



THE ARMY LAWYER

Headquarters, Department of the Army

Department of the Army Pamphlet 27-50-441

February 2010

MILITARY JUSTICE SYMPOSIUM I

Foreword

Lieutenant Colonel Daniel G. Brookhart

Articles

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The Army Lawyer (ISSN 0364-1287, USPS 490-330) is published monthly by The Judge Advocate General's Legal Center and School, 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 \$45.00 each (\$63.00 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 Legal Center and School, 600 Massie Road, ATTN: ALCS-ADA-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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Articles may be cited as: ARMY LAW., [date], at [first page of article], [pincite].

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Foreword

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Welcome to the fifteenth annual Military Justice Symposium, which for the third straight year consists of two consecutive issues of *The Army Lawyer* dedicated to military justice. Our intent is to provide practitioners with a useful analysis of the most important recent developments in the military justice arena. To that end, the leadoff issue contains four articles written by current Criminal Law Department faculty members. These articles address topics ranging from new developments in Fourth Amendment case law, trends in post-trial processing, admitting forensic evidence after *Melendez-Diaz*, and proper methods for impeaching witnesses. We also have the annual instructions update written by Colonel Tim Grammel and Lieutenant Colonel Kwasi Hawks, both of whom are Criminal Law Department alumni currently serving as military judges.

The second issue of the Symposium, to be published in March 2010, will contain faculty-authored articles on aggravation evidence, charging webcam-related sex crimes, new developments in guilty pleas and pre-trial agreements, unlawful command influence committed by judge advocates, the evolution of the Sexual Assault Prevention and Response Program, and professional responsibility for military justice practitioners. The second issue will also contain a *View from the Bench* by Colonel Mike Hargis and an excellent piece from the Regimental Historian on an infamous court-martial involving the wear of a pigtail. As always, we hope that you will find these articles useful in developing your practice.

I would also like to remind you all of the many great military justice short-courses offered here at The Judge Advocate General's Legal Center and School. A complete listing of these courses is found at the end of this issue. Most courses have some seats dedicated to sister services. However, please remember that the Criminal Law Advocacy Course, which is offered in the spring and fall, is a by-invitation-only course. You must speak directly to the course manager, and he or she must individually approve your enrollment in the course. For more information contact the Criminal Law Department at (434) 971-3341.

If you can't make it all the way to the School, there are additional opportunities for training. The Trial Counsel Assistance Program (TCAP) also offers a number of excellent short courses geared for trial counsel. Course information can be obtained from the TCAP newsletter or by contacting TCAP at (703) 588-5277 or via e-mail at usalsatcap@conus.army.mil. If you are a defense counsel or a soon-to-be defense counsel, the Defense Counsel Assistance Program (DCAP) offers a similar set of defense-oriented short-courses. For more information contact DCAP at (703) 588-2571 or via email at dcap@conus.army.mil.

Finally, this issue marks the final Symposium for Major Maureen Kohn and Major Pat Pflaum, who will be departing after three years each on the faculty. Please join me in thanking these two fine officers for all of their hard work and dedication to training military justice practitioners across the entire Department of Defense.

New Developments

Criminal Law

*Maryland v. Shatzer*¹: Fourteen-Day Limitation on the Edwards Bar

The defendant had been incarcerated after being convicted for an unrelated offense when police detectives attempted to question him in 2003 for sexually abusing his son. Shatzer invoked his *Miranda*² rights and the detectives returned him to the general population of the prison holding him. Almost three years later, the police discovered new evidence that Shatzer had sexually abused his son. The defendant was still incarcerated for the same unrelated offense. When police detectives questioned him this time, he waived his *Miranda* rights and made several admissions. Five days later, he again waived his *Miranda* rights and submitted to a polygraph. Shatzer failed this polygraph, broke down, and made several confessions before finally invoking his *Miranda* right to counsel.

*Edwards v. Arizona*³ held that after an accused has invoked his right to counsel, any waiver of that right is invalid until counsel has been made available, the accused has been released from custody, or the accused initiates further communications with the police. The main issue before the court was whether or not the “*Edwards* bar” had a temporal time limit. In this case, Shatzer had invoked his right to counsel almost three years before he finally waived his rights and made admissions and confessions to the police. During that time, he had been continuously incarcerated for an unrelated offense. The secondary issue before the court was whether or not post-conviction incarceration counted as custody for *Miranda-Edwards* purposes.

On the first issue, Justice Scalia, writing for a 7-2 court,⁴ held that the “logical endpoint of *Edwards* disability is termination of *Miranda* custody and any of its lingering effects.”⁵ The court stated that to hold otherwise would “prevent[] questioning *ex ante* . . . render invalid *ex post*, confessions invited and obtained from suspects who (unbeknownst to the interrogators) have acquired *Edwards* immunity previously in connection with any offense in any

jurisdiction.”⁶ The court held that the temporal end of the *Edwards* bar is fourteen days, which “provides plenty of time for the suspect to get reacclimated to his normal life, to consult with friends and counsel, and to shake off any residual coercive effects of his prior custody.”⁷

As to the second issue, the court held that incarceration imposed “upon conviction of a crime does not create the coercive pressures identified in *Miranda*.”⁸ As a result, even though Shatzer had been in continuous “custody” since he invoked his *Miranda* right to counsel, this custody was held not to be the same as *Miranda* custody. The court noted that, in addition to the absence of a coercive atmosphere, the interrogator had “no power to increase the duration of incarceration, which was determined at sentencing.”⁹ The court held that the *Edwards* bar did not apply to Shatzer’s statements.

While the specific facts of this case may not occur frequently in the military setting, there are several practice pointers for military attorneys. First, military practitioners have the added clarity of several Court of Appeals for the Armed Forces (CAAF) opinions issued prior to this opinion. *United States v. Schake* held that a six-day break in custody was enough for the *Edwards* protection to dissolve when the accused had a real opportunity to seek legal advice.¹⁰ *United States v. Young* held that a two-day break in custody was sufficient to dissolve the *Edwards* protection because the accused had an opportunity to speak to his family and friends.¹¹ Even further, the Army Court of Criminal Appeals has held that a twenty-hour release from custody was sufficient to overcome the *Edwards* barrier when the accused had the opportunity to consult with counsel during that twenty-hour break.¹² Second, the *Shatzer* decision seems to take these opinions even further. A fourteen-day break is sufficient to dissolve the *Edwards* protection, even in the absence of evidence that the accused had the opportunity to consult with counsel.¹³ Reading these

¹ No. 08-680, 2010 WL 624042 (Feb. 24, 2010).

² *Miranda v. Arizona*, 384 U.S. 436 (1966).

³ 451 U.S. 477 (1981).

⁴ He was joined by C.J. Roberts, J. Kennedy, J. Ginsburg, J. Breyer, J. Alito, and J. Sotomayor. Justice Thomas joined the main opinion as to Part III and filed a separate opinion concurring in the judgment and concurring in part. Justice Stevens filed a separate opinion concurring in the judgment.

⁵ *Shatzer*, 2010 WL 624042, at *7.

⁶ *Id.* at *7.

⁷ *Id.* at *8.

⁸ *Id.* at *9.

⁹ *Id.* at *10.

¹⁰ 30 M.J. 314 (C.M.A. 1990).

¹¹ 49 M.J. 265 (C.A.A.F. 1998).

¹² *United States v. Mosely*, 52 M.J. 679 (A. Ct. Crim. App. 2000).

¹³ In fact, there were probably very few opportunities for Shatzer to consult with counsel while incarcerated, but the Court did not focus on this at all. As stated previously, the Court was concerned with whether the coercive effects of the prior custodial interrogation had worn off. See *supra* note 6 and accompanying text.

opinions together, they can co-exist depending on the circumstances. In situations where counsel is readily available, the twenty-hour *Mosely* standard would appear to suffice to dissolve the *Edwards* bar. In situations where counsel is not readily available, the *Shatzer* fourteen-day standard would appear to suffice. —MAJ Andrew D. Flor

*Florida v. Powell*¹⁴: The Further Erosion of *Miranda* Rights

Powell was arrested on weapons charges. Tampa police read him his *Miranda* rights from their standard form. The relevant portion stated, “You have the right to talk to a lawyer before answering any of our questions” and “You have the right to use any of these rights at any time you want during this interview.”¹⁵ At no point did the form specifically advise Powell that he could have an attorney present during questioning.

Miranda did not specify the exact language to be used when advising suspects of their rights. The format is irrelevant as long as the suspect is warned “[1] that he has the right to remain silent, [2] that anything he says can be used against him in a court of law, [3] that he has the right to the presence of an attorney, and [4] that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.”¹⁶ The third warning was at issue in *Powell*.

Justice Ginsburg, writing for a 7-2 court,¹⁷ held that the warnings given must “reasonably convey to a suspect his rights as required by *Miranda*.”¹⁸ The warnings in this case sufficed. The “two warnings reasonably conveyed Powell’s right to have an attorney present, not only at the outset of interrogation, but at all times.”¹⁹ The court stated that this holding will not lead to gamesmanship by law enforcement because it is in law enforcement’s best interest to make sure that their warnings are absolutely clear. The court stated that the FBI warnings are a model to follow, but that the court will not mandate specific language.²⁰

Army practitioners have little to worry about with this case. Department of the Army (DA) Form 3881, Rights Warning Procedure/Waiver Certificate, states in relevant part, “I have the right to talk privately to a lawyer before, during, and after questioning and to have a lawyer present with me during questioning.”²¹ This wording clearly complies with the intent behind *Miranda* and would pass Supreme Court scrutiny, particularly in light of *Powell*. Arguably, DA Form 3881 is even clearer than the FBI warnings because it states plainly that the right to speak to an attorney is not just applicable before and during questioning, but also afterward. In addition, DA Form 3881 explicitly provides the right to have an attorney present during questioning. —MAJ Andrew D. Flor

Administrative & Civil Law

In accordance with AR 27-3, commanders must ensure that Soldiers have access to preventive law services. The servicing Office of the Staff Judge Advocate is responsible for developing and delivering these services. Inevitably, the commander, the staff judge advocate, and others will have questions about the focus of the preventive law program. When questions do arise, where can duty-conscious Chiefs of Legal Assistance turn for assistance? The Federal Trade Commission (FTC) website is a great place to start.²² As part of its mission to protect America’s consumers, the FTC has developed a website that provides a wealth of information on issues such as identity theft, third party and creditor debt collection, and foreign money offers and counterfeit check scams. The FTC also publishes an annual report of the top consumer complaints. The 2009 report, published on 24 February 2010, is available at the FTC website.²³ —MAJ Oren H. McKnelly

¹⁴ No. 08-1175, 2010 WL 605603 (Feb. 23, 2010).

¹⁵ *Id.* at *1.

¹⁶ *Id.* at *7 (quoting *Miranda v. Arizona*, 384 U.S. 436, 479 (1966)).

¹⁷ She was joined by C.J. Roberts, J. Scalia, J. Kennedy, J. Thomas, J. Alito, and J. Sotomayor. Justice Breyer joined the main opinion as to Part II. Justice Stevens filed a separate dissenting opinion, in which J. Breyer joined as to Part II.

¹⁸ *Powell*, 2010 WL 605603, at *7 (internal citations omitted).

¹⁹ *Id.* at *8.

²⁰ In relevant part, the FBI warnings state, “You have the right to talk to a lawyer for advice before we ask you any questions. You have the right to have a lawyer present during questioning.” *Id.* at *9 (internal citation omitted).

²¹ U.S. Dep’t of Army, DA Form 3881, Rights Warning Procedure/Waiver Certificate (Nov. 1989).

²² Federal Trade Commission, <http://www.ftc.gov> (last visited Mar. 17, 2010).

²³ Federal Trade Commission, FTC Issues Report of 2009 Top Consumer Complaints (Feb. 24, 2010), <http://www.ftc.gov/opa/2010/02/2009.fraud.shtm>.

Searching for Reasonableness—The Supreme Court Revisits the Fourth Amendment

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Introduction

In the 2009 term of court, the Supreme Court issued three major Fourth Amendment opinions that significantly changed Fourth Amendment precedent.¹ At first glance, the Supreme Court's three Fourth Amendment cases appeared to pull the Fourth Amendment in different directions. The first two cases dealt with two well-known Fourth Amendment doctrines, the *Terry* frisk² and search incident to arrest,³ as applied to vehicles. In *Arizona v. Johnson*, the Court provided a clear and easy test for law enforcement to use when they conduct a *Terry* frisk incident to a traffic stop.⁴ In *Arizona v. Gant*, the Court restricted law enforcement's use of vehicle searches incident to arrests of individuals.⁵ In the third case, *Herring v. United States*, the Court limited the exclusionary rule's application to Fourth Amendment violations based on police negligence.⁶ Although the three cases appear to both shrink and expand Fourth Amendment

protection to various degrees, a closer look demonstrates a greater theme that makes all three cases consistent: reasonableness.⁷

*Arizona v. Johnson*⁸—Applying *Terry* to Vehicles

In *Johnson*, three police officers made a traffic stop at 9:00 p.m. for a suspended registration, a civil infraction, following a license plate check. The officers were in an area known for gang activity, but the officers had no reason to suspect anyone in the car of criminal activity. There were three occupants in the car, and during the stop, each officer focused on a separate passenger. Johnson was in the backseat and looked suspicious to one of the officers. He was wearing gang-affiliated clothing and had a police scanner in his pocket, which “struck [the officer] as highly unusual and cause [for] concern.”⁹ After some questioning revealed Johnson may have gang affiliations, the officer asked him to exit the vehicle so she could ask him questions about his gang affiliations outside of the hearing of the other vehicle occupants. When Johnson exited the vehicle, the officer “suspected that ‘he might have a weapon on him’” and “patted him down for officer safety.”¹⁰ The officer's suspicion was based on “Johnson's answers to her questions while he was still seated in the car.”¹¹ The officer conducted a patdown and felt a gun in Johnson's waistband; a struggle ensued, and Johnson was handcuffed and arrested. Johnson was later convicted of unlawful possession of a weapon by a prohibited possessor. The Court of Appeals of Arizona reversed the conviction, and the Arizona Supreme Court denied review of the case.¹²

The Supreme Court unanimously held the officer made a lawful *Terry* stop prior to the frisk.¹³ The Court began its

¹ See *Arizona v. Gant*, 129 S. Ct. 1710 (2009); *Arizona v. Johnson*, 129 S. Ct. 781 (2009); *Herring v. United States*, 129 S. Ct. 695 (2009). The Supreme Court issued one other Fourth Amendment-related opinion last year, but it is not covered in this paper because it is inapplicable to military justice. In *Pearson v. Callahan*, 129 S. Ct. 808 (2009), the Court examined the process used to evaluate qualified immunity claims for police officers alleged to have violated the Fourth Amendment. The Fourth Amendment issue in the case involved the consent-once-removed doctrine, which permits police to enter a home without a warrant after consent to enter was given to an undercover police officer or an informant, who then observed contraband in plain view in the home. *Id.* at 814. The Court did not make a definitive finding on the consent-once-removed doctrine, only noting that a circuit split on the issue would not prevent a police officer from relying on the doctrine to support a qualified immunity claim. *Id.* at 823.

² The *Terry* doctrine allows police officers to conduct an investigatory stop and frisk of an individual without a warrant or probable cause. See *Terry v. Ohio*, 392 U.S. 1 (1968); MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 314(f) [hereinafter MCM].

³ The search incident to arrest doctrine allows law enforcement to search an arrestee to protect the arresting officer and preserve evidence. MCM, *supra* note 2, MIL. R. EVID. 314(g). See also *Chimel v. California*, 395 U.S. 752, 755–63 (1969) (articulating the scope of the search incident to arrest rule after examining the development of the principles behind the rule, beginning with *Weeks v. United States*, 232 U.S. 383 (1914)).

⁴ *Johnson*, 129 S. Ct. at 784 (holding that the first prong of the *Terry* test, a lawful investigatory stop, is met whenever police “detain an automobile and its occupants pending inquiry into a vehicular violation”).

⁵ *Gant*, 129 S. Ct. at 1723 (allowing searches incident to arrest “only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest”).

⁶ *Herring*, 129 S. Ct. at 702 (finding that nonrecurring and nonattenuated negligence by a police employee was not enough to trigger application of the exclusionary rule).

⁷ “The touchstone of the Fourth Amendment is reasonableness.” *Florida v. Jimeno*, 500 U.S. 248, 250 (1991) (citing *Katz v. United States*, 389 U.S. 347, 360 (1967)).

⁸ 129 S. Ct. 781 (2009).

⁹ *Id.* at 784–85.

¹⁰ *Id.* at 785.

¹¹ *Id.* *Johnson* told the officer where he was from, which was an area known for gang activity, and that he was released from jail about one year earlier after serving a sentence for burglary. *Id.*

¹² *Id.*

¹³ *Id.* at 788 (reversing the Court of Appeals of Arizona).

analysis by reviewing the *Terry* doctrine. It explained that a “stop and frisk” is

constitutionally permissible if two conditions are met. First, the investigatory stop must be lawful. That requirement is met . . . when the police officer reasonably suspects that the person apprehended is committing or has committed a criminal offense. Second, to proceed from a stop to a frisk, the police officer must reasonably suspect that the person stopped is armed and dangerous.¹⁴

The precise issue in the case was whether or not the officer properly met the first prong of the *Terry* test.¹⁵ Because the officers did not suspect the car’s occupants of any criminal activity, they would normally fail the first prong of *Terry*. In *Brendlin v. California*,¹⁶ however, the Court found that “for the duration of a traffic stop . . . a police officer effectively seizes ‘everyone in the vehicle,’ the driver and all passengers.”¹⁷ Based on *Brendlin*, the Court held that the first *Terry* prong “is met whenever it is lawful for police to detain an automobile and its occupants pending inquiry into a vehicular violation. The police need not have, in addition, cause to believe any occupant of the vehicle is involved in criminal activity.”¹⁸ Regarding the second prong of *Terry*, the Court said the *Terry* analysis remained the same: “police must harbor reasonable suspicion that the person subjected to the frisk is armed and dangerous.”¹⁹

The Arizona Court of Appeals had agreed that the officer made a lawful detention of Johnson during the traffic stop²⁰ but found that the officer failed the first prong of *Terry* because that detention “evolved into a separate, consensual encounter stemming from an unrelated investigation by [the officer] of Johnson’s possible gang affiliation.”²¹ The Supreme Court easily dismissed this segmenting of Johnson’s traffic stop into different phases. “An officer’s inquiries into matters unrelated to the

justification for the traffic stop . . . do not convert the encounter into something other than a lawful seizure, so long as those inquiries do not measurably extend the duration of the stop.”²² The Court provided clear guidance on when this lawful seizure ends; “[n]ormally, the stop ends when the police have no further need to control the scene, and inform the driver and passengers they are free to leave.”²³ In this case in particular, the Court found “[n]othing occurred . . . that would have conveyed to Johnson that, prior to the frisk, the traffic stop had ended or that he was otherwise free ‘to depart without police permission.’”²⁴

The unanimous *Johnson* opinion is the only one of last term’s three Fourth Amendment cases that provides a clear, easy to apply rule for law enforcement. Recognizing the unpredictability and unique nature of traffic stops, the Court reasonably held that the first prong of *Terry* is met during all traffic stops. Law enforcement officers in the field will not have to guess whether or not someone in the vehicle is committing, or has committed, a criminal offense; they only have to show that the traffic stop was lawful. Even though officers—and prosecutors—will still have to articulate a reasonable suspicion that the person they frisked was armed and dangerous, the *Johnson* holding should remove some unpredictability in Fourth Amendment *Terry* litigation. The same cannot be said for the Court’s other two cases. *Arizona v. Gant* and *Herring v. United States*, both 5-4 decisions, also used a reasonableness-based approach to the Fourth Amendment, but applying their holdings requires more fact-specific analyses to determine whether a Fourth Amendment violation has occurred.

***Arizona v. Gant*²⁵—An Apparent Bright-line Rule Disappears**

Gant was arrested based on an outstanding arrest warrant for driving with a suspended license. He was arrested after he drove up to a residence, left his vehicle, and moved ten to twelve feet away from the vehicle.²⁶ After he was arrested, handcuffed, and locked in the back of a patrol car, two police officers searched *Gant*’s car.²⁷ They found a

¹⁴ *Id.* at 784 (citing *Terry v. Ohio*, 392 U.S. 1 (1968)).

¹⁵ *Id.* at 784–85 (noting that the Arizona Court of Appeals did not find a lawful investigatory stop, but rather a consensual encounter).

¹⁶ 551 U.S. 249 (2007).

¹⁷ *Johnson*, 129 S. Ct. at 784 (citing *Brendlin*, 551 U.S. at 255).

¹⁸ *Id.*; see also *Pennsylvania v. Mimms*, 434 U.S. 106 (1977) (holding police may order the driver to exit a lawfully stopped vehicle); *Maryland v. Wilson*, 519 U.S. 407 (1997) (extending the *Mimms* rule to passengers).

¹⁹ *Johnson*, 129 S. Ct. at 784. The Court did not make a specific finding on the second prong: “We do not foreclose the appeals court’s consideration of [whether the officer had reasonable suspicion that Johnson was armed and dangerous] on remand.” *Id.* at 788.

²⁰ *Arizona v. Johnson*, 170 P.3d 667, 671 (Ariz. Ct. App. 2007).

²¹ *Id.* at 673.

²² *Johnson*, 129 S. Ct. at 788.

²³ *Id.*

²⁴ *Id.* (quoting *Brendlin v. California*, 551 U.S. 249, 257 (2007)).

²⁵ 129 S. Ct. 1710 (2009).

²⁶ The officers had seen *Gant* at the house earlier in the day when they investigated an anonymous tip that someone was selling drugs there. After leaving the house, the officers ran *Gant*’s name in their database and discovered the warrant. When the officers returned to the house later that night, *Gant* pulled up in his car, at which time the officers arrested him for the suspended license. *Id.* at 1714–15.

²⁷ *Id.* at 1715. *Gant* was locked in the back of a patrol car even after backup officers arrived on scene. *Id.*

gun and a bag of cocaine in a jacket pocket. After being charged with possession of drugs and drug paraphernalia, the defense moved to suppress the drugs because of the warrantless search. During the suppression hearing, one of the police officers said they conducted the search of the car “[b]ecause the law says we can do it.”²⁸

The police officer’s matter of fact statement about why the police could search Gant’s car incident to his arrest was based on a broad and common interpretation of two key Supreme Court cases. In *Chimel v. California*,²⁹ the Court held that a police officer could search “the arrestee’s person and the area ‘within his immediate control’—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.”³⁰ This rule allowed a limited search “commensurate with its purposes of protecting officers and safeguarding any evidence of the offense of arrest that an arrestee might conceal or destroy.”³¹ Under this rationale, “[i]f there is no possibility that an arrestee could reach into the area that law enforcement officers seek to search, both justifications for the search-incident-to-arrest exception are absent and the rule does not apply.”³²

The Supreme Court applied the two prongs of *Chimel*—officer safety and preserving evidence—to an automobile in *New York v. Belton*.³³ In *Belton*, a police officer stopped a car for speeding.³⁴ During the stop, the officer developed probable cause to believe the four occupants had committed a drug offense.³⁵ The officer arrested the four occupants for possession of marijuana, and separated them into different areas on the side of the road. While the arrestees were separated, the officer searched each individual, and also searched the vehicle incident to arrest, finding cocaine during the vehicle search.³⁶ The Supreme Court in *Belton* held that after a police officer arrests a vehicle’s occupant, he “may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile,” including “the contents of any containers found within the passenger compartment.”³⁷

The issue in *Gant* was the proper reach and scope of a vehicle search incident to arrest under *Chimel* and *Belton*. The Court acknowledged that *Belton* “has been widely understood to allow a vehicle search incident to the arrest of a recent occupant even if there is no possibility the arrestee could gain access to the vehicle at the time of the search.”³⁸ Essentially, lower courts read *Belton* as a justification for a broad search of a vehicle incident to arrest without requiring one of the two prongs of *Chimel* as a trigger for the lawful search.³⁹ This broad reading of *Belton* was “widely taught in police academies and . . . law enforcement officers have relied on the rule in conducting vehicle searches during the past 28 years.”⁴⁰ Even though this broad reading became an apparent bright-line rule allowing searches of vehicles in most situations—remember, the police officer in *Gant* said he performed the search “[b]ecause the law says we can do it”—the *Gant* Court applied a narrower and more reasonable interpretation of *Chimel* and *Belton*. *Gant* used a straightforward application of those two cases, holding that “[p]olice may search a vehicle incident to a recent occupant’s arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest.”⁴¹ Based on this analysis, the Court found the search of Gant’s car unreasonable.⁴²

The *Gant* holding is a clear requirement that one of the two prongs of *Chimel*, either officer safety or protecting evidence, must be met before the broad search authority under *Belton* is applicable. Both *Chimel* and *Belton* are still good law, but *Gant*’s interpretation of them means they will be applied differently in the future. This new *Chimel-Belton* analysis is not a concerted effort to remove police search authority; it is simply a more reasonable approach to Fourth Amendment analysis. The *Gant* majority realized it was a constitutional fiction to find a search lawfully because the location of the search was a vehicle. The Court realized a broad reading of *Belton* that always allowed searches did not really further the two prongs of *Chimel*:

Because officers have many means of ensuring the safe arrest of vehicle occupants, it will be the rare case in which an officer is unable to fully effectuate an

²⁸ *Id.*

²⁹ 395 U.S. 752 (1969).

³⁰ *Id.* at 763.

³¹ *Gant*, 129 S. Ct. at 1716.

³² *Id.*

³³ 453 U.S. 454 (1981).

³⁴ *Id.* at 455.

³⁵ *Id.* at 455–56. The officer “smelled burnt marihuana” in the car and saw an envelope on the floor of the car with the name “Supergold” on it, which he knew was a slang term for marijuana. *Id.*

³⁶ *Id.* at 456.

³⁷ *Id.* at 460. The Court extended the reach of *Belton* to “recent occupants” of a vehicle in *United States v. Thornton*. 541 U.S. 615, 617 (2004)

(holding “*Belton* governs even when an officer does not make contact until the person arrested has left the vehicle”).

³⁸ *Arizona v. Gant*, 129 S. Ct. 1710, 1718 (2009).

³⁹ *Id.* (attributing the broad reading of *Belton* to Justice Brennan’s dissent in the case, which said the majority relied on a “fiction . . . that the interior of a car is *always* within the immediate control of an arrestee who has recently been in the car”) (quoting *Belton*, 453 U.S. at 466).

⁴⁰ *Id.* at 1722.

⁴¹ *Id.* at 1723.

⁴² *Id.* at 1724.

arrest so that a real possibility of access to the arrestee's vehicle remains.⁴³

....

A rule that gives police the power to conduct such a search whenever an individual is caught committing a traffic offense, when there is no basis for believing evidence of the offense might be found in the vehicle, creates a serious and recurring threat to the privacy of countless individuals.⁴⁴

Although *Gant* is interpreted as severely restricting law enforcement's ability to search vehicles,⁴⁵ *Gant* points out that a bright-line rule "serve[s] no purpose except to provide a police entitlement, and it is anathema to the *Fourth Amendment* to permit a warrantless search on that basis."⁴⁶

Despite the Court's seemingly reasonable application of *Chimel* and *Belton* to vehicle searches incident to arrest, *Gant* was only a 5-4 decision, with Justice Scalia's concurrence providing the deciding vote.⁴⁷ Justice Scalia preferred to overrule *Belton* because the "reaching distance" rule "fails to provide the needed guidance to arresting officers and also leaves much room for manipulation, inviting officers to leave the scene unsecured (at least where dangerous suspects are not involved) in order to conduct a

vehicle search."⁴⁸ Justice Scalia preferred to only allow searches for evidence related to the crime for which an individual was arrested; he stated, "I would hold in the present case that the search was unlawful."⁴⁹ Justice Scalia realized that "[n]o other Justice, however, shares my view" but felt it was "unacceptable for the Court to come forth with a 4-to-1-to-4 opinion that leaves the governing rule uncertain."⁵⁰ Justice Scalia therefore concurred with the majority because the dissent's broad, bright-line rule reading of *Belton* "opens the field to what I think are plainly unconstitutional searches."⁵¹

Although *Gant* uses a very reasonable interpretation of Fourth Amendment principles consistent with those discussed in *Chimel* and *Belton*, the practical effect of the holding will require some adjustment by law enforcement and prosecutors.⁵² The prior bright-line rule that always allowed searches of vehicles incident to arrest certainly reduced the amount of issues subject to litigation, even if it was likely to allow unconstitutional searches. Now, law enforcement officers in the field, and prosecutors in the courtroom, will need to carefully analyze the facts of each case to determine when there is a reasonable basis to conduct a search incident to arrest. To re-phrase the police officer's testimony in *Gant*, "the law says we might be able to search."⁵³

***Herring v. United States*⁵⁴—When the Exclusionary Rule Does Not Exclude**

When Herring, "no stranger to law enforcement," arrived at the Coffee County Sheriff's Department to get some items from his impounded vehicle, Investigator Anderson asked the warrant clerk to check for outstanding warrants.⁵⁵ Finding none, Anderson asked the clerk to check with neighboring Dale County, which reported an active

⁴³ *Id.* at 1719 n.4. Justice Scalia's concurrence made this point even more clearly. "[P]olice virtually always have a less intrusive and more effective means of ensuring their safety—and a means that is virtually always employed: ordering the arrestee away from the vehicle, patting him down in the open, handcuffing him, and placing him in the squad car." *Id.* at 1724 (Scalia, J., concurring).

⁴⁴ *Id.* at 1720.

⁴⁵ See, e.g., Richard G. Schott, *The Supreme Court Reexamines Search Incident to Lawful Arrest*, FBI LAW ENFORCEMENT BULL., Jul. 2009, at 22 ("After having what was considered a bright-line rule for almost 30 years . . . the Supreme Court decided . . . that this search is not subject to such a bright-line rule after all."); Jason Schuck, *The Impact of Arizona v. Gant*, LAW OFFICER.COM, Apr. 23, 2009, http://www.lawofficer.com/news-and-articles/columns/lexisnexis/arizona_v_gant.html ("The long-standing *Belton* rule has been severely curtailed and many searches that would previously have been upheld would now likely be found unconstitutional."). Cf. Mark M. Neil, *The Impact of Arizona v. Gant: Limiting the Scope of Automobile Searches?*, BETWEEN THE LINES (Nat'l Dist. Att'y Ass'n/Nat'l Traffic Law Ctr., Alexandria, Va), Fall 2009, at 1 ("In short, the holding in *Arizona v. Gant* is not an overly burdensome one on law enforcement. While it certainly limits the prior practices of officers conducting wide-ranging searches incident to an arrest of an occupant of a motor vehicle, it does still permit those searches under more defined circumstances.")

⁴⁶ *Gant*, 129 S. Ct. at 1721.

⁴⁷ *Id.* at 1724–25 (Scalia, J., concurring). The four dissenting Justices would have preferred to keep the broad reading of *Belton* that allowed for a bright-line rule that police could apply. *Id.* at 1726–32. Justice Alito's dissent notes the majority's holding is "truly endorsed by only four Justices; Justice Scalia joins solely for the purpose of avoiding a "4-to-1-to-4" opinion." *Id.* at 1726 (Alito, J., dissenting).

⁴⁸ *Id.* at 1724–25 (Scalia, J., concurring).

⁴⁹ *Id.* at 1725 (noting that there would be no evidence of the crime *Gant* was arrested for, driving without a license, in the vehicle).

⁵⁰ *Id.*

⁵¹ *Id.* (calling the option presented by the dissent a "greater evil").

⁵² Judge advocates should be aware that the *Gant* holding significantly affects MRE 314(g)(2), which articulated the bright-line rule eliminated by *Gant*. See MCM, *supra* note 2, MIL. R. EVID. 314(g)(2) ("the passenger compartment of an automobile, and containers within the passenger compartment may be searched as a contemporaneous incident of the apprehension of an occupant of the automobile, regardless whether the person apprehended has been removed from the vehicle.")

⁵³ The police officer in *Gant* testified at the motion hearing that they conducted the search of *Gant*'s car "[b]ecause the law says we can do it." *Gant*, 129 S. Ct. at 1715.

⁵⁴ 129 S. Ct. 695 (2009).

⁵⁵ *Id.* at 698.

felony arrest warrant. Anderson asked to have it faxed over and then left with a deputy to arrest Herring. When they searched Herring incident to his arrest, they found methamphetamine in his pocket and a pistol in his vehicle (Herring was a felon and not allowed to possess a weapon). In the ten to fifteen minutes it took Anderson to follow Herring and arrest him, however, Dale County called back to say they had made a mistake. There was no arrest warrant; it had been rescinded, but a filing error made the warrant still appear active in the police computer database.⁵⁶

The parties in *Herring* agreed that the warrantless arrest of Herring violated the Fourth Amendment,⁵⁷ but disagreed whether the exclusionary rule should apply to evidence discovered in the search incident to that arrest. The exact issue in the case was whether the exclusionary rule applied when a police “officer reasonably believes there is an outstanding arrest warrant, but that belief turns out to be wrong because of a negligent bookkeeping error by another police employee.”⁵⁸ The Eleventh Circuit did not exclude the evidence, because it found the arresting officers “were entirely innocent of any wrongdoing or carelessness” and there would be no deterrent effect by applying the rule.⁵⁹ Because other circuits excluded evidence in similar cases involving police error, the Supreme Court granted certiorari.⁶⁰

In *Arizona v. Evans*,⁶¹ the Court did not apply the exclusionary rule when police reasonably relied in good faith on a court database showing a current arrest warrant, even though there was no warrant.⁶² *Herring* looked at three reasons why the error by a court official in *Evans* did not trigger the exclusionary rule: “The exclusionary rule was crafted to curb police rather than judicial misconduct; court employees were unlikely to try to subvert the Fourth Amendment; and [the rule would not] have any significant effect in deterring the errors.”⁶³ In *Herring*, the Court analyzed whether the rationale supporting *Evans* would hold true for errors made by police, and not court, personnel.⁶⁴ The Court noted the exclusionary rule was not an automatic consequence of every Fourth Amendment violation; rather, it depended “on the culpability of the police and the

potential of exclusion to deter wrongful police conduct.”⁶⁵ The Court found that the officers in *Herring* “did nothing improper”⁶⁶ and “[t]o trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system.”⁶⁷ The *Herring* Court affirmed the Eleventh Circuit and found the exclusionary rule did not apply.⁶⁸

Herring does not give law enforcement a “free pass” to perform shoddy warrant practices and then claim good-faith reliance. The Court’s holding only says that “nonrecurring and attenuated negligence” would not trigger the rule.⁶⁹ It also provides guidance about what type of police negligence would trigger the exclusionary rule: “If police have been shown to be reckless in maintaining a warrant system, or to have knowingly made false entries to lay the groundwork for future false arrests, exclusion would certainly be justified under our cases should such misconduct cause a Fourth Amendment violation.”⁷⁰ Therefore, “deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence” by police would still trigger the exclusionary rule.⁷¹

Although *Herring*’s holding was a reasonable approach to the exclusionary rule, it was only a 5-4 decision. The dissent favored “a more majestic conception”⁷² of the exclusionary rule, which would not “constrict the domain of the exclusionary rule.”⁷³ The dissent felt the rule was particularly applicable in the area of criminal electronic databases, which “form the nervous system of contemporary criminal justice operations”⁷⁴ and “are insufficiently monitored and often out of date.”⁷⁵

Johnson, Gant, Herring and Reasonableness

The common theme in the past year’s three Supreme Court cases on the Fourth Amendment is reasonableness. The opinions did not represent a concerted effort by the Court to expand or contract the Fourth Amendment. Instead,

⁵⁶ *Id.*

⁵⁷ *Id.* at 699.

⁵⁸ *Id.* at 698.

⁵⁹ *United States v. Herring*, 492 F.3d 1212, 1218 (2007) (relying on the good-faith rule of *United States v. Leon*, 468 U.S. 897 (1984)).

⁶⁰ *Herring*, 129 S. Ct. at 699.

⁶¹ 514 U.S. 1 (1995).

⁶² *Id.* at 15.

⁶³ *Herring*, 129 S. Ct. at 701.

⁶⁴ *Id.*

⁶⁵ *Id.* at 698.

⁶⁶ *Id.* at 700.

⁶⁷ *Id.* at 702.

⁶⁸ *Id.* at 698.

⁶⁹ *Id.* at 702.

⁷⁰ *Id.* at 703.

⁷¹ *Id.* at 702.

⁷² *Id.* at 707 (Ginsburg, J., dissenting).

⁷³ *Id.* at 705 (Ginsburg, J., dissenting).

⁷⁴ *Id.* at 708 (Ginsburg, J., dissenting).

⁷⁵ *Id.* at 709 (Ginsburg, J., dissenting).

they ensured that the Fourth Amendment is reasonably applied. *Johnson* did not make it easier for police to conduct “stop and frisks” during vehicle stops; it simply provided a reasonable analysis of how the first prong of the *Terry* doctrine should be applied to those stops. By calling any vehicle stop a lawful investigatory stop under *Terry*, the Court simply made a reasonable determination that when all of the occupants of a vehicle are “seized” under *Brendlin*, they are also lawfully detained under *Terry*. In *Gant*, the Court’s 5-4 opinion eliminated an apparent bright-line rule for searches of vehicles incident to arrest. The majority, however, showed that the bright-line rule was actually an unreasonable interpretation of *Chimel* and *Belton* that led to

unconstitutional searches. Lastly, *Herring* did not eliminate or ignore the exclusionary rule; it simply looked to the core function of the rule—deterring police misconduct—and determined what types of negligence were severe enough to warrant exclusion. Law enforcement personnel and prosecutors should not have a problem applying the *Johnson* holding to vehicle stops, but they will need to pay close attention to the facts and circumstances of a case when applying the new rules announced in *Gant* and *Herring*.

“I’ve Got to Admit It’s Getting Better”*: New Developments in Post-Trial

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“You’re holding me down, turning me round, filling me up with your rules.”¹

appellant to resubmit matters under Rule for Courts-Martial (RCM) 1105.⁸

I. Introduction

During the 2008 term of court, the Court of Appeals for the Armed Forces (CAAF) and the service courts of criminal appeal (CCAs) decided several cases that have an impact on post-trial procedures. The opinions addressed numerous post-trial topics, and it is difficult to discern any unifying trend among them. However, the strongest trend is in the arena of post-trial processing delay. Since the landmark opinion of *United States v. Moreno*,² the CAAF has gradually backed away from the seemingly inflexible rules they established in that case.³ This year, the CAAF continued the trend of denying post-trial processing delay relief in almost all cases, except where the appellant has clearly established prejudice. Depending on one’s point of view, this trend in post-trial delay cases might be “getting better” or “it can’t get no [sic] worse.”⁴

This article will discuss three CAAF post-trial decisions from the 2008 term. The first decision is the case that continued the trend away from the strict application of *Moreno*. *United States v. Bush*⁵ clarified the requirement to establish prejudice in a post-trial delay case in order to receive relief. The other two decisions dealt with convening authority actions. In *United States v. Burch*,⁶ the CAAF reiterated that a facially unambiguous action that erroneously suspends a previously vacated suspended sentence must be honored. The third decision, *United States v. Mendoza*,⁷ reinforced the idea that a case remanded for a new action requires a new Staff Judge Advocate’s Recommendation (SJAR) and an opportunity for the

From the service courts, this article will cover four published opinions that fall into two areas. First, there were two cases that discussed the appropriate contents of the SJAR addendum. In *United States v. Taylor*,⁹ the Air Force Court of Criminal Appeals (AFCCA) held that the SJAR addendum does not have to address requests from the appellant to participate in administrative rehabilitation programs. In *United States v. Tuscan*,¹⁰ the Coast Guard Court of Criminal Appeals (CGCCA) held that the SJA should not comment on the circumstances surrounding pretrial negotiations in the addendum. Second, there were two cases that discussed discrepancies in the record of trial (ROT). The Navy-Marine Corps Court of Criminal Appeals (NMCCA) held in *United States v. Godbee*¹¹ that a facially complete and accurate copy of the original ROT can be used when the original ROT is lost, even when the copy has not been properly authenticated as required by RCM 1104(c).¹² Finally, the CGCCA held in *United States v. Usry*¹³ that a fifty-second gap in the trial recording that is re-created for a verbatim ROT is not necessarily a prejudicial omission.

II. Post-Trial Delay and Prejudice—*United States v. Bush*¹⁴

A. Facts and Procedural History

The facts from *Bush* are relatively straight-forward. Before a military judge sitting alone as a general court-martial, Private First Class Bush pled guilty to attempting to escape from custody, failing to obey a lawful order, fleeing apprehension, resisting apprehension, two specifications of reckless driving, two specifications of assault with a dangerous weapon, and striking a superior commissioned officer.¹⁵ On 5 January 2000, he was sentenced to a dishonorable discharge, confinement for six years, total

* THE BEATLES, *Getting Better*, on SGT. PEPPER’S LONELY HEARTS CLUB BAND (EMI 2009) (1967).

¹ *Id.*

² 63 M.J. 129 (C.A.A.F. 2006).

³ For further examples of this backing away, see Lieutenant Colonel James L. Varley, *The Lion Who Squeaked: How the Moreno Decision Hasn’t Changed the World and Other Post-Trial News*, ARMY LAW., June 2008, at 80.

⁴ THE BEATLES, *supra* note *.

⁵ 68 M.J. 96 (C.A.A.F. 2009).

⁶ 67 M.J. 32 (C.A.A.F. 2008).

⁷ 67 M.J. 53 (C.A.A.F. 2008).

⁸ See MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1105(a) (2008) [hereinafter MCM].

⁹ 67 M.J. 578 (A.F. Ct. Crim. App. 2008).

¹⁰ 67 M.J. 592 (C.G. Ct. Crim. App. 2008).

¹¹ 67 M.J. 532 (N-M. Ct. Crim. App. 2008).

¹² See MCM, *supra* note 8, R.C.M. 1104(c).

¹³ 68 M.J. 501 (C.G. Ct. Crim. App. 2009).

¹⁴ 68 M.J. 96 (C.A.A.F. 2009).

¹⁵ *United States v. Bush (Bush CCA I)*, 66 M.J. 541, 542 (N-M. Ct. Crim. App. 2008).

forfeiture of all pay and allowances, and reduction to the grade of E-1. In accordance with a pretrial agreement, the convening authority suspended all confinement in excess of twenty-four months for a period of six months from the action.¹⁶

The convening authority took action on 16 November 2000. Even though the ROT was only 143 pages long, the case was not docketed with the NMCCA until 13 February 2007. According to an affidavit from the legal office in charge of mailing it, this delay was caused by the ROT being lost in the mail for over six years.¹⁷ After returning the case for proper post-trial processing, the NMCCA re-docketed the case on 10 January 2008.¹⁸

B. First NMCCA Review

In the first review of the case, the NMCCA applied the standard from the landmark case of *United States v. Moreno*¹⁹ and found that “a delay of over seven years to review a 143-page guilty plea record of trial [was] facially unreasonable.”²⁰ The NMCCA then applied the four-factor test from *Barker v. Wingo*²¹ to determine if the post-trial delay rose to the level of a due process violation.²² The first prong, the length of the delay, was established by the facially unreasonable delay in the case. The second prong, the reasons for the delay, also weighed in the appellant’s favor because “[m]ailing delay is the least defensible of all post-trial delays.”²³ The third factor, the appellant’s

assertion of the right to a timely appeal, also weighed in favor of Bush because he submitted an un-rebutted affidavit claiming “that approximately two years after being released from confinement, he repeatedly contacted both his command and the Navy-Marine Corps Appellate Leave Activity (NAMALA)” because “he needed his DD Form 214 to maintain his employment.”²⁴ The fourth factor, prejudice, also weighed in favor of the appellant because his affidavit claimed that “he was denied employment by the Costco store in Huntsville, Alabama, three to four years after his trial, specifically because he lacked his final discharge papers (DD Form 214).”²⁵ The NMCCA held that the appellant’s affidavit was “factually adequate on its face to state a claim of legal harm” and that the “Government [did] not offer any evidence to the contrary.”²⁶ The NMCCA balanced the four *Barker* factors, and found that the post-trial delay violated the appellant’s due process rights.²⁷

The reliance of the NMCCA on this affidavit is crucial to understanding the later CAAF opinion. The NMCCA used the appellant’s affidavit alone to establish prejudice. The NMCCA held that even though the appellant did not submit additional “supporting proof” beyond his own words, the affidavit was enough to establish prejudice.²⁸ The NMCCA concluded that even if “the appellant’s declaration is insufficient to support a finding of prejudice, we may, even without specific prejudice, find a due process violation if the ‘delay is so egregious that tolerating it would adversely affect the public’s perception of the fairness and integrity of the military justice system.’”²⁹ As a result, even if the *Barker* factors balancing test was inadequate to establish a due process violation, the NMCCA still found a due process violation due to the egregious delay in the case.³⁰

In determining whether or not the due process violation was harmless beyond a reasonable doubt, the NMCCA held that “the integrity and fairness of the military justice system has been brought into question by the excessive and unreasonable post-trial processing delay . . . and by the Government’s failure . . . to undertake any efforts to verify or refute the appellant’s assertions.”³¹ The NMCCA held that the due process violation was not harmless beyond a reasonable doubt and granted relief.³² The NMCCA

¹⁶ *Id.*

¹⁷ *Id.* The legal office alleged in a post-trial affidavit that they had mailed the ROT on 12 February 2001, but they did not track or confirm whether the ROT made it to the appellate court. *Id.*

¹⁸ *Id.* The NMCCA returned the ROT to the convening authority because they found unspecified “errors in the post-trial processing of the case.” *United States v. Bush (Bush CCA II)*, 67 M.J. 508, 509 (N-M. Ct. Crim. App. 2008) (en banc).

¹⁹ 63 M.J. 129 (C.A.A.F. 2006). While this case predated the *Moreno* decision by several years, the court specifically applies the standards from *Moreno* in conducting their review. See *Bush CCA II*, 67 M.J. at 509. This comment was unnecessary by the NMCCA because the CAAF imposed the standards in *Moreno* “for those cases arriving at the service Courts of Criminal Appeals thirty days after the date of this decision.” *Moreno*, 63 M.J. at 142. *Moreno* was decided on 11 May 2006. *Id.* at 129. Bush’s file arrived at the NMCCA on 13 February 2007. *Bush CCA I*, 66 M.J. at 542. *Moreno* clearly applied.

²⁰ *Bush CCA I*, 66 M.J. at 542.

²¹ 407 U.S. 514 (1972). The four-factor test includes: (1) the length of the delay; (2) the reasons for the delay; (3) the appellant’s “responsibility to assert his right”; and, (4) prejudice. *Id.* at 531. Prejudice includes three interests: 1) preventing oppressive incarceration; 2) minimizing anxiety and concern to the accused; and 3) limiting the possibility that re-trial will be impaired. *Id.* *Barker* was a pre-trial delay case, but these rules have been applied to post-trial delay cases by numerous appellate courts, including the CAAF. See *Moreno*, 63 M.J. at 135 n.6.

²² *Bush CCA I*, 66 M.J. at 542.

²³ *Id.* at 543 (quoting *Moreno*, 63 M.J. at 137 (internal quotation omitted) (citation omitted)).

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* (quoting *United States v. Toohey (Toohey II)*, 63 M.J. 353, 362 (C.A.A.F. 2006)).

³⁰ *Id.*

³¹ *Id.* at 544.

³² *Id.*

affirmed the findings, but limited the sentence to a bad-conduct discharge.³³ The dishonorable discharge, confinement for six years, reduction to the grade of E-1, and forfeiture of all pay and allowances were disapproved.³⁴

C. *United States v. Allende*³⁵ Intervenes

Only one day after the NMCCA issued its first opinion in *Bush*, the CAAF rendered its opinion in *Allende*.³⁶ The facts in *Allende* were very similar to *Bush*: a seven-year post-trial delay, where the appellant submitted an affidavit, without supporting documentation, claiming prejudice based upon lost employment opportunities because he lacked a DD Form 214.³⁷ The CAAF assumed that there was a due process violation and proceeded directly to the issue of whether the violation was harmless beyond a reasonable doubt.³⁸ Unlike the NMCCA opinion in *Bush*, the CAAF held that an unsupported affidavit does not establish prejudice, particularly where the appellant did not demonstrate a valid reason for not providing documentation from potential employers.³⁹

The CAAF also cited, with favor, their prior decision in *United States v. Jones*.⁴⁰ In *Jones*, the appellant was able to establish prejudice through his affidavit and “three affidavits from officials of a potential employer.”⁴¹ In *Jones*, the CAAF set aside the appellant’s bad-conduct discharge, even though the delay was “only” 363 days.⁴² In *Allende*, the lack of these supporting affidavits was fatal. The CAAF held that the due process violation in *Allende* was harmless beyond a reasonable doubt “and note[d] that [the a]ppellant . . . failed to present any substantiated evidence to the contrary.”⁴³

D. Second NMCCA Review

The NMCCA reconsidered the first *Bush* opinion en banc after the *Allende* opinion was issued.⁴⁴ This second *Bush* (*Bush CCA II*) decision did not change much from the first opinion, but the ultimate conclusion changed. The

NMCCA still found the seven-year delay to be facially unreasonable, which triggered the full due process inquiry, and led to a balancing test of the four *Barker v. Wingo* factors.⁴⁵ The NMCCA still found that the reasons for the delay weighed heavily in favor of the appellant because the “mailing delay is the least defensible of all post-trial delays.”⁴⁶ The court noted that Bush submitted an unsupported affidavit in support of the third prong—the assertion of the right to a timely appeal.⁴⁷ However, despite the unsupported nature of this affidavit, the Government made no effort to contact the offices claimed to have been contacted by the appellant to confirm or deny the facts therein.⁴⁸ As a result, this prong weighed “on balance” in favor of the appellant.⁴⁹

As for prejudice, the NMCCA held that “in light of [*Allende*], this court now concludes that the appellant failed to meet his burden to show employment prejudice.”⁵⁰ The court rejected the Government position that “an appellant’s declaration or affidavit of prejudice, standing alone, will never be sufficient to meet his burden of proof no matter how detailed and specific it might be.”⁵¹ Instead, the NMCCA held that the “burden is on the appellant to provide legally competent evidence demonstrating the prejudice asserted,”⁵² but that the appellant does not have to provide “independent third-party substantiation of the facts underlying his claim of employment prejudice upon a showing that he reasonably attempted to obtain such independent corroboration but was unable to do so.”⁵³ In this case, the appellant did provide legally competent evidence with sufficient detail for the Government to confirm or deny the prejudice claimed.⁵⁴ The affidavit “identified a specific store, in a specific town, during a specific timeframe.”⁵⁵ However, the appellant did not submit any supporting documentation or “an explanation of why such evidence could not be obtained.”⁵⁶ Therefore, the fourth factor, prejudice, weighed in favor of the Government.⁵⁷

³³ *Id.*

³⁴ *Id.*

³⁵ 66 M.J. 142 (C.A.A.F. 2008).

³⁶ *Bush CCA I* was issued on 11 March 2008; *Allende* was issued on 12 March 2008. *Allende* was a 5-0 decision. See *Allende*, 66 M.J. at 142.

³⁷ *Allende*, 66 M.J. at 145.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ 61 M.J. 80 (C.A.A.F. 2005).

⁴¹ *Id.* at 82.

⁴² *Id.* at 86.

⁴³ *Allende*, 66 M.J. at 145.

⁴⁴ *United States v. Bush (Bush CCA II)*, 67 M.J. 508, 509 (N-M. Ct. Crim. App. 2008) (en banc).

⁴⁵ *Id.*

⁴⁶ *Id.* at 510 (quoting *United States v. Moreno*, 63 M.J. 129, 137 (internal quotation omitted) (citation omitted)).

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 511 (citing *United States v. Jones*, 61 M.J. 80, 84 (C.A.A.F. 2005)).

⁵² *Id.* (citing *United States v. Allende*, 66 M.J. 142, 145 (C.A.A.F. 2008)).

⁵³ *Id.*

⁵⁴ *Id.* at 512.

⁵⁵ *Id.*

⁵⁶ *Id.* (citing *Allende*, 66 M.J. at 145).

⁵⁷ *Id.*

In the absence of prejudice, the court held that they “will find a due process violation only when, in balancing the other three factors . . . the delay is so egregious that tolerating it would adversely affect the public’s perception of the fairness and integrity of the military justice system.”⁵⁸ In this case, the NMCCA did find that the delay was egregious and would affect the public perception of the military justice system; therefore they found that the appellant’s due process rights were violated.⁵⁹ However, the court also found that the due process violation was harmless beyond a reasonable doubt.⁶⁰ The fact that the appellant could not corroborate his claim of employment prejudice “weigh[ed] heavily in [the court’s] decision.”⁶¹ The appellant’s original conviction and sentence were affirmed.⁶²

E. Review by the CAAF

The CAAF granted review of *Bush CCA II* to resolve whether *Allende* conflicted with *United States v. Ginn*,⁶³ and whether the NMCCA improperly shifted the burden to the appellant to establish that the post-trial delay due process violation was harmful.⁶⁴ *Ginn* established a six-factor test to determine when a post-trial evidentiary hearing is required to resolve issues raised by an appellant in a post-trial affidavit.⁶⁵ At the CAAF, *Bush* claimed that *Ginn* allowed

the CCA to resolve his claims without further proof if his affidavit presented undisputed “legally competent evidence.”⁶⁶ In rejecting this claim, the CAAF reiterated that “an appellant must do something more than provide his own affidavit asserting that a specific employer declined to hire him because he lacked a DD Form 214.”⁶⁷ The court also noted that this was a requirement long before *Allende*.⁶⁸ The CAAF again cited *Jones* with favor, holding that “in most cases, the appropriate source of information pertaining to hiring decisions will be a representative of the potential employer itself.”⁶⁹ The CAAF did not see a conflict between the requirement that the appellant provide independent evidence and the requirements of *Ginn*.⁷⁰ The CAAF held that *Ginn* did not relieve or alter the burden of proof or persuasion,⁷¹ nor did it relieve the appellant of the requirement to testify based on personal knowledge;⁷² it merely established when a service court may resolve a factual matter without resorting to a *DuBay* hearing.⁷³ In fact, because the appellant “failed to provide independent evidence to support his claim” of employment prejudice “and did not demonstrate a valid reason for not doing so[,] . . . the fourth *Barker* factor is resolved against [the appellant] before the question even arises as to whether” *Ginn* required a *DuBay* hearing in his case.⁷⁴

⁵⁸ *Id.* (quoting *United States v. Toohey (Toohey II)*, 63 M.J. 353, 362 (C.A.A.F. 2006)).

⁵⁹ *Id.*

⁶⁰ *Id.* at 513.

⁶¹ *Id.*

⁶² *Id.*

⁶³ 47 M.J. 236 (C.A.A.F. 1997).

⁶⁴ *United States v. Bush*, 68 M.J. 96, 98 (C.A.A.F. 2009).

⁶⁵ *Ginn*, 47 M.J. at 248. The CAAF established six factors to decide when a CCA does not need to order a post-trial evidentiary hearing to resolve allegations raised in an affidavit submitted by the appellant. Those factors are as follows:

First, if the facts alleged in the affidavit allege an error that would not result in relief even if any factual dispute were resolved in appellant’s favor, the claim may be rejected on that basis.

Second, if the affidavit does not set forth specific facts but consists instead of speculative or conclusory observations, the claim may be rejected on that basis.

Third, if the affidavit is factually adequate on its face to state a claim of legal error and the Government either does not contest the relevant facts or offers an affidavit that expressly agrees with those facts, the court can proceed to decide the legal issue on the basis of those uncontroverted facts.

Fourth, if the affidavit is factually adequate on its face but the appellate filings and the record as a whole “compellingly demonstrate” the improbability of those facts, the Court may discount those factual assertions and decide the legal issue.

Fifth, when an appellate claim of ineffective representation contradicts a matter that is within the record of a guilty plea, an appellate court may decide the issue on the basis of the appellate file and record (including the admissions made in the plea inquiry at trial and appellant’s expression of satisfaction with counsel at trial) unless the appellant sets forth facts that would rationally explain why he would have made such statements at trial but not upon appeal.

Sixth, the Court of Criminal Appeals is required to order a factfinding hearing only when the above-stated circumstances are not met. In such circumstances the court must remand the case to the trial level for a *DuBay* proceeding. During appellate review of the *DuBay* proceeding, the court may exercise its Article 66 factfinding power and decide the legal issue.

Id.

⁶⁶ *Bush*, 68 M.J. at 100.

⁶⁷ *Id.*

⁶⁸ *Id.* (citing to *United States v. Jenkins*, 38 M.J. 287, 289 (C.M.A. 1993) (rejecting a prejudice claim because it was unsupported by any independent evidence) and *United States v. Gosser*, 64 M.J. 93, 98 (C.A.A.F. 2006) (rejecting a prejudice claim because it was unsupported by any “persons with direct knowledge of the pertinent facts”)).

⁶⁹ *Bush*, 68 M.J. at 101 (citing *United States v. Jones*, 61 M.J. 80, 84 (C.A.A.F. 2005)).

⁷⁰ *Id.*

⁷¹ *Id.* (citing *United States v. Pena*, 64 M.J. 259, 266–67 (C.A.A.F. 2007)).

⁷² *Id.* (citing MCM, *supra* note 8, MIL. R. EVID. 602).

⁷³ *Id.*

⁷⁴ *Id.*

The CAAF then moved on to the issue of whether *Allende* effectively shifted the burden to the appellant to establish that the due process violation was not harmless beyond a reasonable doubt.⁷⁵ The court quickly dismissed the claim that *Allende* shifted the burden to the appellant: the burden solely rests on the Government to establish that any constitutional error is harmless beyond a reasonable doubt.⁷⁶ The test for post-trial delay harm is “prejudicial impact” from the delay.⁷⁷ “Unless [the court] conclude[s] beyond a reasonable doubt that the delay generated no prejudicial impact, the Government will have failed to attain its burden.”⁷⁸

This second prejudice test, according to the court, is different from prejudice under *Barker*.⁷⁹ The *Barker* prejudice prong is focused on “oppressive incarceration, undue anxiety, and ‘limitation of the possibility that a convicted person’s grounds for appeal, and his or her defenses in case of reversal and retrial, might be impaired.’”⁸⁰ However, the scope and burden of the harmless beyond a reasonable doubt prejudice test are different.⁸¹ The CAAF held that

[i]n circumstances where a record establishes that an appellant has suffered *Barker* prejudice, the Government’s burden to establish that the constitutional violation was harmless beyond a reasonable doubt may be difficult to attain. . . . In those cases where the record does not reflect *Barker* prejudice, as a practical matter, the burden to establish harmlessness may be more easily attained by the Government.⁸²

Applying this standard, the CAAF found the due process violation harmless beyond a reasonable doubt in this case.⁸³ The CAAF refused to find otherwise, because the net result would have been to “adopt a presumption of prejudice . . . in the absence of *Barker* prejudice.”⁸⁴ The court held that they had not adopted such a standard previously, and there was

no need to adopt that position at this point.⁸⁵ Accordingly, the second NMCCA decision was affirmed.⁸⁶

The concurrence in the judgment criticized the majority’s reliance on *United States v. Toohey (Toohey II)*,⁸⁷ which “permits [the court] to find due process violations without any showing of specific prejudice to the appellant.”⁸⁸ The majority had, in a footnote, agreed with the second NMCCA holding that applied the *Toohey II* public perception test to find a due process violation in the absence of *Barker* prejudice.⁸⁹ Judge Ryan, joined by Judge Stucky, disagreed with this holding,

as it necessarily leads to bizarre scenarios like the one presented today. First, the CCA decided that [the a]ppellant had failed to establish any constitutionally cognizable prejudice. Then, despite this failure, the CCA concluded that there was a due process violation based on public perception. Finally, the CCA awarded no relief because it was convinced, as this Court agrees, that the constitutional violation was harmless beyond a reasonable doubt—the Government met its burden because [the a]ppellant did not provide independent evidence of his lost employment opportunity.

This reasoning comes dangerously close to shifting onto [the a]ppellant the burden of proving harmlessness.⁹⁰

The two concurring judges would require, like seven federal circuits and the District of Columbia, “a showing of prejudice before finding a due process violation.”⁹¹ This requirement “would not only be cleaner and simpler, but it also would follow the ordinary model of constitutional inquiry into an alleged due process violation.”⁹² However, the concurrence ultimately agrees with the outcome of the

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ 63 M.J. 353 (C.A.A.F. 2006). Specifically, the concurrence criticized the portion of *Toohey II* that allows due process violations “when the delay is so egregious that tolerating it would adversely affect the public’s perception of the fairness and integrity of the military justice system.” *Bush*, 68 M.J. at 104 (quoting *Toohey II*, 63 M.J. at 362).

⁸⁸ *Bush*, 68 M.J. at 106.

⁸⁹ *Id.* at 103 n.8. See also *supra* note 58 and accompanying text. However, the majority minimizes their reliance on this because the public perception analysis from *Toohey II* “is not ultimately determinative in the present case and is therefore not addressed in the majority opinion.” *Bush*, 68 M.J. at 103 n.8.

⁹⁰ *Id.* at 106 (emphasis in original).

⁹¹ *Id.* at 107.

⁹² *Id.*

⁷⁵ *Id.* at 102.

⁷⁶ *Id.* (citing *Chapman v. California*, 386 U.S. 18, 24 (1967)).

⁷⁷ *Id.* (citing *United States v. Szymczyk*, 64 M.J. 179 (C.A.A.F. 2006); *United States v. Dearing*, 63 M.J. 478 (C.A.A.F. 2006); and *United States v. Jones*, 61 M.J. 80, 84 (C.A.A.F. 2005)).

⁷⁸ *Id.*

⁷⁹ *Id.* at 103.

⁸⁰ *Id.* (quoting *United States v. Moreno*, 63 M.J. 123, 138–39 (C.A.A.F. 2006)).

⁸¹ *Id.*

⁸² *Id.* at 104.

⁸³ *Id.*

⁸⁴ *Id.*

case because they also would find no prejudice and grant no relief.⁹³ What distinguishes the concurrence from the majority opinion is that the concurrence would find no due process violation.⁹⁴

F. Decisions Following *Bush*

Even though the decision in *Bush* was not rendered until 17 August 2009, a mere forty-five days before the end of the term, there were two additional decisions from the CAAF before the end of the term that cited *Bush* to resolve their post-trial delay issues. The two cases were the companion cases of *United States v. Ashby*⁹⁵ and *United States v. Schweitzer*.⁹⁶ Both cases resulted from the infamous cable-car-severing flight that killed twenty Italian nationals in early February 1998.⁹⁷

Post-trial delay was one of eight issues raised in *Ashby*.⁹⁸ Despite the extremely long post-trial processing time in this case, the appellant did not initially complain about the delay.⁹⁹ The NMCCA had raised the post-trial delay issue, *sua sponte*.¹⁰⁰ The CAAF agreed with the NMCCA that the four-factor *Barker* test established a due process violation.¹⁰¹ However, the CAAF held that *Ashby* did not “sustain his burden of showing particularized prejudice.”¹⁰² The only claim *Ashby* could establish in an affidavit was that “he lost job opportunities as a result of his inability to travel due to his appellate leave status.”¹⁰³ Despite this lack of prejudice, the CAAF held, after balancing the four *Barker* factors, that there was a due process violation.¹⁰⁴ Applying *Bush*, the CAAF held that the

Government met its burden of establishing that this violation was harmless beyond a reasonable doubt.¹⁰⁵ The CAAF found “no convincing evidence of prejudice in the record,” and stated that the court “will not presume prejudice from the length of the delay alone.”¹⁰⁶

Post-trial delay was also one of three issues raised in *Schweitzer*.¹⁰⁷ Like in *Ashby*, the NMCCA raised the post-trial delay issue, *sua sponte*.¹⁰⁸ In this case, the appellant claimed in an affidavit, with no substantiation, that he “averaged less than \$35,000 a year in annual income” when the average income for a person with college degrees similar to his earned “\$79,000 to \$95,000 per year.”¹⁰⁹ The appellant also alleged that *Allende* improperly shifted the burden to him to establish harm from any post-trial delay.¹¹⁰ The CAAF cited *Bush* for the settled proposition that *Allende* did not improperly shift the burden to the appellant to establish harm from the delay.¹¹¹ Even though the CAAF agreed with the NMCCA that there was a post-trial delay due process violation, the CAAF held that “[t]here [was] no evidence [the appellant] suffered any prejudice as defined in prong four” of the *Barker* test.¹¹² As a result, the due process violation was harmless beyond a reasonable doubt.¹¹³

G. Practice Pointers

The CAAF continues to back away from the strict position they established in *United States v. Moreno*. Numerous cases have come before the court in the last three years, but only a fraction of them actually receive any form of relief, no matter how long or egregious the delay.¹¹⁴ The

⁹³ *Id.* at 104–05.

⁹⁴ *Id.* at 105.

⁹⁵ 68 M.J. 108 (C.A.A.F. 2009).

⁹⁶ 68 M.J. 133 (C.A.A.F. 2009).

⁹⁷ *Ashby*, 68 M.J. at 112.

⁹⁸ *Id.* at 123.

⁹⁹ The sentencing occurred on 10 May 1999. The initial NMCCA decision in this case was not issued until 27 June 2007 (2970 days later). *Id.*

¹⁰⁰ *Id.* The NMCCA rejected the claim after they raised it. The court found a due process violation, but also held that it was harmless beyond a reasonable doubt. *Id.*

¹⁰¹ *Id.* at 124.

¹⁰² *Id.*

¹⁰³ *Id.* at 125.

¹⁰⁴ *Id.* However, the CAAF again relied on *United States v. Toohey (Toohey II)*, 63 M.J. 353, 362 (C.A.A.F. 2006), for the principle that a due process violation can exist despite the lack of prejudice when “the delay is so egregious that tolerating it would adversely affect the public’s perception of the fairness and integrity of the military justice system.” *Id.* at 125 n.12. Judge Stucky again wrote a separate concurring opinion to express reservation about this public perception analysis. *Id.* at 132. This time he was not joined by Judge Ryan because she had recused herself from the case. *Id.* at 112 n.1.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* (citing *Toohey II*, 63 M.J. at 363).

¹⁰⁷ *United States v. Schweitzer*, 68 M.J. 133, 138 (C.A.A.F. 2009).

¹⁰⁸ *Id.* As in *Ashby*, the NMCCA rejected the claim after they raised it. The court found a due process violation, but also held that it was harmless beyond a reasonable doubt. *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.* at 138–39.

¹¹³ *Id.* at 139. Judge Stucky did not write a separate concurring opinion in *Schweitzer* because he wrote the majority opinion. *Id.* at 133. He does not reference *Toohey II* at all in his opinion, and his opinion glosses over why the NMCCA found a due process violation. *See id.* at 139. Ironically, the NMCCA did use the public perception analysis in determining that there was a due process violation in this case. *See United States v. Schweitzer*, No. 200000755, 2007 WL 1704165, at *32 (N-M. Ct. Crim. App. May 10, 2007) (unpublished). Judge Ryan recused herself from *Schweitzer*, as she did from *Ashby*, so she did not join in Judge Stucky’s opinion. *Schweitzer*, 68 M.J. at 134 n.1.

¹¹⁴ For example, *Ashby* and *Schweitzer* were more than eight-year-delay cases, but no relief was granted. *See United States v. Ashby*, 68 M.J. 108, 125 (C.A.A.F. 2009) and *Schweitzer*, 68 M.J. at 139.

key point to take away from *Bush* is that unless the appellant can establish prejudice with independent evidence, the CAAF will find the error harmless beyond a reasonable doubt.¹¹⁵ Both *Ashby* and *Schweitzer* confirmed that the length of the delay alone is insufficient to establish prejudice, even in light of “gross negligence and lack of institutional vigilance.”¹¹⁶ Appellate defense counsel seeking relief for post-trial delay should follow the actions taken by the defense in *Jones* and request affidavits from potential employers who would have hired the appellant if he or she had had a DD Form 214.¹¹⁷ While not every case will require three independent affidavits from potential employers to establish prejudice, it is clear that an “appellant must do something more than provide his own affidavit” to establish prejudice.¹¹⁸ If the potential employers refuse to provide the affidavits, then the appellant can possibly “demonstrate a valid reason for” not providing the independent evidence, and he or she may still be able to establish *Barker* prejudice.¹¹⁹

The second key point from *Bush* is that the current state of post-trial delay analysis leaves practitioners with a complicated multi-step process. The starting point for analyzing post-trial delay is the application of the “post-trial processing standards” from *United States v. Moreno* to determine whether the case triggers a “presumption of unreasonable delay.”¹²⁰ If the case does not evince facially unreasonable delay, there is no due process violation, and the appellant will receive no relief.¹²¹ On the other hand, if the case exhibits facially unreasonable delay, then the four-factor *Barker* test should be applied.¹²² There are three possible outcomes of the *Barker* balancing test. First, if the balancing test does not weigh in the appellant’s favor, there is no due process violation, and the appellant receives no relief.¹²³ Second, if the balancing test weighs in favor of the

appellant, and the appellant is able to show *Barker* prejudice through independent evidence (or demonstrate a valid reason for not doing so), then there is a due process violation.¹²⁴ Third, if the balancing test weighs in favor of the appellant, but there is no *Barker* prejudice, there may still be a due process violation if after “balancing the other three factors, the delay is so egregious that tolerating it would adversely affect the public’s perception of the fairness and integrity of the military justice system.”¹²⁵

If there is a due process violation, the next step is to determine whether or not the due process violation is harmless beyond a reasonable doubt. The test to determine whether the violation was harmless beyond a reasonable doubt is prejudice. This prejudice test is not the same as the *Barker* four-factor prejudice test.¹²⁶ To add to the confusion, this secondary prejudice test diverges depending on whether or not there was *Barker* prejudice when conducting the four-factor balancing test. In the absence of *Barker* prejudice, the Government’s burden of proving that a post-trial delay due process violation is harmless beyond a reasonable doubt is “more easily attained by the Government,” while in cases with *Barker* prejudice, the Government’s burden “may be difficult to attain.”¹²⁷ If there is *Barker* prejudice, then the case will likely follow the result from *United States v. Jones*, and the appellant will likely receive relief.¹²⁸ If there is not *Barker* prejudice, then the case will likely follow the result from *United States v. Allende*, and the appellant will likely not receive relief.¹²⁹

The last resort for post-trial delay relief is to convince the service CCAs to apply their Article 66(c) authority to “grant relief for excessive post-trial delay without a showing of ‘actual prejudice’ . . . if it deems relief appropriate under the circumstances.”¹³⁰ Article 66(c) authority has been cited on several occasions by the CAAF as a remedy for post-trial delay relief, including such cases as *United States v. Tardif*¹³¹ and *United States v. Toohey*.¹³²

¹¹⁵ See *United States v. Bush*, 68 M.J. 96, 104 (C.A.A.F. 2009).

¹¹⁶ *Schweitzer*, 68 M.J. at 138.

¹¹⁷ See *United States v. Jones*, 63 M.J. 80 (C.A.A.F. 2005).

¹¹⁸ *Bush*, 68 M.J. at 100.

¹¹⁹ *Id.* at 101.

¹²⁰ 63 M.J. 129, 142 (C.A.A.F. 2006). The standards are 120 days from sentencing to convening authority action, 30 days from convening authority action to docketing at the service court, and 18 months from docketing to decision by the service court. *Id.*

¹²¹ *United States v. Toohey (Toohey I)*, 60 M.J. 100 (C.A.A.F. 2004). The relevant portion of this case gives us a two-part test for the length of the delay. First, if the delay is reasonable, “there is no necessity for inquiry into the other factors that go into the balance.” *Id.* at 102 (quotation omitted). Second, the length of the delay may, “in extreme circumstances, give rise to a strong presumption of evidentiary prejudice affecting the fourth *Barker* factor.” *Id.* at 102 (quotation omitted).

¹²² See *supra* note 21.

¹²³ This is an uncommon result. Frequently, the courts will not even apply a balancing test if the case is clear cut. They will presume a due process violation and move directly into the analysis of whether the violation was harmless beyond a reasonable doubt. See, e.g., *United States v. Allison*, 63 M.J. 365, 370–71 (C.A.A.F. 2006).

¹²⁴ See *United States v. Allende*, 66 M.J. 142 (C.A.A.F. 2008). The relevant portion of this case established that an appellant must provide independent “documentation from potential employers,” or “demonstrate[] a valid reason for failing to do so,” in order to establish employment prejudice under the fourth *Barker* factor. *Id.* at 145.

¹²⁵ *United States v. Toohey (Toohey II)*, 63 M.J. 353 (C.A.A.F. 2006).

¹²⁶ See *supra* note 82 and accompanying text.

¹²⁷ *United States v. Bush*, 68 M.J. 96, 104 (C.A.A.F. 2009).

¹²⁸ 63 M.J. 80 (C.A.A.F. 2005).

¹²⁹ *Allende*, 66 M.J. at 142.

¹³⁰ *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002) (citing *United States v. Collazo*, 53 M.J. 721, 727 (A. Ct. Crim. App. 2000)).

¹³¹ See *id.* at 224.

¹³² See *United States v. Toohey (Toohey I)*, 60 M.J. 100, 103 (C.A.A.F. 2004).

Post-trial delay continues to be a complicated area. Wise practitioners will carefully apply the relevant case law in order to determine the potential outcomes for their case. For the time being, the CAAF continues to back away from the seemingly inflexible rules they established in the landmark case of *United States v. Moreno*. This trend will likely continue for the foreseeable future.

III. Action by the Convening Authority

A. *United States v. Burch*¹³³

In the past, figuring out what constitutes an unambiguous action has been a source of dispute and has resulted in numerous appellate opinions.¹³⁴ *Burch* is another in that long line of cases.

1. Facts

Corporal Burch pled guilty at a special court-martial, military judge alone, of willfully damaging military property of the United States, assault consummated by a battery, and assault consummated by a battery upon a child under the age of sixteen years. He was sentenced to a bad-conduct discharge, confinement for one year, and reduction to the grade of E-1. Pursuant to a pretrial agreement, “the convening authority suspended all confinement in excess of forty-five days on the condition that the [a]ppellant commit no misconduct in violation of the UCMJ during [the one year] suspension.”¹³⁵ Burch served forty-five days of confinement and was released. After his release, but prior to the convening authority action and prior to the suspension period running out, he committed additional misconduct.¹³⁶

¹³³ 67 M.J. 32 (C.A.A.F. 2008).

¹³⁴ See, e.g., *United States v. Foster*, 40 M.J. 552 (A.C.M.R. 1994); *United States v. Schiaffo*, 43 M.J. 835 (A. Ct. Crim. App. 1996); *United States v. Klein*, 55 M.J. 752 (N-M. Ct. Crim. App. 2001); *United States v. Koljbornsen*, 56 M.J. 805 (C.G. Ct. Crim. App. 2002); and, *United States v. Wilson*, 65 M.J. 140 (C.A.A.F. 2007).

¹³⁵ *Burch*, 67 M.J. at 33.

¹³⁶ The lower court described the additional misconduct:

On 3 August 2005, the appellant was observed by a Marine lieutenant colonel to be driving an automobile significantly above the posted speed limit. The appellant was in uniform at the time. The officer followed the appellant into a military parking lot and confronted him. The appellant was disrespectful in tone and body language to the officer. After being ordered to accompany the officer to his staff noncommissioned officer, the appellant made an unsuccessful attempt to hide by blending in with other similarly attired Marines in a formation. The officer located the appellant and delivered him to the staff sergeant in charge of the formation.

United States v. Burch (Burch I), No. 200700047, 2007 WL 2745706, at *4 (N-M. Ct. Crim. App. Sept. 13, 2007) (unpublished).

The sentence suspension was properly vacated in accordance with RCM 1109.¹³⁷ Approximately six weeks later, the convening authority took action.¹³⁸ The action stated, in relevant part, “Execution of that part of the sentence adjudging confinement in excess of 45 days is suspended for a period of 12 months”¹³⁹ Despite this convening authority action that reinstated the sentence suspension, the appellant was not released from confinement, and no efforts were made to vacate this second suspension.¹⁴⁰ Burch served a total of 223 days of confinement beyond what the convening authority had approved in the action.¹⁴¹

2. NMCCA Review

The NMCCA affirmed in an unpublished opinion.¹⁴² The NMCCA held that the action was unambiguous, “without reference to other post-trial documents in the record of trial.”¹⁴³ The CAAF had recently held in *United States v. Wilson*¹⁴⁴ that “when the plain language of the convening authority’s action is facially complete and unambiguous, its meaning must be given effect.”¹⁴⁵ The NMCCA interpreted this decision to “constrain[] us from considering anything outside the 4-corners of the unambiguous and complete 11 March 2006 convening authority’s action” to interpret that action.¹⁴⁶ Therefore, the NMCCA had no choice but to find that the appellant’s due process rights under the Fifth Amendment were violated by being held in confinement for a period beyond that approved in the action.¹⁴⁷ However, because *Wilson* only constrained the court from looking outside the four corners of the action to interpret the action itself, the NMCCA looked outside the four corners of the action in the course of determining whether the constitutional error was harmless beyond a reasonable doubt.¹⁴⁸ Considering the record as a whole, the NMCCA held that the convening authority had no intention of releasing the appellant prior to completion of his adjudged sentence.¹⁴⁹ The NMCCA held that despite the due process

¹³⁷ *Burch*, 67 M.J. at 33.

¹³⁸ The appellant was returned to confinement on 24 January 2006, and the convening authority took action on 11 March 2006. *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ The appellant was released from confinement on 20 October 2006. *Id.*

¹⁴² See *United States v. Burch (Burch I)*, No. 200700047, 2007 WL 2745706 (N-M. Ct. Crim. App. Sept. 13, 2007) (unpublished).

¹⁴³ *Id.* at *5.

¹⁴⁴ 65 M.J. 140 (C.A.A.F. 2007).

¹⁴⁵ *Id.* at 141.

¹⁴⁶ *Burch I*, at *5.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at *6.

violation, the appellant suffered no prejudice, and that the error was harmless beyond a reasonable doubt.¹⁵⁰

3. CAAF Review

The CAAF held that the NMCCA erred.¹⁵¹ The CAAF concluded that the prejudice from being held 223 days over the approved confinement “is both obvious and apparent and may not be attenuated by facts predating the final action of the convening authority.”¹⁵² The CAAF placed weight on the fact that the NMCCA opinion essentially authorized extended punishment for the appellant because the convening authority, at some point preceding the action, intended something other than what the action stated.¹⁵³ The CAAF also noted that under RCM 1113(a) punishment suspended by a convening authority may not be executed.¹⁵⁴ Finally, the CAAF reiterated the holding from *Wilson*: Where an action “is facially complete and unambiguous, its meaning must be given effect.”¹⁵⁵ To allow the NMCCA to find otherwise, based upon facts predating the final action, would render an unambiguous action meaningless.¹⁵⁶

B. *United States v. Mendoza*¹⁵⁷

While *Burch* was about giving effect to an unambiguous action, *Mendoza* was about a convening authority purporting to take a new action to replace an ambiguous action.

1. Facts

Aviation Electronics Technician Third Class Mendoza pled guilty at a special court-martial, military judge alone, to wrongfully uttering thirty-nine checks without sufficient funds.¹⁵⁸ He was sentenced to a bad-conduct discharge, confinement for ninety days, and reduction to the grade of E-1.¹⁵⁹ The action taken by the convening authority stated, in relevant part, “only such of the sentence as provides for reduction to the pay grade E-1, confinement for 90 days, is

approved and except for the part of the sentence extending to a bad conduct discharge [sic], will be executed.”¹⁶⁰ This action raised questions about whether or not the convening authority approved the bad-conduct discharge.¹⁶¹

2. NMCCA Review

On appeal, the NMCCA held that the language was ambiguous and set aside the action and returned the case for proper post-trial processing.¹⁶² A successor in command took a new action that stated, in relevant part, “the sentence is approved and, except for that part of the sentence extending to a bad-conduct discharge, will be executed.”¹⁶³ The new convening authority did not consult with his predecessor to divine the intent behind the original action.¹⁶⁴ A new SJAR was not prepared, and an opportunity to submit additional RCM 1105 matters was not offered.¹⁶⁵

On rehearing, the appellant did not file any specific assignments of error dealing with this process.¹⁶⁶ Thereafter, the NMCCA specified the issue: “Whether, under the circumstances of the case, a new [SJAR], with service in compliance with [RCM 1106(f)], was required prior to issuance of the new convening authority’s action DTD 29 May 2007.”¹⁶⁷ The NMCCA held that there was no *per se* rule requiring a new SJAR and opportunity to submit clemency matters whenever there is a new action.¹⁶⁸ However, they held that the passage of time and some evidence of changed circumstances may create a presumption of staleness requiring a new SJAR and opportunity to submit clemency matters.¹⁶⁹ In this case, they held that there were no changed circumstances, only the passage of time, so there was no presumption of staleness in the SJAR.¹⁷⁰ The NMCCA also held that even if the SJAR was stale, the error was harmless beyond a reasonable doubt, because the appellant had “failed to indicate what, if any,

¹⁵⁰ *Id.*

¹⁵¹ *United States v. Burch*, 67 M.J. 32, 34 (C.A.A.F. 2008).

¹⁵² *Id.*

¹⁵³ *Id.* at 33.

¹⁵⁴ *Id.* at 34. “No sentence of a court-martial may be executed unless it has been approved by the convening authority.” MCM, *supra* note 8, R.C.M. 1113(a).

¹⁵⁵ *Burch*, 67 M.J. at 33 (quoting *United States v. Wilson*, 65 M.J. 140, 141 (C.A.A.F. 2007)).

¹⁵⁶ *Id.* at 34.

¹⁵⁷ 67 M.J. 53 (C.A.A.F. 2008).

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 54.

¹⁶¹ This action did not follow the model actions in the MCM either. See MCM, *supra* note 8, app. 16. Also of note, the CAAF highlighted that *Mendoza* had asked the convening authority to disapprove his bad-conduct discharge. See *Mendoza*, 67 M.J. at 54.

¹⁶² *United States v. Mendoza (Mendoza CCA I)*, No. 200602353, 2007 CCA LEXIS 622 (N-M. Ct. Crim. App. Mar. 20, 2007) (unpublished).

¹⁶³ *Mendoza*, 67 M.J. at 54.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *United States v. Mendoza (Mendoza CCA II)*, 65 M.J. 824, 825 (N-M. Ct. Crim. App. 2007).

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 825–26.

¹⁷⁰ *Id.* at 826.

additional information he would have provided to the convening authority if given the opportunity.”¹⁷¹

3. CAAF Review

The CAAF held that in cases involving an ambiguous action returned by a CCA for a corrected action with a successor convening authority, there are two possible outcomes.¹⁷² First, in cases remanded for a corrected action,¹⁷³ the successor convening authority can communicate with his predecessor to ensure that the corrected action reflects the original convening authority’s intent.¹⁷⁴ Alternatively, the successor convening authority may take a new action after receiving a new SJAR that has been served on the defense and after the defense has been provided the opportunity to submit clemency matters.¹⁷⁵ The CAAF also disagreed with the NMCCA holding that passage of time combined with some evidence of changed circumstances may create a staleness that requires a new SJAR and opportunity to submit clemency matters.¹⁷⁶ The court held that staleness is irrelevant in cases involving a new action.¹⁷⁷ Those cases involving a new action require a new SJAR and an opportunity to submit clemency matters under RCM 1105.¹⁷⁸

The CAAF held that because the NMCCA remanded the case for new post-trial processing (as opposed to remanding the case for a corrected action), the second action in this case was a new action, not a corrected action.¹⁷⁹ A new SJAR and an opportunity to submit clemency matters under RCM 1105 were required in this case.¹⁸⁰ The court also disagreed with the NMCCA that Mendoza had nothing further to submit.¹⁸¹ Because of post-trial review errors, the CAAF held that Mendoza did not try to allege prejudice during the

review by the NMCCA.¹⁸² As a result, the CAAF remanded the case for a determination by the NMCCA on whether or not Mendoza was prejudiced by the lack of a new SJAR and the opportunity to submit additional matters under RCM 1105.¹⁸³

C. Practice Pointers for Convening Authority Actions

Practitioners should exercise caution when drafting actions for the convening authority. These two CAAF opinions make clear that attention to detail is crucial when preparing post-trial documents. In *Burch*, the action appeared to unintentionally resurrect the sentence suspension, which is an error in attention to detail. In *Mendoza*, the original error was a failure to follow the model “Forms for Action” in Appendix 16 of the MCM.¹⁸⁴ In both cases, these oversights caused months of appellate litigation and countless man-hours to resolve errors that should not have happened in the first place.

In both *Burch* and *Mendoza*, the CAAF showed little patience for the mistakes that occurred along the way. Both of the CAAF opinions reversed the actions taken by the NMCCA and remanded the cases for further processing. The main takeaway from these two opinions is that the CAAF will critically review convening authority actions for errors. Any mistakes will likely result in a remand. This critical review by the CAAF is consistent with their overall theme that “[i]t is at the level of the convening authority that an accused has his best opportunity for relief.”¹⁸⁵ Mistakes in the action, particularly involving attention to detail, will not be tolerated by the CAAF in order to ensure that the accused has the full opportunity to petition the convening authority for clemency.

¹⁷¹ *Id.* at 825.

¹⁷² *United States v. Mendoza*, 67 M.J. 53, 54 (C.A.A.F. 2008). In cases returned for action to the same convening authority, the first option is irrelevant. The second option is still a possibility. *Cf. id.* (discussing the options for a successor convening authority as opposed to the same convening authority).

¹⁷³ *See generally* MCM, *supra* note 8, R.C.M. 1107(g) (discussing the ability of a CCA or other authority to direct withdrawal and substitution of a corrected action).

¹⁷⁴ *See Mendoza*, 67 M.J. at 54 (citing *United States v. Lower*, 10 M.J. 263 (C.M.A. 1981)).

¹⁷⁵ *See id.* (citing *United States v. Gosser*, 64 M.J. 93 (C.A.A.F. 2006)).

¹⁷⁶ *Id.* at 55.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* Note that this is true whether the new action is from the same or a successor convening authority. *See supra* note 172.

¹⁷⁹ *Id.* at 54–55.

¹⁸⁰ *Id.* at 55.

¹⁸¹ *Id.* at 55 n.2.

IV. Contents of the Addendum to the SJAR

A. *United States v. Taylor*¹⁸⁶

Taylor helps clarify what the SJA must comment on in the addendum to the SJAR. Airman First Class Taylor pled guilty at a general court-martial, military judge alone, to two specifications of willfully disobeying the lawful order of a non-commissioned officer, two specifications of making a false official statement, one specification of divers presentations of false claims (false travel vouchers), and one

¹⁸² *Id.* In fact, Mendoza “filed a motion to attach documents with [the CAAF], alleging such prejudice. Such claims must be raised before the CCA.” *Id.* (citing *United States v. Wheelus*, 49 M.J. 283, 288–89 (C.A.A.F. 1998)).

¹⁸³ *Mendoza*, 67 M.J. at 55.

¹⁸⁴ *See* MCM, *supra* note 8, app. 16.

¹⁸⁵ *United States v. Boatner*, 43 C.M.R. 216, 217 (C.M.A. 1971).

¹⁸⁶ 67 M.J. 578 (A.F. Ct. Crim. App. 2008).

specification of making and uttering worthless checks by dishonorably failing to maintain sufficient funds.¹⁸⁷ She was sentenced to a bad-conduct discharge, confinement for seven months, and reduction to the grade of E-1.¹⁸⁸ In her clemency submissions to the convening authority, she asked to enter the Return-To-Duty Program (RTDP).¹⁸⁹ The SJAR addendum made no mention of her request, nor did it advise the convening authority that he could approve her entry into the RTDP.¹⁹⁰ The addendum did, however, specifically list the appellant's submissions and advised the convening authority that he had to consider them prior to taking action.¹⁹¹

The AFCCA held that the SJA did not err by not advising the convening authority about the RTDP in the addendum to the SJAR.¹⁹² The AFCCA held that the addendum should: (1) inform the convening authority that matters were submitted and that they are attached; (2) inform the convening authority that he must consider those matters; and, (3) list as attachments the matters submitted.¹⁹³ If there are no allegations of legal error, no further comments are required in the addendum.¹⁹⁴ The AFCCA held that a request to participate in the RTDP is not an allegation of legal error, so the SJA is not required to address it in the addendum.¹⁹⁵ Under RCM 1106, the SJA could have advised the convening authority about the RTDP, but there was no obligation to do so.¹⁹⁶

B. *United States v. Tuscan*¹⁹⁷

While *Taylor* resolved an issue about whether an SJA needs to respond to a request in the addendum, *Tuscan* deals

with comments made by the SJA that probably should not have been made. Fireman Machinery Technician Tuscan was convicted at a contested general court-martial, consisting of members, of one specification each of assault with an unloaded firearm and assault consummated by a battery.¹⁹⁸ He was sentenced to a bad-conduct discharge, confinement for twelve months, and reduction to the grade of E-1.¹⁹⁹ The appellant's RCM 1105 submissions included a paragraph asking for a reduction in confinement because Tuscan was "remorseful" and he had "even offered to plead guilty to one of the specifications he was eventually found guilty of during his trial. This indicated a desire to take responsibility for his actions and to move on with his life."²⁰⁰ The SJAR addendum addressed Tuscan's contentions by stating that the SJA disagreed that the appellant was remorseful. The SJA explained, "As you may recall, the pretrial offers, taken as a whole were unreasonable and on their face did not reflect a willingness on the part of the [appellant] to fully accept responsibility."²⁰¹ No objection was raised to the addendum, but the appellant did personally respond to it.²⁰²

The CGCCA first addressed the proper role of the SJA with respect to post-trial matters. The CGCCA held that "[a]n SJA cannot perform trial counsel functions because it limits the SJA's ability to provide a critical independent legal review for the convening authority."²⁰³ In fact, RCM 1106(b) prohibits a trial counsel from acting as an SJA to any convening authority in the same case.²⁰⁴ In this case, the SJA did not act as an actual trial counsel during the court-martial, but the comments made in the addendum may have caused the SJA to become a *de facto* trial counsel because of the apparent loss of objectivity. "An SJA should not only be objective . . . but also should maintain the appearance of objectivity."²⁰⁵ The comments made "did not restate the full scope of the pretrial negotiations. . . . Pretrial negotiations are not really indicative of the appellant's state of mind. They are more likely a reflection of counsel tactics."²⁰⁶

¹⁸⁷ *Id.* at 578–79.

¹⁸⁸ *Id.* at 579.

¹⁸⁹ *Id.* The RTDP is an Air Force program. "The program offers selected court-martialed enlisted personnel with exceptional potential the opportunity to be returned to active duty and have their punitive discharge, if adjudged, remitted." See U.S. DEP'T OF AIR FORCE, INSTR. 31-205, CORRECTIONS PROGRAM para. 11.6 (7 Apr. 2004) (C1, 6 July 2007) [hereinafter AFI 31-205].

¹⁹⁰ *Taylor*, 67 M.J. at 579. There are three authorities that can approve entry into the RTDP: (1) the convening authority; (2) the Air Force TJAG; and, (3) the Air Force Clemency & Parole Board (AFC&PB). See AFI 31-205, *supra* note 189, para. 11.6.6.

¹⁹¹ *Taylor*, 67 M.J. at 579.

¹⁹² *Id.*

¹⁹³ *Id.* (citing *United States v. Foy*, 30 M.J. 664, 665 (A.F.C.M.R. 1990)).

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* MCM, *supra* note 8, R.C.M. 1106(f)(7) states that "[t]he staff judge advocate or legal officer *may* supplement the recommendation." (emphasis added). That permissive language allows the SJA to comment on matters not qualifying as legal error but does not require comments to be made.

¹⁹⁷ 67 M.J. 592 (C.G. Ct. Crim. App. 2008).

¹⁹⁸ *Id.* at 593.

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 596.

²⁰¹ *Id.* at 597.

²⁰² *Id.* The addendum was served on the accused as new matter under RCM 1106(f)(7). Tuscan's personal response was submitted by his counsel and consisted of a 1 1/4 page typed, single-spaced letter to the convening authority. See Memorandum from Defense Counsel to Convening Authority, subject: Supplemental Request for Clemency ICO *United States v. FNMK Gary M. Tuscan*, USCG (27 Apr. 2007) (enclosure 1). The letter says that it "is not at all true" that he was not remorseful. *Id.* It also ended with a plea that "this request for clemency" be granted. *Id.*

²⁰³ *Id.*

²⁰⁴ See MCM, *supra* note 8, R.C.M. 1106(b).

²⁰⁵ *Tuscan*, 67 M.J. at 597.

²⁰⁶ *Id.*

Commenting on the state of pretrial negotiations could be viewed as “unsympathetic to the right of the accused and counsel to engage in a dialogue during negotiations, or as dismissive of the right of the accused not to negotiate at all.”²⁰⁷ Despite all of this, the CGCCA found no prejudice because there was no evidence that the convening authority would have acted differently if the addendum did not contain the SJA’s comments.²⁰⁸ However, the CGCCA did “not consider the addendum a model to be followed.”²⁰⁹

C. Practice Pointers

Practitioners should be wary of unnecessary comments in the SJAR addendum. In *Tuscan*, even though the CGCCA found no prejudice, it is clear that the court was not pleased with the language used in the addendum. The comments made by the SJA were unnecessary and made the SJA look like a trial counsel, which is prohibited by the rules. Meanwhile, in *Taylor*, the AFCCA had no difficulty upholding the absence of comments from the SJA about the RTDP.

Reading the results of both of these cases together, the main takeaway is that the only time an SJA should make comments in the addendum is when allegations of legal error are made (or are ostensibly made). Even then, comments should be limited to the language provided by Chief Judge Cox in *United States v. McKinley*: “I have considered the defense allegation of legal error regarding _____. I disagree that this was legal error. In my opinion, no corrective action is necessary.”²¹⁰ Any language or comments that step outside of this suggested language are unnecessary, as shown by the results in *Taylor* and *Tuscan*.

The second takeaway concerning the addendum is that the AFCCA’s advice on what the addendum should contain applies even outside of the Air Force. Every addendum should include as attachments all of the submissions from the accused and should advise the convening authority that he is required to consider them before taking action.²¹¹ Practitioners that follow this advice will ensure that every addendum is adequate and complies fully with the rules.

²⁰⁷ *Id.* at 597–98.

²⁰⁸ *Id.* at 597.

²⁰⁹ *Id.*

²¹⁰ *United States v. McKinley*, 48 M.J. 280, 281 (C.A.A.F. 1998)

²¹¹ *See supra* note 193 and accompanying text.

V. Issues with the Record of Trial

A. *United States v. Godbee*²¹²

In *Godbee*, the original ROT was lost.²¹³ Private Godbee pled guilty at a special court-martial, military judge alone, to multiple offenses.²¹⁴ He was sentenced to a bad-conduct discharge, confinement for ninety days, and forfeiture of \$823 pay per month for three months.²¹⁵ There was a delay of nearly 1100 days from sentencing to docketing at the NMCCA.²¹⁶ The case is unclear, but the delay may have occurred because the original ROT was lost.²¹⁷ A duplicate copy was eventually submitted for appellate review.²¹⁸ The copy of the ROT submitted for appellate review was “internally consistent, . . . contain[ed] all numbered pages, and all prosecution, defense, and appellate exhibits.”²¹⁹ The original ROT had been authenticated, and this duplicate copy contained a copy of the authentication page signed by the military judge.²²⁰ However, the duplicate copy had not been authenticated.²²¹

Rule for Court-Martial 1104(c) requires the authentication of a duplicate ROT if the original ROT is lost.²²² In this case, because the ROT came from an “undisputed source” and based upon the “completeness of the duplicate,” the NMCCA applied “a presumption of regularity to [the ROT’s] creation, authentication, and distribution.”²²³ The appellant could not point to any discrepancies, and gave no reason to “doubt the completeness, the accuracy, or the authenticity of the duplicate copy of the [ROT] submitted for appellate review.”²²⁴ In fact, Godbee’s “detailed defense counsel reviewed the original record three days before the military judge authenticated it, and he was served with the appellant’s copy of the authenticated record.”²²⁵ The defense counsel did not note any discrepancies in the original or the appellant’s copy of the authenticated record

²¹² 67 M.J. 532 (N-M. Ct. Crim. App. 2008).

²¹³ *Id.* at 533.

²¹⁴ *Id.* at 532.

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *See generally id.* at 533 (noting that a duplicate copy was prepared and submitted for appellate review, but not stating why a duplicate copy was prepared).

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.*

²²² *See MCM, supra* note 8, R.C.M. 1104(c).

²²³ *Id.* (citing *United States v. Weaver*, 1 M.J. 111, 115 (C.M.A. 1975)).

²²⁴ *Id.*

²²⁵ *Id.*

(or any discrepancies between the two of them).²²⁶ Because of this lack of discrepancies, the NMCCA found that the appellant could not establish any prejudice.²²⁷ The NMCCA also found that the lack of prejudice and any discrepancies made the use of the un-authenticated, duplicate ROT a harmless error.²²⁸

B. *United States v. Usry*²²⁹

Usry was a case mostly about competence to stand trial. However, there was a fifty-second gap in the recording of the trial. Seaman Usry pled guilty at a general court-martial, military judge alone, to one specification of wrongful appropriation and five specifications involving child pornography. He was sentenced to a bad-conduct discharge, confinement for thirty-six months, reduction to the grade of E-1, and forfeiture of all pay and allowances. The day before trial was originally scheduled to commence, Usry attempted suicide. An inquiry into his mental health was ordered under RCM 706. The inquiry showed that he was competent to stand trial.²³⁰

Before arraignment, the military judge recited the reasons for the trial delay on the record. The military judge also noted that Usry had taken two medications shortly before trial, including Seroquel and Celexa. The appellant told the military judge that these drugs helped him with the voices in his head, that they calm him down, that they affect his memory, and that they make him mellow. During this colloquy with the military judge, there was a fifty-second gap in the trial recording. The ROT reflected that the military judge held a telephonic, post-trial RCM 802 conference and “proposed text to fill the gap.” Counsel for both sides concurred on the text proposed by the military judge. The proposed text was captured in an appellate exhibit, and was inserted in the appropriate place in the ROT itself, with a note that the “substance” of the conversation followed.²³¹

The CGCCA first noted that RCM 1103(b)(2)(B) requires a “verbatim transcript be included in the [ROT].”²³²

²²⁶ *Id.*

²²⁷ *Id.* (citing to *United States v. Wheelus*, 49 M.J. 283, 288 (C.A.A.F. 1998) (explaining threshold showing of colorable prejudice is low but, nevertheless, must be demonstrated in regard to alleged post-trial errors)).

²²⁸ *Godbee*, 67 M.J. at 533.

²²⁹ 68 M.J. 501 (C.G. Ct. Crim. App. 2009).

²³⁰ *Id.* at 502–03.

²³¹ *Id.*

²³² *Id.* (citing MCM, *supra* note 8, R.C.M. 1103(b)(2)(B)). A verbatim record of trial is required for any court-martial where the sentence includes a discharge or any part of the sentence exceeds: (1) six months confinement; (2) forfeitures of pay greater than two-thirds pay per month; (3) forfeitures of pay for more than six months; or, (4) other punishments that may be adjudged by a special court-martial. See MCM, *supra* note 8, R.C.M. 1103(b)(2)(B).

The court also referred to several other cases in a footnote to show that reconstructed testimony or a summary of testimony normally makes a ROT non-verbatim.²³³ Then the CGCCA cited to *United States v. Lashley*²³⁴ for the principle that “insubstantial omissions from a [ROT] do not affect its characterization as a verbatim transcript, but substantial omissions give rise to a presumption of prejudice.”²³⁵ In this case, the appellant claimed that he was prejudiced because the missing material was substantial and “critical to the military judge’s determination of whether [he] was competent to stand trial.”²³⁶

The CGCCA found that the fifty-second gap was not a substantial omission.²³⁷ Even though that fifty-second gap occurred when the military judge was inquiring into the appellant’s competence to stand trial, which is an important issue, the court held that a decision on competence is “unlikely to turn on the precise words being spoken during a fifty-second period.”²³⁸ The military judge had an opportunity to observe the appellant’s behavior during the entire trial, which was more probative of the appellant’s competence than his answers to a few questions. Even if there had been actual words in that fifty-second gap that would have demonstrated a lack of competence to stand trial, the behavior of the appellant during the course of the trial would have reflected this lack of competence. Usry’s answers during the providence inquiry, and the contents of his unsworn statement reflected that he was competent. The CGCCA found no issue with the fifty-second gap in the trial recording.²³⁹

C. Practice Pointers

Practitioners should exercise caution when dealing with issues involving the ROT. There are two main takeaways from *Godbee* and *Usry*. The first takeaway is that when the original ROT is lost, the Government should ensure that the duplicate copy is authenticated as required by RCM 1104(c). Even though the NMCCA found no prejudice in *Godbee* from using a non-authenticated copy, this should be the exception rather than the rule. Meanwhile, properly authenticating the duplicate copy would avoid litigating the issue of prejudice altogether. If the military judge is unavailable to conduct authentication, there are procedures for substitute authentication that would have solved any concerns from *Godbee*.²⁴⁰

²³³ *Usry*, 68 M.J. at 503 n.3.

²³⁴ 14 M.J. 7, 8–9 (C.M.A. 1982).

²³⁵ *Usry*, 68 M.J. at 503.

²³⁶ *Id.*

²³⁷ *Id.* at 504.

²³⁸ *Id.* at 503.

²³⁹ *Id.* at 504.

²⁴⁰ See MCM, *supra* note 8, R.C.M. 1104(a)(2)(B).

The second takeaway is that not all omissions from a verbatim ROT are substantial or result in relief on appeal. If practitioners have an issue with gaps in the trial recordings, the best course of action is to follow the trial court's approach in *Usry*. A post-trial RCM 802 session with the military judge where counsel agree to proposed text will ensure that any possible prejudice is minimized. If the gap is so large that proposed text cannot reasonably be re-created, then having the convening authority approve non-verbatim ROT punishment is the prudent course of action.²⁴¹

play—notice and an opportunity to respond.”²⁴² Any post-trial matters that fall short of this mantra will likely result in appellate decisions, whether the matter involves post-trial delay, ambiguous actions, or any number of other issues. Wise practitioners realize that once court is adjourned, the post-trial process is just beginning. Addressing post-trial matters requires the same effort and professionalism with which the trial was conducted.

VI. Conclusion

The post-trial process continues to be a fruitful area for the appellate courts to examine. Practitioners should always exercise due diligence when following the rules to avoid unnecessary appellate litigation. As the CAAF has stated in the past, “[t]he essence of post-trial practice is basic fair

²⁴¹ A verbatim record is only required when the sentence exceeds a certain threshold. If the record cannot be re-created as a verbatim ROT due to gaps in the recording, the convening authority can approve a sentence below those thresholds to avoid any issues on appeal (e.g., no sentence in excess of six months confinement, forfeitures of two-thirds pay per month, forfeitures for more than six months, or a punitive discharge). *See supra* note 232 for a more detailed discussion of the verbatim ROT threshold.

²⁴² *United States v. Leal*, 44 M.J. 235, 237 (C.A.A.F. 1996).

The Impact of *Melendez-Diaz v. Massachusetts* on Admissibility of Forensic Test Results at Courts-Martial

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In June 2009, the U.S. Supreme Court decided the case of *Melendez-Diaz v. Massachusetts*.¹ The case is the most recent progeny of the Court's ground-breaking decision in *Crawford v. Washington*² and is proving to be, like *Crawford*, a source of both contention and uncertainty. The *Melendez-Diaz* Court held that affidavits by lab analysts stating the results of forensic tests were "testimonial" statements and thus their admission into evidence violates a defendant's right to confrontation.³ As a result of this decision, military trial counsel and the forensic laboratories that support the military will likely need to adjust the way they conduct business where forensic tests, including urinalyses, are concerned.

It appears that under *Melendez-Diaz* the Government is obligated to present the live testimony of the analyst who performed a forensic test in order to introduce the results of that test. The Government may also have the option of admitting the test results through the testimony of an expert who reviewed, but did not conduct, the tests. Although this latter option was not addressed by the *Melendez-Diaz* Court, it appears to comport with the Supreme Court's Confrontation Clause jurisprudence to date. *Melendez-Diaz* also restricts the Government's options for introducing chain of custody and equipment maintenance and calibration evidence. Although the Supreme Court has left many questions unanswered with its most recent Confrontation Clause decision, one thing is certain: *Melendez-Diaz* will generate a significant amount of litigation at military courts-martial.

I. Background

A. Confrontation Pre-*Crawford*

The Sixth Amendment to the U.S. Constitution states that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ."⁴ As the Supreme Court has noted, the Confrontation Clause is not, and never has been, an absolute rule.⁵ Despite the absolute language of the Sixth Amendment, courts have understood since the adoption of the Bill of Rights that the

Sixth Amendment incorporated common law hearsay exceptions to confrontation.⁶ For example, at common law, if a witness was unavailable for trial for certain reasons and the defendant had a prior opportunity to cross-examine that witness, the witness's statement, although ordinarily considered hearsay, could nevertheless be admitted at trial without the witness's presence.⁷

Over time, the Confrontation Clause's "procedural . . . guarantee"⁸ that evidence would be tested for reliability "in the crucible of cross-examination"⁹ was partially transformed into the *substantive* guarantee that judges would determine that evidence was reliable.¹⁰ The U.S. Supreme Court decision in *Ohio v. Roberts*,¹¹ issued in 1980, articulated the Confrontation Clause analysis required to admit a hearsay statement. Under *Roberts*, a court could admit a hearsay statement if, in addition to complying with hearsay rules, that statement possessed adequate indicia of reliability.¹² The requirement for reliability could be met by either showing that the statement fell under a "firmly rooted hearsay exception" or by showing that it possessed "particularized guarantees of trustworthiness."¹³ Although the *Roberts* rule was consistent with the Confrontation Clause's purpose—to ensure the reliability of evidence—it was arguably inconsistent with the method prescribed by the clause for doing so.¹⁴

B. A Return to Constitutional Principles: *Crawford v. Washington*

In 2004, the Supreme Court significantly changed the law governing the admission of hearsay statements. In the case of *Crawford v. Washington*,¹⁵ the defendant, Michael Crawford, was convicted in state court of assault for stabbing a man who Crawford's wife alleged had attempted

¹ 129 S. Ct. 2527 (2009).

² 541 U.S. 36 (2004).

³ *Melendez-Diaz*, 129 S. Ct. at 2532.

⁴ U.S. CONST. amend. VI.

⁵ See, e.g., *Crawford v. Washington*, 541 U.S. 36, 42–51 (2004).

⁶ *Id.* at 53.

⁷ *Id.* at 45–50.

⁸ *Id.* at 61 (emphasis added).

⁹ *Id.*

¹⁰ *Id.*

¹¹ 448 U.S. 56 (1980).

¹² *Crawford*, 541 U.S. at 66.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ 541 U.S. 36 (2004).

to rape her.¹⁶ Crawford's wife, Sylvia, was interviewed by police officers and made statements that undercut Crawford's self-defense claim.¹⁷ The police tape-recorded Sylvia's statements.¹⁸ At trial, Crawford precluded Sylvia's testimony by invoking the Washington State marital privilege.¹⁹ Washington State then admitted Sylvia's tape recorded statements under the state hearsay exception for statements against penal interest.²⁰

On appeal, Crawford argued that Washington State's use of his wife's out-of-court statement to police at trial violated his right to confront witnesses against him.²¹ First, the Washington Court of Appeals and, then, the Washington Supreme Court examined Crawford's claim under the *Ohio v. Roberts* rubric.²² Both courts agreed that Sylvia's statement did not fall under a "firmly rooted" hearsay exception, but reached opposite conclusions as to whether or not the statement "bore particularized guarantees of trustworthiness."²³

The U.S. Supreme Court granted certiorari to determine whether the prosecution's use of the statements violated Crawford's Confrontation Clause rights.²⁴ In concluding that it did, the Court returned to the historical roots of the right of confrontation.²⁵ Noting that the Sixth Amendment applies to "witnesses" against the accused, the Court examined the common usage of the term "witness" at the time of the framing of the Constitution.²⁶ The Court determined that a "witness" is one who "bear[s] testimony."²⁷ The Court stated that "testimony" is "a solemn declaration or affirmation made for the purpose of establishing or proving some fact."²⁸ Based on this definition, the Court determined that hearsay statements must be categorized as either "testimonial" or "nontestimonial" when determining the applicability of the

confrontation rights.²⁹ Expressly overruling its *Roberts* decision, the *Crawford* Court ruled that testimonial hearsay statements are always subject to the confrontation.³⁰ The Court reasoned that the test in *Roberts*

departs from the historical principles identified above in two respects. First, it is too broad: It applies the same mode of analysis whether or not the hearsay consists of *ex parte* testimony. This often results in close constitutional scrutiny in cases that are far removed from the core concerns of the Clause. At the same time, however, the test is too narrow: It admits statements that *do* consist of *ex parte* testimony upon a mere finding of reliability. This malleable standard often fails to protect against paradigmatic confrontation violations.³¹

Under the *Crawford* standard, testimonial statements are admissible only if the declarant is unavailable and the defendant has had a prior opportunity to cross-examine the declarant.³² The next section explores the Court's answer to the question begged by the *Crawford* decision: What is "testimonial"?

C. Defining "Testimonial" Under *Crawford*

The *Crawford* Court declined to provide a comprehensive definition of "testimonial."³³ The Court instead spelled out certain specific instances of testimonial statements³⁴ and three categories of testimonial statements that defined the Confrontation Clause's "coverage at various levels of abstraction."³⁵ The Court held that statements that fell within one or more of these three categories were testimonial. These categories, or "formulations," were

ex parte in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used

¹⁶ *Id.* at 38.

¹⁷ *Id.* at 38–41.

¹⁸ *Id.* at 41.

¹⁹ *Id.* at 40.

²⁰ *Id.* The Washington Court of Appeals, applying a nine-factor test, determined that Sylvia's statement did not bear particularized guarantees of trustworthiness. Among other reasons, it found that her statement did not "interlock" with the statement of her co-defendant, Michael Crawford. The Washington Supreme Court reversed, finding that Sylvia's statement so closely matched Michael's that it "interlocked" and thus bore particularized guarantees of trustworthiness.

²¹ *Id.*

²² *Id.* at 41–42.

²³ *Id.*

²⁴ *Id.* at 42.

²⁵ *Id.* at 43.

²⁶ *Id.* at 51.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* at 68.

³¹ *Id.* at 60.

³² *Id.* at 68.

³³ *Id.*

³⁴ *Id.* (holding that testimonial statements include "police interrogations" and "prior testimony at a preliminary hearing, before a grand jury, or at a former trial").

³⁵ *Id.* at 51–52.

prosecutorially; extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions; and statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.³⁶

The lack of a comprehensive definition of “testimonial” generated a significant amount of litigation as courts struggled to classify statements under the *Crawford* standard. In 2006 the Supreme Court provided some clarification in its decision in the case of *Davis v. Washington*,³⁷ a case in which the Court examined statements made to law enforcement by an alleged assault victim both during and after an assault. The *Davis* Court held:

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the *primary purpose* of the interrogation is *to enable police assistance to meet an ongoing emergency*. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency and that the *primary purpose* of the interrogation is *to establish or prove past events* potentially relevant to later criminal prosecution.³⁸

The “primary purpose” test articulated in *Davis* would figure prominently in subsequent decision-making by lower courts, including the Court of Appeals for the Armed Forces (CAAF).

D. Application of *Crawford* and Its Progeny to the Military: *United States v. Rankin*

The seminal military case applying the Confrontation Clause post-*Crawford* is *United States v. Rankin*.³⁹ In *Rankin*, the CAAF considered whether the admission of four documents to prove a Navy Corpsman’s unauthorized absence violated the Confrontation Clause. The documents

in question included a letter from the accused’s command to the accused’s mother notifying her of her son’s unauthorized absence, a computer-generated document indicating the date the accused was accounted as being absent without authorization, a copy of a naval message noting the accused’s apprehension, and a copy of a DD Form 553 prepared for the purpose of notifying civilian law enforcement of the accused’s status as a “deserter/absentee wanted by the Armed Forces.”⁴⁰ The trial court admitted the documents under the business and public records exceptions to the hearsay rule.⁴¹

While Rankin’s case was pending review, the Supreme Court decided *Crawford*.⁴² Rankin asserted on appeal that the documents admitted against him fell within the third category of core testimonial statements articulated in *Crawford*, to wit: “Statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.”⁴³ In deciding that all of the documents except the DD Form 553 were nontestimonial, the *Rankin* court conducted a contextual analysis using the following three questions, which the court characterized as “relevant”:

First, was the statement at issue elicited by or made in response to a law enforcement or prosecutorial inquiry? Second, did the “statement” involve more than a routine and objective cataloging of unambiguous factual matters? Finally, was the primary purpose for making, or eliciting, the statements the production of evidence with an eye toward trial?⁴⁴

These three questions currently make up the analytical framework military courts use to analyze statements falling within *Crawford*’s third category of potential testimonial statements. As discussed in Part III.A, below, it seems likely this test will remain mostly intact. However, the *Melendez-Diaz* decision calls into question the utility of the *Rankin* Court’s second question: “[D]id the ‘statement’ involve more than a routine and objective cataloging of unambiguous factual matters?” This is the case despite the fact that the *Melendez-Diaz* lead opinion held that the statements in that case fell within all three of *Crawford*’s categories of potential testimonial statements and the *Rankin* analysis applies only to *Crawford*’s third category.⁴⁵

³⁶ *Id.* (internal citations and quotations omitted).

³⁷ 547 U.S. 813 (2006). The *Davis* decision consolidates *Hammon v. Indiana*, 829 N.E.2d 244 (Ind. 2005), *rev’d and remanded*, 547 U.S. 813. The *Davis* court found that statements made by an assault victim to a 911 operator immediately after the assault and while the victim’s assailant was still nearby were nontestimonial. *Id.* In *Hammon*, the court held that an assault victim’s statements to a police officer who was on the scene after the police had separated the victim from her assailant were testimonial.

³⁸ *Id.* at 822 (emphasis added).

³⁹ 64 M.J. 348 (C.A.A.F. 2007).

⁴⁰ *Id.* at 350.

⁴¹ *Id.* at 351.

⁴² *Id.*

⁴³ *Id.* (quoting *Crawford v. Washington*, 541 U.S. 36, 51–52 (2004)).

⁴⁴ *Rankin*, 64 M.J. at 352. As discussed in Part III.A, *infra*, the *Rankin* court derived the first and third factors from Supreme Court precedent and the second factor from lower court decisions.

⁴⁵ See Part III.A, *infra*.

II. The *Melendez-Diaz* Decision

A. *Melendez-Diaz*: Facts, Procedural History, and Holding

The facts of the *Melendez-Diaz* case are as follows: Luis Melendez-Diaz was convicted in a Massachusetts court of distributing cocaine and trafficking in cocaine in an amount between fourteen and twenty-eight grams.⁴⁶ In November 2001, Boston police officers stopped and searched Melendez-Diaz along with two other men because the police suspected they were illegally buying and selling drugs.⁴⁷ The men were arrested, and during the course of the arrest, police seized four clear plastic bags containing a substance that resembled cocaine from one of the suspects, Thomas Wright.⁴⁸ The police put the three suspects in the back of a police cruiser and drove them to the station for booking.⁴⁹ During the drive to the police station, the officers noticed the suspects “fidgeting and making furtive movements in the back of the car.”⁵⁰ While the suspects were being booked, the officers searched the passenger compartment of the cruiser and found a plastic bag containing nineteen smaller plastic bags containing a substance resembling cocaine.⁵¹

The police sent the substance to the Massachusetts Department of Health’s State Laboratory Institute to be tested.⁵² This laboratory was regularly used by law enforcement to analyze suspected drugs and was required by law to perform the analysis.⁵³ The lab issued three “certificates of analysis” from two state-employed forensic analysts.⁵⁴ The certificates contained the analysts’ conclusions that the substance in the bags weighed a certain amount and that the substance contained cocaine.⁵⁵ In accordance with Massachusetts law, the analysts swore to the contents of the certificates before a notary public.⁵⁶

Massachusetts law specified that the certificates were “prima facie evidence of the composition, quality, and the net weight of the narcotic . . . analyzed.”⁵⁷ At Melendez-Diaz’s trial, the prosecution introduced the certificates

without testimony by the analysts who wrote the statements.⁵⁸ Melendez-Diaz objected to the admission of the statements as a violation of his right of confrontation, citing *Crawford*.⁵⁹

The Appeals Court of Massachusetts affirmed the conviction, rejecting Melendez-Diaz’s Sixth Amendment claim under *Crawford*. In doing so, the court relied on the Massachusetts Supreme Judicial Court’s decision in *Commonwealth v. Verde*.⁶⁰ The *Verde* court concluded that a drug analysis certificate is “akin to a business or official record” and was thus not testimonial under *Crawford*.⁶¹ After the Massachusetts Supreme Judicial Court denied review without comment, Melendez-Diaz appealed to the U.S. Supreme Court, arguing that the *Verde* holding was in conflict with the *Crawford* decision.⁶²

Justice Scalia, writing for the majority and joined by Justices Stevens, Souter, Thomas, and Ginsberg, explained that the certificates were “testimonial” statements, and the affiants were “witnesses” for purposes of the Sixth Amendment.⁶³ Accordingly, admission of the affidavits violated Melendez-Diaz’s right to confrontation.⁶⁴

B. *Melendez-Diaz*: Analysis

The Court found that the certificates of analysis fell within all three categories of potential testimonial statements under *Crawford*—the “core class” of testimonial statements.⁶⁵ Noting that its description of the “core class” mentioned affidavits twice, the Court found that a “certificate of analysis” was an “affidavit” because it was a “solemn declaration or affirmation made for the purpose of establishing or proving some fact.”⁶⁶

In addition to being “affidavits,” the Court found that the certificates of analysis satisfied the third category within *Crawford*’s “core class”: “statements made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.”⁶⁷ In support of this finding the Court

⁴⁶ *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2530–31 (2009).

⁴⁷ *Id.* at 2530.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Commonwealth v. Melendez-Diaz*, 2007 WL 2189152, at *2 (Mass. App. Ct. July 31, 2007).

⁵² *Melendez-Diaz*, 129 S. Ct. at 2530.

⁵³ *Id.*

⁵⁴ *Id.* at 2531.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ 444 Mass. 279, 827 N.E.2d 701, 704 (Mass. 2005).

⁶¹ *Id.*

⁶² Brief for Petitioner at 10, *Melendez-Diaz v. Massachusetts*, 2008 WL 2468543, at *10 (June 16, 2008) (No. 07-591).

⁶³ *Melendez-Diaz*, 129 S. Ct. at 2532.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* (citing *Crawford v. Washington*, 541 U.S. 36, 51 (2004) (quoting 2 N. WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828))).

⁶⁷ *Id.* (quoting *Crawford*, 541 U.S. at 52) (internal quotation marks omitted).

pointed out that, according to Massachusetts law, the “sole purpose” of the certificates was to provide “prima facie evidence” about the tested substance.⁶⁸ The Court surmised that the analysts who prepared the certificates must have been aware of this purpose because it was reprinted on the certificates.⁶⁹

After Justice Scalia concluded what he characterized as a “rather straightforward application of our holding in *Crawford*,”⁷⁰ he then turned to address “a potpourri of analytic arguments”⁷¹ advanced by the dissent and the Commonwealth of Massachusetts. First, the Court downplayed the dissent’s assertion that the majority opinion overturned “90 years”⁷² of precedent governing the admission of scientific evidence.⁷³ He noted that most of the state and federal decisions relied on by the dissent were written in the last thirty years and relied on “*Ohio v. Roberts* . . . or its since-rejected theory that unopposed testimony was admissible as long as it bore indicia of reliability.”⁷⁴

The Court rejected the argument that the analysts’ statements were not subject to confrontation because they were not “accusatory witnesses” in the sense that their testimony did not inculpate the defendant unless it was linked to other evidence.⁷⁵ The Court reasoned that the Sixth Amendment contemplated only two types of witnesses: those “against him,” as guaranteed by the Confrontation Clause, and those “in his favor,” as guaranteed by the Compulsory Process Clause.⁷⁶ There was, found the Court, no “third category of witnesses, helpful to the prosecution, but somehow immune from confrontation.”⁷⁷

The dissent argued that the analysts were not subject to confrontation because they were not “conventional witnesses”⁷⁸ since (1) they reported “near-contemporaneous observations” vice “events observed in the past”;⁷⁹ (2) they did not observe “the crime nor any human action related to it”;⁸⁰ and (3) they did not give their statements “in response

to interrogation.”⁸¹ Nonetheless, the Court declined to carve out an exception for these witnesses, reasoning that there was “no authority”⁸² to do so and explaining that the exceptions would encompass evidence that is clearly testimonial.⁸³ By way of example, the Court pointed out that a police investigator who prepared a report describing a crime scene might not have observed “the crime nor any human action related to it” yet his report would clearly be testimonial evidence.⁸⁴

For its part, Massachusetts argued that testimony reporting the results of “neutral, scientific testing” should be exempt from confrontation because confrontation does nothing to increase its reliability.⁸⁵ Acknowledging that “there are . . . in some cases better ways . . . to challenge or verify the results of a forensic test,”⁸⁶ the Court explained that “the Constitution guarantees one way: confrontation.”⁸⁷ In addition, the Court pointed out that confrontation serves to “weed out” fraudulent and incompetent analysts⁸⁸ and may be the only way to challenge tests that cannot be repeated (e.g., autopsies, breathalyzers, and tests of specimens that are no longer available).⁸⁹

The Court also rejected the argument that the tests were admissible as business records. The Court held that they did not qualify as business or public records under the hearsay evidentiary rules because they were created by law enforcement and not for the purpose of administering a business.⁹⁰ The Court explained that business records are admissible without confrontation because, by their nature, they are nontestimonial—not because they fall under a hearsay exception.⁹¹

Massachusetts further argued that the Confrontation Clause was not violated because Melendez-Diaz could have subpoenaed the analysts.⁹² The Court responded by reasoning that because the Compulsory Process Clause already guaranteed Melendez-Diaz that right, the Confrontation Clause must guarantee an additional right: to have the state bear the burden of pro-state witness “no-

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Melendez-Diaz*, 129 S. Ct. at 2533.

⁷¹ *Id.* at 2532.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at 2533–34.

⁷⁷ *Id.*

⁷⁸ *Id.* at 2551 (Kennedy, J., dissenting).

⁷⁹ *Id.* at 2551–52 (Kennedy, J., dissenting).

⁸⁰ *Id.* at 2552 (Kennedy, J., dissenting).

⁸¹ *Id.* (Kennedy, J., dissenting).

⁸² *Id.* at 2535.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* at 2536.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* at 2537.

⁸⁹ *Id.* at 2536 n.5.

⁹⁰ *Id.* at 2538.

⁹¹ *Id.* at 2539.

⁹² *Id.* at 2540.

shows.”⁹³ The Court further explained that the prosecution, not the defendant, has the burden to present witnesses for the state.⁹⁴ Finally, the Court downplayed the dissent’s prediction of the adverse consequences of the decision and restated that, even if the decision made prosecutions more difficult, the Court was bound to follow the Constitution.⁹⁵

C. Justice Thomas’s Concurrence

Justice Thomas authored a concurring opinion of some significance because of the fractured nature of the 5-4 Court. In Justice Thomas’s opinion, “the Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.”⁹⁶ Justice Thomas thus implies in his opinion that he would not join the majority in cases concerning the third category of potentially testimonial statements under *Crawford*—“statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial”—unless the statements were accompanied by sufficient “indicia of formality”—for example, the statements were “Mirandized or custodial.”⁹⁷

The Supreme Court has held that when, as in *Melendez-Diaz*, a Court is fragmented such that five or more justices cannot agree on a single rationale for its decision, “the holding of the Court may be viewed as that position taken by those members who concurred in the judgment on the narrowest grounds.”⁹⁸ Accordingly, Justice Thomas’s opinion limits *Melendez-Diaz* to “extrajudicial statements . . . contained in formalized testimonial material.”⁹⁹

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* at 2540–42.

⁹⁶ *Id.* at 2543 (Thomas, J., concurring) (quoting *White v. Illinois*, 502 U.S. 346, 365 (1992) (Thomas, J., concurring in part and concurring in judgment)).

⁹⁷ *Id.* (Thomas, J., concurring) (quoting *Davis v. Washington*, 547 U.S. 813, 816 (2006) (Thomas, J., concurring in part and concurring in judgment)).

⁹⁸ *Marks v. United States*, 430 U.S. 188, 193 (1976) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)) (internal quotation marks omitted).

⁹⁹ *Melendez-Diaz* 129 S. Ct. at 2543 (Thomas, J., concurring) (quoting *White v. Illinois*, 502 U.S. 346, 365 (1992) (Thomas, J., concurring in part and concurring in judgment)). See, e.g., *Larkin v. Yates*, 2009 WL 2049991, at *2 (C.D. Cal. 2009) (finding “no clear majority [in *Melendez-Diaz*] if . . . the offending material did not consist of formalized testimonial material”); *People v. Rutterschmidt*, 176 Cal. App. 4th 1047, 1075 (Cal. Ct. App. 2009) (“[T]he lead opinion speaks for a court majority only on the narrow basis set forth in Justice Thomas’s concurring opinion.”); *People v. Johnson*, 2009 WL 2999142, at *8 (Ill. App. 2009) (noting Justice Thomas’s concurrence and holding that “*Melendez-Diaz* did not reach the question of whether the analyst who conducted the scientific tests must testify at a defendant’s trial”).

Although Justice Thomas’s concurrence limits the reach of *Melendez-Diaz*, it should not be read too broadly. It seems extremely unlikely that Justice Thomas would advocate that courts could admit any forensic test result without live testimony provided the results were presented in a sufficiently informal format. Justice Thomas addressed this possibility in his dissenting opinion in *Davis*, stating, “the Confrontation Clause . . . reaches the use of technically informal statements when used to evade the formalized process.”¹⁰⁰

III. Comparing *Melendez-Diaz* to Military Court Precedent: Are They Consistent?

The CAAF and the service appellate courts have applied the *Crawford* line of cases to forensic test results on a number of occasions prior to the *Melendez-Diaz* decision. In separate cases the CAAF and the Army Court of Criminal Appeals (ACCA) have held that non-urinalysis forensic test results generated in furtherance of particular criminal investigations were testimonial statements.¹⁰¹ The CAAF has also held that the results of a random urinalysis exam were nontestimonial.¹⁰² Two service courts have gone a step further than the CAAF, finding that the results of urinalyses generated for a specific law enforcement purpose were also nontestimonial.¹⁰³ After the *Melendez-Diaz* Court’s firm repudiation of a general theory allowing admission of forensic test records as nontestimonial business records, military court decisions finding forensic test results to be nontestimonial may be vulnerable to challenge on two grounds: a misguided reliance on the neutral, scientific nature of the testing procedures and the presumption that certain forensic tests are not undertaken for a law enforcement purpose.

A. Non-Urinalysis Forensic Tests

In *United States v. Harcrow*,¹⁰⁴ the CAAF held that lab results of tests on physical evidence done at the behest of law enforcement are testimonial.¹⁰⁵ Lance Corporal Harcrow was convicted of drug offenses based in part on lab reports identifying substances seized from Harcrow’s house as illegal drugs.¹⁰⁶ The reports were produced by the Virginia state forensic science lab at the behest of the law

¹⁰⁰ *Davis*, 547 U.S. at 838 (Thomas, J., dissenting).

¹⁰¹ See *United States v. Harcrow*, 66 M.J. 154, 159 (C.A.A.F. 2008); *United States v. Williamson*, 65 M.J. 706 (A. Ct. Crim. App. 2007).

¹⁰² See *United States v. Magyari*, 63 M.J. 123, 126–27 (C.A.A.F. 2006).

¹⁰³ See *United States v. Blazier*, 68 M.J. 544 (A.F. Ct. Crim. App. 2008); *United States v. Harris*, 65 M.J. 594 (N-M. Ct. Crim. App. 2007).

¹⁰⁴ 66 M.J. 154.

¹⁰⁵ *Id.* at 155.

¹⁰⁶ *Id.* at 156.

enforcement officers who seized the evidence while arresting Harcrow in his house pursuant to a warrant.¹⁰⁷ At a trial held prior to the *Crawford* decision, the Government introduced the lab reports through the testimony of the arresting police officer without defense objection.¹⁰⁸

Applying the *Rankin* factors, the *Harcrow* court determined that these lab reports were testimonial hearsay evidence and subject to the Confrontation Clause. The CAAF analyzed the question from the perspective of the analysts testing the evidence. The *Harcrow* court explained that the lab personnel were not “merely cataloging the results of routine tests”¹⁰⁹ and could “reasonably expect their data entries would ‘bear testimony’”¹¹⁰ because (1) the police specifically requested the tests and (2) the lab reports identified Harcrow as “the suspect.”¹¹¹

In *United States v. Williamson*,¹¹² the ACCA considered a similar case. Pursuant to a controlled delivery, police arrested Sergeant Williamson and seized a package containing what was apparently marijuana.¹¹³ The police sent the marijuana to the U.S. Army Criminal Investigation Laboratory (USACIL) for testing.¹¹⁴ The USACIL generated a report stating that the substance seized was marijuana.¹¹⁵ At trial, the judge admitted the USACIL lab report as a business record over defense objection.¹¹⁶ Analyzing the case using the *Rankin* framework, the Army court held that the report was testimonial evidence and that the military judge’s admission of the evidence was error.¹¹⁷ The court reasoned as follows:

[A]lthough we find generating the USACIL forensic report akin to an “objective cataloging of unambiguous factual matters[.]” i.e., the identity and amount of a controlled substance, we also find the laboratory technician’s “statements” responded to a law enforcement inquiry, and the “primary purpose for making, or eliciting, the [report]” was to produce evidence “with an

eye toward trial,” i.e., the report was produced months after appellant’s arrest, and after the government preferred the charge alleging narcotics possession with intent to distribute.¹¹⁸

The court made it clear that it was not drawing any bright-line rules but was instead applying the contextual analysis called for by the *Rankin* court.¹¹⁹ The court explained that it reached its conclusion primarily because the statement in question was a “post-apprehension laboratory report, requested after local police arrested appellant.”¹²⁰ The Army court’s explanation left open by implication the possibility that the court might find pre-apprehension lab reports to be non-testimonial, particularly given the court’s finding that the USACIL analysts were engaging in an “objective cataloging of unambiguous factual matters” under *Rankin*.

Regarding the Army court’s “objective cataloging” finding, it is worth noting that eight months after *Williamson* was decided, the CAAF reached the opposite conclusion under very similar circumstances in *Harcrow*.¹²¹ The critical facts in both cases were the same: A lab prepared a report identifying a controlled substance at the behest of the police lab post-apprehension. The fact that the courts disagreed about whether the lab workers were “bearing testimony” in their lab reports calls into question the utility of the *Rankin* court’s second question, despite the fact that both courts, applying all three *Rankin* factors, ultimately found that the statements in question were testimonial.

In addition to being difficult to apply consistently, the *Harcrow* and *Williamson* courts’ application of this second question may be inconsistent with *Melendez-Diaz* even if the ultimate conclusions reached by the *Harcrow* and *Williamson* courts are not. When developing its framework, the *Rankin* court derived its first and third questions from the Supreme Court’s decisions in *Crawford* and *Davis*.¹²² The court derived the second question, however, from lower federal court cases addressing the testimonial nature of warrants of deportation.¹²³ The source of these questions is worth noting because the *Melendez-Diaz* Court’s refusal to differentiate between lab analysts and “conventional” witnesses indicates that the answer to the second question is irrelevant if the answer to the third *Rankin* question (“was the primary purpose . . . the production of evidence?”) is “yes.”

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* 159 (quoting *United States v. Magyari*, 63 M.J. 123, 127 (C.A.A.F. 2006) (internal quotations omitted).

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² 65 M.J. 706 (A. Ct. Crim. App. 2007).

¹¹³ *Id.* at 707–10.

¹¹⁴ *Id.* at 710.

¹¹⁵ *Id.* at 710–11.

¹¹⁶ *Id.* at 707.

¹¹⁷ *Id.*

¹¹⁸ *United States v. Williamson*, 65 M.J. 706, 718 (A. Ct. Crim. App. 2007) (quoting *United States v. Rankin*, 64 M.J. 348, 352 (C.A.A.F. 2007)).

¹¹⁹ *Id.* at 717.

¹²⁰ *Id.* at 717–18.

¹²¹ *United States v. Harcrow*, 66 M.J. 154, 159 (C.A.A.F.).

¹²² *Rankin*, 64 M.J. at 351–52.

¹²³ *Id.* at 352.

The *Melendez-Diaz* Court held that the certificates of analysis at issue in that case were “made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial” (the third category of potential testimonial evidence addressed by the *Rankin* test) because their purpose was to provide evidence at a trial.¹²⁴ The Court also rejected outright the notion that laboratory analysts are different than “conventional” witnesses because they objectively record results of tests performed in accordance with standard routines.¹²⁵ It seems apparent that if the Government’s purpose for obtaining a test result is to produce or preserve evidence for trial, it does not make any difference how “objective” or “routine” the laboratory process is, or how “unambiguous” or “factual” the matters being recorded are. In other words, if the police send evidence to a lab pursuant to a criminal investigation, *Melendez-Diaz* seems to hold that any lab reports generated will be testimonial whether or not a suspect has been apprehended or even identified.

B. Urinalysis Reports

If *Melendez-Diaz* does indeed mean that the results of tests of evidence sent to a lab pursuant to a criminal investigation are necessarily testimonial, the decision may disturb military precedent regarding urinalysis tests. It is likely that two decisions—*Blazier*¹²⁶ and *Harris*¹²⁷—will no longer be good law because both found the reports of urinalysis test results, based on individualized suspicion, to be nontestimonial by focusing on the nature of the testing procedure (the second question in *Rankin*). There is also a good case to be made that, in light of *Melendez-Diaz*, even reports containing the results of random urinalyses are testimonial.

1. Random Urinalysis

In *United States v. Magyari*,¹²⁸ the CAAF held that lab reports from random urinalyses were not “statements that were made under circumstances that would lead an objective witness reasonably to believe that the statement would be available for use at a later trial by the government” and were

thus nontestimonial under *Crawford*.¹²⁹ The court reasoned that the lab technicians testing random samples had no reason to suspect any particular individual’s sample would test positive and be used at a criminal trial. The court further reasoned that the lab technicians’ data entries were not part of a law enforcement function but instead were “simply a routine, objective cataloging of an unambiguous factual matter.”¹³⁰ The *Magyari* court approvingly cited the Massachusetts Supreme Judicial Court’s decision in *Commonwealth v. Verde*¹³¹ for the proposition that “drug tests are nontestimonial if they are ‘mere[] records of primary fact, with no judgment or discretion on the part of the analysts.’” The *Verde* court’s reasoning was also relied on by the Appeals Court of Massachusetts when it held that the certificates of analysis introduced against Luis Melendez-Diaz were nontestimonial.¹³²

That the Supreme Court rejected the *Verde* court’s reasoning suggests that *Magyari* is no longer valid precedent to the extent the decision relies on an analyst’s detachment from the exercise of judgment or discretion for its holding. However, the *Magyari* court also reasoned that the lab technicians were “not engaged in a law enforcement function” when they tested Magyari’s urine sample.¹³³ Implicit in the court’s decision was a finding that the Navy Drug Screening Laboratory was an “impartial examining center”¹³⁴ and that the report it produced was “a record of ‘regularly conducted’ activity.”¹³⁵ The court stopped short of concluding that all records prepared by the lab were nontestimonial. In dicta, the court explained that lab records may be testimonial “where a defendant is already under investigation, and where the testing is initiated by the prosecution to discover incriminating evidence.”¹³⁶ The *Magyari* court’s narrowing of its decision in this way anticipated the facts in *Melendez-Diaz* and allows the two cases to be distinguished on the basis of the Government’s purpose for obtaining the test results. Of course, distinguishing the two cases on this basis is possible only if the *Magyari* court was correct in its assessment that the report of the urinalysis was not created for purpose of producing evidence for trial. This assessment is debatable in two respects.

¹²⁴ *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2532 (2009).

¹²⁵ *Id.* at 2535–38 (rejecting dissent’s argument that analysts should be treated differently than other witnesses because an analyst “reports . . . observations at the time they are made[,] . . . does not know the defendant’s identity, much less have personal knowledge of an aspect of the defendant’s guilt[,] . . . [and conducts tests] according to scientific protocols.” *Id.* at 2551–52 (Kennedy, J., dissenting))

¹²⁶ *United States v. Blazier*, 68 M.J. 544 (A.F. Ct. Crim. App. 2008).

¹²⁷ *United States v. Harris*, 65 M.J. 594 (N-M. Ct. Crim. App. 2007).

¹²⁸ 63 M.J. 123 (C.A.A.F. 2006).

¹²⁹ *United States v. Magyari*, 63 M.J. 123, 126–27 (C.A.A.F. 2006).

¹³⁰ *Id.* at 126 (citing *United States v. Bahena-Cardenas*, 411 F.3d 1067, 1075 (9th Cir. 2005) (internal quotations omitted)).

¹³¹ 444 Mass. 279 (Mass. 2005).

¹³² *Commonwealth v. Melendez-Diaz*, 2007 WL 2189152, at *4 n.3 (Mass. App. Ct.) (July 31, 2007).

¹³³ *Magyari*, 63 M.J. at 126.

¹³⁴ *Id.* at 127.

¹³⁵ *Id.*

¹³⁶ *Id.*

First, one could challenge the court's *ipse dixit* that the Navy lab was an "impartial examining center" or that it was performing an impartial function when it tested urine from random urinalysis tests. The fact that military labs prepare "litigation packets" specifically for the purpose of prosecuting drug cases belies the assertion that the labs are not conducting urinalyses to produce evidence for trial.¹³⁷ Indeed, it is Department of Defense (DoD) policy to use drug testing "to deter Military Service members . . . from abusing drugs" and "as a basis to take action, adverse or otherwise . . . , against a Service member based on a positive test result," and to use urinalysis results "as evidence in disciplinary actions under the UCMJ."¹³⁸ The counter-argument is that although producing evidence may be one purpose of the labs, their primary purpose is "to permit commanders to detect drug abuse and assess the security, military fitness, readiness, good order, and discipline of their commands."¹³⁹

A stronger argument could be made that, even if the overall purpose of random urinalysis tests is not to produce or preserve evidence for trial, any reports produced by the lab analysts who perform the final tests confirming the presence of controlled substances must be testimonial. For instance, the Army drug testing laboratory at Fort Meade conducts immunoassay screening tests of all of the urine samples it receives.¹⁴⁰ However, only those samples that test positive at the two screening tests are sent to a different part of the lab to be tested using a gas chromatography-mass spectrometry (GC-MS) test, also known as the "confirming" test.¹⁴¹ Accordingly, the lab technicians administering the GC-MS test must know that there is a high probability that the samples they are testing come from servicemembers that have used illegal drugs. These technicians also know that the military uses GC-MS test results to prosecute Soldiers; therefore, the primary purpose of, at a minimum, the GC-MS "confirming" test is to produce evidence for trial.

On the other hand, one could argue that this is not the primary purpose because some Soldiers whose urine tests positive are not court-martialed. This argument seems unconvincing because the protocols in place at military drug testing labs are designed such that the test results can

arguably provide evidence of guilt beyond a reasonable doubt at a court-martial—a testing standard that would not be necessary if the purpose of a GC-MS test was simply to support adverse administrative action or enrollment in a substance abuse program.¹⁴² In any event, it seems that an objective GC-MS lab technician would reasonably believe that his statement would be available for use at a later trial by the Government, and the test result would thus be testimonial (and not admissible as a public or business record)¹⁴³ under *Crawford*.

Although two of the service courts have found, in unpublished opinions, that *Melendez-Diaz* did not overrule *Magyari*,¹⁴⁴ the *Magyari* court's view that lab results of random urinalyses are admissible as nontestimonial business records no longer seems tenable. The *Magyari* court's rationale—that the lab tests are "simply a routine, objective cataloging of an unambiguous factual matter"¹⁴⁵—has been undermined by *Melendez-Diaz*.¹⁴⁶ The *Magyari* court's assessment of the purpose of random urinalyses, although not specifically addressed by *Melendez-Diaz*, seems insufficiently convincing to serve as the sole rationale for the court's holding.

¹⁴² Not every service requires proof of misconduct beyond a reasonable doubt to punish a service member under Article 15, Uniform Code of Military Justice (UCMJ) as the Army does. For those services that do not, at least, it cannot be argued that the rigorous protocols followed by military drug testing labs are followed for the purpose of producing evidence at non-judicial punishment hearings. In addition, the fact that a Soldier facing non-judicial punishment proceedings may elect to refuse those proceedings and demand his right to be tried at a court-martial means that even the Army lab must contemplate that any GC-MS test result may be introduced at a court-martial.

¹⁴³ See *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2539–40 (2009) (explaining that statements are not *per se* nontestimonial because they are business records, but rather, business records are nontestimonial because they are "created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial").

¹⁴⁴ See *United States v. Robinson*, 2010 WL 317686 (N-M. Ct. Crim. App. Jan. 28, 2010) (unpublished) (holding that the unchallenged admission of a lab report showing the accused's urine sample gathered as part of a unit sweep was positive for cocaine was not plain error); *United States v. Bradford*, 2009 WL 4250093 (A.F. Ct. Crim. App. Nov. 23, 2009) (unpublished) (holding that an Article 62 appeal of a random urinalysis case that the judge committed error by preventing the admission of a redacted lab report on the basis that documents containing information about post-initial screening tests are testimonial); *United States v. Anderson*, 2009 WL 4250095 (A.F. Ct. Crim. App. Nov. 23, 2009) (unpublished) (holding that an Article 62 appeal that judge's denial of Government request to pre-admit lab report of a consent urinalysis testing positive for morphine was error where Government planned to present expert testimony from a lab employee).

¹⁴⁵ 63 M.J. 123, 126 (C.A.A.F. 2006).

¹⁴⁶ Although as discussed in Part II.C, *supra*, Justice Thomas's concurrence arguably limits *Melendez-Diaz* to cases involving sworn affidavits (which are not present in urinalysis litigation packets), it seems unlikely that a lab could escape Confrontation Clause scrutiny by simply having its analysts cease swearing to their certified lab test results.

¹³⁷ See, e.g., Laboratory Documentation Packet from the Forensic Toxicology Drug Testing Laboratory at Fort Meade, Md. (8 May 2009) [hereinafter Laboratory Documentation Packet] (on file with author).

¹³⁸ U.S. DEP'T OF DEF., DIR. 1010.1, MILITARY PERSONNEL DRUG ABUSE TESTING PROGRAM paras. 3.1.1, 3.1.3, 3.4.1 (9 Dec. 1994) (C1, 11 Jan. 1999) [hereinafter DoDD 1010.1].

¹³⁹ *Id.* para. 3.1.2.

¹⁴⁰ Laboratory Documentation Packet, *supra* note 137.

¹⁴¹ *Id.*

2. Urinalysis Reports Based on Individualized Suspicion

*United States v. Harris*¹⁴⁷ is a Navy-Marine Corps Court of Criminal Appeals (NMCCA) case that considered whether a lab report generated following a command-directed urinalysis was testimonial. In *Harris*, the accused was arrested for trespassing and, due to his bizarre behavior, was ordered to undergo a urinalysis by his command.¹⁴⁸ Law enforcement sent the sample to the Navy drug testing laboratory, which tested the sample and returned a report indicating that the accused's urine tested positive for illegal drugs.¹⁴⁹ The report was admitted against the accused at trial. The *Harris* court held that the lab report was nontestimonial and that its admission did not violate the Confrontation Clause.¹⁵⁰ In reaching its result, the court relied on the CAAF's holding in *Magyari*.¹⁵¹ The *Harris* court reasoned that, although the CAAF opinion in *Magyari* was limited to cases of random urinalysis, the report from the command-directed urinalysis was, nevertheless, nontestimonial because the lab would have followed the same procedures regardless of the reason it received the urine sample.¹⁵² The court noted that the lab's processes precluded lab technicians from knowing whether a particular sample was being tested to produce evidence for trial or not.¹⁵³

After the case was remanded by CAAF on other grounds,¹⁵⁴ the NMCCA re-examined *Harris*' Sixth Amendment claim of error.¹⁵⁵ Applying the *Rankin* factors, the court again concluded that the report was nontestimonial. The court reasoned that the report was not "elicited by or made in response to a law enforcement or prosecutorial inquiry"¹⁵⁶ because it was "less than certain" that neither *Harris*'s command nor the lab officials had *Harris*'s prosecution in mind when they elicited and made the report.¹⁵⁷ In applying the "primary purpose" factor, the court examined the question solely from the perspective of the lab technicians and concluded that their primary purpose "was the proper implementation of the Navy Lab's drug

screening program, not the production of evidence . . . for use at trial."¹⁵⁸

The *Harris* court's logic seems inconsistent with Supreme Court precedence in two ways. First, the *Harris* court's "less than certain" standard does not comport with the standard articulated in *Crawford* and *Melendez-Diaz*. The question the *Rankin* factors seek to resolve is whether a statement was "made under circumstances which would lead an objective witness reasonably to believe that the statement would be *available for use* at a later trial."¹⁵⁹ The question is not, as the *Harris* court suggests, whether a statement would *actually be used* at a later trial. It seems a stretch to assert that lab officials and *Harris*'s chain of command would not have believed that test results of a urine sample collected based on probable cause, sent individually to the lab, and labeled "probable cause"¹⁶⁰ would not have been available for use at a later trial.

Second, the *Harris* court's determination of the "primary purpose" of the lab technicians who made the report is too narrowly focused. The relevant "purpose" is the DoD's stated purpose for drug screening: to deter servicemembers from abusing drugs, to permit commanders to assess the state of their commands, and to take action (adverse or otherwise) against servicemembers who use drugs.¹⁶¹ One way the DoD accomplishes these objectives is through the use of urinalysis results "as evidence in disciplinary actions under the UCMJ."¹⁶² "Properly implementing the Navy Lab's drug screening program" is simply a description of a lab technician's job and a means by which the lab technician achieves the overall purpose of the DoD drug screening program. The *Harris* court's rationale—that the purpose of a lab technician properly performing his job is to properly perform his job—seems circular and nonsensical.

After *Magyari* and *Harris* were decided, the Air Force Court of Criminal Appeals (AFCCA) decided *United States v. Blazier*,¹⁶³ a case that involved two forensic laboratory reports on the same defendant. Senior Airman Blazier was convicted of drug use in 2006.¹⁶⁴ Over the objection of the defense, the prosecution offered at trial the results of two urinalysis lab reports without the testimony of the lab technicians who prepared the reports.¹⁶⁵ The first report,

¹⁴⁷ 65 M.J. 594 (N-M. Ct. Crim. App. 2007).

¹⁴⁸ *United States v. Harris*, 65 M.J. 594, 596 (N-M. Ct. Crim. App. 2007).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 600.

¹⁵¹ *Id.* at 599–600.

¹⁵² *Id.* at 600.

¹⁵³ *Id.*

¹⁵⁴ *United States v. Harris*, No. 07-0385 (C.A.A.F. Dec. 31, 2007).

¹⁵⁵ *United States v. Harris*, 66 M.J. 781 (N-M. Ct. Crim. App. 2008).

¹⁵⁶ *Id.* at 788 (citing *United States v. Rankin*, 64 M.J. 348, 352 (C.A.A.F. 2007)).

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 789.

¹⁵⁹ *Rankin*, 64 M.J. at 351 (quoting *Crawford v. Washington*, 541 U.S. 36, 51–52) (2004) (emphasis added).

¹⁶⁰ *United States v. Harris*, 66 M.J. 781, 788 (N-M. Ct. Crim. App. 2008).

¹⁶¹ DoDD 1010.1, *supra* note 138, paras. 3.1.1–.3.

¹⁶² *Id.* para. 3.4.1.

¹⁶³ 68 M.J. 544 (A.F. Ct. Crim. App. 2008).

¹⁶⁴ *United States v. Blazier*, 68 M.J. 544, 544 (A.F. Ct. Crim. App. 2008).

¹⁶⁵ *Id.*

which indicated that Blazier had used drugs, contained test results of a urine sample taken as part of a random urinalysis.¹⁶⁶ Five days after the initial urinalysis, Blazier consented to another urinalysis at the request of law enforcement officials.¹⁶⁷ The report generated from the consent urinalysis also indicated that Blazier had used drugs.¹⁶⁸

In a 2-1 ruling the *Blazier* court determined that the trial judge's admission of both reports as nontestimonial and falling within the business records hearsay exception was not an abuse of discretion.¹⁶⁹ The court reasoned that the testing procedures in both urinalyses were identical and that, looking objectively at the totality of the circumstances, the lab technicians had conducted a neutral function: "[the] routine and objective cataloging of unambiguous factual matters."¹⁷⁰ In reaching its decision, the *Blazier* court relied on the *Magyari* court's holding that the lab report of a urinalysis following testing procedures identical to those at issue in *Blazier* was nontestimonial.¹⁷¹

Judge Jackson dissented on the issue of the nature of the report generated from Blazier's consent urinalysis. Judge Jackson's view was that with regard to the testimonial nature of the report, the neutral nature of the lab technicians, although relevant, should not have been the court's "sole consideration."¹⁷² Rather, it was the Government's purpose in conducting the consent urinalysis that was dispositive.¹⁷³ Judge Jackson reasoned that the second report was testimonial because the Government sought the consent urinalysis for the purpose of gathering evidence to use against Blazier at a criminal trial.¹⁷⁴

Although the Air Force court maintained in a recent unpublished decision that *Blazier* and *Harris* are still good law,¹⁷⁵ the *Melendez-Diaz* decision casts serious doubt on the precedential value of these two cases. The logic behind *Melendez-Diaz* Court's rejection of the notion that lab analysts are not "conventional" witnesses also undermines the *Blazier* and *Harris* courts' rationale finding urinalysis

reports to be testimonial because of the way the tests were conducted. What remains is the fact that the Government sent urine samples to the drug testing laboratories for the purpose of producing evidence against a specific criminal suspect. Under *Melendez-Diaz*, forensic lab reports prepared for this purpose are testimonial. The fact that the CAAF recently granted review of *Blazier*¹⁷⁶ in light of *Melendez-Diaz* suggests that the CAAF may be concerned that *Blazier* was wrongly decided.¹⁷⁷

IV. The Way Ahead

If *Melendez-Diaz* does significantly affect military precedent, military justice practitioners will obviously need to adjust to the changed legal landscape. This section seeks to predict the way ahead for military practitioners after *Melendez-Diaz*. In doing so, it will explore the following questions: First, who are "analysts" under *Melendez-Diaz*? Second, who, other than analysts, can testify about a forensic test's results? Third, can the lab report be admitted without accompanying testimony by the analyst who prepared it? Finally, what is the effect of *Melendez-Diaz* on chain of custody and equipment maintenance evidence?

A. Who Are "Analysts" Under *Melendez-Diaz*?

The *Melendez-Diaz* Court's requirement for the analyst to testify in order to admit the analyst's conclusions begs the question: Who is the analyst? Taking up this question, the *Melendez-Diaz* dissent argued that the majority failed to

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 544.

¹⁶⁹ *Id.* at 545-46.

¹⁷⁰ *Id.* at 545 (citing *United States v. Harcrow*, 66 M.J. 154, 158 (C.A.A.F. 2008)).

¹⁷¹ *Id.* at 545.

¹⁷² *Id.* at 546 (Jackson, J., dissenting).

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ See *United States v. Skrede*, 2009 WL 4250031 (A.F. Ct. Crim. App. Nov. 23, 2009) (unpublished) (holding on an Article 62 appeal that lab reports based on urine specimens provided pursuant to random and consent urinalyses were nontestimonial statements).

¹⁷⁶ *United States v. Blazier*, __ M.J. __, No. 09-0441/AF (C.A.A.F. Oct. 29, 2009) (granting review of the following issue: Whether, in light of *Crawford v. Washington*, 541 U.S. 36 (2004), appellant was denied meaningful cross-examination of Government witnesses in violation of his Sixth Amendment right of confrontation when the military judge did not compel the Government to produce essential Brooks Law officials who handled Appellant's urine samples and instead allowed the expert toxicologist to testify to non-admissible hearsay). See *Melendez-Diaz v. Massachusetts*, 557 U.S. __, 129 S. Ct. 2527 (2009)). See also *United States v. Garcia-Varela*, __ M.J. __, No. 09-0660/AF (C.A.A.F. Oct. 29, 2009) (granting review of the following issues: (1) Whether, in light of *Melendez-Diaz v. Massachusetts*, 557 U.S. __, 129 S. Ct. 2527 (2009), appellant was denied his Sixth Amendment right to confront the witnesses against him where the Government's case consisted of appellant's positive urinalysis; and (2) Whether trial defense counsel's statement that he did not object to the admission of the drug laboratory report at trial waived or forfeited the Confrontation Clause issue, and, if forfeited, whether admission of the report constituted plain error.).

¹⁷⁷ The CAAF may find a way to preserve the result in *Blazier* using rationale different than that employed by the Air Force court. Neither the majority nor the dissent in the lower court decision mentioned that an expert from the lab testified for the Government at trial. Nonetheless, the CAAF spent some time discussing this expert's testimony during oral arguments. See Audio Recording, Oral Arguments, Jan. 26, 2010, *United States v. Blazier*, (C.A.A.F. Oct. 29, 2009) (No. 09-0441/AF), available at <http://www.armfor.uscourts.gov/CourtAudio2/20100126a.wma>. Depending on the nature of the expert's testimony, the CAAF may find that the Confrontation Clause was satisfied because the defense was free to cross-examine the expert. See Part IV.C, *infra*.

explain which people involved in a typical forensic test were “analysts.”¹⁷⁸ The dissent gave an example involving four possible individuals: The first prepares a drug sample for a testing machine and retrieves the machine’s printout. The second interprets the printout. The third maintains the machine. The fourth supervises the process to ensure the others follow established procedures.¹⁷⁹ The dissent argued that each of these people contributes to the test’s results, makes a representation about the test, and may be responsible for negligently or intentionally introducing error in the test.¹⁸⁰ Under the majority’s logic, the dissent argued, all four of these individuals must testify in order to satisfy the Confrontation Clause.¹⁸¹ In light of the dissent’s concern over the need to call four witnesses, it is interesting to note that the urine sample at issue in *Magyari* was handled or tested by approximately *twenty* people.¹⁸²

One response to the “who is the analyst” question eliminates certain witnesses based on their technical role in the testing process. The Government is not required to produce witnesses “establishing the chain of custody, authenticity of the sample, or accuracy of the testing device”¹⁸³ because, as the *Melendez-Diaz* majority stated in a footnote (“footnote 1”), those individuals are not necessarily required to “appear in person as part of the prosecution’s case.”¹⁸⁴ The problem with this answer is that, as the dissent points out, it fails to explain why these individuals are different than “analysts.” Referring to footnote 1, the *Melendez-Diaz* dissent stated, “It is no answer.”¹⁸⁵ Nevertheless, it appears the *Melendez-Diaz* majority has drawn a line in this case, apparently finding that defendants can adequately challenge these foundational facts through cross-examination of the Government’s analyst. For instance, the defense could cross-examine an analyst on whether a sample arrived at her station unadulterated, whether the lab’s equipment was functioning properly, and so on. Several courts have found the *Melendez-Diaz* majority’s answer in footnote 1 to be sufficient.¹⁸⁶

¹⁷⁸ *Melendez-Diaz*, 129 S. Ct. at 2544 (Kennedy, J., dissenting).

¹⁷⁹ *Id.* (Kennedy, J., dissenting).

¹⁸⁰ *Id.* at 2545 (Kennedy, J., dissenting).

¹⁸¹ *Id.* at 2546 (Kennedy, J., dissenting).

¹⁸² *United States v. Magyari*, 63 M.J. 123, 124 (C.A.A.F. 2006).

¹⁸³ *Melendez-Diaz*, 129 S. Ct. at 2532 n.1.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 2546 (Kennedy, J. dissenting).

¹⁸⁶ *See, e.g.*, *United States v. Forstell*, 2009 WL 2634666 (E.D. Va) (holding that Intoxilyzer breath alcohol measuring device maintenance and calibration certificates signed by the police technician who maintained the Intoxilyzer “fit squarely into the category of nontestimonial records carved out by the Supreme Court”); *People v. Johnson*, 2009 WL 2999142, at *8 (Ill. Ct App. 2009) (citing footnote 1 of *Melendez-Diaz* for the proposition that “it is up to the prosecution to decide which steps to introduce into evidence at trial”); *United States v. Darden*, 656 F. Supp. 2d 560 ((D. Md. 2009) (citing footnote 1 for the holding that *Melendez-Diaz* does not require the live testimony of lab technicians who performed a forensic blood

The problem becomes thornier when one considers lab technicians whose duties blur the line between the duties identified in footnote 1 (e.g., chain of custody) and the duties of the archetypal beaker-wielding analyst. Consider, for example, a lab technician handling a urinalysis sample at the Army’s Fort Meade Forensic Toxicology Drug Testing Laboratory. A typical “Laboratory Documentation Packet” prepared by that lab includes a memorandum for record describing the lab’s urine testing procedures.¹⁸⁷ The three-page memorandum describes the actions of various technicians in the “intra-laboratory chain of custody”:

The technician labels a new test tube with a LAN [laboratory accession number] label, and then opens the bottle and pours a one to two milliliter (mL) aliquot into the corresponding barcode labeled test tube. The technician closes the bottle and places the bottle into a tray for temporary storage. The technician returns the specimen bottles to temporary storage. The laboratory documents all movement and handling of the specimen bottle on the DD Form 2624 and a continuation intra-laboratory form.¹⁸⁸

It seems apparent that the DD Form 2624 referenced in the lab memorandum is simply shorthand for a series of statements by various technicians: “I labeled a new test tube with a LAN label;” “I opened the bottle and poured a one to two milliliter aliquot into the corresponding barcode labeled test tube;” etc. One could argue that “intra-laboratory chain of custody” technicians perform analytic functions as significant as the lab worker who performs the final steps of the analytic process. As in the example highlighted by the *Melendez-Diaz* dissent, each technician contributes to the result of the test, makes certain representations about the test, and has the power to introduce error into the test.¹⁸⁹ The question becomes one of line-drawing: Is the Fort Meade “intra-laboratory chain of custody” technician a chain of custody witness like a Fed-Ex delivery person, or is he an “analyst” like the people who signed the affidavits in *Melendez-Diaz*?

Unfortunately, the *Melendez-Diaz* decision does not provide the answer. Because analysis implies some level of skillful judgment, analysts could be distinguished from technicians who perform rote tasks, such as labeling test tubes, from those exercising intellectual expertise and discretion. Although *Melendez-Diaz* does not explicitly allow for that line-drawing, it is consistent with the Court’s

analysis when a supervising toxicologist testifies about the results of the analysis after reviewing the raw data and forming his own conclusions).

¹⁸⁷ Laboratory Documentation Packet, *supra* note 137.

¹⁸⁸ *Id.*

¹⁸⁹ *Melendez-Diaz*, 129 S.Ct. at 2545 (Kennedy, J., dissenting).

characterization of an analyst as an “expert witness[] . . . [whose] lack of proper training or deficiency in judgment may be disclosed in cross-examination.”¹⁹⁰ In any event, unless the Supreme Court permits some additional line-drawing, it would appear that the military must either streamline its testing procedures to significantly reduce the number of people who could be classified as “analysts” or provide greater incentives for defendants to waive their confrontation rights.¹⁹¹

B. Who Other Than the Analyst Can Testify About a Forensic Test’s Results?

Fortunately for the Government, there may be a “middle way.”¹⁹² The practice of having an expert (1) review the process and the results of tests performed by other people; and (2) testify as to the independent conclusions the expert drew based on his review has been upheld by a number of courts post-*Melendez-Diaz*. In addition, after deciding *Melendez-Diaz*, the Supreme Court has denied certiorari of lower court decisions where this practice was employed.

Four days after deciding *Melendez-Diaz*, the Court vacated and remanded for further reconsideration a number of cases involving Confrontation Clause challenges to the admission of forensic evidence in light of *Melendez-Diaz*, including: *People v. Barba*,¹⁹³ *Ohio v. Crager*,¹⁹⁴ *Commonwealth v. Rivera*,¹⁹⁵ *Commonwealth v. Morales*,¹⁹⁶ and *Commonwealth v. Pimentel*.¹⁹⁷ The Supreme Court did not vacate the Fourth Circuit’s decision in *United States v.*

*Washington*¹⁹⁸ or the California Supreme Court’s decision in *People v. Geier*¹⁹⁹ even though those courts found, as in the vacated cases, that evidence of forensic tests were nontestimonial. Accordingly, what distinguishes those cases from the other four may provide some clues about the limits of the *Melendez-Diaz* decision. The distinguishing characteristic in *Washington* and *Geier* appears to be the use of expert testimony to admit evidence about the results of forensic tests.

In *Washington*, a U.S. Park police officer stopped Dwonne Washington’s car after observing Washington driving erratically on the Baltimore-Washington parkway, which falls within the Federal Government’s territorial jurisdiction.²⁰⁰ On the night of his arrest, Washington consented to a police request for a blood sample, which the police sent to the Armed Forces Institute of Pathology Forensic Toxicology Laboratory for testing.²⁰¹ Three lab technicians performed various tests using the lab’s machines and provided the raw data in the form of computer printouts to the lab’s chief toxicologist.²⁰² The toxicologist prepared a report and provided it to the police.²⁰³ Based on his report, the Government charged Washington with driving under the influence of alcohol or PCP, among other charges.²⁰⁴

The toxicologist testified at Washington’s trial about the test results and the physiological effects of alcohol and PCP.²⁰⁵ The trial court admitted his testimony as an expert witness under Federal Rules of Evidence 702 and 703.²⁰⁶ The Defense objected to his testimony, arguing that it violated Washington’s confrontation rights because the toxicologist did not personally perform the tests.²⁰⁷ The Defense argued that the Confrontation Clause entitled Washington to confront the lab technicians who prepared the samples for the testing machines.²⁰⁸ On appeal, Washington argued that the computer printouts were testimonial statements of the lab technicians.²⁰⁹

¹⁹⁰ *Id.* at 2537 (emphasis added).

¹⁹¹ The appointment of Justice Sonia Sotomayor in 2009 to replace the retiring Justice David Souter may have some impact on future line-drawing. As Justice Souter was part of the *Melendez-Diaz* 5-4 majority, Justice Sotomayor has now become a “swing vote.” Given the dissent’s strongly worded opinion, it is likely that the dissenting justices will seek to narrow the reach of *Melendez-Diaz* if Justice Sotomayor agrees with their interpretation of the law. Thus far, it appears that Justice Sotomayor is siding with the majority. Following her appointment, the Court granted certiorari of a case that seemed to be directly at odds with the *Melendez-Diaz* decision. The fact that the Court returned a per curiam decision that upheld *Melendez-Diaz* indicates that the dissent failed to gather an additional vote. See *Briscoe v. Virginia*, ___ S. Ct. ___, 2010 WL 246152 (Va. 2010).

¹⁹² A “middle way” is “a mediating path or compromise between extremes of action or policy.” Dictionary.com, Define Middle Way, [http://dictionary.reference.com/browse/middle way](http://dictionary.reference.com/browse/middle+way) (last visited Nov. 16, 2009).

¹⁹³ 2007 WL 4125230 (Cal. App. 2d Dist.), *vacated*, 129 S. Ct. 2857 (2009).

¹⁹⁴ 116 Ohio St. 3d 369 (Ohio 2007), *vacated*, 129 S. Ct. 2856 (2009).

¹⁹⁵ 70 Mass.App.Ct. 1116 (Mass. App. Ct. 2007), *vacated*, 129 S. Ct. 2857 (2009).

¹⁹⁶ 71 Mass. App. Ct. 587 (Mass. App. Ct. 2008), *vacated*, 129 S. Ct. 2858 (2009).

¹⁹⁷ 2008 WL 108762 (Mass.App.Ct. 2008), *vacated*, 129 S. Ct. 2857 (2009).

¹⁹⁸ 498 F.3d 225 (4th Cir. 2007), *cert. denied*, 129 S. Ct. 2856 (U.S. June 29, 2009) (No. 07-8291).

¹⁹⁹ 41 Cal. 4th 555 (2007), *cert. denied*, 129 S. Ct. 2856 (U.S. June 29, 2009) (No. 07-7770).

²⁰⁰ *United States v. Washington*, 498 F. 3d 225, 227–28 (4th Cir. 2007).

²⁰¹ *Id.* at 228.

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 228–29.

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*

The Fourth Circuit rejected Washington's argument, holding that the printouts of the raw data were not the statements of the lab technicians.²¹⁰ The court reasoned that the data was produced by a machine and that the "technicians could neither have affirmed or denied *independently* that the blood contained PCP and alcohol because all the technicians could do was to refer to the raw data printed out by the machine."²¹¹ The court further held that the machines were not "declarants" and the machine-produced raw data were not hearsay "statements" as implicated by the Confrontation Clause.²¹² The court reasoned that "[o]nly a *person* may be a declarant and make a statement."²¹³

Washington can be distinguished from the vacated cases in at least two ways. First, the *Washington* court did not rely on the *Verde* line of reasoning, which the *Melendez-Diaz* Court had rejected. Second, the testifying toxicologist had not merely repeated the statements of out-of-court declarants. Rather, the toxicologist had interpreted data supplied by other people and by machines and had testified about his own independent conclusions.

On the same day the Supreme Court denied certiorari in *Washington*, the Court did the same regarding the California Supreme Court's decision in *People v. Geier*.²¹⁴ *Geier* appears to exemplify a pre-*Melendez-Diaz* court arriving at the right answer for the wrong reasons. The *Geier* court held that the admission of DNA test results through the testimony of an expert who had not performed the tests did not violate the defendant's confrontation rights.²¹⁵ In *Geier*, the California Supreme Court announced a rule that a statement is nontestimonial unless it is "(1) made to a law enforcement officer or by or to a law enforcement agent and (2) describes a past fact related to criminal activity for (3) possible use at a later trial."²¹⁶ The court decided that the DNA lab results did not fulfill the second requirement because they were based on a "contemporaneous recordation of *observable events*."²¹⁷ Accordingly, the court found the analyst was, like a 911 caller reporting an emergency in *Davis*, not "bearing witness."²¹⁸ Alternatively, the court found the analyst's notes and report were nontestimonial

because they were made "as part of [the analyst's] job,"²¹⁹ and were "neutral,"²²⁰ "routine,"²²¹ and not made "in order to incriminate [the] defendant."²²²

The Court in *Melendez-Diaz* explicitly rejected both of these lines of reasoning. The *Melendez-Diaz* Court dismissed the dissent's suggestion that the Massachusetts analyst's reports should be considered nontestimonial because they reported "near-contemporaneous observations." First, the Court rejected the dissent's characterization of the reports, noting that the analysts completed the affidavits almost a week after conducting the tests.²²³ The Court then explained, citing *Davis*, that the "near-contemporaneous" recording of statements did not in any case render them nontestimonial.²²⁴ Although the *Geier* court characterized the reports in that case as being "contemporaneous recordation of observable events,"²²⁵ it seems very unlikely that the analysis actually occurred contemporaneously with the analyst's observation of the tests. After all, the term "analysis" implies at least some degree of thoughtful reflection. Reflection, by definition, requires time. Most significantly, the *Melendez-Diaz* Court rejected outright the contention, advanced by the *Melendez-Diaz* dissent and the *Geier* court, that a statement from a witness who does not "recall[] events observed in the past"²²⁶ or observe "the crime [or] any human action related to it"²²⁷ is exempted from Confrontation Clause scrutiny.²²⁸

The *Melendez-Diaz* Court also rejected the idea advanced by the *Geier* court that the results of forensic testing are nontestimonial because they are the result of neutral, scientific procedures. The Court explained that the Sixth Amendment's procedural guarantee of cross-examination could not be avoided on the grounds that testimony reporting the results of forensic tests is more reliable than ordinary testimony.²²⁹ To argue otherwise, the Court reasoned, would simply invite a return to the rationale of *Ohio v. Roberts*, which the Court overturned in *Crawford*.²³⁰ Finally, the Court noted that "neutral scientific

²¹⁰ *Id.*

²¹¹ *Id.* at 230.

²¹² *Id.* at 231.

²¹³ *Id.*

²¹⁴ 41 Cal. 4th 555 (2007).

²¹⁵ *People v. Barba*, 2007 WL 4125230, at *7 (Cal. Ct App. 2007) (citing *Geier*, 41 Cal. 4th at 605–08).

²¹⁶ *Geier*, 41 Cal. 4th at 605.

²¹⁷ *Barba*, 2007 WL 4125230, at *7 (quoting *Geier*, 41 Cal. 4th at 605–06) (italics in original).

²¹⁸ *Geier*, 41 Cal. 4th at 607.

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.*

²²³ *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2535 (2009).

²²⁴ *Id.*

²²⁵ *Geier*, 41 Cal. 4th at 607.

²²⁶ *Melendez-Diaz*, 129 S. Ct. at 2535 (internal quotations omitted).

²²⁷ *Id.* (internal quotations omitted).

²²⁸ *Id.*

²²⁹ *Id.* at 2536.

²³⁰ *Id.*

testing” was not necessarily reliable or “immune from the risk of manipulation.”²³¹

Why then, given the *Melendez-Diaz* Court’s evisceration of the logical foundation of the *Geier* decision, did the Supreme Court permit *Geier* to remain undisturbed? It may be that the trial court in *Geier* had the right answer when it found that, even if the analyst’s results were inadmissible, the testifying expert could rely on them “for purposes of formulating her opinion as a DNA expert.”²³² It is worth noting that the expert did not simply testify about the end result of the testing. She also testified about the procedures used to ensure an accurate result and testified that, in her opinion, the testing in *Geier*’s case was accomplished according to these procedures.²³³ The expert relied on records generated by other people in reaching this conclusion.²³⁴

The fact that the Supreme Court permitted *Washington* and *Geier* to remain undisturbed strongly indicates that the Court is satisfied that the presentation of evidence in those cases did not violate the Confrontation Clause. If that is so, it follows that a majority of the Court believes the Confrontation Clause is satisfied when an expert testifies about her own independent conclusions, even if her conclusions are based on otherwise inadmissible testimonial evidence.²³⁵

Several courts since *Melendez-Diaz* was decided have reached that conclusion. The court in *People v. Rutterschmidt*²³⁶ held that an expert’s testimony about forensic blood test results was nontestimonial where the expert supervised, but did not perform, the underlying tests. The *Rutterschmidt* court, citing *Geier*, reasoned that the defendant’s confrontation rights were not violated because the “accusatory opinions . . . were reached and conveyed not through the nontestifying technician’s laboratory notes and report, but by the testifying witness.”²³⁷ The court distinguished *Melendez-Diaz* on the grounds that live testimony, not an affidavit, was admitted to prove the lab test results.²³⁸ The court held that this basis alone was sufficient to distinguish *Melendez-Diaz* because “the lead opinion [in *Melendez-Diaz*] speaks for a court majority only on the narrow basis set forth in Justice Thomas’s concurring

opinion.”²³⁹ A number of other courts since *Melendez-Diaz* have reached the same conclusion as the *Rutterschmidt* court.²⁴⁰

A note of caution: Prosecutors and labs may be tempted to assign a single lab employee the task of certifying test results and testifying in court about the results. Although this would certainly reduce the burden on the Government, it seems unlikely to pass muster under the Supreme Court’s confrontation jurisprudence unless the certifying employee reviews the entire process, draws his or her own independent conclusions, and testifies only about those conclusions. As the *Melendez-Diaz* dissent points out, the Court in *Davis v. Washington* rejected any attempt to evade the Confrontation Clause “by having a note-taking policeman [here, the laboratory employee who signs the certificate] recite the unsworn hearsay testimony of the declarant [here, the analyst who performs the actual test], instead of having the declarant sign a deposition.”²⁴¹ Permitting a certifying official to merely restate testimonial statements of a non-testifying analyst would seem to defy the logic of *Crawford* and its progeny.

In sum, barring presentation of testimony by the actual analyst, the Government should call an expert to testify to forensic test results at trial. That expert should thoroughly understand the procedures and protocols involved in the forensic test at issue; should have supervised or performed the test of the material or sample at issue; should have reviewed all of the information about the performed test; and should have drawn independent conclusions about the results of the test, compliance with applicable procedures, and the reliability of the science behind the test. In contrast, the defense should seek to limit the scope of an expert witness’s

²³¹ *Id.*

²³² 41 Cal. 4th 555, 596 (2007).

²³³ *Id.* at 594–96.

²³⁴ *Id.*

²³⁵ Military Rule of Evidence 703 and its federal counterpart permits expert witnesses to base their opinions and inferences on facts or data that are themselves inadmissible.

²³⁶ 176 Cal. App. 4th 1047 (2d Dist. 2009).

²³⁷ *People v. Rutterschmidt*, 176 Cal. App. 4th 1047, 1074 (Cal. Ct. App. 2009) (citing *Geier*, 41 Cal. 4th at 607) (internal quotations omitted).

²³⁸ *Id.* at 1075.

²³⁹ *Id.* See also *Larkin v. Yates*, 2009 WL 2049991, at *2 (Cal. 2009) (finding “no clear majority if . . . the offending material did not consist of formalized testimonial material”); *People v. Johnson*, 2009 WL 2999142, at *8 (Ill. App. 1st Dist.) (noting Justice Thomas’s concurrence and holding that “*Melendez-Diaz* did not reach the question of whether the analyst who conducted the scientific tests must testify at a defendant’s trial”).

²⁴⁰ See, e.g., *Rector v. State*, 285 Ga. 714 (Ga. Sp. Ct. 2009) (expert testimony by a toxicologist who reviewed another toxicologist’s report and agreed with it did not violate the Confrontation Clause); *Larkin v. Yates*, 2009 WL 204991 (C.D. Cal.) (a lab supervisor testifying about the results of DNA testing that she reviewed but did not personally perform did not violate the defendant’s confrontation rights); *People v. Johnson*, 2009 WL 2999142 (Ill. App. 1st Dist.) (expert testimony by a forensic scientist about DNA analyses she did not perform did not violate defendant’s confrontation rights); *People v. Milner*, 2009 WL 2025944 (Cal. App. 2d Dist.) (expert testimony regarding cause of death by a medical examiner who relied on another examiner’s autopsy as the basis for his opinion did not form the basis for an ineffective assistance of counsel claim under the Confrontation Clause); *United States v. Turner*, 591 F.3d 928 (7th Cir. 2010) (expert testimony about results of lab tests by chemist who peer-reviewed but did not perform the test and formed independent conclusions based on the actual analyst’s notes and data charts did not violate the Confrontation Clause).

²⁴¹ *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2546 (2009)(Kennedy, J. dissenting) (quoting *Davis v. Washington*, 547 U.S. 813, 826 (2006)) (internal quotations omitted).

recognized areas of expertise, thus forcing the Government to call additional witnesses. Even if a witness is clearly an expert on certain scientific procedure, defense counsel should challenge the expert's knowledge regarding the chain of custody, preparation of samples for testing, authenticity of samples, and any other facts the Government might want to prove using their expert. This is crucial because, as is discussed in Part IV.D, below, *Melendez-Diaz* may restrict the Government's ability to introduce chain of custody or equipment maintenance evidence without live witnesses.

C. Can the Lab Report Be Admitted Without Accompanying Testimony by the Analyst Who Prepared It?

Besides finding that expert testimony based on an underlying report is nontestimonial, the cases discussed in the previous section have something else in common. The underlying report in those cases was not itself admitted into evidence. Although at least one court since the *Melendez-Diaz* decision has permitted the admission of a certificate of analysis without the live testimony of the analyst who performed the analysis,²⁴² this practice seems to run afoul of *Melendez-Diaz*.

The prosecution in *Pendergrass v. State*²⁴³ offered a DNA certificate of analysis and two supporting documents along with the live testimony of two witnesses: a lab supervisor who checked the work of a lab "processor" who performed the test and an expert who interpreted the test results for the jury.²⁴⁴ The Supreme Court of Indiana held that the admission of the certificate did not violate the Confrontation Clause.²⁴⁵ The court explained that, unlike the defendant in *Melendez-Diaz* who "did not know what tests the analysts performed, whether those tests were routine, and whether interpreting their results required the exercise of judgment or the use of skills that the analysts may not have possessed,"²⁴⁶ the defense in *Pendergrass* was "thoroughly prepared" to address these issues because the prosecution's witnesses had testified about these matters before the prosecution sought to admit the certificate.²⁴⁷

²⁴² *Pendergrass v. State*, 913 N.E. 2d 703 (Ind. 2009).

²⁴³ *Id.*

²⁴⁴ *Id.* at 707–08.

²⁴⁵ *Id.* at 708.

²⁴⁶ *Id.* (citing *Melendez-Diaz*, 129 S. Ct. at 2537) (internal quotations omitted).

²⁴⁷ *Id.* Cf. *People v. Benjamin*, 2009 WL 2933153 (Cal. App. 2d Dist.) (admission of reports prepared by non-testifying analysts did not infringe on defendant's confrontation rights because an expert testified about the reports and the defendant did not object to their admission at trial); *United States v. Darden*, 2009 WL 3049886 (D. Md.) (admission of the written report of a testifying toxicologist based on the results of a forensic blood analysis performed by two non-testifying lab technicians that the toxicologist supervised does not violate defendant's confrontation rights where the testifying toxicologist formed his own conclusions based on machine-generated data).

The *Pendergrass* court's approach seems less likely to survive future scrutiny. The admitted documents contained statements made by a witness the defendant was unable to cross-examine. To suggest the defendant's ability to cross-examine the testifying witnesses about the statements in the documents was an adequate substitute is nonsensical because the Confrontation Clause protects the defendant's right to cross-examine the witness who actually made the statements. It is a fundamentally different proposition to allow a witness to present expert testimony based on statements contained in non-admitted documents. In that case, the statements in the documents, although testimonial, are not admitted into evidence for the truth of the matter asserted.²⁴⁸ The Supreme Court in *Crawford* indicated that this use would not violate the Sixth Amendment because "[t]he [Confrontation] Clause also does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted."²⁴⁹

D. What Is the Effect of *Melendez-Diaz* on Chain of Custody and Equipment Maintenance Evidence?

Among the other changes wrought by *Melendez-Diaz*, the decision also restricts a prosecutor's ability to introduce documents proving the chain of custody or the maintenance and calibration of devices used for forensic tests. Regarding chain of custody evidence, the *Melendez-Diaz* Court explained in footnote 1 that it did not hold "that anyone whose testimony may be relevant in establishing the chain of custody . . . must appear in person."²⁵⁰ The Court reasoned that "gaps in the chain of custody go to weight, not admissibility" and left it to prosecutors "to decide what steps in the chain of custody are so crucial as to require evidence."²⁵¹ However, the Court also held that "what [chain of custody] testimony is introduced must (if the defendant objects) be introduced live."²⁵²

Gone, apparently, are the days when the Government could introduce without defense challenge "a chain of custody document listing specific dates and all law enforcement personnel who handled the marijuana," as it did in *Williamson*.²⁵³ To the extent the Government believes a link in a chain of custody is vulnerable to attack, it will need

²⁴⁸ See *People v. Rutterschmidt*, 176 Cal. App. 4th 1047, 1076 (Cal. Ct. App. 2009).

²⁴⁹ *Crawford v. Washington*, 541 U.S. 36, 59 n.9 (2004).

²⁵⁰ *Id.* at 42 n.1.

²⁵¹ *Melendez-Diaz*, 129 S. Ct. at 2532 n.1.

²⁵² *Id.*

²⁵³ *United States v. Williamson*, 65 M.J. 706, 710 (A. Ct. Crim. App. 2007). Although the defense in *Williamson* did not object to the chain of custody document's admission, it is unlikely that a defense counsel who is aware of *Melendez-Diaz* will do so without obtaining a *quid pro quo* from the Government.

to present a live chain of custody witness to prove that link directly.²⁵⁴

As an alternative to direct evidence of the chain of custody, *Melendez-Diaz* does appear to permit expert evidence generally proving that a lab followed procedures in performing a forensic test. As discussed in Part IV.B, above, an expert could use inadmissible material, including chain of custody documents, as part of a basis for her opinion that a lab followed certain protocols described by the expert.

The *Melendez-Diaz* Court also raised the bar for the admission of evidence supporting the maintenance and calibration of devices used in forensic testing, although to a lesser degree than it did for chain of custody evidence. As with chain of custody evidence, the Court stated in footnote 1, “[W]e do not hold, and it is not the case, that anyone whose testimony may be relevant in establishing the . . . accuracy of the testing device must appear in person.”²⁵⁵ Unlike chain of custody evidence, however, the Court held that certain equipment maintenance documents might qualify as nontestimonial business records.²⁵⁶ Although prosecutors may be able to admit evidence of equipment calibration and maintenance using records, they now have to take the additional step of proving that such records are nontestimonial. Various courts have already begun wrestling with this issue.

The court in *United States v. Griffin*,²⁵⁷ a federal DUI prosecution occurring in Virginia, cited footnote 1 when it held that a “Certificate of Instrument Accuracy” for a breath alcohol measuring device was nontestimonial evidence.²⁵⁸ The *Griffin* court explained that the certificate was nontestimonial because it “was not prepared with knowledge of any particular defendant’s case, or specifically for use in any particular trial.”²⁵⁹ The court noted that, under the applicable Virginia law, technicians were required to ensure the device’s accuracy semiannually, “regardless of whether [it] will be used to procure breath test results for DUI cases.”²⁶⁰ Accordingly, the court found the “‘primary purpose’ of calibration certificates . . . is not ‘to establish or

prove past events potentially relevant to later criminal prosecution.”²⁶¹

The Court of Appeals of Oregon in *State v. Bergin* similarly held that certificates attesting to the accuracy of an “intoxilyzer” breath alcohol device were nontestimonial.²⁶² The *Bergin* court distinguished the drug certificates at issue in *Melendez-Diaz* from the intoxilyzer certificates of accuracy in three ways. First, the court noted that unlike the drug certificates that the *Melendez-Diaz* Court found were “quite plainly affidavits,” the intoxilyzer certificates were not sworn under oath.²⁶³ Second, the court reasoned that while the drug certificates directly proved a fact that was an element of a charged offense, the intoxilyzer certificates bore “a more attenuated relationship to the conviction: they [supported] one fact (the accuracy of the machine) that, in turn, [supported] another fact that can establish guilt (blood alcohol level).”²⁶⁴ Third, the *Bergin* court examined the subjective knowledge of the person preparing the certificate. The court noted that the analysts in *Melendez-Diaz* knew the certificates they were preparing were for use at trial against a specific defendant, while the person performing the intoxilyzer accuracy tests had “no particular prosecutorial use in mind, and, indeed, . . . no guarantee that the [intoxilyzer] will ever, in fact, be used.”²⁶⁵ Citing footnote 1, the court concluded that “*Melendez-Diaz* either rejects, or at least leaves open, the question of whether Intoxilyzer certificates . . . are testimonial.”²⁶⁶

The *Melendez-Diaz* Court’s discussion of the relationship between the Confrontation Clause and business-and-public-records is likely the key to this question:

Business and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because—having been created for the administration of an entity’s affairs and not for the purpose of establishing or proving some fact at trial—they are not testimonial.²⁶⁷

The bottom line is that the Government must show that equipment maintenance records are maintained for some purpose other than “establishing or proving some fact at trial” in order to have them admitted as nontestimonial business records. In the alternative, the Government could

²⁵⁴ *But see* *United States v. Bradford*, 2009 WL 4250093 (A.F. Ct. Crim. App. Nov. 23, 2009) (holding that “chain of custody lab technicians make no statements which would fall within the Confrontation Clause and the holding of *Melendez-Diaz*” because their “notations and signatures are not testimony”).

²⁵⁵ *Melendez-Diaz*, 129 S.Ct. at 2532 n.1.

²⁵⁶ *Id.*

²⁵⁷ 2009 WL 3064757 (E.D. Va).

²⁵⁸ *United States v. Griffin*, 2009 WL 3064757, at *2 (E.D. Va).

²⁵⁹ *Id.* See also *United States v. Washington*, 498 F.3d 225, 232 (4th Cir. 2007) (holding that a blood-testing device could “tell no difference between blood analyzed for health-care purposes and blood analyzed for law enforcement purposes”).

²⁶⁰ *Id.*

²⁶¹ *Id.* (quoting *Davis v. Washington*, 547 U.S. 813, 822 (2006)).

²⁶² 2009 WL 3018038 (Or. Ct. App. 2009).

²⁶³ *Id.* at *3.

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ *Id.* at *4.

²⁶⁷ *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2539–40 (2009).

argue that Justice Thomas's concurrence means that *Melendez-Diaz* does not reach a given record because the record is not formalized testimonial material. It is not clear from Justice Thomas's opinions since *Crawford*, however, exactly what the Government must show in order to prove that proposition.

V. Conclusion

The Danish physicist Niels Bohr is purported to have said "prediction is very difficult, especially if it's about the future."²⁶⁸ This sentiment certainly holds true in the universe of Confrontation Clause jurisprudence. While the *Melendez-Diaz* decision clarified the reach of the *Crawford* line of cases, the decision also disrupted long-standing prosecutorial practices regarding the results of forensic tests.

Although there is significant uncertainty about how evidence of forensic tests may be admitted at trial, it seems apparent that government trial counsel may no longer offer reports of urinalyses generated as a result of individualized suspicion as nontestimonial business records. The same may also hold true for random urinalyses as well. However, it is likely that prosecutors will be permitted to introduce the evidence through experts who did not personally perform the test. If this prediction is accurate, the impact of *Melendez-Diaz* on the Government, although still significant, will be greatly reduced.

²⁶⁸ Niels Bohr Quotes, http://thinkexist.com/quotes/niels_bohr/3.html (last visited Nov. 16, 2009).

Armed for the Attack: Recent Developments in Impeachment Evidence

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“Pretty much all the honest truth telling in the world is done by [children].”¹

I. Introduction

Impeachment is a “complicated but vital part of the trial process”² that is often abused or misunderstood by counsel. The following exchange is adapted from questions reported in *United States v. Harrison* and demonstrates an inartful attempt at impeachment.³

TC: You’re saying they’re going on the stand, swearing an oath to testify to the truth and then lying . . . ?
W: Sir, I’m just saying that I’m telling the truth.
TC: Are the officers dirty cops?
W: Sir, I never said that they were dirty cops.
TC: So I’m in the conspiracy against you, is that right?
W: Well, Sir, you might be . . .
TC: The Government’s witnesses similarly made up the allegations . . . ?
W: Well . . .
TC: So both officers lied . . . ?

On appeal, the reviewing court found that “improper questioning was an organizational theme for the prosecutor’s entire cross-examination.”⁴ However, this prosecutor was not alone in his misunderstanding of permissible methods of attacking a witness’s credibility.⁵ In three recent opinions,

the service courts, the Court of Appeals for the Armed Forces (CAAF), and the Supreme Court have each focused on a different impeachment method that may help prepare counsel for the attack.

The goal of this article is to describe different methods of impeachment using recent developments as an anchor for discussion. Each section begins with a review of the applicable Military Rule of Evidence (MRE), discusses recent developments in that area of impeachment, and concludes with practical tips for practitioners.

Generally, there are four methods of attacking a witness’s credibility. Counsel can show (1) that a witness has a bad character for truthfulness; (2) that a witness has a bias, prejudice, or motive; (3) that a witness made a prior inconsistent statement; or (4) that a witness’s general trustworthiness is defective.⁶ Recently, one of the service courts tackled impeachment by specific instances of untruthfulness under MRE 608(b), while the CAAF focused on impeachment by bias, motive, and prejudice under MRE 608(c). Meanwhile, the Supreme Court addressed impeachment by prior inconsistent statements which fall under MRE 613. However, the courts were not alone in attempting to clarify the impeachment rules for counsel. The drafters of the MREs addressed the recent amendment to MRE 609, impeachment by bad character for truthfulness by evidence of prior convictions. Each method and the accompanying opinions are discussed below.

II. Bad Character for Truthfulness under MRE 608(a) and (b)

A. The Baseline

Military Rule of Evidence 608(a) allows a party to attack a witness’s veracity by offering reputation or opinion testimony of the witness’s character for untruthfulness.⁷

¹ OLIVER WENDELL HOLMES, SR., *THE POET AT THE BREAKFAST-TABLE* (1872), available at <http://www.readbookonline.net/read/7144/19429/> (last visited 10 March 2010).

² James Moody & LeEllen Coacher, *A Primer on Methods of Impeachment*, 45 A.F.L. REV. 161, 162 (1998).

³ *United States v. Harrison*, 585 F.3d 1155, 1158–59 (9th Cir. 2009). The trial counsel’s questions are derived from *Harrison*, and the witness’s responses have been added to provide a sample narrative.

⁴ *Id.* at 1159. While not apparent on the face of any rule regarding impeachment, it is generally impermissible for counsel to attack a witness’s testimony by goading a subsequent witness to testify that a prior witness testified untruthfully. *Id.* Although the court found that the judge erred in allowing the improper questioning, the court denied the defendant relief based on the improper questioning. The defendant had not shown that he was prejudiced by the improper questioning and the judge’s instructions ameliorated any prejudice. *Id.* at 1160. See also *United States v. Boyd*, 54 F.3d 868, 870 (D.C. Cir. 1995) (finding error for the prosecutor to ask the defendant whether two other witnesses were “making this [the allegations against him] up.”).

⁵ See *United States v. Banker*, 15 M.J. 207 (C.M.A. 1983) (noting that the fundamental problem was that the parties failed to understand and distinguish between different methods of impeachment).

⁶ See *id.* at 210. There is one other common method of impeachment not discussed in *Banker*—impeachment by showing problems in capacity. This method involves nothing more than showing the “limits or defects in sensory or mental capacities [which] bear[s] on both the likelihood that a witness accurately perceived the events or occurrences he describes and the accuracy or completeness of his testimony.” CHRISTOPHER MUELLER & LAIRD KIRKPATRICK, *EVIDENCE* § 6.35 (4th ed. 1995). Questioning a witness concerning the amount of alcohol he imbibed on the night in question is an example. *Id.*

⁷ *MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID.* 608(a) (2008) [hereinafter MCM]. Note that Military Rule of Evidence (MRE) 608(a) also allows a witness’s character for truthfulness to be rehabilitated

Reputation evidence is “the estimation in which a person generally is held in the community in which the person lives or pursues a business or profession.”⁸ In other words, it is “information that a witness knows about an individual from having heard discussion about the individual in a specified community.”⁹ Community is broadly defined and “includes a post, camp, ship, station, or other military organization regardless of size.”¹⁰ Before offering evidence of a witness’s (e.g., Witness #1’s) reputation for untruthfulness, the proponent must establish three elements: (1) that the testifying witness (Witness #2) “is a member of the same ‘community’ as Witness #1”; (2) that “Witness #1 has a reputation for untruthfulness in the community”; and (3) that “Witness #2 knows Witness #1’s reputation for untruthfulness.”¹¹

Opinion testimony is simply a witness’s “personal opinion of an individual’s character.”¹² Before offering evidence of a prior witness’s character for untruthfulness, the proponent must establish (1) that the testifying witness (Witness #2) is personally acquainted with Witness #1”; (2) that “Witness #2 knows Witness #1 well enough to have formed an opinion of Witness #1’s truthfulness”; (3) that “Witness #2 has an opinion of Witness #1’s untruthfulness”; and (4) that “Witness #2 has the opinion that Witness #1 is an untruthful person.”¹³

Assume for a moment that Specialist (SPC) Lyar, the Government’s star witness, testified that he saw the accused strike the alleged victim. During the defense case-in-chief, the defense calls SPC Lyar’s squad leader, Sergeant (SGT) True to testify. The following colloquy is an example of attacking SPC Lyar’s credibility by offering reputation and opinion testimony concerning his bad character for truthfulness.

DC: SGT True, do you know SPC Lyar?

W: Yes.

with reputation or opinion testimony but only after the witness’s character for truthfulness has first been attacked.

⁸ *Id.* MIL. R. EVID. 405(d).

⁹ STEPHEN SALTZBURG ET AL., MILITARY RULES OF EVIDENCE MANUAL 4-154 (6th ed. 2006).

¹⁰ MCM, *supra* note 7, MIL. R. EVID. 405 (d). *See also* United States v. Reveles, 41 M.J. 388, 395 (1995) (describing the definition of community as inclusive rather than restrictive).

¹¹ DAVID SCHLUETER ET AL., MILITARY EVIDENTIARY FOUNDATIONS § 5-8[2][b] (2007); *see also* THOMAS A. MAUET, TRIAL TECHNIQUES 154 (2002); LAWRENCE MORRIS ET AL., THE ADVOCACY TRAINER: A MANUAL FOR SUPERVISORS, at E-15-7 (2008).

¹² SALTZBURG ET AL., *supra* note 9, at 4-155.

¹³ SCHLUETER ET AL., *supra* note 11, § 5-8[3][c]; *see also* MAUET, *supra* note 11, at 154; MORRIS ET AL., *supra* note 11, at E-15-6.

DC: How?

W: He’s in my squad. I’m his squad leader.

DC: How long has SPC Lyar been in your squad?

W: For a little over a year.

DC: Have you been his squad leader the whole time?

W: Yes.

DC: How many soldiers do you have in your squad?

W: Seven.

DC: Does SPC Lyar have a reputation in his squad concerning his character for truthfulness?

W: Yes.

DC: What is it?

W: SPC Lyar is known to be an untruthful person.

DC: Now, SGT True, how often do you see SPC Lyar?

W: Every day. He works for me.

DC: Over the year that you’ve known SPC Lyar, have you formed an opinion of his reputation for truthfulness?

W: Yes.

DC: What is that opinion?

W: SPC Lyar is an untruthful person.¹⁴

Attacking a witness’s credibility by offering reputation or opinion evidence is perfectly permissible, but practitioners should understand that this method of attack does not allow panel members to hear the impeaching testimony contemporaneously with the testimony to be impeached.¹⁵ That is, there will be a lag between the time that the witness testifies and the time of the opponent’s attack since the reputation or opinion testimony will likely have to wait until the defense’s case-in-chief or the Government’s rebuttal case.

Often, attacking the witness’s credibility by cross-examining the witness about specific acts related to untruthfulness under MRE 608(b) is more effective.¹⁶ As long as counsel has a good faith basis and the conduct relates to untruthfulness,¹⁷ MRE 608(b) allows counsel to attack a witness’s testimony with specific instances of untruthfulness.¹⁸ However, the specific instances may not be

¹⁴ *See* SCHLUETER ET AL., *supra* note 11, § 5-8[2][b]-[3][c]; *see also* EDWARD IMWINKELREID, EVIDENTIARY FOUNDATIONS 175-77 (1998); MAUET, *supra* note 11, at 56-57; MORRIS ET AL., *supra* note 11, at E-15-14, 19.

¹⁵ SALTZBURG ET AL., *supra* note 9, at 6-49.

¹⁶ *Id.*

¹⁷ Moody & Coacher, *supra* note 2, at 175 (referencing United States v. Robertson, 39 M.J. 211 (C.M.A. 1994)).

¹⁸ Military Rule of Evidence 608(b) provides:

Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness’s character for truthfulness . . . may not be proved by extrinsic evidence. They may, however, in the discretion of the military judge, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the character of the witness for truthfulness or untruthfulness, or (2) concerning the character for

proven by extrinsic evidence.¹⁹ In other words, counsel is “stuck” with the witness’s answer.²⁰

The CGCCA addressed the issue of impeachment by specific instances of bad character for truthfulness in the recent case of *United States v. Smith*.²¹

B. Recent Developments in Bad Character for Truthfulness: *United States v. Smith*²²

“Beware of the half truth. You may have gotten hold of the wrong half.”²³

“A half truth is a whole lie.”²⁴

In May 2005, Smith and “SR” were cadets in the Coast Guard Academy’s summer program.²⁵ They were assigned to different but neighboring cutters. Smith informed SR that he had heard rumors about her.²⁶ Hoping to garner Smith’s support, SR told Smith only pieces of the entire situation underlying the rumors, which were of a sexual nature, and omitted details that made her look bad.²⁷ Smith promised her that “he would counteract the rumors.”²⁸ A couple of months later, Smith told SR that he continued to hear rumors about her. This time, SR told him the complete story. In doing so, SR admitted to conduct that, at a minimum, violated cadet regulations and possibly the Uniform Code of Military Justice (UCMJ).²⁹

According to SR, once she had told Smith the complete story, Smith explained that he needed motivation to continue to help counteract the rumors. That evening, Smith and SR engaged in sexual acts. SR later claimed that she engaged in the sexual conduct only because she “was scared

truthfulness or untruthfulness of another witness as to which character of the witness being cross-examined has testified.

¹⁹MCM, *supra* note 7, MIL. R. EVID. 608(b).

²⁰SALTZBURG ET AL., *supra* note 9, at 6-52.

²¹ 66 M.J. 556 (C.G. Ct. Crim. App. 2008), *rev. granted*, 67 M.J. 371 (C.A.A.F. 2009).

²² *Id.*

²³ Author Unknown, *quoted in* Quotations About Honesty, <http://www.quote garden.com/honesty.html> (last visited Oct. 17, 2009).

²⁴ *Id.*

²⁵ *Smith*, 66 M.J. at 556.

²⁶ *Id.* at 558. The opinion does not clearly identify the nature of the rumors.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

to upset him because he had a big secret of mine.”³⁰ SR did not report the incident until February 2006, five months after the alleged incident.³¹ The Government subsequently charged Smith, *inter alia*, with extortion, indecent assault, and sodomy.³²

Pursuant to MRE 412,³³ the defense gave notice of their intent to cross-examine SR regarding the sexual behavior which fueled the rumors. In an Article 39(a) session, the military judge ruled that SR could only be cross-examined regarding her initial lie to Smith, which consisted of her omission of unfavorable details when Smith first approached her about the rumors.³⁴ Citing MRE 412, the military judge refused to allow defense counsel to question SR about the details of the sexual behavior underlying the rumors.³⁵ Contrary to his pleas, the panel convicted Smith of unauthorized absence, failure to go to his appointed place of duty, sodomy, extortion, and indecent assault.³⁶

On appeal to the CGCCA, Smith argued that his Sixth Amendment right to confrontation was violated when the military judge ruled that the evidence that he sought to cross-examine SR on was barred by MRE 412.³⁷ Specifically, Smith alleged that SR had testified falsely (i.e., had alleged that the acts were nonconsensual) to protect herself from discipline and that the military judge’s ruling prevented him from presenting his theory of the case.³⁸

The CGCCA, noting that “the Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish,”³⁹ found that the

³⁰ *Id.*

³¹ *Id.* at 560 n.11.

³² *Id.* at 557. The Government also charged Smith with unauthorized absence and attempted failure to obey a lawful order.

³³ Military Rule of Evidence 412 generally bars evidence of an alleged victim’s sexual behavior or sexual predisposition when the accused is charged with a sexual offense. However, there are three exceptions to this general rule: (1) “evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of the semen, injury, or other physical evidence,” or (2) “evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution” or (3) “evidence the exclusion of which would violate the constitutional rights of the accused.” MCM, *supra* note 7, MIL. R. EVID. 412.

³⁴ *Smith*, 66 M.J. at 558.

³⁵ *Id.*

³⁶ *Id.* at 557.

³⁷ *Id.* at 558.

³⁸ *Id.*

³⁹ *Id.* at 559.

military judge had not abused his discretion because he had given the defense some latitude in impugning SR's credibility under MRE 608(b) by allowing the defense to cross-examine SR regarding her initial lie to Smith (i.e., a specific instance of untruthfulness).⁴⁰ Nevertheless, the CGCCA recognized that Smith would have had the right to present evidence barred by MRE 412 if the evidence was "constitutionally required."⁴¹ Evidence is constitutionally required when it is relevant,⁴² material,⁴³ and favorable to the defense.⁴⁴ In Smith's case, the CGCCA found that the defense had failed to make an adequate showing that the evidence was constitutionally required.⁴⁵ In a footnote, the CGCCA stated,

In the defense's Notice Pursuant to M.R.E. 412, the argument referred to credibility generally, and went on to argue that the evidence at issue "tends to show the alleged victim as untruthful about her sexual conduct generally and specifically has motive to lie about the specific sexual rumors underlying the charge. However, the "motive to lie" point was not developed.⁴⁶

On 11 March 2009, the CAAF granted review in *Smith* to determine if Smith's constitutional rights had been violated in limiting the defense's cross-examination of SR.⁴⁷ Accordingly, the issue is not yet settled.

⁴⁰ *Id.* at 560.

⁴¹ *Id.* at 559 (quoting MRE 412).

⁴² The standard definition of relevant evidence under MRE 401 applies. "Evidence is relevant if it has 'any tendency to make the existence of any fact . . . more probable or less probable than it would be without the evidence.'" *United States v. Banker*, 60 M.J. 216 (C.A.A.F. 2004) (quoting MRE 401).

⁴³ "In determining whether evidence is material, the military judge looks at 'the importance of the issue for which the evidence was offered in relation to other the other issues in this case; the extent to which this issue is in dispute; and the nature of the other evidence in the case pertaining to this issue.'" *Id.* at 222.

⁴⁴ The CAAF has adopted the Supreme Court's definition for favorable, meaning "vital." *Id.* at 222. The military judge must conduct a balancing test to determine whether the probative value outweighs the danger of unfair prejudice to the victim's privacy. MCM, *supra* note 7, MIL. R. EVID. 412(c)(3). *See also Banker*, 60 M.J. at 222.

⁴⁵ *Smith*, 66 M.J. at 560 (citation omitted).

⁴⁶ *Id.* at 559.

⁴⁷ Review was granted on the following issue: "Whether the military judge violated appellant's constitutional right to confront his accusers by limiting his cross-examination of [SR], the Government's only witness, on three of the five charges." *United States v. Smith*, 67 M.J. 371 (C.A.A.F. 2009).

C. Practical Application for Litigators

Despite the fact that the CAAF has granted review of the case, *Smith* still offers practitioners an important takeaway. While impeachment using specific instances of untruthfulness can be an effective technique, remember that it is not the only method of attack. The importance of understanding the different methods of impeachment and their limitations cannot be overstated. The defense counsel in *Smith* focused on getting evidence of SR's previous sexual behavior admitted under MRE 608(b) as a specific instance of untruthfulness. He failed to adequately explore alternate methods of impeachment, including MRE 608(c), impeachment by bias, motive, or prejudice.⁴⁸ Unfortunately, this defense counsel's mistake mirrors that mistakes so many others have made regarding the different methods of impeachment.⁴⁹ Wise counsel are always prepared to argue alternative theories for the admissibility of impeachment evidence.

III. Impeachment by Bias, Prejudice, Motive to Misrepresent under MRE 608(c)

A. The Baseline

While the CGCCA in *Smith* focused on impeachment with specific instances of bad character for truthfulness, the CAAF in *United States v. Collier*⁵⁰ focused on impeachment with evidence of a witness's bias, prejudice, or motive to misrepresent under MRE 608(c).⁵¹ Unlike impeachment evidence offered under MRE 608(b), evidence offered to prove bias, prejudice, or motive to misrepresent under MRE

⁴⁸ Note that MRE 608(c) does not trump MRE 412's general prohibition precluding admission of SR's prior sexual behavior. The military judge in *Smith* would have still needed to conduct an MRE 412 analysis to determine whether an exception to the general prohibition applied. Evidence of bias, motive, and prejudice, sufficiently articulated and addressed, is "generally constitutionally required to be admitted." *United States v. Banker*, 60 M.J. 216, 224 (C.A.A.F. 2004).

⁴⁹ *Id.* at 207. The defense counsel in *Banker* failed to articulate the evidence was admissible as either impeachment by specific contradiction or impeachment by bias. The Court of Military Appeals found that "[t]he failure . . . to distinguish between these different methods of impeachment led the military judge to bar the testimony . . ." *Id.* *See also* *United States v. Stellon*, 65 M.J. 802 (2007). The defense counsel in *Stellon* relied on MRE 608(b) as his theory of admission and failed to show how the evidence could be admissible as evidence of motive. On appeal, the court found that "We agree that M.R.E. 608(c) could provide a basis for admission . . . However, counsel did not cite or implicate M.R.E. 608(c)." *Id.* at 805.

⁵⁰ 67 M.J. 347 (C.A.A.F. 2009).

⁵¹ Note that there is no Federal Rule of Evidence (FRE) equivalent to MRE 608(c). *See SALTZBURG ET AL.*, *supra* note 9, at 6-56. Nevertheless, federal courts recognize evidence of bias as proper impeachment. *See United States v. Abel*, 469 U.S. 45, 51 (1984) (stating "A successful showing of bias on the part of a witness would have a tendency to make the facts to which he testified less probable in the eyes of the jury than it would be without such testimony.")

608(c) may be established by either “examination of the witness or by evidence *otherwise adduced*.”⁵² In other words, evidence of bias, prejudice, or motive to misrepresent may be proven by extrinsic evidence. Moreover, counsel are “not stuck”⁵³ with a witness’s denial of bias, prejudice, or motive.

An accused’s Sixth Amendment right to expose a witness’s bias is not absolute, however. In *United States v. Carruthers*,⁵⁴ the defense wanted to explore the potential bias of Sergeant First Class (SFC) Rafferty, a Government witness, by exposing the favorable terms of SFC Rafferty’s pretrial agreement (PTA). Sergeant First Class Rafferty’s PTA provided that he would be tried in federal district court where he could not receive a punitive discharge.⁵⁵ The military judge, finding that the evidence was both not relevant and too prejudicial, allowed the defense to only extract evidence that SFC Rafferty was testifying pursuant to a PTA. The defense was precluded from questioning SFC Rafferty about the specifics of his PTA.⁵⁶ In concluding that the military judge did not err, the CAAF reiterated its holding in *United States v. James*⁵⁷ that “once the defendant has been allowed to expose a witness’s motivation in testifying, ‘it is of peripheral concern to the Sixth Amendment how much opportunity defense counsel gets to hammer that point home to the jury.’”⁵⁸

B. Recent Development in Bias, Prejudice, Motive to Misrepresent: *United States v. Collier*⁵⁹

“Reality is bad enough. Why should I tell the truth?”⁶⁰

United States v. Collier was a case involving impeachment by motive to misrepresent. Aviation Machinist’s Mate Third Class Collier was a tool custodian for a Helicopter Combat Support Squadron. She and Hospitalman Second Class (HM2) C were good friends, and Collier stayed at HM2 C’s home four to five nights a week. Four months into their relationship, they argued, and HM2 C kicked Collier out of her home. Sometime after the

argument, C claimed she found tools belonging to the command in her home, apparently left by Collier. No one had previously reported the tools missing. The Government charged Collier with larceny, and after she admittedly slashed HM2 C’s tires, the Government subsequently charged Collier with obstructing justice as well.⁶¹

According to Collier, she and HM2 C had had a homosexual relationship. The Government filed a motion in limine requesting that the defense be precluded from cross-examining HM2 C about the alleged homosexual relationship because the issue was not relevant, was too prejudicial, and would be embarrassing to HM2 C. In response, the defense argued that precluding cross-examination on the issue would violate Collier’s Sixth Amendment right to confrontation and that the evidence was admissible under MRE 608(c) to show HM2 C’s motive to lie about the alleged larceny. Additionally, the defense argued that evidence of the homosexual relationship was admissible to show Collier slashed HM2 C’s tires out of anger over their failed relationship, and that she had no intent to influence HM2 C’s testimony as the Government alleged in its obstruction of justice charge. The military judge, finding that evidence of a sexual relationship would not be sufficiently relevant, granted the Government’s motion. However, the military judge did allow the defense to cross-examine HM2 C about her close friendship with Collier.⁶²

The panel convicted Collier of both larceny and obstructing justice. The convening authority approved the adjudged sentence to a bad-conduct discharge, six months confinement, and reduction to E-1.⁶³ The Navy-Marine Court of Criminal Appeals (NMCCA) affirmed the findings and the sentence.⁶⁴ On appeal to the CAAF, Collier alleged that the military judge abused his discretion in prohibiting the defense from cross-examining the Government’s main witness, HM2 C, regarding her alleged homosexual relationship with Collier and from introducing any evidence of the alleged relationship in violation of Collier’s Sixth Amendment right to confrontation.⁶⁵

The CAAF, acknowledging that “the accused’s confrontation right does not give, for example, free license to cross-examine a witness to such an extent as would ‘hammer th[e] point home to the jury,’”⁶⁶ nevertheless

⁵² MCM, *supra* note 7, MIL. R. EVID. 608(c) (emphasis added).

⁵³ This is coined after Saltzburg’s description of impeachment evidence under MRE 608(b). See *supra* note 20.

⁵⁴ 64 M.J. 340 (C.A.A.F. 2007).

⁵⁵ *Id.* at 343.

⁵⁶ *Id.*

⁵⁷ 63 M.J. 217 (C.A.A.F. 2006).

⁵⁸ *Carruthers*, 64 M.J. at 344 (quoting *United States v. Nelson*, 39 F.3d 705, 708 (7th Cir. 1994)).

⁵⁹ 67 M.J. 347 (C.A.A.F. 2009).

⁶⁰ Patrick Sky, *quoted in* Quotations About Honesty, *supra* note 23.

⁶¹ 67 M.J. 347.

⁶² *Id.* at 350–52.

⁶³ *Id.* at 350.

⁶⁴ *Id.*

⁶⁵ *Id.* at 349.

⁶⁶ *Id.* at 352 (quoting *United States v. James*, 61 M.J. 132,135 (C.A.A.F. 2005)).

concluded that the military judge had in fact erred.⁶⁷ Had the members known of the sexual relationship, the members might have had a significantly different impression of HM2 C's credibility.⁶⁸ Furthermore, the record was devoid of any evidence that HM2 C would suffer undue harassment or that the evidence would be a waste of time or confuse the issues or that there was a danger of unfair prejudice.⁶⁹

After finding that the military judge had committed constitutional error, the CAAF tested to see whether the error was harmless beyond a reasonable doubt. The CAAF noted that the defense's main strategy was to impeach HM2 C's credibility through bias and motive to lie⁷⁰ and that there is a qualitative difference between a failed friendship and a failed romantic relationship.⁷¹ The CAAF concluded that the error was not harmless beyond a reasonable doubt and reversed the NMCCA's decision.⁷²

C. Practical Application for Litigators

Collier serves as a good reminder to Government counsel of their obligation to protect the record for appellate review. Although not unique to cases covered under MRE 608(c), in cases where the military judge decides favorably for the Government on MRE 403 grounds, Government counsel must be certain that the military judge puts his findings on the record. Much of the CAAF's analysis in *Collier* is spent detailing what the record lacks: the military judge "made no findings . . . that HM2 C would suffer from undue embarrassment"; the military judge "made no factual findings about any delay or confusion"; and the military judge's ruling "lacked an articulated or supportable legal basis."⁷³ Consequently, the court found that "the limitation on cross-examination and related bias evidence was a violation of Appellant's Sixth Amendment confrontation rights."⁷⁴ The time that the CAAF devoted to the factual findings intimates that the result could have been different had the Government encouraged the military judge to properly articulate his findings on the record.

⁶⁷ *Id.*

⁶⁸ The test is "whether '[a] reasonable jury might have received a significantly different impression of [the witness's] credibility had [defense counsel] been permitted to pursue his proposed line of cross-examination.'" *Id.*

⁶⁹ *Id.* at 353–55 (applying the MRE 403 balancing test).

⁷⁰ *Id.* at 357.

⁷¹ *Id.* at 352 ("[I]t is intuitively obvious that there is a qualitative difference between the breakup of a friendship and a badly ended romantic relationship, whether that romantic relationship was sexual or not.")

⁷² *Id.* at 357.

⁷³ *Id.* at 353–55.

⁷⁴ *Id.* at 355.

Collier also serves as a reminder to defense counsel to be sure to connect the dots for the military judge when attempting to offer evidence under MRE 608(c). The CAAF noted that the military judge's ruling "did not allow Appellant to expose the alleged nefarious motivation behind HM2 C's allegations and testimony."⁷⁵ A good proffer will show how the defense theory of the case is directly impacted by the admission of the evidence of bias, prejudice, or motive to misrepresent.⁷⁶

II. Impeachment by Prior Inconsistent Statements

A. Baseline: Prior Inconsistent Statements

In *Kansas v. Ventris*,⁷⁷ the Supreme Court focused on impeachment by a prior inconsistent statement. Under MRE 613, once a witness testifies inconsistently with a prior written or oral statement, he may be impeached with that statement.⁷⁸ Probably the more typical and more effective approach to impeaching a witness with a prior inconsistent statement is during cross-examination where counsel commits the witness to his testimony, validates the circumstances of the making of the prior statements (with indicators of reliability), and then confronts the witness with the prior statement.⁷⁹ If the witness admits to making the statement, then impeachment is complete.⁸⁰ However, if the witness denies the statement, then MRE 613 allows counsel

⁷⁵ *Id.* at 352.

⁷⁶ *Collier* is also a good reminder to all of what is not discussed. Despite discussions of HM2 C's sexual behavior and predisposition, notice that MRE 412 is not implicated. Military Rule of Evidence 412 only bars evidence of an alleged victim's sexual predisposition or behavior in cases involving an alleged sexual offense. See MCM, *supra* note 7, MIL. R. EVID. 412 ("The following evidence is not admissible in any proceeding involving alleged sexual misconduct . . ."). *Collier* was charged with larceny and obstruction of justice. Consequently, although the government ultimately lost before the CAAF, it made the closest argument to MRE 412 that it could—that the evidence of their homosexual relationship was not legally relevant under MRE 403.

⁷⁷ 129 S. Ct. 1841 (2009). Although the Court never specifically cites Federal Rule of Evidence (FRE) 613 (the civilian counterpart to MRE 613), discussed below, its analysis is not inconsistent with the provisions of FRE 613.

⁷⁸ Note the difference between a prior inconsistent statement offered under MRE 613 and a prior inconsistent statement offered under MRE 801(d)(1). A prior inconsistent statement offered under MRE 613 can only be used for impeachment purposes. (Counsel should request a limiting instruction from the military judge.) If a witness testifies inconsistently with a prior statement and the prior statement was made under oath subject to penalty of perjury and was made at a trial, hearing, other proceeding, or a deposition, then the statement may be offered under MRE 801(d)(1). Because of the extra protections (subject to perjury at a formal proceeding, etc.) statements offered under MRE 801(d)(1) can be used for substantive purposes. See MCM, *supra* note 7, MIL. R. EVID. 613 & 801(d)(1).

⁷⁹ STEVEN LUBET, MODERN TRIAL ADVOCACY 160–77 (1997); see also MORRIS ET AL., *supra* note, 11, at D-4-3–4.

⁸⁰ SCHLUETER ET AL., *supra* note 11, § 5-10[3][b].

to “prove up” the statement by offering extrinsic evidence.⁸¹ Similar to MRE 608(c), counsel are “not stuck” with a witness’s response.

Alternatively, instead of confronting the witness with the prior statement during cross-examination, counsel can wait and offer the prior statement through another witness. Military Rule of Evidence 613 only mandates that before the testimony is admitted, the “witness [who made the statement] is afforded an opportunity to explain or deny”⁸² The rule does not require that the witness be afforded the opportunity to explain or deny the statement before it is *offered*. Therefore, when electing to impeach a witness’s testimony through this means, counsel must be careful to only temporarily excuse the witness so that he can be recalled to explain or deny the statement.⁸³

B. Recent Development in Prior Inconsistent Statements: *Kansas v. Ventris*⁸⁴

“When you stretch the truth, watch out for the snapback.”⁸⁵

Ventris and his female companion, Theel, allegedly went to investigate allegations that Hicks had been abusing children. According to Ventris, their visit had nothing to do with the fact that both he and Theel were drug users and that it was rumored that Hicks carried a lot of money.⁸⁶ During their visit, however, things went awry. Either Ventris or Theel—or both—shot and killed Hicks, took \$300 and Hicks’s cell phone, and drove away in Hicks’s truck.⁸⁷ The police later arrested Theel and Ventris after receiving a tip. Both Theel and Hicks were charged, *inter alia*, with murder and aggravated robbery. The State agreed to dismiss the murder charges against Theel in exchange for her pleading guilty to robbery and testifying against Ventris as the shooter.⁸⁸

While Ventris was in pretrial confinement, police officers planted an informant in his cell and instructed the informant to “keep [his] ear open and listen” for inculpatory

statements.⁸⁹ Prompted by a question from the informant, Ventris admitted that “[h]e’d shot this man in the head and his chest” and taken “his keys, his wallet, about \$350.00, and . . . a vehicle.”⁹⁰

At trial, Ventris took the stand in his defense and completely blamed Theel for the robbery and the murder. In its rebuttal case, the State called the informant to testify concerning Ventris’s jail-cell admission. The defense objected. The State conceded that the statement was taken in violation of Ventris’s Sixth Amendment right to counsel but argued that Ventris’s statements could still be used to impeach Ventris’s testimony. The trial judge overruled the objection and allowed the informant’s testimony.⁹¹ The jury eventually convicted Ventris of aggravated robbery and aggravated burglary but acquitted him of the murder and misdemeanor theft. The Kansas Supreme Court reversed Ventris’s conviction, finding that the judge erred in allowing evidence taken in violation of Ventris’s Sixth Amendment rights to be used in any manner.⁹² The Supreme Court granted the State’s petition for review and considered whether a defendant’s statements, taken in violation of a defendant’s Sixth Amendment rights, could be used to impeach his in-court testimony.

The Supreme Court found that the Kansas Supreme Court had erred and reversed the Kansas Supreme Court’s decision. The Court’s holding that Ventris’s statements could be used to impeach Ventris’s in-court testimony turned on the nature of the constitutional violation. “Whether otherwise excluded evidence can be admitted for purposes of impeachment depends upon the nature of the constitutional guarantee that is violated. Sometimes it explicitly mandates exclusion from trial, and sometimes it does not.”⁹³ In Ventris’s case, Ventris was denied his right to counsel under the Sixth Amendment. The Supreme Court noted that the Sixth Amendment rule is a prophylactic rule intended to deter certain police conduct.⁹⁴ The Sixth Amendment, similar to the Fourth Amendment, does not mandate the automatic exclusion of unlawfully obtained evidence. Instead, courts must apply the exclusionary rule balancing test to such evidence.⁹⁵ In conducting its own balancing test, the Supreme Court concluded that it would be unfair for the defendant, having testified, to be shielded from his lies. “It is one thing to say that the Government cannot

⁸¹ MCM, *supra* note 7, MIL. R. EVID. 613 (stating that extrinsic evidence is admissible if “the witness is afforded an opportunity to interrogate the witness thereon, or the interest of justice otherwise require.”).

⁸² *Id.* MIL. R. EVID. 613.

⁸³ See SALTZBURG ET AL., *supra* note 9, at 6-150-52.

⁸⁴ 129 S. Ct. 1841 (2009).

⁸⁵ Bill Copeland, *quoted in* Quotations About Honesty, *supra* note 23.

⁸⁶ *Ventris*, 129 S. Ct. at 1844.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* at 1845.

⁹⁴ *Id.*

⁹⁵ *Id.*

make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can . . . provide himself with a shield against contradiction of his untruths.”⁹⁶ The Court also found that the exclusion of the testimony would do little to deter police misconduct.⁹⁷ On balance, the Court ultimately found that the statements were admissible for impeachment purposes.⁹⁸

C. Practical Application for Litigators

Military practitioners can glean at least two important nuggets from *Kansas v. Ventris*. First, the case provides a starting point for determining whether a statement unlawfully obtained may be used to impeach the in-court testimony of an accused. Practitioners must first determine what right has been violated.⁹⁹ In *Ventris*’s case, his Sixth Amendment right to counsel had been violated. The statement, albeit illegally obtained in violation of his right to counsel, was still admissible to impeach his in-court testimony because the Sixth Amendment does not mandate exclusion of the statement. In contrast, the outcome would have been different had the statements been coerced in violation of *Ventris*’s Fifth Amendment rights. The Fifth Amendment provides that no person “shall be compelled to in any criminal case to be a witness against himself.”¹⁰⁰ Consequently, had the statement been a coerced statement taken in violation of *Ventris*’s Fifth Amendment rights, the statement could not have been used against *Ventris* “whether by way of impeachment or otherwise.”¹⁰¹

Alternatively, consider this scenario. *Ventris* is now Specialist (SPC) *Ventris*. His first sergeant, suspecting him of robbery, asks SPC *Ventris* “what happened?” without reading him his Article 31 rights.¹⁰² Specialist *Ventris* confesses to robbery to the first sergeant. At trial, SPC *Ventris* blames Theel. Assuming that only SPC *Ventris*’s Article 31 rights had been violated, the statement may be used to impeach his in-court testimony. Military Rule of Evidence 304(b)(1)¹⁰³ provides a specific exception for

statements taken in noncompliance with Article 31. Hence, SPC *Ventris* statements made to his first sergeant would be admissible under MRE 304(b)(1) and MRE 613 to impeach his in-court testimony.

The second important lesson from *Ventris* derives from the way the State proved the prior inconsistent statement. The State called the jail-cell informant to the stand to testify about *Ventris*’s statements. Again, *Kansas v. Ventris* reminds us that the beauty of offering prior inconsistent statements under MRE 613 is that extrinsic evidence may be used to prove the inconsistent statements. Counsel are not “stuck” with a witness’s answers and can present testimony or other evidence on point.

IV. Impeachment by Bad Character for Truthfulness by Evidence of Prior Convictions Under MRE 609

A. The Baseline

The drafters of the MREs¹⁰⁴ recently addressed impeachment by prior convictions. Military Rule of Evidence 609 allows counsel to attack a witness’s credibility by presenting certain convictions of the witness. The rule covers two types of convictions: (1) *non-crimen falsi* crimes and (2) *crimen falsi* crimes.¹⁰⁵ *Non-crimen falsi* crimes do not have an element of dishonesty but are punishable by death, dishonorable discharge, or confinement greater than a year.¹⁰⁶ The key to determining whether a conviction is a non-crimen falsi conviction is the maximum potential punishment.¹⁰⁷ For example, counsel could impeach a witness with a special court-martial conviction for an indecent act despite the jurisdictional limits of a special court-martial. The relevant issue is that the maximum possible punishment for an indecent act is a dishonorable discharge, total forfeitures, and five years confinement, not

the in-court testimony of the accused . . . MCM, *supra* note 7, MIL. R. EVID. 304(b)(1).

⁹⁶ *Id.* at 1846.

⁹⁷ *Id.* at 1847.

⁹⁸ *Id.* at 1846–47.

⁹⁹ *See id.* at 1845.

¹⁰⁰ U.S. CONST. amend. V.

¹⁰¹ *Ventris*, 129 U.S. at 1845.

¹⁰² Article 31 provides, *inter alia*, “No person subject to this chapter may interrogate, or request any statement from an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected. UCMJ art. 31 (2008).

¹⁰³ “Where the statement is involuntary only in terms of noncompliance with the requirements of Mil. R. Evid. 305(c) [Article 31 warnings] . . . , this rule does not prohibit use of the statement to impeach by contradiction

¹⁰⁴ By “drafters of the MREs,” the author is referring to the Joint Service Committee (JSC). The JSC is composed of one representative of The Judge Advocate General (TJAG) of the Army, TJAG of the Navy, TJAG of the Air Force, The Staff Judge Advocate of the Commandant of the Marine Corps, and the Chief Counsel of the Department of Homeland Security, United States Coast Guard. The JSC is responsible for reviewing the Manual for Courts-Martial (MCM) annually and proposing amendments to the MCM when necessary. U.S. DEPT’T OF DEF., DIR. 5500.17, ROLE AND RESPONSIBILITIES OF THE JOINT SERVICE COMMITTEE (JSC) ON MILITARY JUSTICE paras. 3, 4.3 (3 May 2003).

¹⁰⁵ *See SALTZBURG ET AL., supra* note 9, at 6-88.

¹⁰⁶ MCM, *supra* note 7, MIL. R. EVID. 609.

¹⁰⁷ *Id.* (“In determining whether a crimes tried by court-martial was punishable by death, dishonorable discharge, or imprisonment in excess of one year, the maximum punishment prescribed by the President under Article 56 at the time of the conviction applies without regard to whether the case was tried by general, special, or summary court-martial.”).

that maximum available punishment is limited because it is at a special-court martial.¹⁰⁸ In comparison, counsel could not impeach a witness with a general court-martial conviction for a simple failure to be at the appointed place of duty since the maximum possible punishment for that offense is one month confinement and two-thirds forfeiture of pay per month for one month.¹⁰⁹

However, before evidence of a *non-crimen falsi* conviction may be admitted, the military judge must perform a balancing a test. Witness convictions, other than convictions of the accused, are analyzed under the standard MRE 403 balancing test—the conviction may be excluded if the probative value is substantially outweighed by the danger of unfair prejudice.¹¹⁰ Meanwhile, a special balancing test must be applied to *non-crimen falsi* convictions of the accused. *Non-crimen falsi* convictions by the accused may only be admitted if their probative value outweighs their prejudicial effect.¹¹¹ “[T]o be excluded, the conviction’s probative value need simply be outweighed by its prejudicial effect upon the defendant.”¹¹² Stated differently, the conviction should only be admitted if it is more probative than prejudicial.

The second type of conviction covered by MRE 609 are *crimen falsi* convictions. The current *MCM* defines a *crimen falsi* crime simply as a crime “involv[ing] dishonesty or false statement.”¹¹³ *Crimen falsi* convictions, unlike *non-crimen falsi* convictions, are not subject to a balancing test and must be admitted.¹¹⁴ In the past, some but not all federal courts were willing to look at the underlying circumstances of a conviction to see if the conviction involved a crime of dishonesty that could be admitted as a *crimen falsi* crime,¹¹⁵ thereby obviating the need to conduct a balancing test. For example, a federal court might find that a particular murder conviction falls within the definition of a *crimen falsi* crime because the witness made a false statement during the commission of the murder; consequently, the court could admit the conviction without regard to unfair prejudice or the need to conduct a balancing test.¹¹⁶

¹⁰⁸ UCMJ art. 120.

¹⁰⁹ *Id.* art. 86.

¹¹⁰ *MCM*, *supra* note 7, MIL. R. EVID. 403.

¹¹¹ *Id.* MIL. R. EVID. 609.

¹¹² SALTZBURG ET AL., *supra* note 9, at 6-92.

¹¹³ *MCM*, *supra* note 7, MIL. R. EVID. 609.

¹¹⁴ “[E]vidence that any witness has been convicted of crime shall be admitted if it involved dishonestly or false statement, regardless of the punishment.” *Id.* Fraud, larceny, and perjury are examples of *crimen falsi* crimes. See *id.* MIL. R. EVID. 609 analysis, at A22-47.

¹¹⁵ SALTZBURG ET AL., *supra* note 9, at 6-95 to -96.

¹¹⁶ See FED. R. EVID. 609, Advisory Committee Notes, at 111 (2008).

B. Recent Developments: Amended MRE 609 Prior Convictions

“[W]itnesses who have violated the law are more likely to lie”¹¹⁷

Federal Rule of Evidence 609 was amended on 1 December 2006 to clarify what convictions constitute *crimen falsi* crimes.¹¹⁸ Under the amendment, a conviction is a *crimen falsi* conviction “if it readily can be determined that establishing the elements of the crime required proof or admission of an act of dishonesty or false statement by the witness.”¹¹⁹ According to MRE 1102, any changes to the FRE are incorporated by operation of law eighteen months from the FRE’s effective date unless the President takes action to the contrary.¹²⁰ Consequently, the amended language became applicable to the military on 1 June 2008. Although the amended language does not yet appear in the current *MCM*, military courts-martial are nevertheless bound to follow the amended MRE 609’s “elements test.” Changes are now being made to incorporate the amended language in the next edition of the *MCM*.¹²¹

V. Impeachment by Specific Contradiction

A. The Baseline

Although not the primary focus of any recently published cases, counsel should be aware that impeachment by specific contradiction is another method of attack. Impeachment by specific contradiction is hardly ever used because it is not specifically enumerated in an MRE.¹²² Instead, it is found in common law. “This line of attack involves showing the tribunal the contrary of a witness’ asserted fact, so as to raise an inference of a general defective trustworthiness.”¹²³ Under impeachment by specific contradiction, counsel are permitted to introduce extrinsic evidence so long as the evidence is not collateral.¹²⁴ That is, counsel are “not stuck” with the witness’s answer as

¹¹⁷ *Id.* at 6-87 (“The rationale for admitting this proof is that certain convictions enable the finder of fact being able to assess a witness’s credibility because such convictions demonstrate that the witness has violated the law, and witnesses who have violated the law are more likely to lie than witnesses who have not.”).

¹¹⁸ FED. R. EVID. 609 (2008).

¹¹⁹ *Id.*

¹²⁰ *MCM*, *supra* note 7, MIL. R. EVID. 1102.

¹²¹ Manual for Courts-Martial; Proposed Amendments, 74 Fed. Reg. 47785 (Sept. 17, 2009).

¹²² Moody & Coacher, *supra* note 2, at 182.

¹²³ United States v. Banker, 15 M.J. 207, 210 (C.M.A. 1983).

¹²⁴ *Id.* at 211.

long as the evidence pertains to a matter that counts in the case.¹²⁵ A matter “counts” when the evidence is offered for a purpose other than for the sake of simply contradicting the witness’s testimony.¹²⁶

Although not the focus of any published cases this term, the facts in *Collier* could easily be changed to illustrate this rarely used method of attack. As discussed, the CAAF reversed the NMCCA’s holding in *Collier* and authorized a rehearing. Assume for a moment that upon rehearing, the defense counsel cross-examines HM2 C concerning her homosexual relationship with Collier, and HM2 C denies having a homosexual relationship with Collier. On redirect, the trial counsel asks HM2 C about her sexual orientation, and HM2 C responds that she is strictly heterosexual and has been heterosexual all of her life.¹²⁷ The defense calls HM2 C’s co-worker who testifies she saw HM2 C engaged in homosexual activity with another female. The co-worker’s testimony is not inadmissible as a prior inconsistent statement under MRE 613 because the co-worker’s testimony described only what the co-worker perceived. The co-worker’s testimony would not be admissible as a specific instance of untruthfulness since MRE 608(b) bars extrinsic evidence of the untruthfulness. The defense might try to argue the testimony is evidence of bias, motive, or prejudice under MRE 608(c); however, that approach may be a stretch. Still, the co-worker’s testimony should be readily admissible as impeachment by contradiction.

The trial counsel’s questioning and HM2 C’s response gave the appearance that HM2 C is heterosexual. The defense would be offering the co-worker’s testimony not only to contradict HM2 C’s testimony but also to show that HM2 C has a motive to lie (i.e., anger over a failed romantic relationship). Consequently, the testimony does not constitute a collateral matter and should be allowed to show a general defectiveness in HM2 C’s trustworthiness. Though these revised facts are illustrative only, they are somewhat similar to the facts of *United States v. Montgomery*,¹²⁸ an older Army Court of Criminal Appeals (ACCA) case.

¹²⁵ See MUELLER & KIRKPATRICK, *supra* note 6, § 6.61 (“Counterproof is admissible if it contradicts on a matter that counts in the case, but not otherwise.”); see also BLACK’S LAW DICTIONARY 256 (7th ed. 1999) (defining collateral matter s “[a]ny matter on which evidence could not have been introduced for a relevant purpose.”).

¹²⁶ See MUELLER & KIRKPATRICK, *supra* note 6, § 6.62; *Banker*, 15 M.J. at 212 n.2 (finding that extrinsic evidence of a witness’s drug use was not a collateral matter when offered to both contradict his in-court testimony and to establish his bias and prejudice).

¹²⁷ Note that although this line of questioning pertains to HM2 C’s sexual predisposition, it is not barred by MRE 412. Collier was charged with larceny and obstruction of justice. *United States v. Collier*, 67 M.J. 347, 350 (2009). Military Rule of Evidence 412 only bars evidence of an alleged victim’s sexual predisposition or behavior in cases where the accused is charged with a sexual offense. MCM, *supra* note 7, MIL. R. EVID. 412.

¹²⁸ 56 M.J. 660 (A. Ct. Crim. App. 2001).

In that case, the Government accused Montgomery of cutting his mistress’s wrist and thumb with a knife after he found that she was involved with another man. Montgomery alleged that his mistress was the violent one, that she initiated a struggle, and that she was accidentally cut during that struggle. During redirect, the trial counsel asked the mistress, “[W]hat type of person are you in terms of reacting to events that upset you?”¹²⁹ The mistress replied that she was not the type to make a scene.¹³⁰ The defense wanted to cross-examine the mistress concerning five instances where she had assaulted five different individuals. The military judge refused to let the defense cross-examine the mistress about other incidents. On appeal, the ACCA found that the Government had opened the door to the other incidents by making the mistress appear passive and that the testimony should have been allowed as impeachment by contradiction. Had the defense been allowed to cross-examine the mistress, or been otherwise allowed to present evidence of the other assaults—or both—the evidence would have raised “more than ‘an inference of general defective trustworthiness’” and that evidence may have changed the panel’s view of the evidence.¹³¹

IV. Conclusion

*“Dear General, We have met the enemy and they are ours”*¹³²

A warrior knows what he has in his arsenal. He knows each weapons system. He knows not only the lethalties of his weapons systems, but their limitations as well.

For those that conduct battle in the courtroom, the same principles apply. In order to effectively attack a witness’s credibility, counsel must know what he has in his arsenal.

He is keenly aware that he has more than one weapons system available. He is not focused on just one weapons system, just one method of impeachment—not when he has a variety of methods of attack available. He also knows that not all weapons systems are created equal. Some have limitations. Some methods of impeachment allow extrinsic evidence and others do not. The enemy will be yours as well if you understand and apply these principles.

¹²⁹ *Id.* at 668.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² Oliver Hazard Perry, *quoted in* JOHN BARTLETT, FAMILIAR QUOTATIONS 553 (14th ed. 1968). During the War of 1812, Oliver Perry dispatched the message “Dear General, we have met the enemy, and they are ours” to Major General William Henry Harrison after defeating the British during the Battle of Lake Erie.

Annual Review of Developments in Instructions

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Introduction

This annual installment of developments on instructions covers cases decided by the Court of Appeals for the Armed Forces (CAAF) during its September 2008 term,¹ and it is written for military trial practitioners. The *Military Judges' Benchbook (Benchbook)*² remains the primary resource for drafting instructions. During this term, the CAAF decided cases involving the definition of "child pornography" for conduct unbecoming an officer and a gentleman; the definition of "criminal proceedings" for obstruction of justice; variance; lesser included offenses; and the mistake of fact defense.

Crimes

Possession of Virtual Child Pornography as Conduct Unbecoming an Officer and a Gentleman

In 1996, the U.S. Congress passed the Child Pornography Prevention Act (CPPA), which implemented the *Ferber* standard³ and criminalized the possession of a broad range of materials that sexually depicted minors. Included among the proscriptions was the mere possession of any matter that "is or appears to be" a sexual depiction of a minor.⁴ In 2002, the *Ashcroft v. Free Speech Coalition*⁵

decision struck down provisions of the act that criminalized the possession of so-called "virtual child pornography," apparent depictions created by computer morphing or other means that did not depict actual children.

The *Free Speech Coalition* decision required the CAAF to revisit Uniform Code of Military Justice (UCMJ) Article 134, clause 3, child pornography prosecutions that relied on the CPPA, as parts of the underlying statute had been held unconstitutional. It set aside such prosecutions in the *United States v. Cendajas* decision.⁶ However, it held in the *United States v. Mason*⁷ and subsequent *United States v. Brisbane*⁸ decisions that the possession of even "virtual" child pornography could be punished under clause 1 and clause 2 of Article 134 as service-discrediting or conduct prejudicial to good order and discipline.

In *United States v. Forney*,⁹ the CAAF confronted the related issue of whether possession of even "virtual" child pornography could, in line with *Mason* and *Brisbane*, constitute conduct unbecoming an officer. At issue in the case were the proper instructions in light of the *Free Speech Coalition* and *Cendajas* decisions.

Prior to *Free Speech Coalition*, Lieutenant Junior Grade Forney was accused and found guilty of two specifications in violation of Article 134 for possessing child pornography in his stateroom and work area computers in violation of the CPPA.¹⁰ He was also accused and convicted of one

¹ The September 2008 term began on 1 September 2008 and ended on 31 August 2009.

² U.S. DEP'T OF ARMY, PAM. 27-9, LEGAL SERVICES: MILITARY JUDGES' BENCHBOOK (1 Jan. 2010) [hereinafter BENCHBOOK].

³ The Supreme Court, in *New York v. Ferber*, unanimously held that the First Amendment did not protect the sale of materials depicting minors engaged in sexual activity. 458 U.S. 747, 765 (1982). In *Osborne v. Ohio*, the Court further held that the mere possession of child pornography was not protected by the First Amendment. 495 U.S. 103 (1990).

⁴ 18 U.S.C. § 2252A (2006) provides, in part:

(a) Any person who—

(1) knowingly mails, or transports or ships in interstate or foreign commerce by any means, including by computer, any child pornography;

(2) knowingly receives or distributes—

(A) any child pornography that has been mailed, or shipped or transported in

interstate or foreign commerce by any means, including by computer; or

(B) any material that contains child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer;

⁵ 535 U.S. 234 (2002).

⁶ 62 M.J. 334 (C.A.A.F. 2006) (setting aside an Article 134 prosecution for possession of child pornography based on the incorporated 18 U.S.C. § 2252A).

⁷ 60 M.J. 15, 18 (C.A.A.F. 2004).

⁸ 63 M.J. 106, 116–17 (C.A.A.F. 2006).

⁹ 67 M.J. 271 (C.A.A.F. 2009).

¹⁰ *Id.* at 273; *see also* 18 U.S.C. § 2256(8)(D) (2006).

specification of conduct unbecoming an officer in violation of UCMJ Article 133 for receiving and possessing child pornography as defined by 18 U.S.C. § 2256.¹¹

The military judge instructed the court members that in order to convict the accused they had to be convinced beyond a reasonable doubt that he had received and possessed child pornography, he knew that he had done so, he knew that it was child pornography, that his receipt and possession were wrongful, and that under the circumstances the conduct was unbecoming an officer and a gentleman.¹²

At trial, the court merged the three offenses for sentencing purposes, and a general court-martial with members sentenced the naval officer to twelve months confinement and a dismissal.¹³ After his trial concluded, the Supreme Court held part of the CPPA unconstitutional.¹⁴ There was no proof at his trial that the images he possessed were not virtual, and accordingly, his two convictions for violations of Article 134 were overturned by the Navy and Marine Corps Court of Criminal Appeals (NMCCA); the NMCCA affirmed his conviction for violating Article 133 and affirmed the sentence.¹⁵

At issue before the CAAF was whether the accused's conviction under Article 133 should stand, given that it rested on conduct that was arguably constitutionally protected in a civilian context. In a plurality decision, all five judges agreed that the conviction should stand.¹⁶ The court recounted the Supreme Court's holding in *Parker v. Levy* in pointing out that "[s]peech that is protected in the civil population may nonetheless undermine the effectiveness of response to command. If it does, it is constitutionally unprotected [in a military context]."¹⁷

¹¹ *Id.* The Supreme Court found the provisions of 18 U.S.C. § 2256(8)(B), (D) unconstitutional. Those sections defined child pornography to include "any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture" that "is, or appears to be, of a minor engaging in sexually explicit conduct," § 2256(8)(B), and any sexually explicit image that is "advertised, promoted, presented, described, or distributed in such a manner that conveys the impression" it depicts "a minor engaging in sexually explicit conduct."

¹² *Forney*, 67 M.J. at 273.

¹³ *Id.* at 272.

¹⁴ *Ashcroft*, 535 U.S. 234, 235 (2002).

¹⁵ *Forney*, 67 M.J. at 272.

¹⁶ *United States v. Forney*, 2005 CCA LEXIS 235, at *23 (N-M. Ct. Crim. App. 2005). Judge Stucky delivered the judgment of the court which Baker joined. Chief Judge Effron concurred in the result but not the opinion's finding that there was no instructional error. Judge Erdmann dissented which Judge Ryan joined. All three opinions opined that the possession of "virtual" child pornography could constitute conduct unbecoming an officer. *Forney*, 67 M.J. at 271.

¹⁷ *Forney*, 67 M.J. at 275 (citing *United States v. Gray*, 42 C.M.R. 255 (C.M.A. 1970); *Parker v. Levy*, 417 U.S. 733, 759 (1974)).

The court then confronted the contention that the military judge erred by not requiring the members to find that the images appellant possessed were of actual children.¹⁸ That issue was prompted by the dismissal of the two Article 134 offenses occasioned by the *Free Speech Coalition* decision and the trial court's reliance on the unconstitutional definition of child pornography in 18 U.S.C. § 2256.¹⁹ Judges Stucky and Baker held that because the judge's instructions for the Article 133 offense were not based on an incorporated offense, the judge's instructions were proper.²⁰ The lead opinion pointed out the absence of a definition of child pornography in the UCMJ and that the Article 133 offense only relied on the civilian statute for a definition.²¹ Judge Stucky further pointed out that there would have been no issue if the specification alleged that the officer possessed "images of children engaged in sexually explicit conduct" and avoided reference to the statute.²² Judge Stucky rejected the appellant's argument that he should have had an opportunity to present the defense that his conduct was arguably legal in civilian society. He relied on the absence of jurisprudence requiring instructions on the state of the civilian law even in cases raising explicit First Amendment issues.²³ Judge Stucky noted that even if the military judge's reliance on the unconstitutional statute contained some (ultimately incorrect) suggestion to the members that the appellant's conduct violated civilian law and that it was thereby instructional error, the error was harmless beyond a reasonable doubt because of the significant evidence of military-specific ramifications of the alleged misconduct.²⁴ The two justice "majority" upheld the ruling of the Navy Court.²⁵

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 276 n.2.

Even if it were error for the military judge to reference the federal statute in the instruction—arguably suggesting that the possession of virtual child pornography was illegal in civilian society—we are confident such error was harmless beyond a reasonable doubt. There is no reasonable possibility that any such error might have contributed to Appellant's conviction. In light of the totality of the circumstances—his receiving and possessing such images on government computers on a Navy ship underway, the discovery of the misconduct by an enlisted person in the performance of his duties, and the focus of the offense and the military judge's instructions on the military nature of the offense—any such error would have been unimportant in relation to everything else the jury considered on the issue in question

Id. (internal citations omitted).

²⁵ *Id.*

Chief Judge Effron concurred in the result that the possession of “virtual” child pornography could be charged as conduct unbecoming, but he took issue with the fact that the instructions relied on a provision of a statute that was later held unconstitutional.²⁶ The Chief Judge’s concurrence pointed out that, in Article 133 prosecutions, “the nature of the standard—whether the act or omission violated a military-specific norm or a generally applicable civilian law—is important.”²⁷ The concurrence went on to explain that, while the possession of “virtual” child pornography might constitute a military-specific offense, this accused was tried with the understanding that his conduct also violated a civilian statute.²⁸ Chief Judge Effron stated that, in Article 133 and 134 prosecutions when the conduct is alleged to have violated a civilian criminal statute, the accused may often offer evidence that the charged conduct does not violate the civilian criminal statute.²⁹ Chief Judge Effron’s concurrence concludes by holding that it was error for the judge’s instruction to rely on a violation of a civil norm that was later held to be unconstitutional.³⁰ The concurrence found that the instructional error was harmless beyond a reasonable doubt and thereby concurred in the result.³¹ The concurrence also noted that a three-judge majority of the court agreed that reliance on the overturned statute was instructional error.³²

The three-judge majority Chief Judge Effron alluded to was composed of his concurrence and Judge Erdmann’s dissent, which was joined by Judge Ryan. The dissent also found that the instructions were error in that it was impossible to separate the violation of the civil norm from the purely military misconduct.³³ The dissent held that Forney was entitled to an opportunity to argue to the members that his conduct was constitutionally protected in that there was no evidence that his images depicted real children.³⁴

It is clear that *Forney* establishes that the possession of sexually explicit images of children may constitute a violation of Article 133 even if the images are “virtual” or otherwise not actual children.³⁵ It seems equally clear that such a prosecution must focus solely on how possession of the images detracted from the possessor’s fitness to lead as

an officer and not rely on an inference that such images are illegal under civilian law.³⁶

Obstruction of Justice in Foreign Criminal Proceedings

In *United States v. Ashby*,³⁷ the CAAF revisited a high profile tragedy from the late 1990s. Captain (Capt.) Ashby, U.S. Marine Corps, flew an EA-6B Prowler aircraft on a routine training mission in the Italian Alps that culminated in the aircraft striking weight bearing cables causing a gondola with twenty international passengers to fall over 300 feet to their death.³⁸ Capt. Ashby was tried in two separate courts-martial. In the first, he was acquitted of all charged offenses, including dereliction of duty, negligently suffering military property to be damaged, recklessly damaging nonmilitary property, involuntary manslaughter, and negligent homicide.³⁹ In his second court-martial, he was convicted of conduct unbecoming an officer for conspiring to obstruct justice.⁴⁰ The court considered the issue of whether the military judge properly instructed the members that they could consider the obstruction of foreign criminal proceedings as qualifying conduct for obstruction of justice.⁴¹ The defense moved in limine to prevent the Government from arguing that obstructing foreign criminal proceedings violated the UCMJ.⁴² The defense argument flowed from the absence of foreign proceedings in the enumerated investigations in the *Manual for Courts-Martial (MCM)* and the lack of clear precedent in case law.⁴³ The judge denied the defense’s motion but imposed a requirement that the obstruction of any foreign criminal proceeding must be directly prejudicial to good order and discipline or service-discrediting.⁴⁴ The judge instructed the panel that criminal proceedings included

obstruction of foreign criminal proceedings or investigations when such obstruction of the criminal proceedings or investigation have a direct impact upon the efficacy of the United States criminal justice system by being directly prejudicial

²⁶ *Id.* at 277 (Effron, C.J., concurring).

²⁷ *Id.*

²⁸ *Id.* at 279.

²⁹ *Id.*

³⁰ *Forney*, 67 M.J. at 280.

³¹ *Id.*

³² *Id.* at 280 n.1.

³³ *Id.* at 281 (Erdmann, J., dissenting).

³⁴ *Id.* at 282.

³⁵ *Id.* at 275.

³⁶ *Id.* at 276.

³⁷ 68 M.J. 108 (C.A.A.F. 2009).

³⁸ *Id.* at 112.

³⁹ *Id.*

⁴⁰ *Id.* at 113.

⁴¹ *Id.* at 117–18.

⁴² *Id.* at 117; see also MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 96.b.(2) (2008) [hereinafter MCM]. The MCM does not define criminal proceedings but enumerates only military investigations and investigations “relating to a violation of any criminal statute of the United States” as examples of investigations whose obstruction is criminally proscribed.

⁴³ *Ashby*, 68 M.J. at 118.

⁴⁴ *Id.* at 117.

to good order and discipline or being directly discreditable to the Armed Forces.⁴⁵

The court held that the *MCM*'s omission of foreign criminal proceedings was not dispositive as the examples in the *MCM* are "illustrative, not exclusive."⁴⁶ The court pointed out that, under Article 133 and clauses 1 or 2 of Article 134, an accused could be charged with obstruction of a foreign criminal proceeding.⁴⁷ That narrowed the inquiry to whether Capt. Ashby was sufficiently on notice in his prosecution under Article 133 to defend himself. The court concluded he was and pointed to the public, international nature of the investigation, the NATO Status of Forces Agreement, and the inherent dishonesty of the alleged act to support the idea that he was clearly on notice that destroying a piece of evidence in an international investigation "would reflect poorly on him as an officer and would be service discrediting."⁴⁸

The court then reviewed the assignments of error, including another one involving instructions. The court found that the military judge's curative instruction, after the trial counsel mentioned appellant's invocation of his right to silence in her opening statement, was sufficient to cure any prejudice.⁴⁹ The court pointed out that a mistrial was a drastic remedy necessary only to prevent "manifest injustice," and despite the clear error of trial counsel's comments, they were harmless beyond a reasonable doubt.⁵⁰

⁴⁵ *Id.* at 117–18.

⁴⁶ *Id.* at 118.

⁴⁷ *Id.*

⁴⁸ *Id.* at 118–19.

⁴⁹ *Id.* at 121–23. The military judge instructed the members:

I want to just remind you that Captain Ashby has an absolute right to remain silent at all times. I want to remind you that you will not draw any inference adverse to Captain Ashby from any comment by the Trial Counsel in her opening statement that might suggest that Captain Ashby invoked his right to remain silent. You are directed to disregard any comment by trial counsel that may have alluded to any silence by Captain Ashby. You must not hold this against Captain Ashby for any reason, or speculate as to this matter. You are not permitted to consider that Captain Ashby may have exercised his absolute right to remain silent, at any time, as evidence for any purpose.

As you know, we spent a great deal of time yesterday talking about the accused's right to remain silent. Accordingly, Captain Ashby was not required to speak to anyone about the video tape. Again, to the extent that the trial counsel may have implied that he was required to speak to anyone about the tape, that was incorrect.

Id. The military judge polled each member and each assured the court he or she would not consider trial counsel's comments. The military judge reiterated the instructions at the conclusion of findings.

⁵⁰ *Id.* at 123.

Ashby clarifies that prosecutions for obstructing foreign criminal proceedings may proceed if the conduct is service-discrediting or prejudicial to good order and discipline. *Ashby* also reminds practitioners to be careful to avoid references to the accused's exercise of a fundamental right—in *Ashby*'s case, the right to remain silent. Military judges must be prepared to give curative instructions in the event that counsel comment on the exercise of fundamental rights.

Variance and Escape from Custody

In *United States v. Marshall*,⁵¹ the CAAF confronted the issue of whether it was a fatal variance to find that an accused escaped from the custody of a person different than the one identified in the charged offense.⁵² Captain (CPT) Kreitman directed Staff Sergeant (SSG) Fleming to collect Private (PVT) Marshall from a local police station.⁵³ Staff Sergeant Fleming did so and escorted PVT Marshall back to his unit area.⁵⁴ Staff Sergeant Fleming informed the appellant to stay put while pretrial confinement orders were drafted.⁵⁵ Private Marshall left during an authorized smoke break.⁵⁶ Private Marshall was charged with, inter alia, escaping "from the custody of CPT Kelvin K. Kreitman, a person authorized to apprehend the accused" in violation of Article 95, UCMJ.⁵⁷ At PVT Marshall's trial, the defense asserted there was no evidence of CPT Kreitman having custody of the accused.⁵⁸

The military judge found PVT Marshall guilty of escaping from the custody of SSG Fleming by exceptions and substitutions.⁵⁹ The four-judge majority held that the issue was not waived despite counsel's failure to object to the military judge's finding.⁶⁰ They held that counsel's motion for a finding of not guilty placed the issue squarely before the military judge, and to object to the findings would have been an "empty exercise."⁶¹ The court then reviewed standards for variance, looking first at the decision in *United States v. Hopf*.⁶² In *Hopf*, appellant was convicted of an

⁵¹ 67 M.J. 418, 419 (C.A.A.F. 2009).

⁵² *Id.* at 419.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* Defense moved for a finding of not guilty, which was denied, and argued that while there was evidence of custody regarding SSG Fleming, there was none regarding CPT Kreitman.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* at 420.

⁶² *Id.*; *United States v. Hopf*, 5 C.M.R. 12 (C.M.A. 1952).

aggravated assault on a named Korean male but was found guilty by exceptions and substitutions of an assault on an “unnamed Korean male.”⁶³ The victim in that case was unable to testify, and two U.S. eyewitnesses did not know the victim’s name.⁶⁴ The court held the variance was not fatal because the nature and identity of the victim did not change. The appellant was convicted of the charged assault, and the defense preparations were unaffected.⁶⁵

The court also distinguished the case of *United States v. Finch*.⁶⁶ In *Finch*, the appellant was charged with conspiracy to provide alcohol to a person in the delayed entry program, in violation of a general order.⁶⁷ The court found the appellant guilty by substituting a different location for the overt act in furtherance of the conspiracy.⁶⁸ The CAAF noted that while the overt act was an element, it was not the “core of the offense” and “did not substantially change the nature or seriousness of the offense or increase the punishment” the accused was subject to.⁶⁹ In *Marshall*, the court held that the substitution was material in that, while the nature of the offense was the same, the identity of the offense the accused had prepared for was different.⁷⁰ The four-judge majority found prejudice in that the accused prepared to defend against a charge involving CPT Kreitman but was instead required to refute a de facto agency theory of liability for escaping from SSG Fleming.⁷¹

Judge Ryan concurred in the judgment but differed in her evaluation of the waiver issue.⁷² Judge Ryan found the issue was waived by failure to object to the findings absent plain error.⁷³ She then found that the judge’s findings constituted plain error and was thereby suitable for review and reversal.⁷⁴

Marshall establishes that changing the identity of the person from whose custody the accused allegedly escaped is usually a fatal variance.⁷⁵ Likewise attempts to change the identity of such a person are best treated as major changes requiring the consent of the accused or re-preferral.⁷⁶

⁶³ *Hopf*, 5 C.M.R. at 13.

⁶⁴ *Id.* at 14.

⁶⁵ *Id.* at 14–15.

⁶⁶ 64 M.J. 118, 121 (C.A.A.F. 2006).

⁶⁷ *United States v. Marshall*, 67 M.J. 419, 420 (C.A.A.F. 2009).

⁶⁸ *Id.* at 420.

⁶⁹ *Id.* (citing *Finch*, 64 M.J. at 122).

⁷⁰ *Id.* at 421.

⁷¹ *Id.*

⁷² *Id.* at 422 (Ryan, J., concurring).

⁷³ *Id.* at 423 (citing *Finch*, 64 M.J. at 121).

⁷⁴ *Id.*

⁷⁵ *Id.* at 421.

⁷⁶ *Id.*; see also MCM, *supra* note 42, R.C.M. 603(d).

Lesser Included Offenses

When drafting instructions, the military judge must determine all lesser included offenses at issue because the military judge has a sua sponte duty to instruct the court members on them. During this term, in three separate cases, the CAAF reversed the conviction of an offense because it was not a lesser included offense of the charged offense under Article 79.⁷⁷ Each of these cases involved a court of criminal appeals finding the evidence insufficient for a greater offense and affirming a supposedly lesser included offense. However, these cases are still helpful in drafting instructions during trial because Article 79 applies at both the trial level and the appellate level.⁷⁸

In *United States v. Thompson*,⁷⁹ Private Thompson was convicted of, inter alia, kidnapping his wife.⁸⁰ On appeal, the Navy-Marine Corps Court of Criminal Appeals (NMCCA) found the evidence to be factually and legally insufficient for kidnapping because the detention was de minimis.⁸¹ However, the NMCCA affirmed a conviction to the “closely related” offense of reckless endangerment.⁸² The CAAF quickly found that reckless endangerment was not a lesser included offense under Article 79 because it required proof of elements not required for kidnapping.⁸³ When comparing the elements, it is clear that reckless endangerment requires that the accused’s conduct was likely to produce death or grievous bodily harm to another person,⁸⁴ which is not required for kidnapping.⁸⁵ Because it was not a lesser included offense, the NMCCA could not affirm a conviction of reckless endangerment under Article 59.⁸⁶

While *Thompson* reiterated existing law on lesser included offenses, in the second lesser included offense case, *United States v. Miller*,⁸⁷ the CAAF changed the existing law by overruling its precedent. In 1994, after a period of confusion and uncertainty over whether offenses were lesser included offenses, the Court of Military Appeals (CMA), in

⁷⁷ “An accused may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein.” UCMJ art. 79 (2008).

⁷⁸ *United States v. Miller*, 67 M.J. 385, 388 (C.A.A.F. 2009).

⁷⁹ 67 M.J. 106 (C.A.A.F. 2009).

⁸⁰ *Id.* at 106–07.

⁸¹ *Id.* at 109.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*; see MCM, *supra* note 42, pt. IV, ¶ 100b(3).

⁸⁵ See MCM, *supra* note 42, pt. IV, ¶ 92b.

⁸⁶ “Any reviewing authority with the power to approve or affirm a finding of guilty may approve or affirm, instead, so much of the finding as includes a lesser included offense.” UCMJ art. 59(b) (2008).

⁸⁷ 67 M.J. 385 (C.A.A.F. 2009).

United States v. Foster,⁸⁸ adopted the elements test for determining whether an offense is a lesser included offense.⁸⁹ This elements test came from *Schmuck v. United States*, in which the Supreme Court stated that “one offense is not ‘necessarily included’ in another unless the elements of the lesser-offense are a subset of the elements of the charged offense.”⁹⁰ The elements test brought predictability to the law on lesser included offenses. However, the CMA further explained two important aspects in which the elements test would be applied less rigidly in the military. First, the elements of the lesser included offense can be either a quantitative subset or a qualitative subset of the greater offense.⁹¹ A “qualitative” subset is when the elements of the lesser offense, although not in the greater offense, are rationally derived from or legally less serious than those in the greater offense.⁹² Second, the court held that “an offense arising under the general article may, depending upon the facts of the case, stand either as a greater or lesser offense of an offense arising under an enumerated article.”⁹³ The court explained that “[t]he enumerated articles are rooted in the principle that such conduct per se is either prejudicial to good order and discipline or brings discredit to the armed forces; these elements are implicit in the enumerated articles.”⁹⁴ *Foster* has been cited frequently for both of these aspects of the application of the elements test.

The year after *Foster*, the CAAF further explained another important circumstance in which the application of the elements test in the military would diverge from its application in civilian federal practice. In *United States v. Weymouth*,⁹⁵ the CAAF pointed out that, in the military, both the statute and the specification provide notice to the accused of the essential elements of the offense.⁹⁶ It held that, for the elements test, the elements include both the elements in the statute and those necessarily alleged in the specification.⁹⁷

This year the CAAF reversed the trend of its less rigid application of the elements test by overruling part of its

holding in *Foster*.⁹⁸ In *Miller*, Private Miller was convicted of, inter alia, resisting apprehension under Article 95.⁹⁹ On appeal, the Army Court of Criminal Appeals (ACCA) found the evidence to be factually insufficient for resisting apprehension, because Private Miller was already in custody when the military police arrived at the scene.¹⁰⁰ However, ACCA found him guilty of a simple disorder under Article 134, as a lesser included offense.¹⁰¹ Although the elements test reveals that clauses 1 and 2 of Article 134 require an element not required for resisting apprehension under Article 95, ACCA cited to *Foster* in support of the proposition that the elements of prejudicial to good order and discipline or service-discrediting are implicit in every enumerated article under the UCMJ.¹⁰²

In considering whether a simple disorder under Article 134 is a lesser included offense of resisting apprehension under Article 95, the CAAF discussed both the constitutional requirements in the due process clause and the statutory requirements in Article 79. Both require notice to the accused of the offense against which the accused must defend.¹⁰³ The allegations in the specification may put the accused on notice explicitly or by fair implication.¹⁰⁴ This case called into question the validity of that part of *Foster* that stands for the proposition that the elements of prejudicial to good order and discipline or service-discrediting are implicit in the offenses in Articles 80 through 132. In *Miller*, the CAAF acknowledged that language it used in *Foster* and the line of cases following it support this proposition, but such language is at odds with the due process principle of fair notice.¹⁰⁵ Due to this conflict and without lengthy explanation, the court overruled that part of *Foster*. “To the extent [*Foster* and its progeny] support the proposition that clauses 1 and 2 of Article 134, UCMJ, are *per se* included in every enumerated offense, they are overruled.”¹⁰⁶

In the third lesser included offense case this term, the CAAF held that the offense of open and notorious indecent

⁸⁸ 40 M.J. 140 (C.M.A. 1994).

⁸⁹ *Id.* at 142. The court had recently adopted the *Schmuck* elements test for determining multiplicity. *United States v. Teters*, 37 M.J. 370, 376–77 (C.M.A. 1993).

⁹⁰ 409 U.S. 705, 716 (1989).

⁹¹ *Foster*, 40 M.J. at 144.

⁹² *Id.* at 144–46.

⁹³ *Id.* at 143.

⁹⁴ *Id.*

⁹⁵ 43 M.J. 329 (C.A.A.F. 1995).

⁹⁶ *Id.* at 333.

⁹⁷ *Id.* at 340.

⁹⁸ The reversal of this trend was foreshadowed in *United States v. Medina*, 66 M.J. 21, 26 (C.A.A.F. 2008) (holding that clauses 1 and 2 are not necessarily lesser included offenses of offenses alleged under clause 3, although they may be, depending on the drafting of the specification”).

⁹⁹ *United States v. Miller*, 67 M.J. 385, 386 (C.A.A.F. 2009).

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 387.

¹⁰² *Id.*

¹⁰³ *Id.* at 388.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 388–89.

¹⁰⁶ *Id.* at 389. In a footnote, the court noted, as it did in *Medina*, that when a comparison of the elements of two offenses shows that one is not necessarily a lesser included offense of the other, allegations in the specification, which make the accused aware of any alternative theory of guilt, may satisfy the requirement for notice. *Id.* at 389 n.6.

acts was not expressly nor inherently a lesser included offense of rape. In *United States v. McCracken*,¹⁰⁷ Sergeant McCracken was charged with, inter alia, rape.¹⁰⁸ During the trial, both parties agreed that indecent assault and indecent acts were lesser included offenses of rape. In regard to indecent acts, the military judge instructed the members that, in order to find the accused guilty of this lesser included offense, they had to find that “the accused committed a certain wrongful act with Corporal [KM] . . . by fondling her breasts and vagina.”¹⁰⁹ The members were not instructed on a theory that the acts were indecent because of their open and notorious nature.¹¹⁰ The court members found the accused guilty of, inter alia, indecent assault as a lesser included offense of rape.¹¹¹ On appeal, the NMCCA affirmed only so much of that finding of guilty as included the offense of open and notorious indecent acts.¹¹² However, the CAAF stated that an appellate court may not affirm a lesser included offense on a theory not presented to the trier of fact.¹¹³ It also cited to *Miller* as holding that a court of criminal appeals may not affirm an Article 134 offense based solely on the charging of an enumerated offense.¹¹⁴ In its short opinion, the CAAF concluded that, under the circumstances of this case, open and notorious indecent acts under Article 134 was not expressly nor inherently a lesser included offense of rape, and it reversed the conviction.¹¹⁵

The court left unresolved two related issues concerning Article 134 lesser included offenses. In a footnote, the opinion specifically “reserved for another day” the issues of whether an Article 134 offense that includes elements not in the greater offense may be affirmed either when the lesser included offense is listed in the *MCM* as a lesser included offense or when there is no objection to the lesser included offense at trial and the military judge instructs the members on it.¹¹⁶ Because these two situations are relatively common, it should not be long before that other day comes.

¹⁰⁷ 67 M.J. 467 (C.A.A.F. 2009).

¹⁰⁸ *Id.* at 467.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 468.

¹¹¹ *Id.* (Baker, J., concurring).

¹¹² *Id.* at 467–68.

¹¹³ *Id.* at 468.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 467–68.

¹¹⁶ *Id.* at 468 n.2. It appears that this footnote was added after Judge Baker wrote his concurring opinion, because Judge Baker stated that it may well be that the majority opinion currently resolves these issues and related issues through implication. *Id.* at 469 (Baker, J., concurring). If the majority opinion already included footnote 2, Judge Baker would not have written that.

This trilogy of cases about lesser included offenses offers many lessons for trial practitioners about instructions. During the trial, when determining the possible lesser included offenses that might be at issue in a case, each potential lesser included offense should be compared to the charged offense using the elements test. As seen in *Thompson*, even if closely related, if the lesser offense has an element not required for the greater offense, then it is not necessarily included in the greater offense. As seen in *Miller* and *McCracken*, this is true even if that element is the prejudicial to good order and discipline or service-discrediting element for clauses 1 or 2 of Article 134. The practice, since *Foster*, of disregarding that element during the elements test has been invalidated by the CAAF in *Miller*. Finally, as seen in *McCracken*, the offense of open and notorious indecent acts is not inherently a lesser included offense of rape.¹¹⁷ In a sexual assault case, if a trial counsel wants the members instructed on the offense of indecent acts under a theory that the indecency of the acts is based on their open and notorious nature, then it should be charged separately and the open and notorious nature of the acts should be explicitly alleged in the specification.

Defenses

Mistake of Fact as to Consent for Indecent Assault

In *United States v. DiPaola*,¹¹⁸ the CAAF addressed the frequently encountered issue of whether the affirmative defense of mistake of fact was raised by the evidence in a nonconsensual sexual offense case. Although the case involved indecent assault when it was still listed as an offense under Article 134,¹¹⁹ the opinion is still helpful for any case involving an affirmative defense. It discusses the legal standard for determining whether an affirmative defense was raised by the evidence, and it touches on the role that the defense theory of the case plays in that determination. A thorough description of the facts is necessary to understand the court’s opinion.

¹¹⁷ In future cases like *McCracken*, the circumstances will be different. For conduct occurring on or after 1 October 2007, the offense of indecent acts with another under Article 134 has been replaced in its entirety by the new offense of indecent act under Article 120. MCM, *supra* note 42, pt. IV, ¶ 45 analysis, at A23-15; see UCMJ art. 120(k) (2008); see National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 552, 119 Stat. 3136, 3257 [hereinafter NDAA 2006] (codified at 10 U.S.C. § 920) (2006) (replacing or superseding certain sexual offenses under Article 120 and Article 134, as of 1 October 2007). The prejudicial to good order and discipline and service-discrediting elements of clauses 1 and 2 of Article 134 will no longer be an issue. Also, indecent act is now listed as an additional lesser included offense in the *MCM* for most of the offenses in Article 120. See MCM, *supra* note 42, pt. IV, ¶ 45e.

¹¹⁸ 67 M.J. 98 (C.A.A.F. 2008).

¹¹⁹ For conduct occurring on or after 1 October 2007, the offense of indecent assault under Article 134 has been replaced by new offenses in the new statutory scheme in Article 120. MCM, *supra* note 42, at A27-1; see NDAA 2006, *supra* note 117 (replacing or superseding certain sexual offenses under Article 120 and Article 134, as of 1 October 2007); see MCM, *supra* note 42, pt. IV, ¶ 45.

Culinary Specialist Third Class DiPaola and Petty Officer ED had a relationship that became sexual for several months, and then it ended because ED did not want to pursue it any further. Later that year, ED let DiPaola into her barracks room. He told her that he wanted to have sex with her, but she responded that she did not want to have sex. He kept saying that he wanted to have sex, and she kept saying “no.”¹²⁰ After consensual kissing, they moved to the bed. ED testified that she kissed him because she still had feelings for him. On the bed, she got on top of DiPaola and allowed him to remove her shirt and they continued kissing. DiPaola kissed her breasts and then started biting them. She told him not to bite them, and he stopped.¹²¹

DiPaola got on top of ED, grabbed her wrists, and held them on the bed above her head. He attempted to unzip her pants, but she got one hand loose and pulled up her zipper. He continued to say, “Let’s have sex,” and she kept saying “no.”¹²² He unsuccessfully begged her, and then he started to offer her marriage, children, and his car. She found that amusing, and they both laughed.¹²³

DiPaola rubbed his hand on ED’s crotch area over her pants.¹²⁴ He put her legs on his shoulders and acted like he was having sex with her. Because this position hurt, she pushed and kneed him.¹²⁵ DiPaola left the bed, exposed himself, and began to touch himself.¹²⁶ ED told him to stop, but he continued and several times asked her for oral sex. She said “no” and told him that if he came any closer she would “bite it off and spit it at him.”¹²⁷ DiPaola laughed. A few minutes later he stopped, and he said he could not believe that it took about an hour and a half of ED saying “no” for him to finally give up. He then left her room.¹²⁸ In a sworn statement to Naval Criminal Investigative Service, DiPaola admitted that he asked ED to have sex with him; she said, “No;” and then he tried to convince her to have sex until he understood that she was not going to change her mind.¹²⁹

Based on this incident, DiPaola was charged with indecent assault against ED, “by holding her down on her bed by her wrists, kissing her, fondling and biting her breasts, sitting and laying on top of her, touching her vaginal

area with his hand, attempting to remove her underwear, and rubbing his erect penis against her vaginal area.”¹³⁰ During the opening statement, the defense counsel talked about the relationship. The defense counsel stated that “there’s often a fine line between seduction and allegations of assault” and that “‘no’ doesn’t always mean ‘no’ in the course of a relationship.”¹³¹ ED was the only one to testify about what happened, because DiPaola exercised his right not to testify.¹³² During the closing argument, the defense counsel returned to the same theme.

[I]t’s even more complicated, because you have someone like [ED] saying yes, yes, yes, no once, yes, yes, yes. And therefore when the government makes the argument, “If you say no, that’s the end of it,” we all know that that’s not the case and that’s an oversimplification of all human behavior.¹³³

The defense counsel requested an instruction on mistake of fact regarding DiPaola’s belief that he had ED’s consent for the acts alleged in the specification, but the military judge declined to give the instruction.¹³⁴ The panel of officer and enlisted members found DiPaola guilty of indecent assault.¹³⁵

In its opinion, the CAAF mentioned many of the legal principles involved in determining whether a defense has been raised. The standard is that, if the record contains “some evidence” of each element of the defense to which the members of the court may attach credit if they so desire, the military judge must instruct on the affirmative defense.¹³⁶ The evidence that raises an affirmative defense can be presented by the defense, the prosecution, or the court-martial.¹³⁷ It is not necessary that the accused testify in order to get a mistake of fact instruction.¹³⁸ Also, “a military

¹²⁰ *Id.*

¹²¹ *DiPaola*, 67 M.J. at 99.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.* at 99 n.2. The accused was also charged with another specification of indecent assault and two specifications of indecent exposure (one involving the exposure during this incident), under Article 134, and one specification of false official statement, under Article 107. He was acquitted of both specifications of indecent exposure and convicted of the remaining offenses. *Id.* at 99 n.1.

¹³¹ *Id.* at 101.

¹³² *Id.* at 99 n.3.

¹³³ *Id.* at 102.

¹³⁴ *Id.*

¹³⁵ *Id.* at 99.

¹³⁶ *Id.*; *United States v. Ferguson*, 15 M.J. 12, 17 (C.M.A. 1983). Also, when determining whether a defense has been raised, the military judge does not weigh the credibility of the evidence. *United States v. Brooks*, 25 M.J. 175, 178–79 (C.M.A. 1987); *United States v. Tulin*, 14 M.J. 695, 698–99 (N.M.C.M.R. 1982); MCM, *supra* note 42, R.C.M. 920(e) discussion.

¹³⁷ *DiPaola*, 67 M.J. at 100; *United States v. Jones*, 49 M.J. 85, 91 (C.A.A.F. 1998); *United States v. Rose*, 28 M.J. 132, 135–36 (C.M.A. 1989); MCM, *supra* note 42, R.C.M. 916(b) discussion.

¹³⁸ *DiPaola*, 67 M.J. at 100; *Jones*, 49 M.J. at 91.

judge's duty to instruct is not determined by the defense theory; he must instruct if the defense is raised."¹³⁹

The court had no difficulty in deciding that the evidence in this case reasonably raised the affirmative defense of mistake of fact. For indecent assault, a mistake of fact as to consent would require that the accused had an honest belief that the alleged victim consented and that belief must have been reasonable under all the circumstances.¹⁴⁰ The court found that this case did not present a clear dichotomy where the evidence raised and the parties disputed only the question of actual consent.¹⁴¹ "The conduct and conversations of the parties during the encounter, as informed by the 'mixed message' defense theme, provide 'some evidence' that could support an honest (subjective) and reasonable (objective) belief as to consent to some or all of the alleged acts."¹⁴² The court found that "the record reveals a 'mixed message' evidentiary situation which, when considered in conjunction with defense counsel's 'mixed message' theme in his opening and closing statements and his request of a mistake-of-fact instruction, comprises 'some evidence' of a mistake of fact that the panel could attach credit to if it so desired."¹⁴³ Therefore, the court concluded that it was error not to instruct the members on mistake of fact.¹⁴⁴ It also concluded that the error was not harmless beyond a reasonable doubt, and it reversed the conviction.¹⁴⁵

The opinion in *DiPaola* serves as a good reminder that the evidence needed to raise an affirmative defense can come from prosecution witnesses, and the accused does not have to testify for a mistake of fact defense to be raised. On a different point, as indicated in the above quotes, the CAAF considered the defense theory at trial a non-dispositive factor in determining whether the affirmative defense was raised, which the court supported with the following quote from *United States v. Hibbard*:¹⁴⁶ "The defense theory at trial and the nature of the evidence presented by the defense are factors that may be considered in determining whether the accused is entitled to a mistake of fact instruction"¹⁴⁷

¹³⁹ *DiPaola*, 67 M.J. at 101 n.6 (quoting *United States v. Brown*, 43 M.J. 187, 189 (C.A.A.F. 1995)).

¹⁴⁰ *Id.* at 101.

¹⁴¹ *Id.* A few cases where the evidence did present such a clear dichotomy are *United States v. Brown*, 43 M.J. 187 (C.A.A.F. 1995), *United States v. Willis*, 41 M.J. 435 (C.A.A.F. 1995), and *United States v. Peel*, 29 M.J. 235 (C.M.A. 1989).

¹⁴² *DiPaola*, 67 M.J. at 102.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ 58 M.J. 71 (C.A.A.F. 2003).

¹⁴⁷ *DiPaola*, 67 M.J. at 100 (quoting *Hibbard*, 58 M.J. at 73). Although not included in the quotation in *DiPaola*, the remainder of the quoted sentence from *Hibbard* was ". . . but neither factor is dispositive." *Hibbard*, 58 M.J. at 73.

Although one might disagree with that proposition,¹⁴⁸ *Hibbard* and *DiPaola* permit consideration of the defense theory at trial as a factor in determining whether or not a defense has been raised. The court did not explain how it would factor in, either as a positive factor or a negative factor, to the standard of whether there is "some evidence" of every element of the defense to which the members may attach credit if they so desire. In the past, the defense theory at trial has been used to "confirm [the court's] own evaluation of the evidence"¹⁴⁹ and as context in which to view the record.¹⁵⁰ Use of the term "non-dispositive factor" seems to imply a more significant role than confirmation or context, but the exact role of this factor is still unclear.¹⁵¹

At the trial level, practitioners should still follow the appropriate legal standard but also take the cautious approach in close cases. First of all, they should scrutinize the evidence presented at trial for potential affirmative defenses. Without regard to the defense theory at trial, if there is some evidence of each element of a defense to which the members of the court may attach credit, then the military judge should give the instruction,¹⁵² unless the defense

¹⁴⁸ In *Hibbard*, the CAAF cited *United States v. Taylor*, 26 M.J. 127 (C.M.A. 1988), and *United States v. Jones*, 49 M.J. 85 (C.A.A.F. 1998), as supporting that proposition, but neither one supports it. In *Taylor*, when determining whether mistake of fact as to consent was raised in that rape case, the court stated that its scrutiny of the record did not uncover "some evidence" to which the fact finders might attach credit if they so desired. *Taylor*, 26 M.J. at 130. At the end of the opinion, the court stated, "Although the defense theory at trial is not dispositive in determining what affirmative defenses have been reasonably raised by the evidence the utter absence of any hint of a mistake defense in any of the defense counsel's many sidebar discussions with the military judge or in his lengthy argument to the members on findings confirms our own evaluation of the evidence." *Id.* at 131 (citation omitted) (emphasis added). The court finished by saying that this supported the conclusion that the defense did not simply overlook the availability of the defense but rather recognized that it was not reasonably raised by the evidence presented at trial. *Id.* In *Jones*, when determining whether the affirmative defense of mistake of fact as to consent was raised for the offense of attempted rape, the court again focused on the evidence presented at trial. "Whether an instruction on a possible defense is warranted in a particular case depends upon the legal requirements of that defense and the evidence in the record." *Jones*, 49 M.J. at 90. The court found that there was no evidence whatsoever that the appellant actually believed the victim was consenting to sexual intercourse with him. *Id.* at 91. Although it mentioned a pretrial statement by the accused that there was no penetration because of resistance, the court did not discuss the defense theory or factor the defense theory into the equation for determining whether the defense was raised. *Id.* In *Hibbard*, the court increased the importance of the defense theory of the case when determining whether an affirmative defense has been raised. Unfortunately, it unnecessarily adds confusion to the standard.

¹⁴⁹ *Taylor*, 26 M.J. at 130.

¹⁵⁰ *DiPaola*, 67 M.J. at 102; *United States v. Peel*, 29 M.J. 235, 242 (C.M.A. 1989).

¹⁵¹ This case is not extremely helpful in understanding the role of the defense theory of the case, because, even without considering the defense theory of the case, the evidence clearly raised mistake of fact as to consent for the alleged misconduct.

¹⁵² The military judge has a sua sponte duty to instruct on affirmative defenses raised by the evidence. *DiPaola*, 67 M.J. at 100, *United States v. Brown*, 43 M.J. 187, 189 (C.A.A.F. 1995), *United States v. McMonagle*, 38

Conclusion

affirmatively waives it.¹⁵³ On the other hand, if it is clear that there is no evidence of one or more of the elements of an affirmative defense, then the military judge need not instruct on it, regardless of the defense theory at trial. However, if the defense theory at trial includes an affirmative defense and there is any doubt as to whether there is some evidence of one or more of the elements of the affirmative defense in the record, then the military judge should resolve it in favor of the accused and give the instruction.¹⁵⁴ The cautious approach is not an attempt to avoid a challenging decision. It is a prudent approach to avoid unnecessary appellate issues by merely giving an accurate instruction to the members and letting them apply the law to the facts.¹⁵⁵

As stated earlier, the issue in *DiPaola* is frequently encountered. The appellate courts have had plenty of opportunity to wrestle with the question of whether or not mistake of fact as to consent has been raised by the evidence in particular nonconsensual sexual offense cases. In 1995, in a footnote of a CAAF opinion, Judge Cox made some observations, including the following one:

In every case where consent is the theory of defense to a charge of rape, the military judge would be well-advised to either give the “honest and reasonable mistake” instruction or discuss on the record with counsel applicability of the defense. Absent this on-the-record consideration of the issue, appellate courts are left to “Monday morning quarterbacking,” a job we are ill-equipped to do. Otherwise, there would be few dissents in these cases.¹⁵⁶

Judge Cox was understandably frustrated, and his advice is still sound.

M.J. 53, 58 (C.M.A. 1993); MCM, *supra* note 42, R.C.M. 920(e)(3) discussion.

¹⁵³ The defense may affirmatively waive an instruction on an affirmative defense. *United States v. Gutierrez*, 64 M.J. 374, 376 (C.A.A.F. 2007).

¹⁵⁴ Any doubt as to whether the evidence is sufficient to raise a defense and to require an instruction should be resolved in favor of the accused. *Brown*, 43 M.J. at 189; *United States v. Steinruck*, 11 M.J. 322, 324 (C.M.A. 1981).

¹⁵⁵ See *United States v. Buckley*, 35 M.J. 262, 265 (C.M.A. 1992), *cert denied*, 507 U.S. 952 (1993) (Gierke, J., dissenting) (“[It is] the prerogative of the court members to decide, under proper instructions, what the truth is.”).

¹⁵⁶ *Brown*, 43 M.J. at 190 n.3.

CLE News

1. Resident Course Quotas

a. Attendance at resident continuing legal education (CLE) courses at The Judge Advocate General's Legal Center and School, U.S. Army (TJAGLCS), 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, attendance is prohibited.

b. Active duty service members and civilian employees must obtain reservations through their directorates training office. Reservists or ARNG must obtain reservations through their unit training offices or, if they are non-unit reservists, through the U.S. Army Personnel Center (ARPERCOM), ATTN: ARPC-OPB, 1 Reserve Way, St. Louis, MO 63132-5200.

c. Questions regarding courses should be directed first through the local ATRRS Quota Manager or the ATRRS School Manager, Academic Department at (800) 552-3978, extension 3307.

d. The ATRRS Individual Student Record is available on-line. To verify a confirmed reservation, log into your individual AKO account and follow these instructions:

Go to Self Service, My Education. Scroll to Globe Icon (not the AARTS Transcript Services).

Go to ATRRS On-line, Student Menu, Individual Training Record. The training record with reservations and completions will be visible.

If you do not see a particular entry for a course that you are registered for or have completed, see your local ATRRS Quota Manager or Training Coordinator for an update or correction.

e. The Judge Advocate General's School, U.S. Army, 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, KY, LA, ME, MN, MS, MO, MT, NV, NH, NM, NY, NC, ND, OH, OK, OR, PA, RI, SC, TN, TX, UT, VT, VA, WA, WV, WI, and WY.

2. TJAGLCS CLE Course Schedule (2009–September 2010) (<http://www.jagcnet.army.mil/JAGCNETINTERNET/HOMEPAGES/AC/TJAGSAWEB.NSF/Main?OpenFrameset> (click on Courses, Course Schedule))

ATRRS. No.	Course Title	Dates
GENERAL		
5-27-C22	58th Judge Advocate Officer Graduate Course	10 Aug 09 – 20 May 10
5-27-C22	59th Judge Advocate Officer Graduate Course	16 Aug 10 – 26 May 11
5-27-C20	181st JAOBC/BOLC III (Ph 2)	19 Feb – 5 May 10
5-27-C20	182d JAOBC/BOLC III (Ph 2)	16 Jul – 29 Sep 10
5F-F1	211th Senior Officer Legal Orientation Course	22 – 26 Mar 10
5F-F1	212th Senior Officer Legal Orientation Course	14 – 18 Jun 10
5F-F1	213th Senior Officer Legal Orientation Course	30 Aug – 3 Sep 10
5F-F3	16th RC General Officer Legal Orientation Course	10 – 12 Mar 10
5F-F52S	13th SJA Team Leadership Course	7 – 10 Jun 10
5F-F52	40th Staff Judge Advocate Course	7 – 11 Jun 10
JARC-181	Judge Advocate Recruiting Conference	21 – 23 Jul 10

5F-F70	Methods of Instruction	22 – 23 Jul 10
NCO ACADEMY COURSES		
512-27D30	4th Advanced Leaders Course (Ph 2)	8 Mar – 13 Apr 10
512-27D30	5th Advanced Leaders Course (Ph 2)	21 May – 29 Jun 10
512-27D30	6th Advanced Leaders Course (Ph 2)	26 Jul – 31 Aug 10
512-27D40	2d Senior Leaders Course (Ph 2)	8 Mar – 13 Apr 10
512-27D40	3d Senior Leaders Course (Ph 2)	21 May – 29 Jun 10
512-27D40	4th Senior Leaders Course (Ph 2)	26 Jul – 31 Aug 10
WARRANT OFFICER COURSES		
7A-270A0	17th JA Warrant Officer Basic Course	24 May – 18 Jun 10
7A-270A1	21st Legal Administrators Course	14 – 18 Jun 10
7A-270A2	11th JA Warrant Officer Advanced Course	6 – 30 Jul 10
ENLISTED COURSES		
512-27D/20/30	21st Law for Paralegal NCO Course	22 – 26 Mar 10
512-27D-BCT	12th BCT NCOIC Course	10 – 14 May 10
512-27DC5	31st Court Reporter Course	25 Jan – 26 Mar 10
512-27DC5	32d Court Reporter Course	19 Apr – 18 Jun 10
512-27DC5	33d Court Reporter Course	26 Jul – 24 Sep 10
512-27DC6	10th Senior Court Reporter Course	12 – 16 Jul 10
512-27DC7	13th Redictation Course	29 Mar – 2 Apr 10
ADMINISTRATIVE AND CIVIL LAW		
5F-F24	34th Administrative Law for Military Installations and Operations	15 – 19 Mar 10
5F-F202	8th Ethics Counselors Course	12 – 16 Apr 10
5F-F29	28th Federal Litigation Course	2 – 6 Aug 10
5F-F22	63d Law of Federal Employment Course	23 – 27 Aug 10
5F-F24E	2010 USAREUR Administrative Law CLE	13 – 17 Sep 10

CONTRACT AND FISCAL LAW		
5F-F101	9th Procurement Fraud Advisors Course	10 – 14 May 10
5F-F10	163d Contract Attorneys Course	19 – 30 July 10

CRIMINAL LAW		
5F-F33	53d Military Judge Course	19 Apr – 7 May 10
5F-F301	13th Advanced Advocacy Training Course	1 – 4 Jun 10
5F-F31	16th Military Justice Managers Course	23 – 27 Aug 10
5F-F34	34th Criminal Law Advocacy Course	13 – 24 Sep 10
5F-F35E	2010 USAREUR Criminal Law CLE	11 – 15 Jan 10

INTERNATIONAL AND OPERATIONAL LAW		
5F-F57	2010 BJA Symposium (non-CLE)	10 – 14 May 10
5F-F47	54th Operational Law of War Course	26 Jul – 6 Aug 10
5F-F41	6th Intelligence Law Course	9 – 13 Aug 10
5F-F47E	2010 USAREUR Operational Law CLE	20 – 24 Sep 10
5F-F48	3d Rule of Law	16 – 20 Aug 10

3. Naval Justice School and FY 2009–2010 Course Schedule

For information on the following courses, please contact Jerry Gallant, Registrar, Naval Justice School, 360 Elliot Street, Newport, RI 02841 at (401) 841-3807, extension 131.

Naval Justice School Newport, RI		
CDP	Course Title	Dates
0257	Lawyer Course (020) Lawyer Course (030)	25 Jan – 2 Apr 10 2 Aug – 9 Oct 10
0258	Senior Officer (030) Senior Officer (040) Senior Officer (050) Senior Officer (060) Senior Officer (070)	12 – 16 Apr 10 (Newport) 24 – 28 May 10 (Newport) 12 – 16 Jul 10 (Newport) 23 – 27 Aug 10 (Newport) 27 Sep – 1 Oct 10 (Newport)
2622	Senior Officer (Fleet) (020) Senior Officer (Fleet) (030) Senior Officer (Fleet) (040) Senior Officer (Fleet) (050)	14 – 18 Dec 10 (Hawaii) 10 – 14 May 10 (Naples, Italy) 19 – 23 Jul 10 (Quantico, VA) 26 – 30 Jul 10 (Camp Lejeune, NC)

03RF	Legalman Accession Course (020) Legalman Accession Course (030)	15 Jan – 2 Apr 10 10 May 23 Jul 10
049N	Reserve Legalman Course (010) (Ph I)	29 Mar – 9 Apr 10
056L	Reserve Legalman Course (010) (Ph II)	12 – 23 Apr 10
03TP	Trial Refresher Enhancement Training (020)	2 – 6 Aug 10
4040	Paralegal Research & Writing (020)	19 – 30 Apr 10 (Norfolk)
4046	Mid Level Legalman Course (020)	14 – 25 Jun 10 (Norfolk)
4048	Legal Assistance Course (010)	19 – 23 Apr 10
3938	Computer Crimes (010)	21 – 25 Jun 10
525N	Prosecuting Complex Cases (010)	19 – 23 Jul 10
627S	Senior Enlisted Leadership Course (Fleet) (090) Senior Enlisted Leadership Course (Fleet) (100) Senior Enlisted Leadership Course (Fleet) (110) Senior Enlisted Leadership Course (Fleet) (120) Senior Enlisted Leadership Course (Fleet) (130) Senior Enlisted Leadership Course (Fleet) (140) Senior Enlisted Leadership Course (Fleet) (150) Senior Enlisted Leadership Course (Fleet) (160) Senior Enlisted Leadership Course (Fleet) (170)	19 – 23 Apr 10 (Bremerton) 10 – 14 May 10 (Naples) 1 – 3 Jun 10 (San Diego) 2 – 4 Jun 09 (Norfolk) 29 Jun – 1 Jul 10 (San Diego) 9 – 13 Aug 10 (Great Lakes) 13 – 17 Sep 10 (Pendleton) 13 – 17 Sep 10 (Hawaii) 22 – 24 Sep 10 (Norfolk)
7485	Classified Info Litigation Course (010)	3 – 7 May 10
748A	Law of Naval Operations (010)	13 – 17 Sep 10
748B	Naval Legal Service Command Senior Officer Leadership (010)	26 Jul – 6 Aug 10
786R	Advanced SJA/Ethics (010)	26 – 30 Jul 10
7878	Legal Assistance Paralegal Course (010)	30 Aug – 3 Sep 10
846L	Senior Legalman Leadership Course (010)	26 – 30 Jul 10
846M	Reserve Legalman Course (010) (Ph III)	26 Apr – 7 May 10
850T	Staff Judge Advocate Course (010) Staff Judge Advocate Course (020)	19 – 30 Apr 10 (Norfolk) 5 – 16 Jul 10 (San Diego)
850V	Law of Military Operations (010)	7 – 18 Jun 10
900B	Reserve Lawyer Course (010) Reserve Lawyer Course (020)	14 – 18 Jun 10 20 – 24 Sep 10
932V	Coast Guard Legal Technician Course (010)	2 – 13 Aug 10
961A (PACOM)	Continuing Legal Education (020) Continuing Legal Education (030)	25 – 26 Jan 10 (Yokosuka) 10 – 11 May 10 (Naples)

961J	Defending Complex Cases (010)	12 – 16 Jul 10
961M	Effective Courtroom Communications (020)	12 – 16 Apr 10 (San Diego)
NA	Iraq Pre-Deployment Training (030) Iraq Pre-Deployment Training (040)	6 – 9 Apr 10 6 – 9 Jul 10
Naval Justice School Detachment Norfolk, VA		
0376	Legal Officer Course (050) Legal Officer Course (060) Legal Officer Course (070) Legal Officer Course (080) Legal Officer Course (090)	29 Mar – 16 Apr 10 3 – 21 May 10 14 Jun – 2 Jul 10 12 – 30 Jul 10 16 Aug – 3 Sep 10
0379	Legal Clerk Course (050) Legal Clerk Course (060) Legal Clerk Course (070)	5 – 16 Apr 10 19 – 30 Jul 10 23 Aug – 3 Sep 10
3760	Senior Officer Course (040) Senior Officer Course (050) Senior Officer Course (060) Senior Officer Course (070)	22 – 26 Mar 10 24 – 28 May 10 9 – 13 Aug 10 13 – 17 Sep 10
Naval Justice School Detachment San Diego, CA		
947H	Legal Officer Course (050) Legal Officer Course (060) Legal Officer Course (070) Legal Officer Course (080)	3 – 21 May 10 7 – 25 Jun 10 19 Jul – 6 Aug 10 16 Aug – 3 Sep 10
947J	Legal Clerk Course (040) Legal Clerk Course (050) Legal Clerk Course (060) Legal Clerk Course (070) Legal Clerk Course (080)	29 Mar – 9 Apr 10 3 – 14 May 10 7 – 18 Jun 10 26 Jul – 6 Aug 10 16 – 27 Aug 10
3759	Senior Officer Course (050) Senior Officer Course (060) Senior Officer Course (070) Senior Officer Course (080) Senior Officer Course (090)	29 Mar – 2 Apr 10 (San Diego) 19 – 23 Apr 10 (Bremerton) 26 – 30 Apr 10 (San Diego) 24 – 28 May 10 (San Diego) 13 – 17 Sep 10 (Pendleton)

4. Air Force Judge Advocate General School Fiscal Year 2010 Course Schedule

For information about attending the following courses, please contact Jim Whitaker, Air Force Judge Advocate General School, 150 Chennault Circle, Maxwell AFB, AL 36112-5712, commercial telephone (334) 953-2802, DSN 493-2802, fax (334) 953-4445.

Air Force Judge Advocate General School, Maxwell AFB, AL	
Course Title	Dates
Judge Advocate Staff Officer Course, Class 10-B	16 Feb – 16 Apr 10
Paralegal Craftsman Course, Class 10-02	16 Feb – 24 Mar 10

Paralegal Apprentice Course, Class 10-03	2 Mar – 14 Apr 10
Area Defense Counsel Orientation Course, Class 10-B	29 Mar – 2 Apr 10
Defense Paralegal Orientation Course, Class 10-B	29 Mar – 2 Apr 10
Military Justice Administration Course, Class 10-A	26 – 30 Apr 10
Advanced Labor & Employment Law Course, Class 10-A (off-site, Rosslyn, VA)	27 – 29 Apr 10
Paralegal Apprentice Course, Class 10-04	27 Apr – 10 Jun 10
Reserve Forces Judge Advocate Course, Class 10-B	1 – 2 May 10
Advanced Trial Advocacy Course, Class 10-A	3 – 7 May 10
Environmental Law Update Course (DL), Class 10-A	4 – 6 May 10
Operations Law Course, Class 10-A	10 – 20 May 10
Negotiation & Appropriate Dispute Resolution, Class 10-A	17 – 21 May 10
Reserve Forces Paralegal Course, Class 10-A	7 – 11 Jun 10
Staff Judge Advocate Course, Class 10-A	14 – 25 Jun 10
Law Office Management Course, Class 10-A	14 – 25 Jun 10
Paralegal Apprentice Course, Class 10-05	22 Jun – 5 Aug 10
Judge Advocate Staff Officer Course, Class 10-C	12 Jul – 10 Sep 10
Paralegal Craftsman Course, Class 10-03	12 Jul – 17 Aug 10
Paralegal Apprentice Course, Class 10-06	10 Aug – 23 Sep 10
Environmental Law Course, Class 10-A	23 – 27 Aug 10
Trial & Defense Advocacy Course, Class 10-B	13 – 24 Sep 10
Accident Investigation Course, Class 10-A	20 – 24 Sep 10

5. Civilian-Sponsored CLE Courses

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

AAJE: American Academy of Judicial Education
P.O. Box 728
University, MS 38677-0728
(662) 915-1225

ABA: American Bar Association
750 North Lake Shore Drive
Chicago, IL 60611
(312) 988-6200

AGACL: Association of Government Attorneys in Capital Litigation
Arizona Attorney General's Office
ATTN: Jan Dyer
1275 West Washington
Phoenix, AZ 85007
(602) 542-8552

ALIABA: American Law Institute-American Bar Association
Committee on Continuing Professional Education
4025 Chestnut Street
Philadelphia, PA 19104-3099
(800) CLE-NEWS or (215) 243-1600

APRI: American Prosecutors Research Institute
99 Canal Center Plaza, Suite 510
Alexandria, VA 22313
(703) 549-9222

ASLM: American Society of Law and Medicine
Boston University School of Law
765 Commonwealth Avenue
Boston, MA 02215
(617) 262-4990

CCEB: Continuing Education of the Bar
University of California Extension
2300 Shattuck Avenue
Berkeley, CA 94704
(510) 642-3973

CLA: Computer Law Association, Inc.
3028 Javier Road, Suite 500E
Fairfax, VA 22031
(703) 560-7747

CLESN: CLE Satellite Network
920 Spring Street
Springfield, IL 62704
(217) 525-0744
(800) 521-8662

ESI: Educational Services Institute
5201 Leesburg Pike, Suite 600
Falls Church, VA 22041-3202
(703) 379-2900

FBA: Federal Bar Association
1815 H Street, NW, Suite 408
Washington, DC 20006-3697
(202) 638-0252

FB: Florida Bar
650 Apalachee Parkway
Tallahassee, FL 32399-2300
(850) 561-5600

GICLE: The Institute of Continuing Legal Education
P.O. Box 1885
Athens, GA 30603
(706) 369-5664

GII: Government Institutes, Inc.
966 Hungerford Drive, Suite 24
Rockville, MD 20850
(301) 251-9250

GWU: Government Contracts Program
The George Washington University
National Law Center
2020 K Street, NW, Room 2107
Washington, DC 20052
(202) 994-5272

IICLE: Illinois Institute for CLE
2395 W. Jefferson Street
Springfield, IL 62702
(217) 787-2080

LRP: LRP Publications
1555 King Street, Suite 200
Alexandria, VA 22314
(703) 684-0510
(800) 727-1227

LSU: Louisiana State University
Center on Continuing Professional Development
Paul M. Herbert Law Center
Baton Rouge, LA 70803-1000
(504) 388-5837

MLI: Medi-Legal Institute
15301 Ventura Boulevard, Suite 300
Sherman Oaks, CA 91403
(800) 443-0100

NCDA: National College of District Attorneys
University of South Carolina
1600 Hampton Street, Suite 414
Columbia, SC 29208
(803) 705-5095

NDAA: National District Attorneys Association
National Advocacy Center
1620 Pendleton Street
Columbia, SC 29201
(703) 549-9222

NITA: National Institute for Trial Advocacy
1507 Energy Park Drive
St. Paul, MN 55108
(612) 644-0323 (in MN and AK)
(800) 225-6482

NJC: National Judicial College
Judicial College Building
University of Nevada
Reno, NV 89557

NMTLA: New Mexico Trial Lawyers' Association
P.O. Box 301
Albuquerque, NM 87103
(505) 243-6003

PBI: Pennsylvania Bar Institute
104 South Street
P.O. Box 1027
Harrisburg, PA 17108-1027
(717) 233-5774
(800) 932-4637

PLI: Practicing Law Institute
810 Seventh Avenue
New York, NY 10019
(212) 765-5700

TBA: Tennessee Bar Association
3622 West End Avenue
Nashville, TN 37205
(615) 383-7421

TLS: Tulane Law School
Tulane University CLE
8200 Hampson Avenue, Suite 300
New Orleans, LA 70118
(504) 865-5900

UMLC: University of Miami Law Center
P.O. Box 248087
Coral Gables, FL 33124
(305) 284-4762

UT: The University of Texas School of Law
Office of Continuing Legal Education
727 East 26th Street
Austin, TX 78705-9968

VCLE: University of Virginia School of Law
Trial Advocacy Institute
P.O. Box 4468
Charlottesville, VA 22905

6. Information Regarding the Judge Advocate Officer Advanced Course (JAOAC)

a. The JAOAC is mandatory for an RC company grade JA's career progression and promotion eligibility. It is a blended course divided into two phases. Phase I is an online nonresident course administered by the Distributed Learning Division (DLD) of the Training Developments Directorate (TDD), at TJAGLCS. Phase II is a two-week resident course at TJAGLCS each January.

b. Phase I (nonresident online): Phase I is limited to USAR and Army NG JAs who have successfully completed the Judge Advocate Officer's Basic Course (JAIBC) and the Judge Advocate Tactical Staff Officer Course (JATSOC) prior to enrollment in Phase I. Prior to enrollment in Phase I, a student must have obtained at least the rank of CPT and must have completed two years of service since completion of JAIBC, unless, at the time of their accession into the JAGC they were transferred into the JAGC from prior commissioned service. Other cases are reviewed on a case-by-case basis. Phase I is a prerequisite for Phase II. For further information regarding enrolling in Phase I, please contact the Judge Advocate General's University Helpdesk accessible at <https://jag.learn.army.mil>.

c. Phase II (resident): Phase II is offered each January at TJAGLCS. Students must have submitted all Phase I subcourses for grading, to include all writing exercises, by 1 November in order to be eligible to attend the two-week resident Phase II in January of the following year.

d. Regarding the January 2011 Phase II resident JAOAC, students who fail to submit all Phase I non-resident subcourses by 2400 1 November 2010 will not be allowed to attend the resident course.

e. If you have additional questions regarding JAOAC, contact LTC Jeff Sexton, commercial telephone (434) 971-3357, or e-mail jeffrey.sexton@us.army.mil.

7. Mandatory Continuing Legal Education

Judge Advocates must remain in good standing with the state attorney licensing authority (i.e., bar or court) in at least one state in order to remain certified to perform the duties of an Army Judge Advocate. This individual responsibility may include requirements the licensing state has regarding continuing legal education (CLE).

To assist attorneys in understanding and meeting individual state requirements regarding CLE, the Continuing Legal Education Regulators Association (formerly the Organization of Regulatory Administrators) provides an exceptional website at www.clereg.org (formerly www.cleusa.org) that links to all state rules, regulations and requirements for Mandatory Continuing Legal Education.

The Judge Advocate General's Legal Center and School (TJAGLCS) seeks approval of all courses taught in Charlottesville, VA, from states that require prior approval as a condition of granting CLE. For states that require attendance to be reported directly by providers/sponsors, TJAGLCS will report student attendance at those courses. For states that require attorneys to self-report, TJAGLCS provides the appropriate documentation of course attendance directly to students. Attendance at courses taught by TJAGLCS faculty at locations other than Charlottesville, VA, must be self-reported by attendees to the extent and manner provided by their individual state CLE program offices.

Regardless of how course attendance is documented, it is the personal responsibility of each Judge Advocate to ensure that their attendance at TJAGLCS courses is accounted for and credited to them and that state CLE attendance and reporting requirements are being met. While TJAGLCS endeavors to assist Judge Advocates in meeting their CLE requirements, the ultimate responsibility remains with individual attorneys. This policy is consistent with state licensing authorities and CLE administrators who hold individual attorneys licensed in their jurisdiction responsible for meeting licensing requirements, including attendance at and reporting of any CLE obligation.

Please contact the TJAGLCS CLE Administrator at (434) 971-3309 if you have questions or require additional information.

Current Materials of Interest

1. The Judge Advocate General's Fiscal Year 2010 On-Site Continuing Legal Education Training.

Date	Region	Location	Units	ATR RS Number	POCs
19 – 21 Feb 2010	National Capital Region On-Site	Fort Myer, VA	151st LSO 10th LSO 153rd LSO	002	MAJ Gary Bilski – Onsite OIC MAJ Matthew Caspari – S-3 SSG Michael Waskewich – NCOIC 703.960.7395 ext. 7420 Michael.Waskewich@usar.army.mil
19 – 21 Mar 2010	Northeast On-Site	Boston, MA	3rd LSO 4th LSO 7th LSO	003	MAJ Don Corsaro Don.corsaro@us.army.mil Mr. Aaron Stein 617.753.4565 Mr. Aaron.Stein1@usar.army.mil
23 – 30 Apr 2010	Western On-Site & FX	San Francisco, CA (followed by FX at Fort Hunter Liggett 25 – 30 Apr)	87th LSO 6th LSO 75th LSO 78th LSO	004	LTC Tomson T. Ong Tomson.Ong@us.army.mil Tong@LASuperiorCourt.org 562.491.6294 Mr. Khahn Do Khahn.K.Do@usar.army.mil 650.603.8652
1 – 2 May 2010	Midwest On-Site	Fort McCoy, WI	WIARNG, WI ANG	NA	COL Julio R. Barron Julio.barron2@us.army.mil 608.242.3077 (DSN 724) MSG Al Rohmeyer Aloysisu.rohmeyer@us.army.mil 608.242.3076 (DSN 724)
6 – 12 Jun 2010	Midwest On-Site & FX	Fort McCoy, WI (includes an FX – exact dates TBD)	91st LSO 9th LSO 139th LSO	006	SFC Treva Mazique 708.209.2600 Treva.Mazique@usar.army.mil
16 – 18 Jul 2010	Heartland On-Site	San Antonio, TX	1st LSO 2nd LSO 8th LSO 214th LSO	007	LTC Chris Ryan Christopher.w.ryan1@dhs.gov Christopher.w.ryan@us.army.mil 915.526.9385 MAJ Rob Yale Roburt.yale@navy.mil Rob.yale@us.army.mil 703.463.4045
24 – 25 Jul 2010	Make-up On-Site	TJAGLCS, Charlottesville, VA			COL Vivian Shafer Vivian.Shafer@us.army.mil 301.944.3723

2. 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 cases. Whether you have Army access or DOD-wide access, all users will be able to download 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 (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 to: LAAWSXXI@jagc-smtp.army.mil

c. How to log on to JAGCNet:

(1) Using a Web browser (Internet Explorer 6 or higher recommended) go to the following site: <http://jagcnet.army.mil>.

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

(3) 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.

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

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

(6) 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.

(7) Once granted access to JAGCNet, follow step (c), above.

3. TJAGSA Publications Available Through the LAAWS XXI JAGCNet

The TJAGSA, U.S. Army, Charlottesville, Virginia continues to improve capabilities for faculty and staff. We have installed new computers throughout TJAGSA, all of which are compatible with Microsoft Windows XP Professional and Microsoft Office 2003 Professional.

The TJAGSA faculty and staff are available through the Internet. Addresses for TJAGSA personnel are available by e-mail at jagsch@hqda.army.mil or by accessing the JAGC directory via JAGCNET. If you have any problems, please contact LTMO at (434) 971-3257. Phone numbers and e-mail addresses for TJAGSA personnel are available on TJAGSA Web page at <http://www.jagcnet.army.mil/tjagsa>. Click on "directory" for the listings.

For students who wish to access their office e-mail while attending TJAGSA classes, please ensure that your office e-mail is available via the web. Please bring the address with you when attending classes at TJAGSA. If your office does not have web accessible e-mail, forward your office e-mail to your AKO account. It is mandatory that you have an AKO account. You can sign up for an account at the Army Portal, <http://www.jagcnet.army.mil/tjagsa>. Click on "directory" for the listings.

Personnel desiring to call TJAGSA can dial via DSN 521-7115 or, provided the telephone call is for official business only, use the toll free number, (800) 552-3978; the receptionist will connect you with the appropriate department or directorate. For additional information, please contact the LTMO at (434) 971-3264 or DSN 521-3264.

4. The Army Law Library Service

Per *Army Regulation 27-1*, paragraph 12-11, the Army Law Library Service (ALLS) must be notified before 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.

Point of contact is Mr. Daniel C. Lavering, The Judge Advocate General's Legal Center and School, U.S. Army, ATTN: ALCS-ADD-LB, 600 Massie Road, Charlottesville, Virginia 22903-1781. Telephone DSN: 521-3306, commercial: (434) 971-3306, or e-mail at Daniel.C.Lavering@us.army.mil.