharge.[21]

If *Vasquez* left any questions unanswered regarding the extent of protection afforded to an accused under MRE 410, *Anderson* now makes it clear. During the government's pre-

9. MCM, *supra* note 1, R.C.M. 1001(b)(2).

10. *Id.* Rule for Courts-Martial 1001(b)(2) defines "[p]ersonnel records of the accused" as "any records made or maintained in accordance with departmental regulations that reflect the past military efficiency, conduct, performance, and history of the accused." *Id.*

11. 55 M.J. 182 (2001).

12. *Id.* The unauthorized absence began on 19 September 1997 and was terminated by apprehension on 28 September 1998. *Id.*

13. *Id.* at 183. The document was dated 10 September 1997 and was from the Commanding Officer, Naval Air Station, Jacksonville, Florida. The discharge in lieu of trial by court-martial was for offenses preceding the charges of which the accused had been found guilty. *Id.*

14. Military Rule of Evidence 410(a)(4) makes inadmissible in any court-martial proceeding against the accused "any statement made in the course of plea discussions with the convening authority, staff judge advocate, trial counsel or other counsel for the Government which do not result in a plea of guilty or which result in a plea of guilty later withdrawn." MCM, *supra* note 1, MIL. R. EVID. 410(a).

15. *Anderson*, 55 M.J. at 183.

16. 54 M.J. 303 (2001). *Vasquez* was discussed at length in the 2001 new developments article. *See* Major Tyler Harder, *New Developments in Sentencing: The Fine Tuning Continues, but Can the Overhaul Be Far Behind?*, ARMY LAW., May 2001, at 67.

17. *Anderson*, 55 M.J. at 183 (quoting *Vasquez*, 54 M.J. at 305 (quoting United States v. Barunas, 23 M.J. 71, 76 (C.M.A. 1986))).

18. *Id.* (quoting *Vasquez*, 54 M.J. at 305 (citing United States v. Ariail, 48 M.J. 285, 287 (1998))).

19. *Vasquez*, 54 M.J. at 304.

20. *Anderson*, 55 M.J. at 184 (quoting *Barunas*, 23 M.J. at 75). Military Rule of Evidence 410(b) defines a "statement made in the course of plea discussions" to include "a statement made by the accused solely for the purpose of requesting disposition under an authorized procedure for administrative action in lieu of trial by court-martial." MCM, *supra* note 1, MIL. R. EVID. 410(b).

21. *Anderson*, 55 M.J. at 184.

sentencing case, MRE 410 keeps out *any* evidence of an accused's discharge in lieu of trial by court-martial, not just admissions or statements by the accused.

Prior Convictions

Evidence of prior convictions is the third category of government pre-sentencing evidence found in RCM 1001(b).[22] The rule states that "any evidence admissible under the Military Rules of Evidence" may be used to prove the conviction.[23]

In *United States v. Douglas*,[24] the Air Force Court of Criminal Appeals (AFCCA) addressed whether the promulgating order and stipulation of fact were properly admitted to prove a prior conviction of the accused. The accused pled guilty to wrongful appropriation, making and uttering a worthless check, and wrongful use of his government travel card. During presentencing, the trial counsel moved to admit a copy of the promulgating order and the stipulation of fact from a prior court-martial of the accused.[25] The defense objected to the admission of the stipulation of fact and to the portion of the promulgating order indicating the accused's sentence.[26] The military judge allowed both documents into evidence, but ordered redaction of the portion of the promulgating order indicating the accused's sentence[27] and two portions of the stipulation of fact.[28] The record indicated that the trial counsel failed to redact these portions before providing the documents to the members. The accused argued on appeal that he was denied a fair trial because the members received the entire unredacted documents, and that the military judge erred in admitting the stipulation of fact.[29]

The AFCCA first addressed the promulgating order, determining that the document was admissible in its entirety under RCM 1001(b)(3). The court stated that "[a]s a matter of law, the sentence adjudged and the action of the convening authority are relevant parts of such a promulgating order."[30] It disapproved of the trial counsel's failure to abide by the military judge's order, but found no prejudice to the accused because the redacted portion was admissible and relevant anyway.

Second, the court addressed the stipulation of fact. It summarized the holdings of the various service courts on whether evidence of the underlying facts of a prior conviction is admissible under RCM 1001(b)(3). The Army Court of Criminal Appeals (ACCA) has held that when a court-martial order is vague and fails to provide sufficient details to the members regarding the prior conviction, "a stipulation of fact is *admissible* to explain the circumstances of the prior conviction."[31] The NMCCA has held that evidence of "the detailed facts underlying a prior conviction is *inadmissible* in the prosecution's case-in-chief during sentencing."[32] The AFCCA had previously held in an unpublished opinion, *United States v. Bellanger*,[33] that evi-

22. MCM, *supra* note 1, R.C.M. 1001(b)(3)(A). "The trial counsel may introduce evidence of military or civilian convictions of the accused." *Id*. At the time this article was going to print, RCM 1001(b)(3) was amended to clarify "civilian convictions." *See* Exec. Order No. 13,262, 2002 Amendments to the Manual for Courts-Martial, United States, 67 Fed. Reg. 18,773, 18,744 (Apr. 17, 2002).

23. *Id.* R.C.M. 1001(b)(3)(C). The discussion to RCM 1001(b)(3)(C) states further that "previous convictions may be proved by the use of the personnel records of the accused, by the record of the conviction, or by the order promulgating the result of trial." *Id.* R.C.M. 1001(b)(3)(C) discussion.

24. 55 M.J. 563 (A.F. Ct. Crim. App. 2001).

25. *Id.* at 564-65. At the accused's prior court-martial he was convicted of simple assault, attempted larceny, conspiracy to commit larceny, wrongful use of his government travel card, larceny, forgery, uttering bad checks, and dishonorably failing to pay debts. *Id.* at 567-68.

26. *Id*. at 565.

27. The military judge found the accused's sentence from the previous court-martial and the convening authority's action to be irrelevant. *Id.* at 566.

28. *Id.* The military judge found that admission of the stipulation was "'necessary to explain the facts and circumstances surrounding the offenses' of which the accused had been convicted at his previous trial." *Id.* at 565. The military judge ordered redaction of the following sections of the stipulation of fact, which contained uncharged misconduct:

> In order to determine whether or not the stolen credit card was activated, Amn Douglas and A1C Sims went to the Sunglasses Hut in the Coronado Mall.
>
> . . . .
>
> During a lawful consent search of Amn Douglas' dormitory room, numerous insufficient fund checks and past due notices were seized. Some of the items were in the trashcan, unopened and ripped in half.

Id. at 568.

29. *Id.* at 565.

30. *Id*. at 566 (citing United States v. Maracle, 26 M.J. 431 (C.M.A. 1988)).

31. *Id*. (citing United States v. Nellum, 24 M.J. 693 (A.C.M.R. 1987)) (emphasis added).

dence of the underlying details of an offense would be admissible "only when it is necessary to explain the nature of the offense and the probative value is not outweighed by the danger of unfair prejudice."[34]

In *Douglas*, the AFCCA took a new position. It specifically rejected its decision in *Bellanger*, holding that "the underlying details of a prior conviction are *not admissible* as 'evidence of civilian or military convictions' under RCM 1001(b)(3), but may be admissible as relevant personal data and character of prior service under RCM 1001(b)(2)."[35] Looking at the language of RCM 1001(b)(3), which permits evidence of convictions, the AFCCA held that the stipulation of fact was evidence upon which the conviction was based, and not evidence of the conviction.[36] Although the court determined the stipulation of fact should not have been admitted under RCM 1001(b)(3), it found the evidence was properly admitted under RCM 1001(b)(2) because the stipulation of fact had been properly maintained in the accused's personnel records.[37]

The AFCCA further found that the MRE 403[38] balancing test applied by the military judge in admitting the stipulation under RCM 1001(b)(3) was "so closely related to admissibility under RCM 1001(b)(2)" that it warranted "enormous leeway."[39] The court viewed the portions of the stipulation of fact that the military judge ordered redacted as a ruling by the military judge that such portions should have been excluded under MRE 403. Because the trial counsel failed to redact the portions of the stipulation of fact as ordered by the military judge, it was error for the stipulation to go to the members.[40]

As *Douglas* indicates, there appears to be a division among the service courts on whether a stipulation of fact should be admissible under RCM 1001(b)(3) as part of a prior conviction. The good news is that the CAAF granted review of the case on 12 December 2001,[41] and its decision should amalgamate the rulings of the service courts on this issue. Currently, practitioners can take away some helpful lessons from the AFCCA's opinion. Specifically, *Douglas* reinforces the point that trial counsel need to be prepared to articulate to the military judge which of the five categories under RCM 1001(b)(2) the evidence in question falls. More importantly, counsel should look at sentencing evidence as potentially admissible under more than one category; evidence that may not come in under one rule may be permitted under another.[42]

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32. *Id.* (quoting United States v. Brogan, 33 M.J. 588, 593 (N.M.C.M.R. 1991)) (emphasis added).

33. No. ACM 32373, 1997 CCA LEXIS 671 (A.F. Ct. Crim. App. Oct. 29, 1997) (unpublished).

34. *Douglas*, 55 M.J. at 566 (quoting *Bellanger*, 1997 CCA LEXIS 671).

35. *Id.* (emphasis added).

36. *Id.* The AFCCA held that evidence under RCM 1001(b)(3) is limited to a "document that reflects the fact of the conviction, including a description of the offense, the sentence, and any action by appellate or reviewing authorities." *Id.* (citing *Brogan*, 33 M.J. at 593).

37. *Id.* at 567. The court cited to the Air Force regulations that require the making of records of trial and the maintenance of such records. "As the appellant's first court-martial was still under appeal at the time the stipulation of fact was admitted into evidence, *the record of trial and the stipulation of fact were properly maintained in the appellant's personnel records.*" *Id.* (emphasis added).

38. Military Rule of Evidence 403 provides that "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." MCM, *supra* note 1, MIL. R. EVID. 403.

39. *Douglas*, 55 M.J. at 567. The "enormous leeway" to which the AFCCA refers is the latitude given to the military judge in applying MRE 403 when subjected to appellate review for an abuse of discretion. *See* United States v. DiCupe, 21 M.J. 440 (C.M.A. 1986).

40. *Douglas*, 55 M.J. at 567. Although the AFCCA found error in admitting the stipulation of fact, it found the error was not prejudicial to the substantial rights of the accused. *Id.*

41. United States v. Douglas, No. 01-0777/AF, 2001 CAAF LEXIS 1469 (Dec. 12, 2001). The granted issues for review are:

> I. Whether the lower court erred in holding that prosecution [exhibit] 3—the stipulation of fact from appellant's first court-martial—was properly admitted during sentencing as "relevant personal data and character of prior service" under R.C.M. 1001(b)(2), [and]
>
> II. Whether the appellant was denied a fair sentencing hearing when portions of prosecution exhibits 1 and 3, which the military judge ordered redacted, were presented to the court members without redaction and without the benefit of a curative instruction.

Id.

42. *Douglas* is one of several recent cases that illustrate this point. *See, e.g.*, United States v. Patterson, 54 M.J. 74 (2000) (expert testimony regarding patterns of pedophiles admissible under RCM 1001(b)(4) as victim impact); United States v. Ariail, 48 M.J. 285 (1998) (history of offenses admissible under RCM 1001(b)(2), but not under RCM 1001(b)(3)).

Evidence in Aggravation

The fourth category of government pre-sentencing evidence, found in RCM 1001(b)(4), is evidence of "any aggravating circumstances directly related to or resulting from the offenses of which the accused has been found guilty."[43] This includes "evidence of financial, social, psychological, and medical impact on or cost to . . . any victim of an offense committed by the accused" as well as "evidence of significant adverse impact on the mission, discipline, or efficiency of the command directly and immediately resulting from the accused's offense."[44] This past year, the CAAF decided *United States v. Nourse*,[45] which specifically focuses on the broad "directly related to or resulting from" language of RCM 1001(b)(4).

In *Nourse*, the accused was a staff sergeant in the Marine Corps. He and another marine, Sergeant Dilembo, worked part-time for a sheriff's office in New Orleans, Louisiana. One day, while mowing grass around a sheriff's office warehouse, the two marines decided to steal rain ponchos that were stored in the warehouse. They began loading cases of ponchos into a sheriff's office truck when a deputy sheriff came upon the scene. The accused and Sergeant Dilembo fled in the truck, and the deputy pursued them for some time before eventually abandoning the chase. The accused was arrested sometime later when he returned to the sheriff's office to get his own car.[46]

At a trial by military judge alone, the accused pled guilty to conspiracy, reckless driving, larceny, wrongful appropriation, and unlawful entry.[47] During the government's pre-sentencing case, and over defense objection, the trial counsel introduced testimony from Sergeant Dilembo concerning uncharged larcenies from the sheriff's office that he and the accused had committed. The value of the property from these uncharged larcenies was about $30,000. The military judge allowed the testimony under RCM 1001(b)(4), but noted that he would only consider the testimony for the limited purpose of showing "the continuous nature of the charged conduct and its impact on the . . . Sheriff's Office."[48] The CAAF affirmed the case and found that evidence of the uncharged larcenies was admissible under RCM 1001(b)(4) as an aggravating circumstance. The evidence of uncharged larcenies was "directly related to the charged offenses as part of a continuing scheme to steal" from the Sheriff's Office.[49] It was evidence of "a continuous course of conduct admissible to show the full impact of [his] crimes upon the Sheriff's Office."[50]

The court's discussion of the admissibility of uncharged misconduct under RCM 1001(b)(4) provides a good summary of recent case law in this area. The court began with *United States v. Wingart*.[51] Wingart was convicted of indecent acts. In finding that it was error to admit evidence of prior uncharged sexual misconduct with *another* victim,[52] the *Wingart* court held that RCM 1001(b)(4), and not MRE 404(b), is the standard to apply in determining if uncharged misconduct is admissible on sentencing.[53] In other words, the test for relevance of uncharged misconduct evidence on the merits is whether the uncharged misconduct meets one of the purposes listed in MRE 404(b); but, in deciding whether the evidence of uncharged misconduct is relevant for sentencing, the question is whether it directly relates to or results from the offenses of which the accused has been convicted.[54] Referring to the admissibility of uncharged misconduct on sentencing under RCM 1001(b)(4), the *Wingart* court explained that such evidence could be admitted if it is preparatory to, if it accompanies, or if it follows the offense of which the accused had been found guilty.[55]

Following its discussion of *Wingart*, the court in *Nourse* discussed the holding in *United States v. Mullens*,[56] in which the accused had been convicted of sodomy and indecent acts with

43. MCM, *supra* note 1, R.C.M. 1001(b)(4).

44. *Id.*

45. 55 M.J. 229 (2001).

46. *Id.* at 230.

47. *Id.* The stolen rain ponchos were valued at $2256. *Id.*

48. *Id.* at 231. The military judge further explained: "More specifically, it's evidence of the accused's motive; his modus operandi; his intent and his plan with respect to the charged offenses. And it shows evidence of a continuous course of conduct involving the same or similar crimes, the same victim, the same general place." *Id.*

49. *Id.* at 232.

50. *Id.*

51. 27 M.J. 128 (C.M.A. 1988).

52. *See Nourse*, 55 M.J. at 131.

53. *Wingart*, 27 M.J. at 136. Military Rule of Evidence 404(b) allows for the introduction of uncharged misconduct on the merits to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." MCM, *supra* note 1, MIL. R. EVID. 404(b).

54. *Wingart*, 27 M.J. at 135-36.

his children.[57] In *Mullens*, the court held that evidence of uncharged indecent acts with the *same victims* was admissible. It found that the similar misconduct (same victim, same or similar crimes, similar situs) was a "continuous course of conduct" that demonstrated the depth of the accused's sexual problems as well as "the true impact of the charged offenses on the members of his family."[58] The court followed this application of RCM 1001(b)(4) to uncharged misconduct in *United States v. Ross*[59] and *United States v. Shupe*.[60]

Finally, the court in *Nourse* addressed the accused's request to compare the holdings in *Wingart* and *Shupe*. The CAAF held that the two cases were not inconsistent. The court explained that *Mullens*, *Ross*, and *Shupe* hold that uncharged misconduct is admissible under RCM 1001(b)(4) if it shows a continuous course of conduct involving similar crimes and the same victims. This was not the case in *Wingart* because the uncharged misconduct involved a different victim.[61]

Nourse is significant for two reasons. First, it clarifies the different holdings concerning how uncharged misconduct relates to RCM 1001(b)(4) and the "directly relating to or resulting from" language. Past opinions in this area are still good law, and counsel and military judges now have a case that ties those various opinions together. Second, this case reemphasizes the important sentencing principle from *Wingart*—when looking at the relevance and admissibility of uncharged misconduct during the government's pre-sentencing case, practitioners need to use RCM 1001(b)(4) in determining relevance, not MRE 404(b).

The Defense Case in Extenuation and Mitigation

Whereas RCM 1001(b) addresses government evidence, RCM 1001(c) addresses defense evidence. Generally, the defense can present three categories of evidence at trial during pre-sentencing. Those categories are matter in extenuation, matter in mitigation, and a statement by the accused.[62] This past year the CAAF decided four cases addressing defense pre-sentencing evidence. The first three cases involve a matter in mitigation—retirement benefits. The fourth case focuses on the statement by the accused.

Matter in Mitigation

The first of the three retirement benefits cases is *United States v. Luster*.[63] The accused was an E-5 with eighteen years and three months of active service in the Air Force at the time of his trial. He pled guilty to one specification of wrongful use of marijuana.[64] At trial, the trial counsel made a motion in limine to keep out defense evidence of the financial impact a bad-conduct discharge would have on the accused's expected retirement benefits. The military judge granted the motion on the grounds that such evidence was irrelevant and would be confusing to the members.[65] The service court affirmed the case, finding that the accused suffered no prejudice from the military judge's ruling.[66]

The CAAF reversed the decision as to sentence, however, finding first that the military judge erred in preventing the defense from introducing financial impact evidence, and second, that the accused was materially prejudiced by this error. Reviewing the line of cases that address retirement-benefits evidence, the CAAF reiterated its holding in *United States v.*

55. *Id.* at 135. The *Wingart* court provided examples of these three areas: preparatory to the crime, such as "an uncharged housebreaking that occurred prior to a larceny or rape;" accompanying the crime, such as "an uncharged aggravated assault, robbery, or sodomy incident to a rape;" and following the crime, such as "a false official statement concealing an earlier theft of government property." *Id.*

56. 29 M.J. 398 (C.M.A. 1990).

57. *See Nourse*, 55 M.J. at 131-32.

58. *Mullens*, 29 M.J. at 400.

59. 34 M.J. 183 (C.M.A. 1992) (evidence of twenty to thirty altered test scores was admissible to show the "continuous nature of the charged conduct and its full impact on the military community" even though accused was only convicted of altering four test scores).

60. 36 M.J. 431 (C.M.A. 1993) (evidence of five uncharged drug transactions was admissible as proper aggravation because it showed "the continuous nature of the charged conduct and its full impact on the military community").

61. *Nourse*, 55 M.J. at 231-32.

62. *See* MCM, *supra* note 1, R.C.M. 1001(c). Matter in extenuation is evidence that serves to explain the circumstances surrounding the commission of the offense. *Id.* R.C.M. 1001(c)(1)(A). Matter in mitigation is any evidence which might tend to lessen the punishment adjudged by the court-martial. *Id.* R.C.M. 1001(c)(1)(B). The statement by the accused can be given under oath, or the accused can elect to give an unsworn statement. *Id*. R.C.M. 1001(c)(2).

63. 55 M.J. 67 (2001).

64. *Id*. The accused's approved sentence was reduction to E-1 and a bad-conduct discharge. *Id.*

65. *Id*. at 70.

Becker;[67] that is, just because an accused is not retirement eligible at the time of his trial does not mean the defense is precluded from introducing evidence of the estimated retirement pay the accused would lose if he receives a punitive discharge.[68] The court noted that the military judge had some discretion to admit such evidence, but stated that "the judge's decision should not be based solely on the number of months until an accused's retirement where other facts and circumstances indicate that the loss of these benefits is a significant issue in the case."[69] In *Luster*, the accused would not have had to reenlist to be eligible to retire, the probability of his retirement was not shown to be remote, and the expected financial loss was substantial. The CAAF concluded that the accused had been "significantly disadvantaged" by not being allowed to present his specific sentencing case to the members, and thus found prejudicial error.[70]

The second retirement benefits case decided by CAAF this past year is *United States v. Boyd*.[71] Captain Boyd had served fifteen and a half years of active duty in the Air Force. He worked as a nurse in the Intensive Care Unit and was charged with various offenses for taking prescription drugs from the hospital for personal use.[72] Before trial, a physical evaluation board had recommended the accused for temporary disability retirement based upon various mental disorders. At trial, the defense requested that the military judge provide a sentencing instruction on retirement benefits because the accused was "perilously close to retirement."[73] The military judge refused to give the instruction.[74]

On appeal, the accused argued that the military judge should have instructed the members on both his future length of service retirement benefits and his temporary disability retirement benefits.[75] The CAAF looked first at the issue of retirement for length of service, and decided it was unnecessary to determine if fifteen and a half years of service constituted a "sufficient evidentiary predicate" for an instruction on the impact of a punitive discharge on retirement benefits. The accused had not offered any evidence of the projected financial loss of his retirement, nothing was said about his desire to retire in his unsworn statements, the members had no questions about retirement benefits, and the defense never asked the members to save the accused's retirement. Thus, the court reasoned, even if it was error to fail to provide the instruction, it was harmless error.[76] Likewise, in regard to the issue of temporary disability retirement benefits, the court found "no factual predicate for an instruction."[77] The accused did not request an instruction on loss of disability retirement, nor did the defense present any evidence to the members regarding the accused's eligibility for disability retirement. The court, finding no error, affirmed the case.[78]

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66. *Id.* The AFCCA looked to several facts in finding no prejudice. First, the military judge allowed counsel to voir dire the members regarding the length of the accused's service; second, during sentencing argument, defense counsel was able to argue the length of service; third, the accused discussed his years of service during his unsworn statement; and finally, the military judge instructed the members that a bad-conduct discharge would deny the accused "the opportunity to serve the remainder of his 21-month enlistment and, therefore, preclude the eligibility for retirement benefits." *Id.*

67. 46 M.J. 141 (1997) (in which the accused had over nineteen years and eight months of service, it was error for the military judge to exclude defense evidence of the value of projected retirement benefits).

68. *Luster*, 55 M.J. at 68. In *Becker*, the court found the individual circumstances of the case (accused was "literally knocking at retirement's door," he had requested an opportunity to present loss retirement evidence, and he had such evidence available to present) "clearly warranted admission of the evidence." *Becker*, 46 M.J. at 144.

69. *Luster*, 55 M.J. at 71.

70. *Id.* at 72. The CAAF stated that "the critical question is not whether the members generally understood that retirement benefits would be forfeited by a punitive discharge," but rather whether the accused "was allowed to substantially present his particular sentencing case to the members on the financial impact of a punitive discharge." *Id.*

71. 55 M.J. 217 (2001).

72. *Id.* at 218. The accused's approved sentence was a dismissal, ninety days' confinement, and forfeiture of $215 per month for three months. *Id.*

73. *Id.* at 219. The CAAF noted that both the defense counsel and the military judge were referring to retirement benefits for *length of service* and not *temporary disability retirement*. *Id.*

74. *Id.* The military judge provided the standard instruction regarding the impact of a dismissal, and in response to a member's question (would the accused continue to serve in the Air Force if a dismissal were not adjudged?), the military judge emphasized the punitive nature of the dismissal and cautioned the panel against viewing it as a decision to merely retain or separate the accused. *Id.* at 220.

75. *Id.* at 220. The sentencing instructions aspect of this case is discussed later in this article. *See infra* notes 130-42 and accompanying text.

76. *Boyd*, 55 M.J. at 221.

77. *Id.* at 222.

78. *Id.*

The third retirement benefits case is *United States v. Washington*.[79] Published shortly after the CAAF's decisions in *Luster* and *Boyd*, *Washington* simply reemphasizes the court's earlier holdings. In *Washington*, the accused was an E-4 with over eighteen years of active service. She had been court-martialed less than a year earlier for offenses related to wrongful use of her government travel card, and she had been reduced from E-5 to E-4, confined for three months, and given a reprimand.[80] At her second court-martial, the accused pled guilty to one specification of larceny, and she sought to introduce during the pre-sentencing case evidence of her expected financial loss of retirement benefits if she were given a punitive discharge.[81] The military judge refused to admit the evidence.[82]

On appeal, the CAAF found that the "military judge erred when she prevented the defense from presenting to the members a complete picture of the financial loss [the accused] would suffer as a result of a punitive discharge."[83] Further, the CAAF concluded that the error materially prejudiced the accused. The court looked at the evidence that both sides presented, and it stated that the decision to adjudge a punitive discharge in this case was a close call. The accused was "denied the opportunity to present her particular sentencing case to the members," and because the court was unable to "say with reasonable certainty that the members' decision as to sentence would have been the same if the excluded information had been presented to them," the CAAF set aside the sentence.[84]

The CAAF has made it clear from these decisions that the defense has a right under RCM 1001(c)(1)(B) to present evidence of expected financial loss of retirement benefits as a matter in mitigation, even before the accused is retirement eligible. While it is unclear how close to retirement a service member must be, it is clear that there are no per se rules to follow. The CAAF has asked military judges to look at all the facts and circumstances in a given case;[85] however, two questions that should be asked in any case in which the defense seeks to introduce retirement-benefit evidence are: (1) how remote the probability of retirement is, and (2) whether the expected financial loss is substantial.[86] These questions may not be terribly helpful guidance in the practical sense. The answer to the second question is always going to be "yes," and the crux of the first question is the length of time a service member has remaining until retirement. A record of trial that indicates the military judge considered these questions, however, will likely withstand appellate scrutiny better than one that does not.

While the number of months until retirement and the question of whether a service member has to reenlist to make it to retirement seem to be the biggest factors to consider,[87] the hard reality of these opinions may be that military judges simply admit retirement evidence out of an abundance of caution. After all, the members know that a punitive discharge deprives an accused of retirement eligibility, the defense counsel argues that fact, and the judge instructs on that fact.[88] At least in cases involving service members within two to three years of retirement eligibility, evidence of expected loss of retirement pay would always appear to be a significant issue that the defense is entitled to address.[89]

Statement by the Accused

The statement by the accused is the last category of defense pre-sentencing evidence found in RCM 1001(c).[90] The rules provide the accused with the right to give an unsworn state-

79. 55 M.J. 441 (2001).

80. *Id.* at 443.

81. *Id.* at 441-42. The accused's approved sentence was a bad-conduct discharge, two months' restriction, and reduction to E-2. *Id.* at 441.

82. *Id.* at 442. It is unclear from the opinion what the military judge's reasons were for not admitting the evidence; however, because the military judge was the same judge who sat in *Luster*, the two cases were tried within two months of each other, and the accused in both cases had about the same length of active service, it can probably be assumed that the reasons for not admitting the evidence in *Washington* were the same reasons for not admitting the evidence in *Luster* (that is, the evidence was confusing and irrelevant). *See* United States v. Luster, 55 M.J. 67, 69-70 (2001).

83. *Washington*, 55 M.J. at 442.

84. *Id.* at 443.

85. *See, e.g.*, *Luster*, 55 M.J. at 71. "The judge's decision should not be based solely on the number of months until an accused's retirement *where other facts and circumstances indicate that the loss of those benefits is a significant issue* in the case." *Id*. (emphasis added).

86. *See id.*

87. *See* U.S. DEP'T OF ARMY, PAM. 27-9, LEGAL SERVICES: MILITARY JUDGES' BENCHBOOK para. 2-6-10 (1 Apr. 2001) [hereinafter BENCHBOOK].

88. This is assuming, of course, an instruction is warranted. *See infra* notes 139-40 and accompanying text.

89. Notably, *United States v. Henderson*, 29 M.J. 221 (C.M.A. 1989), in which the court found no error when the military judge refused to allow the defense to introduce evidence of the effect of a punitive discharge on the accused's retirement benefits when the accused was over three years from retirement and would have to reenlist, has not been expressly overruled. As an aside, Chief Judge Crawford dissented in both *Luster* and *Washington*. *See Washington*, 55 M.J. at 443 (Crawford, C.J., dissenting); *Luster*, 55 M.J. at 72 (Crawford, C.J., dissenting).

ment. An unsworn statement (that is, not under oath) is not subject to cross-examination by the government.[91] The accused has been given great latitude in deciding what to say during an unsworn statement in recent years.[92] This past year the CAAF addressed whether the defense should be allowed to reopen its case so that the accused could provide a second unsworn statement.

In *United States v. Satterley*,[93] the accused pled guilty to four specifications of larceny, and he entered into a stipulation of fact in which he admitted to stealing nine computers, of which the government had recovered only five. After the government and defense rested and the sentencing instructions were given, the members asked several questions. One question was what happened to the four computers that were not recovered. The defense counsel requested to reopen the defense case to answer the court member's question in the form of a second unsworn statement. The military judge stated that if both sides could agree, he would allow a stipulation of fact to address the question, or the accused could take the stand and testify under oath, but he denied the defense request to answer the question via an unsworn statement.[94]

On appeal, the accused argued that the military judge erred by not allowing the defense to reopen its case to make a second unsworn statement. The CAAF recognized the valuable right of an accused to provide an unsworn statement and the right of an accused to provide an additional unsworn statement in surrebuttal circumstances.[95] The court acknowledged that there may even be "other circumstances beyond legitimate surrebuttal which may warrant an additional unsworn statement;" however, whether those circumstances exist is a decision that is properly left to the sound discretion of the trial judge.[96]

The CAAF concluded in *Satterley* that the military judge had not abused his discretion. First, the accused had already provided an unsworn statement, and at that time he had chosen not to disclose the whereabouts of the other four computers. Second, both sides had rested, both sides had made closing arguments, and sentencing instructions had already been provided to the members. Third, the military judge had addressed the member's question by providing protective instructions. Fourth, the government could have disputed the accused's answer, thus prolonging the litigation. Finally, the military judge had given the accused reasonable options to answer the panel member's question, such as a stipulation of fact or providing sworn testimony.[97]

Practitioners should not read *Satterley* too broadly. The CAAF was careful to find no abuse of discretion "in these circumstances."[98] Would the case have been decided differently had the defense not already rested its case or if the accused had not provided an initial unsworn statement? What if the judge had not provided any protective instructions or had not offered the accused any alternative ways to provide the information? This opinion obviously does not answer these questions, but it does provide confirmation on another matter—the level of scrutiny appellate courts apply when reviewing military judges' decisions. While the court continued to underscore the prominence of the unsworn statement, military judges can take some solace in the court's willingness to defer to the "sound discretion of the trial judge" whether the circumstances warrant providing the accused with an additional unsworn statement.

Sentencing Arguments

Following the introduction of matters by both the prosecution and the defense, RCM 1001(g) provides both sides the opportunity to argue.[99] If the opposing counsel fails to object to an improper argument before the military judge begins to instruct the members on sentencing, the objection is waived, absent plain error.[100] In most cases, the issue on appeal concerns an objection to a trial counsel's argument; however, the

90. MCM, *supra* note 1, R.C.M. 1001(c)(2).

91. *See id*. R.C.M. 1001(c)(2)(C).

92. *See, e.g.*, United States v. Britt, 48 M.J. 233 (1998) (accused wanting to inform members that if the court did not punitively discharge him, his commander would administratively discharge him); United States v. Jeffery, 48 M.J. 229 (1998) (accused wanting to discuss his potential loss of retirement benefits and inform members that he might receive an administrative discharge if the court did not impose a punitive discharge); United States v. Grill, 48 M.J. 131 (1998) (accused wanting to inform members the resolution of co-conspirators' cases).

93. 55 M.J. 168 (2001).

94. *Id*. at 169.

95. *Id.* at 170-71 (citing United States v. Provost, 32 M.J. 98 (C.M.A. 1991) (holding that a second unsworn statement in surrebuttal should have been permitted after the prosecution presented evidence rebutting the accused's first unsworn statement)).

96. *Id.* at 171.

97. *Id.*

98. *Id*. One judge disagreed with the holding of the case. *See id.* (Effron, J., dissenting).

99. MCM, *supra* note 1, R.C.M. 1001(g).

CAAF has addressed a number of cases recently in which the issue on appeal was whether the *defense counsel* made an improper sentencing argument.[101] These issues are normally raised on appeal as ineffective assistance of counsel claims,[102] as in *United States v. Anderson*.[103]

Staff Sergeant Anderson was convicted of five specifications of indecent acts with his thirteen-year-old daughter. During the sentencing argument, the defense counsel stated: "Can this person rehabilitate? . . . [Y]es, John Anderson can rehabilitate. . . . *His offenses are only very recent.*"[104] On appeal, the accused argued that his defense counsel was ineffective because the counsel improperly conceded the accused's guilt in argument.[105] The CAAF cited to *United States v. Wean*,[106] wherein the court held that the "[d]efense counsel should not concede an accused's guilt during sentencing . . . because this can serve to anger the panel members."[107] The court in *Anderson* did not rule on this specific issue, but instead sent the case back for a fact-finding hearing on other alleged issues of ineffective assistance of counsel. The court stated that the sentencing argument could be interpreted as a concession of guilt and "warrants further evaluation after the factual issues are resolved."[108]

A second case decided by the CAAF this past year, *United States v. Bolkan*,[109] addresses a similar but more common issue—the defense counsel conceding the appropriateness of a punitive discharge during sentencing argument.[110] In *Bolkan*, the accused was an Airman First Class in the Air Force, assigned as a student at the Defense Language Institute in California. One weekend he and his friend, Airman Miller, went to a party in San Francisco, where they met the victim, who claimed to be an owner-producer of an adult film business.[111] The victim asked the two airmen if they would be interested in working in the adult film industry, and he invited them to his one-room apartment to fill out an application. He told them they would receive compensation of $100 per film. The two airmen agreed, and both completed lengthy questionnaires at the victim's apartment. The victim then explained to them that the second part of the interview required that they be videotaped while masturbating to determine their comfort level while being filmed. Both servicemen declined.[112]

Sometime later, the accused returned to visit the victim, and on this visit the accused completed a second interview, to include masturbating in front of the camera.[113] The accused started having second thoughts and returned again to visit the victim, this time accompanied by Airman Miller. The victim was told that Airman Miller wanted to complete a second interview as well. Once at the apartment, Airman Miller grabbed the victim by the neck and held a knife to his throat while the accused recovered the questionnaires and videotape. The airmen attempted to tape the victim's legs, but the victim resisted, telling them that they could have what they wanted if they would just release him. The accused and Airman Miller left, warning the victim not to discuss the incident with anyone.[114]

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100. *Id.*; *see* United States v. Ramos, 42 M.J. 392 (1995).

101. *See, e.g.*, United States v. Burt, 56 M.J. 261 (2002); United States v. Bolkan, 55 M.J. 425 (2001); United States v. Anderson, 55 M.J. 198 (2001); United States v. Pineda, 54 M.J. 298 (2001).

102. *See* Strickland v. Washington, 466 U.S. 668 (1984) (two components must be met to prevail on an ineffective assistance of counsel claim: (1) a showing that counsel's performance was deficient, and (2) the deficient performance prejudiced the defense).

103. 55 M.J. 198 (2001).

104. *Id.* at 200 (emphasis added). The accused was sentenced to a dishonorable discharge, nine years' confinement, and reduction to E-1. *Id.* at 199.

105. *Id.* at 201. The accused claimed that both of his defense counsel were ineffective for numerous other reasons. Only the improper concession of guilt is addressed here. *Id.*

106. 45 M.J. 461 (1997).

107. *Anderson*, 55 M.J. at 202 (quoting *Wean*, 45 M.J. at 464).

108. *Id.* at 203.

109. 55 M.J. 425 (2001).

110. *See, e.g.*, United States v. Burt, 56 M.J. 261 (2002); United States v. Pineda, 54 M.J. 298 (2001).

111. *Bolkan*, 55 M.J. at 426.

112. United States v. Bolkan, No. ACM33508, 2000 CCA LEXIS 156, *2 (A.F. Ct. Crim. App. June 20, 2000).

113. *Bolkan*, 55 M.J. at 426.

114. *Bolkan*, 2000 CCA LEXIS 156, at *3.

At trial, the accused was convicted of robbery. On sentencing, in his unsworn statement, he indicated his desire to remain in the Air Force. During the sentencing argument, the defense counsel strenuously argued against confinement and a punitive discharge.[115] In closing, the defense counsel stated,

> If you must choose between confinement and a bad-conduct discharge, give him the punitive discharge. He might not ever recover from it and it will follow him around the rest of his life, but he will be given a chance to go out in society and use his skills and his intelligence.[116]

The accused argued on appeal that his defense counsel improperly conceded the appropriateness of a punitive discharge and that the military judge erred by not inquiring into the matter.[117]

The CAAF acknowledged the long line of cases which "clearly instruct that when an accused asks the sentencing authority to be allowed to remain on active duty, defense counsel errs by conceding the propriety of a punitive discharge."[118] Then, even though the accused did not explicitly claim ineffective assistance of counsel, the court applied the second prong of the *Strickland* analysis, testing for prejudice.[119] The court assumed that the argument made by the defense was a concession and that the military judge erred in not inquiring into whether such argument reflected the accused's desire.[120] Looking at the seriousness of the offense and the likelihood of a bad-conduct discharge, the CAAF concluded that any such error was harmless.[121]

Notably, two judges dissented and found prejudicial error in this case.[122] A third judge concurred in the result. He found error, and after providing a more helpful analysis than the lead opinion, agreed that a bad-conduct discharge was reasonably likely; thus, the error was harmless.[123]

Anderson and *Bolkan* serve to remind practitioners, especially defense counsel and military judges, that defense counsel can make comments during sentencing arguments that are just as problematic on appeal as any improper sentencing arguments made by trial counsel. Defense counsel need to think through their arguments in advance. The defense counsel should not concede the accused's guilt during sentencing argument, and should not argue for or concede the appropriateness of a punitive discharge without first discussing it with the client. If such an argument is made, the military judge should inquire into whether the argument correctly reflects the desire of the accused.

Sentencing Instructions

Before the members deliberate on an appropriate sentence, the military judge must provide them with appropriate sentencing instructions.[124] The discussion to RCM 1005 states that the instructions "should be tailored to the facts and circumstances

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115. *Bolkan*, 55 M.J. at 427. The defense counsel argued:

> But do not give him a punitive discharge. If his conduct is such that you want to brand him for the rest of his life with a punitive discharge, the judge will instruct you that a punitive discharge leaves an inirradicable [sic] stigma on a person such as Airman Bolkan.
>
> The crime of which he's been convicted of, society may one day forgive him and may one day forget it. He's eighteen. He's young. He's naive. But if you give him a punitive discharge, that's going to follow him around for the rest of his life. When he's nineteen, twenty-nine, fifty-nine, seventy-nine. That is not something society is ever going to forgive or forget.
>
> The defense would submit that you should give him hard labor without confinement, reduce him to E-1 and restrict him to base. And give him the reprimand. This will stay in his file permanently and every commander that he has will see that in his file.

Id.

116. *Id.*

117. *Id.*

118. *Id.* at 428 (citing United States v. Pineda, 54 M.J. 298 (2001); United States v. Lee, 52 M.J. 51 (1999); United States v. Dresen, 40 M.J. 462 (C.M.A. 1994); United States v. Lyons, 36 M.J. 425 (C.M.A. 1993); United States v. Robinson, 25 M.J. 43 (C.M.A. 1987); United States v. Holcomb, 43 C.M.R. 149 (C.M.A. 1971); United States v. Weatherford, 42 C.M.R. 26 (C.M.A. 1970); United States v. Mitchell, 36 C.M.R. 458 (C.M.A. 1966)).

119. *Id. See also supra* note 102.

120. *See* BENCHBOOK, *supra* note 87, para. 2-7-27 (providing instructional guidance for military judges in situations of this nature).

121. *Bolkan*, 55 M.J. at 428.

122. *Id.* at 431 (Sullivan, J., dissenting); *id.* (Effron, J., dissenting). Judge Sullivan applied the test for prejudice found in *United States v. Pineda*, 54 M.J. 298 (2001), which is whether a punitive discharge was reasonably likely given the facts of the case. *Id.* (Sullivan, J., dissenting).

123. *Id.* at 429 (Baker, J., concurring in the result).

of [each] case."[125] Rule for Courts-Martial 1005(c) also allows trial and defense counsel to request that the military judge provide specific instructions.[126] Several cases last year touched upon various aspects of sentencing instructions.

In *United States v. Rush*,[127] the defense requested the standard sentencing instruction on the "ineradicable stigma" of a punitive discharge. The military judge refused to give the instruction, but did not explain the basis for his decision on the record.[128] On appeal, the CAAF held that the military judge's refusal to grant the instruction without an explanation for his decision constituted error.[129]

In *United States v. Boyd*,[130] a case discussed earlier in this article,[131] the CAAF addressed the military judge's refusal to grant the defense's request for an instruction on the impact of a punitive discharge on the loss of retirement benefits.[132] Captain Boyd had fifteen and a half years of active service in the Air Force and worked as a nurse in the Intensive Care Unit. He was convicted of various offenses related to taking prescription drugs from the hospital for personal use. Before his court-martial, a physical evaluation board had recommended the accused for temporary disability retirement, but no mention of this disability retirement was made to the members by counsel for either side.[133]

During the hearing on sentencing instructions, the defense requested the military judge to provide an instruction on retirement benefits. The military judge refused. The judge did provide the standard instruction regarding the impact of a dismissal.[134] After the instructions were provided to the members, one member asked what impact a punitive dismissal would have on the accused's continued service—whether the accused would continue to serve in the Air Force. After conferring with counsel and the accused, the military judge gave an additional instruction in which he emphasized the punitive nature of the dismissal and cautioned the panel against viewing the dismissal as a decision to merely retain or separate the accused.[135] Following deliberations, the members sentenced the accused to a dismissal, ninety days' confinement, and forfeiture of $215 per month for three months. On appeal, the accused argued that the military judge should have instructed the members on his length of service retirement benefits and his temporary disability retirement benefits.[136]

First, the CAAF stated that it reviews "a military judge's decision whether to instruct on a specific collateral consequence of a sentence for abuse of discretion."[137] Next, the court looked at the issue of retirement for length of service, and it concluded that the failure to provide the requested instruction did not have a "substantial influence on the sentence."[138] More importantly, however, the court stated: "[W]e will require military judges in all cases tried after [10 July 2001] to instruct on the impact of a punitive discharge on retirement benefits, if there is an evidentiary predicate for the instruction and a party requests it."[139] The court added that military judges need to lib-

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124. *See* MCM, *supra* note 1, R.C.M. 1005.

125. *Id.* R.C.M. 1005(a) discussion.

126. *Id.* R.C.M. 1005(c).

127. 51 M.J. 605 (Army Ct. Crim. App. 1999).

128. *Id.* at 606-07.

129. 54 M.J. 313, 315 (2001). Last year's annual review of instructional issues discussed this case. *See* Lieutenant Colonel William T. Barto & Lieutenant Colonel Stephen R. Henley, *Annual Review of Developments on Instructions—2000*, ARMY LAW., July 2001, at 16.

130. 55 M.J. 217 (2001).

131. *See supra* notes 71-78 and accompanying text (defense case in extenuation and mitigation).

132. *Boyd*, 55 M.J. at 217.

133. *Id.* at 218.

134. *Id.* at 219. The military judge instructed the members:

> A dismissal is a punitive discharge. Our society commonly recognizes the ineradicable stigma of a punitive discharge, and a punitive discharge affects the accused's future with regard to legal rights, economic opportunities, and social acceptability and will deny the accused other advantages which are enjoyed by one whose discharge indicates that he has served honorably. The issue before you is not whether the accused should remain a member of the Air Force, but whether he should be punitively separated from the service.
>
> A sentence to a dismissal of an officer is the general equivalent of a dishonorable discharge for an airman. A dismissal should be reserved for those who, in the opinion of the court, should be separated under conditions of dishonor after conviction of serious offenses of a civil or military nature warranting such severe punishment. A person dismissed from the armed forces is denied substantially all veteran's benefits. You are not required to adjudge a discharge, but if you do, you may only adjudge a dismissal.

Id. at 219-20.

erally grant requests for such instructions. A military judge may deny a request for such an instruction only when there is no evidentiary predicate for the instruction, or when "the possibility of retirement is so remote as to make it irrelevant to determining an appropriate sentence."[140] In this case, the court did not decide whether fifteen and a half years of service was a "sufficient evidentiary predicate" to require an instruction on retirement benefits. It concluded that the evidentiary predicate for such an instruction was "minimal" because the defense had not offered any evidence of retirement benefits, nor did the accused or counsel discuss the importance of retirement during the pre-sentencing case. Finally, the CAAF addressed the issue of temporary disability retirement, noting immediately that the defense did not request an instruction on the impact of a punitive discharge on temporary disability retirement. There was no factual predicate for an instruction on disability retirement because, for undisclosed reasons, the defense chose not to present any evidence concerning the accused's eligibility for disability retirement.[141]

Although the CAAF affirmed the decision in *Boyd*, the case has obvious impact on military judges. Judges must now be prepared to provide an instruction on how a punitive discharge affects retirement benefits if such an instruction is requested. The decision to grant the requested instruction could get more complicated than it might appear. Not only must military judges determine whether a sufficient evidentiary predicate exists, they may also have to determine what "remote" means when deciding if the possibility of retirement is so remote as to make it irrelevant. Further, as the court noted in *Boyd*, if the defense gets an instruction on future retirement benefits, then the prosecution may be entitled to an instruction on "the legal and factual obstacles to retirement faced by a particular accused."[142]

Another recent CAAF decision also touches upon the issue of retirement benefits and sentencing instructions, although in a different way. In *United States v. Burt*,[143] the accused was court-martialed for failing to obey orders, marijuana use, assault consummated by a battery, and adultery. At the time of trial, he was an E-4 with over twenty-one years of active service. Unfortunately, this was his second court-martial within twelve months. At the first court-martial, he was convicted of marijuana and cocaine use and was reduced from E-7 to E-4.[144] Before instructing the members on sentencing, the military judge offered to read the following instruction:

> If a punitive discharge is adjudged, if approved and ordered executed, the accused will lose all retirement benefits. However, regardless of the sentence of this court, even if a punitive discharge is adjudged, the Secretary of the Air Force or his designee may instead allow the accused to retire from the Air Force.[145]

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135. *Id.* at 220. The additional instruction was the following:

> You have a duty to determine an appropriate punishment for the accused in this case. That may include a decision on whether to sentence the accused to be discharged punitively from the service. If you determine a punitive discharge is warranted in this case, then the only punitive discharge this court may adjudge is a dismissal. You are advised, however, that a decision not to include a dismissal in your sentence does not mean the accused would necessarily be retained in the service. Such a decision would only reflect your judgment that he does not deserve a punitive discharge and the stigma that goes with it. Your decision regarding a punitive discharge is but one part of the process of determining an appropriate punishment, and it must not be viewed merely as a decision to retain or separate the accused from the service.

Id.

136. *Id.*

137. *Id.* (citing United States v. Perry, 48 M.J. 197 (1998)).

138. *Id.* at 221.

139. *Id.* The court stated:

> The instruction should be appropriately tailored to the facts of the case with the assistance of counsel, and it should include language substantially as follows: "In addition, a punitive discharge terminates the accused's military status and the benefits that flow from that status, including the possibility of becoming a military retiree and receiving retired pay and benefits."

Id. (quoting BENCHBOOK, *supra* note 87, para. 2-6-10).

140. *Id.* at 221.

141. *Id.* at 222.

142. *Id.* at 221 n.1.

143. 56 M.J. 261 (2002).

144. *Id.* at 262. The approved sentence in his second court-martial was a bad-conduct discharge, confinement for two years, and reduction to E-1. *Id.*

The defense objected to the instruction and asked that it not be provided to the members.[146]

On appeal, the accused argued that he received ineffective assistance of counsel when his counsel requested that the military judge not read the instruction.[147] The CAAF applied the standard in *Strickland* and held that defense counsel's performance was not deficient.[148] It viewed the defense decision as a "logical choice not to let the members off the proverbial hook."[149] If the members were provided the proposed instruction on retirement benefits, it was quite possible that they would adjudge a punitive discharge knowing that the Secretary of the Air Force could still override their decision and allow the accused to retire. This would allow the members to avoid the tough decision of whether to strip the accused of his retirement benefits.[150]

A final case involving sentencing instructions, *United States v. Hopkins*, was decided by the AFCCA this past year,[151] and recently affirmed by the CAAF.[152] Senior Master Sergeant Hopkins had over twenty years of active service in the Air Force at the time of his conviction.[153] During the defense's presentencing case, the accused made an unsworn statement in which he apologized and expressed sorrow for his actions.[154] Before sentencing, the defense counsel asked the military judge to instruct the members to consider the accused's expression of remorse as a matter in mitigation. The military judge declined to provide such an instruction.[155]

On appeal, the accused argued that this was error. The AFCCA affirmed the case, holding that the military judge does not have to list "each and every possible mitigating factor for the court members to consider."[156] The court stated that it is the duty of counsel to argue aggravating, extenuating, and mitigating factors to the panel, and that the military judge is only required to provide instructions as listed in RCM 1005(e).[157] The court stated that in non-capital cases the military judge complies with his duty by providing the following instruction:

> In determining the sentence, you should consider all the facts and circumstances of the offense(s) of which the accused has been convicted and all matters concerning the accused (whether presented before or after findings). Thus, you should consider the accused's background, his/her character, his/her service record, (his/her combat record,) all matters in extenuation and mitigation, and any other evidence he/she presented. You should also consider any matters in aggravation.[158]

The CAAF recently reviewed this issue and affirmed the AFCCA's decision.[159] The CAAF stated that the military judge has "considerable discretion in tailoring instructions to the evidence and law," and "how that discretion should be applied to statements of an accused, such as expressions of remorse,

145. *Id.* at 263.

146. *Id.* at 262.

147. *Id.*

148. *Id*. at 264. The first prong of the *Strickland* analysis is that the defendant must show that counsel's performance was deficient. *See* Strickland v. Washington, 466 U.S. 668, 687 (1984); *supra* note 102.

149. *Boyd*, 55 M.J. at 265.

150. *Id.*

151. 55 M.J. 546 (A.F. Ct. Crim. App. 2001).

152. United States v. Hopkins, 56 M.J. 393 (2002).

153. *Hopkins*, 55 M.J. at 547. The accused pled guilty to adultery, failing to pay debts, and making and uttering worthless checks. He was also convicted of assault consummated by a battery, assault, bigamy, falsifying visa applications, additional failure to pay debts offenses, and additional bad check offenses. *Id.*

154. *Hopkins*, 56 M.J. at 394.

155. *Id.* The military judge did provide the standard instruction to "consider all matters in extenuation and mitigation as well as those in aggravation," and he specifically instructed the members to consider the accused's unsworn statement, adding that an "unsworn statement is an authorized means for an accused to bring information to the attention of the court and must be given appropriate consideration." *Id.*

156. *Hopkins*, 55 M.J. at 550 (citing United States v. Pagel, 40 M.J. 771 (A.F.C.M.R. 1994); United States v. Wheeler, 38 C.M.R. 72 (C.M.A. 1967)).

157. *Id.* Rule for Courts-Martial 1005(e), entitled Required instructions, lists five statements required for sentencing instructions (the maximum punishment, effect of automatic forfeiture provision, procedures to follow for deliberation, members are solely responsible for selecting an appropriate sentence, and members should consider all matters in extenuation and aggravation). *See* MCM, *supra* note 1, R.C.M. 1005(e).

158. *Hopkins*, 55 M.J. at 550. The court also added that an accused's plea of guilty is a matter in mitigation and the members should be specifically instructed as such in guilty plea cases. *Id*.

regret, or apology, depends on the facts and circumstances of each particular case."[160] The statements of remorse were made in an unsworn statement in this case and "when determining how to tailor instructions to address an unsworn statement," the military judge has "broad discretion."[161] The court determined that under the facts and circumstances, it was within the military judge's discretion to decide that a general reference to the unsworn statement, rather than a more particularized instruction, adequately addressed the attention of the members to the accused's remarks.[162]

Hopkins emphasizes the broad discretion military judges have when determining appropriate instructions. As long as they include the required sentencing instructions found in RCM 1005(e), military judges have discretion in whether to give additional specific instructions to the members. Military judges must only ensure they tailor the instructions "to the facts and circumstances of the individual case."[163]

Conclusion

Sentencing issues are a frequent occurrence in the world of appellate review. As the preceding cases demonstrate, this year was certainly no exception. These cases are only a representation of the actual number of written opinions in the area of sentencing. The cases addressed cover areas of sentencing in which either the decision was significant, or a series of cases have developed a trend—for example, the court's effort in *Nourse* to reconcile past decisions addressing the use of uncharged misconduct on sentencing, or the court's effort in a series of cases to clarify and emphasize existing law on retirement benefits.[164]

This past year seemed devoted to tidying up military sentencing law. This is not to say that there are no loose ends remaining, or that additional loose ends were not created,[165] but most of the cases decided this past year lent more to clarification rather than confusion. In any event, this undoubtedly will be another exciting year in the world of sentencing. One service court decision already on the CAAF docket for review gives the court the opportunity to provide further clarification. In *United States v. Douglas*,[166] the court can clarify the law surrounding prior convictions, and mend the split among the service courts. Hopefully the CAAF will continue to tie up loose ends.

159. *Hopkins*, 56 M.J. at 394.

160. *Id.* at 395.

161. *Id*.

162. *Id.* The court added the following comment in a footnote:

> Although the requested instruction was not required under the circumstances of the present case, it is well within the discretion of a military judge to provide a more particularized instruction on the issue of remorse. Depending on the facts of the case, such an instruction might advise the members that they have heard an unsworn statement by the accused, and that, to the extent they considered the statement to contain an expression of remorse, they could consider that expression of remorse as a matter in mitigation.

Id. at 395 n.2.

163. MCM, *supra* note 1, R.C.M. 1005(a) discussion.

164. *See* United States v. Washington, 55 M.J. 441 (2001); United States v. Boyd, 55 M.J. 217 (2001); United States v. Luster, 55 M.J. 67 (2001).

165. One case not addressed in this article that may be an example of "creating a loose end," is *United States v. McDonald*, 55 M.J. 173 (2001) (holding that the Sixth Amendment's Confrontation Clause does not apply to the presentencing portion of a non-capital court-martial, but the Fifth Amendment's Due Process Clause does apply). In *McDonald*, the CAAF held it was *not* an abuse of discretion for the military judge to allow the victim's father to testify from another location via the telephone. While affirming the case, the court cautioned, "We do not suggest that telephone testimony is appropriate in all cases." *Id.* at 178.

166. No. 01-0777/AF, 2001 CAAF LEXIS 1469 (Dec. 12., 2001).

CLE News

1. Resident Course Quotas

Attendance at resident continuing legal education (CLE) courses at The Judge Advocate General's School, United States Army (TJAGSA), is restricted to students who have confirmed reservations. Reservations for TJAGSA CLE courses are managed by the Army Training Requirements and Resources System (ATRRS), the Army-wide automated training system. If you do not have a confirmed reservation in ATRRS, you do not have a reservation for a TJAGSA CLE course.

Active duty service members and civilian employees must obtain reservations through their directorates of training or through equivalent agencies. Reservists must obtain reservations through their unit training offices or, if they are nonunit reservists, through the United States Army Personnel Center (ARPERCEN), ATTN: ARPC-OPB, 1 Reserve Way, St. Louis, MO 63132-5200. Army National Guard personnel must request reservations through their unit training offices.

When requesting a reservation, you should know the following:

TJAGSA School Code—181

Course Name—133d Contract Attorneys Course 5F-F10

Course Number—133d Contract Attorney's Course 5F-F10

Class Number—133d Contract Attorney's Course 5F-F10

To verify a confirmed reservation, ask your training office to provide a screen print of the ATRRS R1 screen, showing by-name reservations.

The Judge Advocate General's School is an approved sponsor of CLE courses in all states that require mandatory continuing legal education. These states include: AL, AR, AZ, CA, CO, CT, DE, FL, GA, ID, IN, IA, KS, LA, MN, MS, MO, MT, NV, NC, ND, NH, OH, OK, OR, PA, RH, SC, TN, TX, UT, VT, VA, WA, WV, WI, and WY.

2. TJAGSA CLE Course Schedule

2002

May 2002

6-10 May	3rd Closed Mask Training (512-27DC3).
13-17 May	5th Intelligence Law Workshop (5F-F41).
13-17 May	50th Legal Assistance Course (5F-F23).
29-31 May	Professional Recruiting Training Seminar.

June 2002

3-5 June	5th Procurement Fraud Course (5F-F101).
3-7 June	171st Senior Officers Legal Orientation Course (5F-F1).
3-14 June	5th Voice Recognition Training (512-27DC4).
3 June-28 June	9th JA Warrant Officer Basic Course (7A-550A0).
4-28 June	158th Officer Basic Course (Phase I, Fort Lee) (5-27-C20).
10-12 June	5th Team Leadership Seminar (5F-F52S).
10-14 June	32d Staff Judge Advocate Course (5F-F52).
17-21 June	13th Senior Paralegal NCO Management Course (512-27D/40/50).
17-21 June	6th Chief Paralegal NCO Course 512-27D-CLNCO).
24-26 June	Career Services Directors Conference.
24-28 June	13th Legal Administrators Course (7A-550A1).
28 June-6 September	158th Officer Basic Course (Phase II, TJAGSA) (5-27-C20).

July 2002

8-12 July	33d Methods of Instruction Course (5F-F70).
8-26 July	3d JA Warrant Officer Advanced Course (7A-550A0).
15-19 July	78th Law of War Workshop (5F-F42).
15 July-	MCSE Boot Camp.

2 August	
15 July-13 September	8th Court Reporter Course (512-27DC5).
29 July-9 August	149th Contract Attorneys Course (5F-F10).

August 2002

5-9 August	20th Federal Litigation Course (5F-F29).
12 August-22 May 03	51st Graduate Course (5-27-C22).
12-23 August	38th Operational Law Seminar (5F-F47).
26-30 August	8th Military Justice Managers Course (5F-F31).

September 2002

9-13 September	2002 USAREUR Administrative Law CLE (5F-F24E).
16-20 September	51st Legal Assistance Course (5F-F23).
16-27 September	18th Criminal Law Advocacy Course (5F-F34).
23-27 September	3rd Court Reporting Symposium (512-27DC6).
23-27 September	2003 USAREUR Legal Assistance CLE (5F-F23E).

3. Civilian-Sponsored CLE Courses

15 March ICLE	The Art of Advocacy Atlanta, Georgia
22 March ICLE	Advocacy & Evidence Atlanta, Georgia

For further information on civilian courses in your area, please contact one of the institutions listed below:

4. Mandatory Continuing Legal Education Jurisdiction and Reporting Dates

Jurisdiction	**Reporting Month**
Alabama**	31 December annually
Arizona	15 September annually
Arkansas	30 June annually
California*	1 February annually
Colorado	Anytime within three-year period
Delaware	31 July biennially
Florida**	Assigned month triennially
Georgia	31 January annually
Idaho	31 December, Admission date triennially
Indiana	31 December annually
Iowa	1 March annually
Kansas	30 days after program
Kentucky	30 June annually
Louisiana**	31 January annually
Maine**	31 July annually
Minnesota	30 August
Mississippi**	1 August annually
Missouri	31 July annually
Montana	1 March annually
Nevada	1 March annually
New Hampshire**	1 August annually
New Mexico	prior to 30 April annually
New York*	Every two years within thirty days after the attorney's birthday
North Carolina**	28 February annually
North Dakota	31 July annually
Ohio*	31 January biennially
Oklahoma**	15 February annually
Oregon	Anniversary of date of birth—new admittees and

	reinstated members report after an initial one-year period; thereafter triennially
Pennsylvania**	Group 1: 30 April Group 2: 31 August Group 3: 31 December
Rhode Island	30 June annually
South Carolina**	15 January annually
Tennessee*	1 March annually
Texas	Minimum credits must be completed by last day of birth month each year
Utah	31 January
Vermont	2 July annually
Virginia	30 June annually
Washington	31 January triennially
West Virginia	30 July biennially
Wisconsin*	1 February biennially
Wyoming	30 January annually

* Military Exempt

** Military Must Declare Exemption

For addresses and detailed information, see the September/October 2001 issue of *The Army Lawyer.*

5. Phase I (Correspondence Phase), RC-JAOAC Deadline

The suspense for submission of all RC-JAOAC Phase I (Correspondence Phase) materials is ***NLT 2400, 1 November 2002***, for those judge advocates who desire to attend Phase II (Resident Phase) at The Judge Advocate General's School (TJAGSA) in the year 2003 ("2003 JAOAC"). This requirement includes submission of all JA 151, Fundamentals of Military Writing, exercises.

This requirement is particularly critical for some officers. The 2003 JAOAC will be held in January 2003, and is a prerequisite for most JA captains to be promoted to major.

Any judge advocate who is required to retake any subcourse examinations or "re-do" any writing exercises must submit the examination or writing exercise to the Non-Resident Instruction Branch, TJAGSA, for grading by the same deadline (1 November 2002). If the student receives notice of the need to re-do any examination or exercise after 1 October 2002, the notice will contain a suspense date for completion of the work.

Judge advocates who fail to complete Phase I correspondence courses and writing exercises by these suspenses will not be cleared to attend the 2003 JAOAC. Put simply, if you have not received written notification of completion of Phase I of JAOAC, you are not eligible to attend the resident phase.

If you have any further questions, contact Lieutenant Colonel Dan Culver, telephone (800) 552-3978, ext. 357, or e-mail Daniel.Culver@hqda.army.mil.

Current Materials of Interest

1. TJAGSA Materials Available through the Defense Technical Information Center (DTIC)

For a complete listing of TJAGSA Materials Available Through the DTIC, see the March 2002 issue of *The Army Lawyer.*

2. Regulations and Pamphlets

For detailed information, see the March 2002 issue of *The Army Lawyer.*

3. The Legal Automation Army-Wide Systems XXI—JAGCNet

a. The Legal Automation Army-Wide Systems XXI (LAAWS XXI) operates a knowledge management and information service called JAGCNet primarily dedicated to servicing the Army legal community, but also provides for Department of Defense (DOD) access in some case. Whether you have Army access or DOD-wide access, all users will be able to download the TJAGSA publications that are available through the JAGCNet.

b. Access to the JAGCNet:

(1) Access to JAGCNet is restricted to registered users, who have been approved by the LAAWS XXI Office and senior OTJAG staff.

(a) Active U.S. Army JAG Corps personnel;

(b) Reserve and National Guard U.S. Army JAG Corps personnel;

(c) Civilian employees (U.S. Army) JAG Corps personnel;

(d) FLEP students;

(e) Affiliated (that is, U.S. Navy, U.S. Marine Corps, U.S. Air Force, U.S. Coast Guard) DOD personnel assigned to a branch of the JAG Corps; and, other personnel within the DOD legal community.

(2) Requests for exceptions to the access policy should be e-mailed:

LAAWSXXI@jagc-smtp.army.mil

c. How to logon to JAGCNet:

(1) Using a web browser (Internet Explorer 4.0 or higher recommended) go to the following site: http://jagcnet.army.mil.

(a) Follow the link that reads "Enter JAGCNet."

(b) If you already have a JAGCNet account, and know your user name and password, select "Enter" from the next menu, then enter your "User Name" and "password" in the appropriate fields.

(c) If you have a JAGCNet account, *but do not know your user name and/or Internet password*, contact your legal administrator or e-mail the LAAWS XXI HelpDesk at LAAWSXXI@jagc-smtp.army.mil.

(d) If you do not have a JAGCNet account, select "Register" from the JAGCNet Intranet menu.

(e) Follow the link "Request a New Account" at the bottom of the page, and fill out the registration form completely. Allow seventy-two hours for your request to process.' Once your request is processed, you will receive an e-mail telling you that your request has been approved or denied.

(f) Once granted access to JAGCNet, follow step (b), above.

4. TJAGSA Publications Available Through the LAAWS XXI JAGCNet

For detailed information, see the March 2002 issue of *The Army Lawyer.*

5. TJAGSA Legal Technology Management Office (LTMO)

The Judge Advocate General's School, United States Army (TJAGSA), continues to improve capabilities for faculty and staff. We have installed new computers throughout the School. We are in the process of migrating to Microsoft Windows 2000 Professional and Microsoft Office 2000 Professional throughout the School.

The TJAGSA faculty and staff are available through the MILNET and the Internet. Addresses for TJAGSA personnel are available by e-mail at jagsch@hqda.army.mil or by calling the LTMO at (434) 972-6314. Phone numbers and e-mail addresses for TJAGSA personnel are available on the School's Web page at http://www.jagcnet.army.mil/tjagsa. Click on directory for the listings.

For students that wish to access their office e-mail while attending TJAGSA classes, please ensure that your office e-mail is web browser accessible prior to departing your office. Please bring the address with you when attending classes at TJAGSA. If your office does not have web accessible e-mail, you may establish an account at the Army Portal,

http://ako.us.army.mil, and then forward your office e-mail to this new account during your stay at the School. The School classrooms and the Computer Learning Center do not support modem usage.

Personnel desiring to call TJAGSA can dial via DSN 934-7115 or, provided the telephone call is for official business only, use our toll free number, (800) 552-3978; the receptionist will connect you with the appropriate department or directorate. For additional information, please contact our Legal Technology Management Office at (434) 972-6264. CW3 Tommy Worthey.

6. The Army Law Library Service

Per *Army Regulation 27-1*, paragraph 12-11, the Army Law Library Service (ALLS) Administrator, Ms. Nelda Lull, must be notified prior to any redistribution of ALLS-purchased law library materials. Posting such a notification in the ALLS FORUM of JAGCNet satisfies this regulatory requirement as well as alerting other librarians that excess materials are available.

Ms. Lull can be contacted at The Judge Advocate General's School, United States Army, ATTN: JAGS-CDD-ALLS, 600 Massie Road, Charlottesville, Virginia 22903-1781. Telephone DSN: 934-7115, extension 394, commercial: (434) 972-6394, facsimile: (434) 972-6386, or e-mail: lullnc@hqda.army.mil.

7. Kansas Army National Guard Annual JAG Officer's Conference

The Kansas Army National Guard is hosting their Annual JAG Officer's Conference at Washburn Law School, Topeka, Kansas, on 20-21 October 2002. The point of contact is Major Jeffry L. Washburn, P.O. Box 19122, Pauline, Kansas 66619-0122, telephone (785) 862-0348.

-A-

ABSENCE, see AWOL

ACQUITTAL

Equitable Acquittals: Prediction and Preparation Prevent Post-Panel Predicaments, Major Michael R. Smythers, Apr. 1986 at 3.

Motion for a Partial Finding of Not Guilty, Captain Kenneth J. Hanko, Aug. 1978, at 1.

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Reductions for Inefficiency: An Overlooked Tool, Major Gregory O. Varo, Jan. 1979, at 14.

ADMINISTRATIVE REMEDIES

Judicial Review of Military Administrative Decisions After Darby v. Cisneros, Major William T. Barto, Sept. 1994, at 3.

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Admissibility Problem of DA Form 2475-2, Captain Stephen R. Burns, June 1975, at 28.

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Charting Scylla and Charybdis: A Guide for Military Judges and Trial Counsel on Admitting Evidence of Other Crimes to Prove Intent, Captain Karen V. Johnson, June 1990, at 31.

Defending Against the "Paper Case," by Captain Preston Mitchell, Oct. 1988, at 31.

Defense Counsel Strategies for Dealing With a Client's Prior Conviction at Trial, Captain George B. Thompson, Jr., Aug. 1986, at 66.

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Interlocking Confessions in Courts-Martial, Captain James H. Weise, Aug. 1982, at 11.

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Will the Suspect Please Speak Into the Microphone?, Captain Robin L. Troxell & Captain Todd M. Bailey, May 1987, at 46.

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"I Did What?" The Defense of Involuntary Intoxication, Captain Stephen J. Kaczynski, Apr. 1983, at 1.

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Be It Ever So Humble, There's No Place Like Home, Major Stephen A. J. Eisenberg, Feb. 1980, at 28.

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-D-

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RULES OF EVIDENCE see MILITARY RULES OF EVIDENCE; EVIDENCE

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SENTENCING see also PUNISHMENTS

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Admissibility of Videotaped Testimony at Courts-Martial, The, Captain Paula C. Juba, May 1991, at 21.

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Invited Comment on a Defendant's Refusal to Testify in the Wake of United States v. Robinson, Captain Joseph P. Falcone, Aug. 1988, at 24.

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Preparing Witnesses For Trial—A Methodology for New Judge Advocates, Captain Alan K. Hahn, July 1982, at 1.

Protecting the Child Witness: Avoiding Physical Confrontation With the Accused, Captain David F. Abernathy, Nov. 1985, at 23.
Sequestration of Witnesses—Recent Developments Regarding Military Rule of Evidence 615, Captain James K. Reed, May 1989, at 37.

Television Comes to Court, Major Leonard R. Piotrowski, Nov. 1974, at 1.

Two-Witness Rule in Falsification Offenses: Going, Going, But Still Not Gone, The, Lieutenant Commander Mary T. Hall, May 1989, at 11.

Use of Article 32 Testimony at Trial—A New Peril for Defense Counsel, Captain Mark Cremin, Jan. 1991, at 35.

Working With Child Abuse Victims, Captain Vito A. Clementi, May 1988, at 36.

TITLE BLOCK, see also CRIMINAL INVESTIGATION COMMAND

CID ROI: Your Client and the Title Block, Captain Paul M. Peterson, Oct. 1987, at 49.

CID Titling Process—Founded or Unfounded?, The, Major Patricia A. Ham, Aug. 1998, at 1.

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U.S. Army Trial Judiciary—A Special Assignment, Lieutenant Colonel Donald Morgan, June 1986, at 46.

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-U-

UNCHARGED MISCONDUCT

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UNIFORM CODE OF MILITARY JUSTICE see MANUAL FOR COURTS-MARTIAL

UNITED STATES CODE

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URINALYSIS, see also DRUGS; ALCOHOL

Commander's Broad Reach: Perspective on United States v. Bickel, A, Captain Lawrence J. Morris, Dec. 1990, at 25.

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Urinalysis Cases and Judicial Notice, Major Willis Hunter & Captain Michael Davidson, July 1990, at 34.

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-V-

VEHICLES

In Search of the Automobile, Major Ernest F. Peluso, Jan. 1986, at 23.

VICTIM/WITNESS ASSISTANCE PROGRAM

Army's Victim Witness Assistance Program, The, Major Douglas K. Mickle, Nov. 1994, at 3.

VICTIMS

A Helping Hand: The Victim and Witness Protection Act of 1982, Captain Stephen J. Kaczynski, Oct. 1984, at 24.

Army's Victim Witness Assistance Program, The, Major Douglas K. Mickle, Nov. 1994, at 3.

Article 139: A Remedy for Victims of Soldier Misconduct, Captain Gregory A. McClelland, Aug. 1985, at 18.
Article 139 and the Victim and Witness Protection Act of 1982, Robert A. Frezza, Jan. 1988, at 40.

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VIDEO

Television Comes to Court, Major Leonard R. Piotrowski, Nov. 1974, at 1.

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VIETNAM

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"Vietnam Syndrome" Defense: A "G. I. Bill of Criminal Rights?", The, Samuel Pyeatt Menefee, Feb. 1985, at 1.

VOIR DIRE see also COURT MEMBERS

Continued Viability of Peremptory Challenges in Courts-Martial, The, Lieutenant Colonel James A. Young, III, Jan. 1992, at 20.

Discovering and Removing the Biased Court Member, Captain Bernard P. Ingold, Jan. 1986, at 32.

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Voir Dire, Captain David A. Shaw, Apr. 1975, at 16.

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Voir Dire: Making Your First Impression Count, Major Hargis, Nov. 1998, at 54.

Voir Dire: What's the Point?, Major Hasdorff, U.S. Army Reserve, June 2001, at 17.

-W-

WAIVER

Resurgent Doctrine of Waiver, The, Captain Raymond M. Saunders, Aug. 1984, at 24.

United States v. Graves: No More Affirmative Waiver?, Major Lawrence J. Sandell, June 1976, at 7.

Waiver Swamp, The, Captain Paul B. Haseman, Nov. 1975, at 21.

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WARRANTS

Issues Raised by Military Warrants, Major Francis A. Gilligan, Aug. 1972, at 4.

Muniz, Breseman, Craig, and the Right to Privacy in a Government-Owned Desk, Captain David P. Arcuri, Jan. 1992, at 26.

WIRETAP see also FOURTH AMENDMENT

Fourth Amendment Practice and the Military Rules of Evidence, Major Stephen A. J. Eisenberg, May 1980, at 30.

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Protecting the Child Witness: Avoiding Physical Confrontation With the Accused, Captain David F. Abernathy, Nov. 1985, at 23.

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Sequestration of Witnesses—Recent Developments Regarding Military Rule of Evidence 615, Captain James K. Reed, May 1989, at 37.

Timing is Everything: Identifying Prior Consistent Statements, Major O'Brien, March 2000, at 31.

Two-Witness Rule in Falsification Offenses: Going, Going, But Still Not Gone, The, Lieutenant Commander Mary T. Hall, May 1989, at 11.

United States v. Hines: An Examination of Waiver Under the Confrontation Clause, Captain Roger D. Washington, Mar. 1987, at 22.

Use of Article 32 Testimony at Trial—A New Peril for Defense Counsel, Captain Mark Cremin, Jan. 1991, at 35.

Using Experts to Prepare for Courts—Martial, Lieutenant Colonel Larry E. Kinder, Jan. 1990, at 27.

Using Residual Hearsay, Captain Walter M. Hudson, Nov. 1993, at 3.

Victim-Witness Assistance, Major Warren G. Foote, June 1991, at 63.

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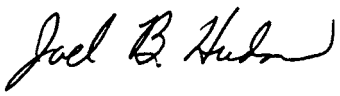

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