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**Military Justice Symposium I**

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## Foreword

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Welcome to the tenth annual *Military Justice Symposium* covering developments in military criminal law and procedure.<sup>1</sup> In this *Symposium*, faculty of the Criminal Law Department and a member of the U.S. Army Trial Judiciary analyze significant case law in military justice from the last year. Our goal is not to cover every case the service courts of criminal appeals and the Court of Appeals for the Armed Forces (CAAF) decided in the last twelve months. Rather, we seek to discuss significant issues raised in this year's cases, identify emerging trends, place these latest decisions in legal and, where relevant, historical context, and provide useful tips to military practitioners who employ the courts' decisions in practice, whether representing the government or the accused, at trial or appeal.

As in most past years, the *Symposium* is divided into two issues. This first volume covers developments in Evidence, Instructions, Fourth Amendment, and Sixth Amendment law. The second volume, set for publication next month, covers developments in Unlawful Command Influence, Pretrial Procedures (including court-martial personnel, *voir dire* and challenges, and pleas and pretrial agreements), Substantive Crimes and Defenses, Professional Responsibility, Sentencing, and Fifth Amendment law. The second volume also contains a primer in post-trial processing by a former criminal law faculty member.

As a preview to this year's *Symposium*, the following outlines the highlights of the articles in the faculty's respective areas:

Major (MAJ) Chris Behan writes on developments in Evidence in Volume I of the Symposium. The 2004 term of court presented several interesting evidentiary issues. The CAAF demonstrated continued difficulty in applying the corroboration rule for confessions of Military Rule of Evidence (MRE) 304(g) in *United States v. Seay*,<sup>2</sup> stretching the rule to permit corroboration of an offense for which no actual extrinsic evidence was admitted. In *United States v. McDonald*,<sup>3</sup> the CAAF continued its trend of strictly construing uncharged misconduct evidence, reversing and setting aside the findings in an uncharged misconduct case for the second year in a row. The CAAF clarified the scope of MRE 412's coverage in *United States v. Banker*, holding that the key to MRE 412 is the presence and status of the victim and not whether the alleged sexual misconduct can be characterized as consensual or nonconsensual.<sup>4</sup> In *United States v. Schmidt*, a case made relevant to contemporary practice because of the Global War on Terror's potential for courts-martial involving classified evidence, the CAAF harmonized MRE 505's disclosure requirements with the needs of the attorney-client relationship.<sup>5</sup> In addition to these cases, the CAAF faced an evidentiary issue of first impression in *United States v. Byrd*, ruling on the foundational requirements for the use of lay opinion testimony under MRE 701 to interpret statements made by others.<sup>6</sup>

Also in Volume I is Lieutenant Colonel (Lt.Col.) Ernie Harper's final article for the *Symposium* prior to departing the Judge Advocate General's School for other duties. Lieutenant Colonel Harper (USMC) discusses developments in Fourth Amendment law, addressing seven Supreme Court opinions and ten military cases. At least two cases from the Supreme Court have reasonably widespread effect—*Devenpeck v. Alford*<sup>7</sup> and *Thornton v. United States*<sup>8</sup>—in which the Court deals with warrantless arrests and searches incident to arrest and automobiles, respectively. The Court also upheld Nevada's "Stop

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<sup>1</sup> Colonel Larry Morris, Chair of the Criminal Law Department from 1995-98, originated these *Symposia* in March 1996. In his *Foreword* to the second consecutive Military Justice Symposium in April 1997, Lieutenant Colonel Morris hesitated to affix the label "annual" to this endeavor. Lieutenant Colonel Lawrence J. Morris, *Foreword - Military Justice Symposium*, ARMY LAW., Apr. 1997, at 4. After a decade, we no longer harbor his hesitation.

<sup>2</sup> 60 M.J. 73 (2004).

<sup>3</sup> 59 M.J. 426 (2004).

<sup>4</sup> 60 M.J. 216 (2004).

<sup>5</sup> 60 M.J. 1 (2004).

<sup>6</sup> 60 M.J. 4 (2004).

<sup>7</sup> 125 S. Ct. 88 (2004).

<sup>8</sup> 541 U.S. 615 (2004).

and Identification” statute in *Hiibel v. Sixth Judicial Circuit*.<sup>9</sup> *Illinois v. Caballes*,<sup>10</sup> another Supreme Court case, addresses traffic stops and dog sniffs. As to CAAF, the most significant case is *United States v. Daniels*, in which the court reverses the Navy-Marine Court of Criminal Appeals (N-MCCA) regarding the official status of a search, holding that the motivation of the person performing the search is not the relevant inquiry.<sup>11</sup>

Last term, the Supreme Court issued a bomb-shell decision concerning the Sixth Amendment Confrontation Clause in *Crawford v. Washington*.<sup>12</sup> Overruling twenty-five years of law in the area, the Court prohibited the use of a witness’ “testimonial” hearsay statements against a criminal defendant in the absence of the witness’ availability at trial or, if the witness is deemed unavailable, the defendant’s prior ability to confront the witness.<sup>13</sup> Major Rob Best discusses state and federal courts’ interpretations of this seminal case, along with scholarly views of the decision. According to Major Best, the text of the Confrontation Clause supports a broader definition of “testimonial” than offered by the *Crawford* majority. Specifically, the *Crawford* majority’s definition of “testimonial” seems to require some element of officiality. In Major Best’s view, however, “testimonial” includes any accusatory statement and the Court’s limitation on the reach of the Confrontation Clause to formalized, official statements made for judicial purposes, is without support in the text of the Clause.

Next month in Volume II, I discuss developments in Unlawful Command Influence.. The most important decision of the year is undoubtedly *United States v. Gore*,<sup>14</sup> a CAAF opinion upholding the military judge’s dismissal of the charges and specifications with prejudice due to witness intimidation by the chain of command. By its decision, the CAAF reinvigorates the role of the Military Judge as the “last sentinel to protect the court-martial from unlawful command influence.”<sup>15</sup>

Major Deidra Fleming addresses developments in pretrial procedures. The most notable decision in the area of court-martial personnel involves the CAAF’s refusal to use its supervisory powers to overhaul panel member selection under Article 25, Uniform Code of Military Justice,<sup>16</sup> if the selection process is inclusive, the convening authority’s motive is proper, and the selection complies with Article 25’s “best qualified” criteria.<sup>17</sup> In the area of *voir dire* and challenges, the CAAF and the N-MCCA, which usually review the propriety of a denied defense challenge for cause, focused on a new factual twist—whether a military judge abused his discretion by granting a government challenge for cause based on a member’s sentencing philosophy.<sup>18</sup> In the pleas and pre-trial agreements arena, the appellate courts continued to reverse numerous findings and sentences because of lack of attention to detail by military judges and counsel. Prevalent guilty plea errors include: the failure to advise the accused of his rights, failure to advise the accused of the elements of the offense, failure to establish a factual predicate for the accused’s plea, and failure to clarify a potential defense raised by the accused’s statements.<sup>19</sup>

Also in Volume II, MAJ Jeff Hagler addresses developments in the substantive law of crimes and defenses: MAJ Hagler reviews the CAAF and service courts’ responses to *Lawrence v. Texas*,<sup>20</sup> and suggests trends to assist counsel in prosecuting and defending sodomy cases after *Lawrence*. Similarly, MAJ Hagler reviews recent CAAF decisions on child pornography and suggests appropriate ways to charge such offenses. Next, MAJ Hagler covers the practical implications of military appellate courts’ recent treatment of absence offenses in a quartet of cases from the last year. Finally, he addresses

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<sup>9</sup> 124 S. Ct. 2451 (2004).

<sup>10</sup> 125 S. Ct. 834 (2005).

<sup>11</sup> 60 M.J. 69 (2005).

<sup>12</sup> 541 U.S. 36 (2004).

<sup>13</sup> *Id.*

<sup>14</sup> 60 M.J. 178 (2004).

<sup>15</sup> *Id.* at 186 (citation omitted).

<sup>16</sup> *See* UCMJ art. 25 (2002).

<sup>17</sup> *See* *United States v. Dowty*, 60 M.J. 163 (2004).

<sup>18</sup> *See* *United States v. Quintanilla*, 60 M.J. 852 (N-M. Ct. Crim. App. 2005).

<sup>19</sup> *See, e.g.,* *United States v. Hansen*, 59 M.J. 410 (2004) (setting aside plea and sentence where military judge neglected to warn appellant that by pleading guilty he gives up the right to confront and cross-examine witnesses against him, the right against self-incrimination, and the right to trial of the facts by court-martial).

<sup>20</sup> 539 U.S. 558 (2003).

cases involving kidnapping, involuntary manslaughter, obscene mail material, pleadings, and defenses. Since there is only one notable case in each of these areas, it is difficult to spot trends, so MAJ Hagler instead points out practical tips for military practitioners in these areas.

Volume II of this year's *Symposium* also includes a return of an article devoted to developments in professional responsibility. Major Jon Jackson's article examines cases in the areas of ineffective assistance of counsel, confidentiality, and prosecutorial misconduct. Specifically, the article compares and contrasts the ineffective assistance of counsel issues presented by the Supreme Court in *Florida v. Nixon*<sup>21</sup> and the CAAF in *United States v. Garcia*.<sup>22</sup>

Major Chris Fredrikson discusses Fifth Amendment cases of note. He provides a general framework for analyzing self-incrimination law, and then addresses last term's decisions within this framework. The Supreme Court had a relatively busy year in the area of self-incrimination law, deciding five cases, only one by unanimous vote. Two of these cases, *Missouri v. Siebert*<sup>23</sup> and *United States v. Patane*<sup>24</sup> are particularly important for practitioners. The plurality in *Siebert* held that a police tactic of intentionally withholding *Miranda*<sup>25</sup> warnings during initial interrogation and then administering the warning after the suspect confessed, rendered the warnings ineffective and the subsequent statement inadmissible.<sup>26</sup> In *Patane*, a plurality of the Court held that the "fruit of the poisonous tree" doctrine does not apply to *Miranda* violations.<sup>27</sup> The plurality also reminded practitioners that the police's mere failure to warn does not violate either the Fifth Amendment or *Miranda*.<sup>28</sup> Major Fredrikson discusses Fifth Amendment cases from the military courts as well, paying particular attention to the issue of the admissibility of evidence derived from unwarned, yet voluntary, statements.

Finally, pulling double duty as he did this last twelve months due to a shortage of professors in the Criminal Law Department, MAJ Best closes out this year's *Symposium* by writing about significant decisions in the sentencing area. His article covers a potpourri of sentencing issues: sentencing schemes; sentencing evidence; sentencing argument; fines and contingent confinement; and the effective date of life without the possibility of parole.

We who write these articles do so with the ultimate goal of assisting you, the practitioners, and to further your knowledge, understanding, and expertise in the law. We welcome your comments, questions, and suggestions to better enable us to reach that goal.

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<sup>21</sup> 125 S. Ct. 551 (2004).

<sup>22</sup> 59 M.J. 447 (2004).

<sup>23</sup> 124 S. Ct. 2601 (2004).

<sup>24</sup> 124 S. Ct. 2620 (2004).

<sup>25</sup> 384 U.S. 436 (1966).

<sup>26</sup> *Siebert*, 124 S.Ct. at 2605

<sup>27</sup> *Patane*, 124 S. Ct. at 2624, 2626.

<sup>28</sup> *Id.* (the self-incrimination clause primarily focuses on the criminal trial, as does *Miranda*). *See also* *Chavez v. Martinez*, 538 U.S. 760 (2003) (holding that the Fifth Amendment cannot be violated where no prosecution is sought and no compelled statements were ever used against the petitioner).

## New Developments in Evidence for the 2004 Term of Court

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### Introduction

Past commentators have noted the apparent difficulty of harmonizing the Court of Appeals for the Armed Forces' (CAAF) evidentiary opinions.<sup>1</sup> Indeed, given the wide variety of evidentiary issues faced by the CAAF and the unique needs of the military justice system, it is virtually impossible to find a universal unifying principle in the court's decisions in any given year. The 2004 term of court was no exception. For example, the CAAF continued its recent trend of holding the line on the improper admission of uncharged misconduct evidence,<sup>2</sup> even as it stretched the rule requiring corroboration of an accused's confession almost beyond recognizable limits.<sup>3</sup>

This article will discuss and analyze the CAAF's cases from the 2004 term of court, proceeding sequentially throughout the military rules of evidence. This year's term addressed cases concerning the following: the objection and waiver doctrine of Military Rule of Evidence (MRE) 103;<sup>4</sup> the corroboration rule for confessions of MRE 304(g);<sup>5</sup> uncharged misconduct and MRE 404(b);<sup>6</sup> the rape shield rule of MRE 412;<sup>7</sup> the waiver and improper disclosure provisions related to privileges under Section V of the MRE;<sup>8</sup> classified evidence and MRE 505;<sup>9</sup> the interplay between impeachment evidence under MRE 608(c)<sup>10</sup> and the MRE 403<sup>11</sup> balancing test; mode and order of interrogation and presentation under MRE 611;<sup>12</sup> an issue of first impression regarding lay opinion testimony and MRE 701;<sup>13</sup> the permissible limits of and basis for expert opinion testimony in child abuse cases under MRE 702<sup>14</sup> and 703;<sup>15</sup> and authentication of audio recording transcripts under MRE 901.<sup>16</sup>

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<sup>1</sup> See, e.g., Major Charles H. Rose, *New Developments: Crop Circles in the Field of Evidence*, ARMY LAW., Apr./May 2003, at 43 (comparing evidentiary decisions to the mysterious crop circles that sometimes appear without apparent explanation at various locations throughout the world).

<sup>2</sup> See *infra* notes 62-79 and accompanying text.

<sup>3</sup> See *infra* notes 42-60 and accompanying text.

<sup>4</sup> MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 103 (2002) [hereinafter MCM].

<sup>5</sup> *Id.* MIL. R. EVID. 304(g).

<sup>6</sup> *Id.* MIL. R. EVID. 404(b).

<sup>7</sup> *Id.* MIL. R. EVID. 412.

<sup>8</sup> *Id.* MIL. R. EVID. 510 and 511.

<sup>9</sup> *Id.* MIL. R. EVID. 505.

<sup>10</sup> *Id.* MIL. R. EVID. 608(c).

<sup>11</sup> *Id.* MIL. R. EVID. 403.

<sup>12</sup> *Id.* MIL. R. EVID. 611.

<sup>13</sup> *Id.* MIL. R. EVID. 701.

<sup>14</sup> *Id.* MIL. R. EVID. 702.

<sup>15</sup> *Id.* MIL. R. EVID. 703.

<sup>16</sup> *Id.* MIL. R. EVID. 901.

## Cases from the 2004 Term of Court

### Rule 103: Ruling on Evidence

One of the key aspects of MRE 103 is the objection and waiver doctrine, which requires a party to make timely objections to evidentiary rulings or risk waiving the issue on appeal.<sup>17</sup> *United States v. Kahmann*<sup>18</sup> presents the issue of whether the objection and waiver doctrine of MRE 103 applies to the admission at sentencing of non-judicial punishment or summary-court martial records.

The appellant in *Kahmann* was convicted at a special court martial (SPCM) of unauthorized absence.<sup>19</sup> During the pre-sentencing proceedings, the government introduced a summary court-martial conviction for unauthorized absence from the appellant's personnel records.<sup>20</sup> The document did not expressly state whether the appellant had been provided with an opportunity to consult with counsel prior to electing trial by summary court-martial,<sup>21</sup> nor did it expressly state that a required legal review had been completed under Uniform Code of Military Justice (UCMJ), Art. 64.<sup>22</sup> Defense counsel did not object at trial to the admissibility of the document.<sup>23</sup> The Navy-Marine Court of Criminal Appeals (NMCCA) affirmed the conviction, relying on the objection and waiver doctrine of MRE 103,<sup>24</sup> and the CAAF granted review.<sup>25</sup>

In affirming, the CAAF held that the military judge did not commit plain error in admitting the summary court-martial conviction.<sup>26</sup> The CAAF focused on two allegations of error: first, whether the record of conviction was inadmissible because it did not state expressly that the appellant had been afforded the right to consult with counsel prior to accepting trial by summary court-martial; and second, whether the record was inadmissible because of its failure to state expressly on its face that the required legal review under Art. 64 had been conducted.<sup>27</sup>

The CAAF began its analysis with a review of the objection and waiver provisions of MRE 103, noting that in the absence of plain error, a ruling admitting evidence will not be reversed on appeal unless there was an appropriate objection at trial.<sup>28</sup> Although the CAAF had merely suggested it in the past,<sup>29</sup> it expressly held for the first time in *Kahmann* that MRE 103 governs admissibility of records of non-judicial punishment (NJP) and summary courts-martial.<sup>30</sup> While *United States v.*

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<sup>17</sup> See *id.* MIL. R. EVID. 103. The rule states:

Error may not be predicated upon a ruling which admits or excludes evidence unless the ruling materially prejudices a substantial right of a party, and (1) *Objection*. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context . . . .

*Id.* The rule preserves the ability of an appellate court to identify and rule on plain error. *Id.* MRE 103(d).

<sup>18</sup> 59 M.J. 309 (2004).

<sup>19</sup> *Id.* at 312.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 313. UCMJ art. 20 and Rule for Court-Martial (RCM) 1303 grant an accused the right to refuse trial by summary court-martial. UCMJ art. 20 (2002); MCM, *supra* note 4, R.C.M. 1303. In a background section of the *Kahmann* opinion, the CAAF noted that the servicemember's decision whether to refuse trial by summary court-martial is important. "In recognition of the key role that counsel can play in advising a service member at that point," stated the CAAF, "our Court has limited the admissibility of such records when the accused has not had the opportunity to consult with counsel." *Kahmann*, 59 M.J. at 311 (citations omitted).

<sup>22</sup> *Kahmann*, 59 M.J. at 313. Article 64 of the UCMJ provides for review by a judge advocate of "[e]ach case in which there has been a finding of guilty that is not reviewed under section 866 or 869(a) of this title (art. 66 or 69(a))." UCMJ art. 64.

<sup>23</sup> *Kahmann*, 59 M.J. at 312.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 314.

<sup>27</sup> *Id.* at 313.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* (citing *United States v. Dyke*, 16 M.J. 426, 427 (C.M.A. 1983)).

<sup>30</sup> *Id.*

*Booker*<sup>31</sup> requires that an accused receive the opportunity to consult with counsel prior to accepting non-judicial punishment or trial by summary court-martial,<sup>32</sup> proof of opportunity to consult with counsel is not an evidentiary requirement for admissibility of NJP or summary court-martial records at sentencing.<sup>33</sup> It is preferable for a summary court-martial record to state on its face that the accused had the opportunity to consult with counsel, but the admissibility of the record does not depend on such a statement; the government can present other evidence that the accused was afforded an opportunity to consult with counsel.<sup>34</sup>

The CAAF rejected appellant's argument that administrative irregularities in the summary court-martial record constituted plain error, reasoning that the government's failure to comply with non-binding regulatory provisions does not constitute prejudicial plain error.<sup>35</sup> The CAAF distinguished *Kahmann* from *United States v. Dyke*,<sup>36</sup> in which the Court of Military Appeals (COMA) held that a military judge should have excluded on his own motion a document that was prejudicially incomplete on its face because it was blank in four places where the signature of either the appellant or his commander should have appeared.<sup>37</sup>

The CAAF made short work of the second issue, whether there was plain error in the absence of a facial indication on the summary court record that an Art. 64 review had been conducted. The appellant failed to identify "any statutory, regulatory, or judicial requirement to place such a notation on a document summarizing a conviction by a summary court-martial."<sup>38</sup> The appellant's right to ensure that a conviction entered into evidence meets the requirements of R.C.M. 1001(b)(3) is sufficiently protected by the opportunity to object provided by MRE 103.<sup>39</sup>

Then-Chief Judge Crawford concurred with the result, agreeing that the appellant had waived the issue in this case, but she excoriated the majority for "misapplying" the Supreme Court case of *Middendorf v. Henry*, which held that the right to counsel does not apply at summary courts-martial.<sup>40</sup> She wrote that it was time for the CAAF to stop imposing "by judicial decree a right to counsel prior to accepting Article 15s and summary courts-martial."<sup>41</sup>

*Kahmann* reinforces the significance of the objection and waiver doctrine for counsel. At sentencing, no less than on the merits, defense counsel have a duty to identify errors and object to them. Documents that contain minor administrative irregularities may still be admissible, and a counsel who fails to object to the underlying defects (for example, failure to actually provide *Booker* rights or conduct a required Art. 64 review of a summary court-martial conviction) will waive on appeal the issue of whether the sentencing authority should have considered the evidence.

#### *Military Rule of Evidence 304. Confessions and Admissions*

Military Rule of Evidence 304(g), the corroboration rule, provides that an accused's admission or confession may only be admitted against him on the question of guilt or innocence if "independent evidence, either direct or circumstantial, has

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<sup>31</sup> 5 M.J. 238 (C.M.A. 1977)

<sup>32</sup> In *Kahmann*, the majority opinion stated that "[t]he point at which a service member must decide whether to object to an informal proceeding is an important stage in the military justice process," *Kahmann*, 59 M.J. at 311, an analysis that then-Chief Judge Crawford faulted in her concurring opinion. *See id.* at 315-16 (Crawford, C.J., concurring in the result).

<sup>33</sup> *Kahmann*, 59 M.J. at 313.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 314.

<sup>36</sup> 16 M.J. 426 (C.M.A. 1983).

<sup>37</sup> *Kahmann*, 59 M.J. at 313-14.

<sup>38</sup> *Id.* at 314.

<sup>39</sup> *Id.* Rule for Court-Martial 1001(b)(3) permits the government to introduce evidence of either military or civilian convictions against the accused. Rule for Court-Martial 1001(b)(3)(B) provides that a summary court-martial conviction may not be admitted under the rule unless Article 64 review "has been completed." MCM, *supra* note 4, R.C.M. 1001(b).

<sup>40</sup> *Kahmann*, 59 M.J. at 315 (stating that the court is not at liberty to disregard the Supreme Court holding in *Middendorf v. Henry*, 425 U.S. 25 (1976) that the right to counsel does not apply at summary courts-martial).

<sup>41</sup> *Id.* at 316 (Crawford, C.J., concurring in the result).

been introduced that corroborates the essential facts admitted to justify sufficiently an inference of their truth.”<sup>42</sup> There are two primary approaches to evaluating the evidence admitted in support of the confession. The first, known as the *corpus delicti* rule, requires the prosecution to prove that a crime was committed before permitting a defendant’s confession to be admitted into evidence.<sup>43</sup> The second approach—the trustworthiness doctrine—requires the prosecution to introduce substantial independent evidence that would tend to establish the trustworthiness of the *statement*, rather than the *corpus delicti* itself.<sup>44</sup> Military appellate courts have struggled over the years with the application of the corroboration rule in military practice; as one influential commentary has observed, “[t]he rule has proved easier to state than to apply.”<sup>45</sup> During the 2004 term of court, the CAAF further clouded the murky waters of the corroboration rule with its decision in *United States v. Seay*.<sup>46</sup>

In *Seay*, the appellant and another Soldier conspired to kidnap and murder Private First Class (PFC) Chafin.<sup>47</sup> In a deserted country area, they stabbed him to death with a Gerber knife.<sup>48</sup> After learning that Chafin was thought to have a large amount of cash when he disappeared, they returned to the body later, stole the wallet, removed the cash from it, and threw the wallet away by the side of a highway.<sup>49</sup> After the appellant’s wife became suspicious of his possible involvement in the offense, she reported him to the Colorado Springs police department, which initiated an investigation against him in cooperation with the Fort Carson Criminal Investigation Command (CID).<sup>50</sup> Eventually, the appellant confessed to the murder and the larceny of the wallet, and the government used his confession against him at trial.<sup>51</sup> The wallet was never recovered.<sup>52</sup> A CID agent testified at trial that no wallet was discovered during a postmortem inventory of Chafin’s effects.<sup>53</sup>

The issue at trial and on appeal was whether the government had provided sufficient corroboration under MRE 304(g) of the appellant’s confession to larceny of the wallet.<sup>54</sup> The CAAF affirmed, holding that the corroboration requirement for admission of a confession does not necessitate independent evidence of all the elements of an offense or even the *corpus delicti* of the offense.<sup>55</sup> According to the CAAF, it was not necessary for the members even to conclude that Chafin had carried a wallet; the critical issue was whether all the facts taken together justified an inference of the truth of the essential facts of the *confession* as a whole, and not necessarily the essential fact of the existence of a wallet.<sup>56</sup> The CAAF recited an inferential chain that it claimed would establish the overall truthfulness of the confession to larceny of the wallet: the appellant and another person were seen with the decedent shortly before he disappeared, the victim died as a result of foul play, his body was found in a concealed place, and no wallet was ever found.<sup>57</sup>

Judge Erdmann dissented on the corroboration issue. In his view, the corroboration rule requires independent evidence that establishes the trustworthiness of the confession.<sup>58</sup> Although the quantum of evidence required is slight, he would

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<sup>42</sup> MCM, *supra* note 4, MIL. R. EVID. 304(g).

<sup>43</sup> Major Russell L. Miller, *Wrestling with MRE 304(g): The Struggle to Apply the Corroboration Rule*, 178 MIL. L. REV. 1, 5-6 (2003).

<sup>44</sup> *See id.* at 12-15.

<sup>45</sup> 1 STEPHEN A. SALTZBURG ET AL., MILITARY RULES OF EVIDENCE MANUAL § 304.02[7] (5th ed. 2003).

<sup>46</sup> 60 M.J. 73 (2004).

<sup>47</sup> *Id.* at 74-75.

<sup>48</sup> *Id.* at 75.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *See id.* at 77-78.

<sup>52</sup> *Id.* at 80.

<sup>53</sup> *Id.* at 79.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 79.

<sup>56</sup> *See id.* at 80.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 81 (Erdmann, J., dissenting).

require independent evidence that a larceny had been committed, and he faulted the majority for its chain-of-inferences argument.<sup>59</sup> According to Judge Erdmann, “without evidence that Chafin possessed a wallet, we can give no weight to the fact that no wallet was found.”<sup>60</sup>

*Seay* is a boon for prosecutors and a disturbing case for defense counsel. *Seay* evidently grants authority for the government to provide strong corroboration for some offenses in multiple-offense confessions and to rely on the spillover effect of such corroboration to be deemed sufficient for the other offenses. All the government has to do is identify an attenuated string of inferences that could plausibly connect the offenses. When the offenses are closely related in time and place, as they were in *Seay*, there is little a defense counsel can do to contest the validity of the confession as to an offense with no corroboration when there is strong corroboration for the other offenses. Although *Seay* could simply be limited to its facts, its potential as a dangerous prosecutorial weapon cannot be overlooked. In any event, the case does little to clarify the CAAF’s already confusing body of law on the subject of corroboration.

#### *Military Rule of Evidence 404(b). Character Evidence*

Military Rule of Evidence 404(b) states that evidence of other crimes, wrongs, or acts is generally not admissible to prove a person’s character to show propensity, but such evidence may be admissible for other purposes, including “proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.”<sup>61</sup> This year, the CAAF continued a trend of aggressively examining government use of uncharged misconduct, demonstrating its willingness to reverse cases,<sup>62</sup> even where the evidence is otherwise strong. The CAAF continued to adhere to the three-part test first established by the COMA in *United States v. Reynolds*: (1) the evidence must reasonably support a finding that the appellant committed uncharged misconduct; (2) a fact of consequence in the proceeding must be made more or less probable by the existence of the evidence; and (3) the evidence must withstand a MRE 403 balancing test.<sup>63</sup> As with last year’s case of *United States v. Diaz*,<sup>64</sup> prong two of the *Reynolds* test proved to be an Achilles’ heel for the government.

In *United States v. McDonald*, the appellant’s wife was injured so severely in a car accident that she could not have sexual relations for several months.<sup>65</sup> The appellant subsequently began making sexual advances towards his twelve-year-old adopted daughter.<sup>66</sup> He gave her condoms, took pictures of her bathing, gave her a story entitled “Daddy and Me” that glorified the supposed virtues of father-daughter sexual relations, and wrote a note expressing his desire to provide her first sexual experience.<sup>67</sup>

At trial, the government introduced testimony from the appellant’s stepsister concerning uncharged misconduct that the appellant had committed some twenty years earlier, when the appellant was thirteen and his stepsister was eight.<sup>68</sup> The uncharged misconduct consisted of the appellant showing pornographic magazines to his stepsister, the stepsister masturbating the appellant, and the appellant attempting to insert his finger into her vagina.<sup>69</sup> Over defense objection, the military judge admitted the evidence under MRE 404(b) as probative of the appellant’s intent and plan. The NMCCA affirmed, holding that MRE 404(b) does not have a temporal element and also holding that even if there was error, it had no effect on the members because of the “overwhelming” nature of the evidence already introduced against the appellant.<sup>70</sup>

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<sup>59</sup> *Id.* at 82.

<sup>60</sup> *Id.*

<sup>61</sup> MCM, *supra* note 4, MIL. R. EVID. 404(b).

<sup>62</sup> For a discussion of this trend in the 2003 term of court, see Major Christopher W. Behan, *New Developments in Evidence 2003*, ARMY LAW., May 2004, at 11-16.

<sup>63</sup> See *United States v. Reynolds*, 29 M.J. 105, 109 (C.M.A. 1989).

<sup>64</sup> 59 M.J. 79 (2003).

<sup>65</sup> *United States v. McDonald*, 57 M.J. 747, 749 (N-M. Ct. Crim. App., 2002).

<sup>66</sup> *United States v. McDonald*, 59 M.J. 426, 427 (2004).

<sup>67</sup> *Id.* at 427.

<sup>68</sup> *Id.* at 428.

<sup>69</sup> *Id.*

<sup>70</sup> *McDonald*, 57 M.J. at 756.

The CAAF applied the three-prong *Reynolds* test and reversed, holding that the military judge abused his discretion in admitting the evidence.<sup>71</sup> The CAAF found that the evidence failed prong two of the *Reynolds* test because it was not logically relevant to show either common plan or intent.<sup>72</sup> In holding that the evidence failed to establish a common plan, the CAAF examined the relationship between the victims and the appellant, ages of victims, nature of the acts, situs of the acts, circumstances of the acts, and time span, finding the dissimilarities too great to support a common plan theory.<sup>73</sup> The evidence also failed to establish intent. Absent evidence of the appellant's state of mind as a 13-year-old child compared to his state of mind as a 33-year-old adult, no meaningful comparison could occur.<sup>74</sup>

Having determined that the military judge abused his discretion in admitting the evidence to show plan or intent, the CAAF next examined the effect of admitting the evidence and held that the error was prejudicial to the appellant.<sup>75</sup> The CAAF applied the four-part *Kerr* test, "weighing (1) the strength of the Government's case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question."<sup>76</sup> The CAAF conceded that the Government had a strong case that the appellant had taken photographs and given his daughter condoms, however, the CAAF found the evidence of the appellant's intent to gratify his own sexual desires was weak.<sup>77</sup> With a weak case on intent, the "irrelevant and highly inflammatory" evidence of the appellant's youthful uncharged misconduct "could not help but be powerful, persuasive, and confusing."<sup>78</sup> In other words, no different from the propensity evidence MRE 404(b) was designed to prohibit.<sup>79</sup>

As previously mentioned, *McDonald* continues a CAAF trend of strictly analyzing the admissibility of uncharged misconduct evidence. *McDonald* sends a strong warning to prosecutors to avoid piling on uncharged misconduct evidence in otherwise strong cases. For defense counsel, *McDonald* provides some encouragement that the government may be vulnerable to attacks on uncharged misconduct evidence using the second prong of the *Reynolds* test. It is not enough for a prosecutor simply to chant the language of MRE 404(b) as if it were a talismanic formula for admission: evidence of plan must actually establish a plan and evidence of intent requires independent evidence of the accused's state of mind. For military judges, *McDonald*, like the *Diaz* case before it, raises the bar high for uncharged misconduct and suggests that military judges ought to examine closely and, perhaps, skeptically, government claims regarding the necessity of uncharged misconduct in a particular case.

#### *Military Rule of Evidence 412: Rape Shield Rule*

Military Rule of Evidence 412, commonly known as the "Rape Shield Rule," actually bears the prolix title, "Nonconsensual sexual offenses; relevance of victim's behavior or sexual predisposition."<sup>80</sup> The words "nonconsensual sexual offenses" in the title raise questions concerning the scope of the Rule's coverage: should the rule be read narrowly, as its title would suggest, to cover only victims of nonconsensual sexual offenses such as rape, forcible sodomy or indecent assault, or should it be read more broadly, as its legislative history might indicate, to protect anyone who can be classified as the victim of "alleged sexual misconduct"? The issue has been somewhat unsettled in the military courts since 2000, when the Coast Guard Court of Criminal Appeals (CGCCA) held that the rule did not protect a witness in a court-martial from having to discuss instances of consensual sexual conduct in her past because MRE 412 covers only nonconsensual sexual offenses.<sup>81</sup> In *United States v. Banker*,<sup>82</sup> the CAAF settled the issue in favor of a broad reading of MRE 412 that focuses on

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<sup>71</sup> *McDonald*, 59 M.J. at 430.

<sup>72</sup> *Id.* at 429-30.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 430-31.

<sup>76</sup> *Id.* at 430 (applying *United States v. Kerr*, 51 M.J. 401, 405 (1999)).

<sup>77</sup> *Id.* at 431.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> MCM, *supra* note 4, MIL. R. EVID. 412.

<sup>81</sup> See *United States v. Stirewalt*, 53 M.J. 582 (C.G. Ct. Crim. App. 2000).

<sup>82</sup> 60 M.J. 216 (2004).

the presence of a victim of alleged sexual misconduct rather than on the nonconsensual nature of the charged offense.

Over a four-year period, the appellant in *Banker* committed several acts of sexual misconduct with LG, the family's babysitter, including oral and anal sodomy and sexual intercourse.<sup>83</sup> The sexual contact began when the appellant was thirty-four years old and LG was fourteen years old, and it continued for several years.<sup>84</sup> According to LG's trial testimony, the activity was entirely consensual on her part.<sup>85</sup> LG eventually stopped all sexual activity with the appellant after she watched a movie in which the male characters exhibited a callous preoccupation in depriving teenage girls of their virginity, and she learned that the appellant shared the same attitude concerning her virginity; she also stopped babysitting for the family.<sup>86</sup> A friend convinced LG to tell LG's mother about the sexual relationship with the appellant.<sup>87</sup> In turn, LG's mother reported the appellant to the Office of Special Investigations (OSI).<sup>88</sup>

Some eight months after OSI began investigating the appellant for his actions with LG, the appellant's son, MB, began attending counseling because MB had been behaving in sexually inappropriate ways towards his cousins, his sister, and his mother.<sup>89</sup> At the counseling sessions, MB revealed that LG had sexually molested him while babysitting him some sixty times over a period of approximately four years, beginning when he was nine years-old.<sup>90</sup>

At his trial for sodomy, indecent acts, and adultery, the appellant moved to admit evidence that LG had sexually molested MB during the same time period the appellant and LG had engaged in a sexual relationship with each other.<sup>91</sup> The military judge excluded the evidence under MRE 412 on the grounds that it was not relevant.<sup>92</sup> The Air Force Court of Criminal Appeals (AFCCA) affirmed, holding that the 1998 changes to MRE 412 changed the focus "from the nature of the alleged sexual misconduct to the status of the person against whom the evidence is offered."<sup>93</sup> The CAAF affirmed, addressing two issues: first, whether MRE 412 applies to consensual sexual misconduct offenses; and second, whether the military judge abused his discretion in using MRE 412 to exclude evidence of LG's abuse of the appellant's son, when appellant claimed the evidence was constitutionally required.<sup>94</sup>

The CAAF adopted the AFCCA's analysis of the first issue. At the outset of the opinion, the CAAF recounted the history of MRE 412. Military Rule of Evidence 412 is modeled after Federal Rule of Evidence (FRE) 412, which was designed to safeguard alleged victims of sexual offenses from "the degrading and embarrassing disclosure of intimate details of their private lives while preserving the constitutional rights of the accused to present a defense."<sup>95</sup> Although the title of MRE 412 still refers to "nonconsensual sexual offenses," the body of the rule was amended in 1998 to substitute the language "alleged sexual misconduct" for "nonconsensual sexual offense." This 1998 change shifted the focus of the rule from the nature of the sexual conduct to the "presence and protection of a victim."<sup>96</sup> Thus, the rule no longer requires a nonconsensual sex offense in order for there to be a victim.

The CAAF then turned its attention to whether LG was a victim within the meaning of MRE 412. Despite LG's testimony that sexual activity was consensual, the CAAF focused on the difference between factual and legal consent in

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<sup>83</sup> *Id.* at 218.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 221.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 218.

<sup>92</sup> *Id.* at 221.

<sup>93</sup> *Id.* at 219.

<sup>94</sup> *Id.* at 224-25.

<sup>95</sup> *Id.* at 220.

<sup>96</sup> *Id.* at 220.

children.<sup>97</sup> The CAAF concluded that a child under the age of sixteen cannot legally consent to indecent acts involving penetration, such as sodomy and sexual intercourse.<sup>98</sup> “Based on the facts of this case and the purpose behind M.R.E. 412,” stated the CAAF, LG was a victim within the meaning of MRE 412 and was therefore entitled to the protections of the rule.<sup>99</sup>

On the second issue, concerning whether the appellant had established the relevance and constitutional necessity of the evidence that LG had molested MB, the military judge, the AFCCA, and the CAAF all agreed that the appellant failed to carry his burden.<sup>100</sup> At trial, defense counsel argued that MB’s testimony about the abuse was relevant because it went directly to LG’s credibility, the idea being that LG made sexual allegations against the appellant as a sort of preemptive strike to protect her from the allegations against her that were sure to come from MB.<sup>101</sup>

The CAAF engaged in an exhaustive analysis of admissibility under MRE 412. The CAAF emphasized the exclusionary nature of MRE 412 as compared to other rules of evidence.<sup>102</sup> There are, however, three exceptions to the general rule of exclusion: (1) evidence that someone other than the accused was the source of semen, physical injury, or other evidence; (2) evidence of specific instances of sexual behavior between the accused and the alleged victim; and (3) evidence that is constitutionally required.<sup>103</sup> The CAAF has established a strict test to admit evidence under the “constitutionally required” exception to MRE 412, requiring defense counsel to detail the accused’s theory of the case and the constitutional necessity of the evidence.<sup>104</sup>

For all MRE 412 evidence, the military judge must determine whether the evidence is (1) relevant and (2) more probative than prejudicial.<sup>105</sup> This is almost exactly opposite the standard used in MRE 403—a rule of inclusion under which evidence is admitted unless its probative value is substantially outweighed by prejudicial or other concerns.<sup>106</sup> The “constitutionally required” exception has additional requirements. The military judge must determine that the evidence is relevant, material, and favorable to the defense.<sup>107</sup> For all practical purposes, “favorable” means “vital.”<sup>108</sup> Military Rule of Evidence 412 is a rule of exclusion designed to protect victims.<sup>109</sup> The probative value of the evidence, therefore, must be weighed against the privacy interests of the victim.<sup>110</sup> Because the defense counsel could not articulate a specific theory as to how the victim’s alleged sexual abuse of the appellant’s son (such abuse was not reported until some eight months after the investigation against the appellant began) provided a motive for the victim to fabricate her testimony, the CAAF held that the military judge did not abuse his discretion in determining that the evidence failed the MRE 412 relevancy standard.<sup>111</sup>

Judge Effron concurred in part and in the result.<sup>112</sup> He agreed with the majority’s holding that MRE 412 is not limited to nonconsensual sex offenses, that a military judge must determine the relevance of MRE 412 evidence, that irrelevant evidence is not admissible, and that the military judge properly decided this evidence was not relevant.<sup>113</sup> He cautioned that

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<sup>97</sup> *Id.* at 220.

<sup>98</sup> *Id.* at 220-21.

<sup>99</sup> *Id.* at 221.

<sup>100</sup> *See id.* at 224-25.

<sup>101</sup> *See id.*

<sup>102</sup> *See id.* at 221.

<sup>103</sup> *See MCM, supra* note 4, MIL. R. EVID. 412(b).

<sup>104</sup> *Banker*, 60 M.J. at 221.

<sup>105</sup> *MCM, supra* note 4, MIL. R. EVID. 412(c)(3).

<sup>106</sup> *See id.* at 223.

<sup>107</sup> *United States v. Williams*, 37 M.J. 352, 359 (C.M.A. 1993).

<sup>108</sup> *Banker*, 60 M.J. at 222.

<sup>109</sup> *See id.* at 223.

<sup>110</sup> *Id.* at 223.

<sup>111</sup> *Id.* at 224-25.

<sup>112</sup> *Id.* at 225 (Effron, J. concurring in part and in the result).

<sup>113</sup> *Id.*

the majority's discussion of relevance, however, was unnecessarily broad.<sup>114</sup> Because the "constitutionally required" exception to MRE 412 is so fact dependent, he would shy from constraining the efforts of trial judges in this area with an overly broad precedent.<sup>115</sup>

### *Military Rule of Evidence 502. Attorney-Client Privilege*

Military Rule of Evidence 502 provides a testimonial privilege that protects the lawyer-client relationship.<sup>116</sup> Under the rule, a client has the privilege not only to refuse to disclose, but also to prevent any other person from "disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services."<sup>117</sup> The privilege is held by the client.<sup>118</sup> It may be claimed on the client's behalf by the lawyer, and unless contrary evidence is presented, the lawyer's authority to claim the privilege on the client's behalf is presumed.<sup>119</sup> Military Rule of Evidence 510 provides that the privilege may be waived by voluntary disclosure "under such circumstances that it would be inappropriate to allow the claim of privilege."<sup>120</sup> Military Rule of Evidence 511, on the other hand, states that a statement or other disclosure of privileged matter "is not admissible against the holder of the privilege if disclosure was compelled erroneously or was made without an opportunity for the holder of the privilege to claim the privilege."<sup>121</sup>

In *United States v. Marcum*,<sup>122</sup> the CAAF addressed the issue of how the privilege works when part of a trial is held in the absence of the accused pursuant to R.C.M. 804(b).<sup>123</sup> The appellant in *Marcum* was convicted of dereliction of duty, consensual sodomy, forcible sodomy, assault consummated by a battery, indecent assault, and indecent acts.<sup>124</sup> The appellant was a noncommissioned officer who held a supervisory position at Offutt Air Force Base.<sup>125</sup> During his off-duty hours, the appellant frequently socialized with his subordinate Airmen at parties, often inviting them to spend the night at his apartment.<sup>126</sup> The charges in the case arose from allegations that the appellant engaged in consensual and nonconsensual sexual activity with these subordinates.<sup>127</sup> The appellant testified at trial and discussed the allegations.<sup>128</sup> After the court members announced findings, the court-martial recessed for the evening, and the appellant went absent without leave (AWOL) before sentencing.<sup>129</sup> Pursuant to R.C.M. 804(b), the sentencing proceedings were held with the appellant *in absentia*.<sup>130</sup>

During the pre-sentencing hearing, appellant's civilian defense counsel introduced as an unsworn statement a twenty page document appellant provided for counsel's use in preparing a defense.<sup>131</sup> The document described the nature of the

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<sup>114</sup> See *id.* at 225.

<sup>115</sup> *Id.*

<sup>116</sup> See MCM, *supra* note 4, MIL. R. EVID. 502.

<sup>117</sup> *Id.* MIL. R. EVID. 502(a).

<sup>118</sup> See *id.* MIL. R. EVID. 502(a).

<sup>119</sup> 2 STEPHEN A. SALTZBURG ET AL., MILITARY RULES OF EVIDENCE MANUAL § 502.02[3] (5th ed. 2003) [hereinafter EVIDENCE MANUAL].

<sup>120</sup> MCM, *supra* note 4, MIL. R. EVID. 510.

<sup>121</sup> *Id.* MIL. R. EVID. 511(a).

<sup>122</sup> 60 M.J. 198 (2004).

<sup>123</sup> MCM, *supra* note 4, R.C.M. 804(b). This rule permits the trial to be held in the absence of the accused if the accused is voluntarily absent after arraignment. *Id.*

<sup>124</sup> *Marcum*, 60 M.J. at 199.

<sup>125</sup> *Id.* at 200.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 200-01.

<sup>128</sup> See *id.*

<sup>129</sup> *Id.* at 208.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

appellant's professional and off-duty relationship with each of six subordinate Airmen, "including details regarding Appellant's level of attraction . . . as well as graphic descriptions of the charged and uncharged sexual contact between Appellant and each [A]irman."<sup>132</sup> The trial counsel referred to this document in sentencing argument, focusing on the appellant's "lack of contrition,"<sup>133</sup> and remarking that through the statement, the appellant "is victimizing those [A]irmen again."<sup>134</sup>

On appeal, the appellant submitted an affidavit in which he expressed his belief that the 20-page statement to his attorney was covered by the attorney-client privilege, invoked the privilege, and expressly stated that he had never authorized his attorney to release this statement to anyone, in or out of court.<sup>135</sup> The CAAF was therefore squarely faced with the issue of whether the disclosure was covered by the privilege, and if so, if it was improperly disclosed under MRE 511 or the privilege was effectively waived under MRE 510.

The CAAF strongly signaled the direction of its analysis by first quoting MRE 511(a), which provides that evidence of a privileged matter is not admissible if disclosure was compelled erroneously or the holder of the privilege did not get the opportunity to claim the privilege.<sup>136</sup> The CAAF next quoted *United States v. Dorman*,<sup>137</sup> a professional responsibility case, for the proposition that a lawyer should not reveal information pertaining to the representation of a client "unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure [is otherwise permitted by this rule]."<sup>138</sup> The CAAF then shifted to a discussion of the unsworn statement in military law. According to the CAAF, the right to make an unsworn statement is a valuable right at military law *that is personal to the accused* and that the CAAF will not permit to be "undercut or eroded."<sup>139</sup> This right cannot be asserted by defense counsel without specific authorization by the accused.<sup>140</sup> Thus, if an accused is absent from trial proceedings without leave, "his right to make an unsworn statement is forfeited unless *prior to his absence*" he authorized counsel to make a particular statement on his behalf.<sup>141</sup>

Despite his AWOL status, appellant did not waive this right.<sup>142</sup> His attorney never asked for permission to use the statement, and appellant never granted it.<sup>143</sup> The CAAF also addressed the issue of whether the appellant waived his privilege of confidentiality because of his trial testimony, which touched on "a great deal" of the information contained within his statement.<sup>144</sup> The CAAF found persuasive the appellant's argument that if he had prepared an unsworn statement, it would have been different than what was ultimately presented by the defense counsel.<sup>145</sup> The CAAF noted that the statement contained sexually explicit details not discussed in appellant's testimony, including observations that were critical of the victims and were specifically cited by trial counsel during sentencing argument.<sup>146</sup> The CAAF affirmed the findings but reversed and set aside the sentence.<sup>147</sup>

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<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 209.

<sup>134</sup> *Id.* at 210.

<sup>135</sup> *Id.* at 208.

<sup>136</sup> *Id.* at 209.

<sup>137</sup> 58 M.J. 295, 298 (2003).

<sup>138</sup> *Marcum*, 60 M.J. at 209 (quoting *Dorman*, 58 M.J. at 298).

<sup>139</sup> *Id.* (emphasis added).

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 210 (emphasis added).

<sup>142</sup> *Id.* at 208.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 210.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at 211.

Then-Chief Judge Crawford dissented on the attorney-client privilege issue.<sup>148</sup> She would have found that the statement was not privileged in the first place, and that even if it was, the record made it clear that the appellant waived the privilege and “impliedly authorized” his counsel to waive the privilege and release the statement on appellant’s behalf.<sup>149</sup> She noted that Air Force court rules in effect at the time required the defense to give three days’ notice prior to making an unsworn statement, and the defense counsel “presumably” gave the required notice, indicating intent to disclose the statement and establishing that it was not privileged.<sup>150</sup> In addition, defense counsel used appellant’s statement to cross-examine witnesses, and one could therefore assume that appellant knew that defense counsel would use the statement according to his discretion at trial.<sup>151</sup> Finally, even if the statement was privileged, Chief Judge Crawford argued that the defense counsel had implied authority to waive the privilege and submit on appellant’s behalf “otherwise privileged matters in an effort to defend Appellant as successfully as possible.”<sup>152</sup> Chief Judge Crawford concluded her dissent by observing that the appellant had forfeited any right to object to his counsel’s use of the statement by appellant’s own misconduct in going AWOL.<sup>153</sup>

*Marcum* is a unique case whose application may very well be limited to its facts. Nonetheless, it emphasizes the personal nature of the accused’s right to present an unsworn statement. In the rare case that an accused is absent for pre-sentencing proceedings, military judges might be well advised to deny the defense the right to present an unsworn statement unless there is some affirmative indication that the accused granted his counsel the right to make a particular statement on his behalf. The case also underscores the importance of conducting a proper waiver analysis under MRE 510 and 511 before admitting any evidence subject to a privilege, particularly where the holder of the privilege is absent from the proceedings.

#### *Military Rule of Evidence 505. Classified Information*

As the global war on terror (GWOT) continues, MRE 505 may play an increasingly significant role in military justice. The rule is designed to strike a balance between the government’s interest in preserving critical national security information from unauthorized disclosure and the accused’s right to a fair trial. There have been very few reported decisions construing MRE 505, because, “[a]s a practical matter, classified information or evidence is only rarely used.”<sup>154</sup> The GWOT could, however, change the frequency with which classified evidence issues reach the appellate level. Since the September 11 attacks, the military justice system has seen cases involving the alleged mishandling of classified information,<sup>155</sup> violations of classified rules of engagement,<sup>156</sup> or offenses involving evidence that includes classified information or imagery.<sup>157</sup> The 2004 term of court saw significant opinions from both the AFCCA and the CAAF in *United States v. Schmidt*, a case involving classified rules of engagement and an incident from Operation Enduring Freedom (OEF) in Afghanistan.<sup>158</sup> The complicated procedural posture of the case and the different holdings of the two courts mandate that counsel facing similar issues consider both the AFCCA and CAAF opinions in formulating a course of action.

The government charged Major Harry Schmidt, an Illinois Air National Guard F-16 pilot, with dereliction of duty for allegedly failing to exercise appropriate flight discipline or comply with rules of engagement (ROE) and special instructions

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<sup>148</sup> *Id.*

<sup>149</sup> *Id.* (Crawford, C.J., dissenting).

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 212.

<sup>153</sup> *Id.*

<sup>154</sup> See EVIDENCE MANUAL, *supra* note 119, § 505.02.

<sup>155</sup> See, e.g., Neil A. Lewis, *Charges Dropped Against Chaplain*, N.Y. TIMES, Mar. 20, 2004, at A5, available at LEXIS, News Library, The New York Times-Military Justice Stories (discussing the case against Army Chaplain (CPT) James Yee, accused of mishandling classified evidence pertaining to detainees at Guantanamo Bay).

<sup>156</sup> See, e.g., Eric Schmitt, *Inquiry on Canadians' Deaths Says U.S. Pilots Broke Rules*, N.Y. TIMES, June 19, 2002, at A5, available at LEXIS, News Library, The New York Times-Military Justice Stories (discussing allegations that a U.S. Air Force pilot violated rules of engagement when dropping bombs in Afghanistan that killed four Canadian troops and wounded eight others).

<sup>157</sup> See, e.g., Bill Glauber, *GI in Probe Believes in System; Full Court Martial Possible in Death of Iraqi Driver*, CHICAGO TRIBUNE, Sept. 11, 2004, at 3, available at LEXIS, News Library, Chicago Tribune file (discussing a case in which the prosecution and defense litigated the issue of whether a classified section of a tape taken by an unmanned aerial vehicle would be admissible at the trial of an Army captain who allegedly shot and killed a wounded Iraqi).

<sup>158</sup> *Schmidt v. Boone*, 59 M.J. 841 (A.F. Ct. Crim. App. 2004).

(SPINs) in an air-to-ground bombing incident during Operation Enduring Freedom (OEF) in Afghanistan.<sup>159</sup> The ROE and SPINs that pertained to the incident were classified at the Secret level.<sup>160</sup> Major Schmidt retained a civilian defense counsel who did not possess a Secret security clearance.<sup>161</sup> The civilian counsel requested that he be processed for a Secret security clearance in order to represent the accused,<sup>162</sup> but the Air Force denied the request, instead conducting an abbreviated background check in accordance with Air Force security regulations<sup>163</sup> and granting defense counsel access to evidence on a case-by-case basis.<sup>164</sup> The government also required Major Schmidt to submit a written request to trial counsel anytime Schmidt, who had a legitimate Secret security clearance, wanted to discuss classified information pertaining to his case with his defense counsel.<sup>165</sup> Major Schmidt submitted a motion for appropriate relief, asking the military judge to compel the government to provide a security clearance or abate the proceedings.<sup>166</sup> The military judge denied the motion.<sup>167</sup>

Major Schmidt then filed a petition with the AFCCA for extraordinary relief, requesting the AFCCA order the respondents to process defense counsel for a Secret security clearance and requesting a stay of the proceedings until the issue had been resolved.<sup>168</sup> On 15 January 2004, the AFCCA ordered the government to show cause why the petition should not be granted.<sup>169</sup> On 24 February 2004, Schmidt filed a motion with the AFCCA for expedited review and a stay of all proceedings until the AFCCA had reviewed the petition for extraordinary relief.<sup>170</sup> The AFCCA denied the motion for a stay on 26 February 2004, but granted the request for expedited review of the request for extraordinary relief.<sup>171</sup> On 27 February 2004, the CAAF accepted petitioner Schmidt's appeal of the AFCCA's denial of the motion for a stay but denied without prejudice the petitioner's request to the CAAF for a writ of mandamus.<sup>172</sup> Thus, the AFCCA considered the petition for extraordinary relief while the court-martial proceedings were stayed pursuant to the CAAF's order.

The AFCCA considered two issues on Schmidt's petition for extraordinary relief: (1) whether the petitioner was entitled to a writ of mandamus ordering the government to process his defense counsel for a Secret security clearance and (2) whether the government's requirement that defense counsel channel through trial counsel requests to discuss classified information with the accused interfered with the attorney-client and attorney work-product privileges.<sup>173</sup>

In denying the writ, the AFCCA conducted an exhaustive review of Department of Defense (DoD) and Air Force security regulations pertaining to investigating security clearances and providing access to classified material.<sup>174</sup> The AFCCA held that the procedures for determining who will receive a security clearance are the exclusive province of the Executive Department and that the Air Force had not violated Executive Branch regulations in refusing to conduct a full investigation leading to the grant of a security clearance.<sup>175</sup> A DoD regulation provides for a full investigation and formal

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<sup>159</sup> See *id.* at 844-45.

<sup>160</sup> See *id.* at 842 and 845.

<sup>161</sup> See *id.* at 842.

<sup>162</sup> Petitioner's civilian defense counsel specifically requested a full personnel security investigation (PSI) in accordance with U.S. DEPARTMENT OF DEFENSE, REG.5200.2-R, PERSONNEL SECURITY PROGRAM (Jan. 1987). *Schmidt*, 59 M.J. at 845.

<sup>163</sup> See U.S. DEP'T OF AIR FORCE, INSTR. 31-401, INFORMATION SECURITY PROGRAM MANAGEMENT para. 5.6 (1 Nov 2001) (providing for a streamlined background check and limited access to classified information for persons who did not already have a PSI). See *Schmidt*, 59 M.J. at 846.

<sup>164</sup> *Schmidt*, 59 M.J. at 845.

<sup>165</sup> *Id.* at 854.

<sup>166</sup> *Id.* at 845.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 842.

<sup>169</sup> *Id.* at 842-43.

<sup>170</sup> *Id.* at 843.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* at 842.

<sup>174</sup> Space does not permit a detailed recounting of the excellent AFCCA analysis of these regulations. Counsel who are dealing with classified information issues, however, would be well advised to read the AFCCA's analysis of the interplay between the regulations.

<sup>175</sup> *Id.* at 844.

adjudication process, but there is also a streamlined process within the regulation for an abbreviated background check and grant of access to specific material.<sup>176</sup> Although the processes in the Air Force Instruction (AFI) differ slightly from those in the DoD directive, the AFCCA found that the AFI is not improper, arbitrary, or unsupported in the law.<sup>177</sup>

The AFCCA found further grounds for denying petitioner's extraordinary writ. Alternative means of relief were available in this case. The Marine Corps, of which the civilian defense counsel was a reserve member, was willing to grant the defense counsel an interim Secret clearance, which the Air Force, in turn, had agreed to honor.<sup>178</sup> The civilian defense counsel had not, however, provided all the information to the Marine Corps necessary for processing his interim Secret clearance.<sup>179</sup> Extraordinary relief is not available where a petitioner has alternative means to obtain the relief.<sup>180</sup>

The AFCCA also denied petitioner's request for relief on the second issue—the government's requirement that petitioner submit written requests to the trial counsel prior to discussing classified information with his defense counsel. Petitioner argued that the process imposed by the government interfered with the attorney work-product and attorney-client privileges, essentially requiring the petitioner to disclose defense work product and strategies to the government in order to discuss classified information legitimately within the petitioner's knowledge and possession.<sup>181</sup> According to the AFCCA, petitioner's argument was misplaced. The AFCCA analogized the requirement to the law of discovery, which frequently requires the defense to go through government counsel to obtain information already in the government's possession; a collateral effect of discovery law is that some discovery requests may in effect reveal defense strategy in the case.<sup>182</sup> Additionally, the national security interests in a classified case require not only that all parties seeking the information have proper security clearances, but that they also have a legitimate "need to know" the information, as determined by an appropriate approval authority. As the AFCCA put it, "it is not up to the petitioner or his counsel to decide whether counsel has a need to know the classified information."<sup>183</sup>

The AFCCA handed down its decision on 31 March 2004, and the petitioner immediately appealed. In *United States v. Schmidt*,<sup>184</sup> the CAAF decided MAJ Schmidt's appeal on 7 June 2004.<sup>185</sup> By the time the CAAF heard the appeal of AFCCA's decision, the appellant's civilian defense counsel obtained an interim security clearance from the Marine Corps, which the Air Force agreed to honor.<sup>186</sup> The first issue, accordingly, was moot, and the CAAF did not address it.

The second issue, however, presented the CAAF with the opportunity to interpret MRE 505(h)(1) in connection with the attorney work-product and attorney-client privileges. Recall that the appellant possessed a current Secret security clearance and wanted to discuss classified information that he had obtained in furtherance of his military duties with his civilian defense counsel for the purpose of preparing for his defense.<sup>187</sup> The government established a procedure that required the appellant to "[i]dentify in an e-mail message . . . the exact materials to which you think the civilian counsel needs access . . ." and also to "contain a full justification of why the civilian counsel needs to be granted access to the additional classified materials."<sup>188</sup> The government based this procedure on MRE 505(h)(1), which states "[i]f the accused reasonably expects to disclose or to cause the disclosure of classified information *in any manner* in connection with a court-martial proceeding, the accused shall notify the trial counsel of such intention . . ."<sup>189</sup>

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<sup>176</sup> *Id.* at 845-47.

<sup>177</sup> *Id.* at 849.

<sup>178</sup> *Id.* at 851.

<sup>179</sup> *See id.* at 851-52.

<sup>180</sup> *Id.* at 852.

<sup>181</sup> *Id.* at 854.

<sup>182</sup> *See id.* at 855-56.

<sup>183</sup> *Id.* at 856.

<sup>184</sup> 60 M.J. 1 (2004).

<sup>185</sup> *Id.* at 1.

<sup>186</sup> *Id.* at 2.

<sup>187</sup> *Id.* at 2 (emphasis added).

<sup>188</sup> *Id.*

<sup>189</sup> MCM, *supra* note 4, MIL. R. EVID. 505(h)(1) (emphasis added).

With respect to the second issue, the CAAF vacated the AFCCA opinion, reversed the ruling of the military judge, and lifted the stay on the trial proceedings.<sup>190</sup> The CAAF adopted a common-sense approach to MRE 505 and struck a balance between the disclosure requirements of MRE 505(h)(1) and the importance of confidentiality in the attorney-client relationship. Military Rule of Evidence 505 permits the government to exercise a privilege against the disclosure of classified information.<sup>191</sup> The rule permits limited disclosure of information and restrictions on disclosure through the use of protective orders.<sup>192</sup> Military Rule of Evidence 505(h)(1), which requires the accused to give notice to the trial counsel of an intention to disclose classified information, applies only when the defense is seeking classified information from the government or when it reasonably expects to disclose classified information during a proceeding.<sup>193</sup>

The CAAF held that the AFCCA erred in holding that the rule comes into play when “the defense is making a preliminary evaluation of the evidence it already possesses to determine what evidence, if any, it may seek to disclose as part of the defense.”<sup>194</sup> Military Rule of Evidence 505(h)(1) does not require an accused to engage in adversarial litigation with the opposing side in order to discuss classified information he already has with his defense counsel.<sup>195</sup> Although the government may establish procedures to protect and restrict access to classified information, it must also respect the “important role of the attorney-client relationship in maintaining the fairness and integrity of the military justice system.”<sup>196</sup> The military judge must balance the government’s interest in protecting national security information with the accused’s right to effective assistance of counsel in preparing a defense and the attorney-client privilege.<sup>197</sup>

The *Schmidt* case teaches several important lessons to counsel involved in classified information cases. The AFCCA opinion establishes that the Executive Branch alone controls access to security clearances and the procedures for obtaining them. The attorney-client relationship does not trump these regulations; an accused cannot demand as a matter of right that the Executive Branch even process his civilian defense counsel’s request for a security clearance investigation. The CAAF opinion, however, demonstrates that MRE 505(h) does not interfere with the attorney-client relationship. Provided that the attorney and client both have a proper security clearance and are discussing information already known to the client as part of the defense preliminary evaluation process, MRE 505(h) will not interfere with that relationship. The CAAF opinion also charges the military judge with the ultimate responsibility of balancing the government’s national security interests with the accused’s sixth amendment and article 27<sup>198</sup> rights to the effective assistance of counsel.

#### *Military Rule of Evidence 608. Character Evidence*

Military Rule of Evidence 608(c) permits a party to use cross-examination or extrinsic evidence to explore the “bias, prejudice, or motive to misrepresent” of any witness.<sup>199</sup> The rule applies at both the findings and pre-sentencing phases of a court-martial.<sup>200</sup> In *United States v. Saferite*,<sup>201</sup> the CAAF addressed the interplay between MRE 608(c), MRE 403,<sup>202</sup> and

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<sup>190</sup> *Schmidt*, 60 M.J. at 3.

<sup>191</sup> See MCM, *supra* note 4, MIL. R. EVID. 505(c).

<sup>192</sup> *Id.* at 2.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> See *id.*

<sup>196</sup> *Id.* at 3.

<sup>197</sup> *Id.*

<sup>198</sup> UCMJ art. 27 (2002).

<sup>199</sup> MCM, *supra* note 4, MIL. R. EVID. 608(c).

<sup>200</sup> See *id.* MIL. R. EVID. 1101.

<sup>201</sup> 59 M.J. 270 (2004).

<sup>202</sup> Military Rule of Evidence 403 permits a military judge to exclude evidence the probative value of which is substantially outweighed by unfair prejudice, confusion of the issues, misleading the members, or considerations of undue delay, waste of time, of needless presentation of cumulative evidence. MCM, *supra* note 4, MIL. R. EVID. 403.

RCM 1001(c)(3)<sup>203</sup> during the pre-sentencing phase of the court-martial.

The appellant in *Saferite* escaped from pretrial confinement during trial and was convicted and sentenced *in absentia* at a general court-martial for stealing government computer equipment and selling it on an on-line auction site.<sup>204</sup> During the pre-sentencing proceedings, the defense counsel presented a written unsworn statement from the appellant's wife describing him as a caring father and loving spouse.<sup>205</sup> In the statement, she pled for the compassion of the court in sentencing.<sup>206</sup>

In rebuttal, trial counsel offered two documents in an attempt to discredit the spouse.<sup>207</sup> The first was a sworn statement showing that the appellant had talked to his spouse on the telephone while he was in pretrial confinement.<sup>208</sup> The second was a sworn statement establishing that military authorities stopped the appellant's wife driving away from the military installation where the appellant was confined at a high rate of speed approximately forty minutes after the appellant's escape from custody.<sup>209</sup> The appellant was not in the vehicle with her, and she told the police that she had gone to the military installation to talk to her husband but had not been able to locate him.<sup>210</sup> Over defense objection, the military judge admitted the evidence as bias evidence under MRE 608(c) and ruled that it did not violate MRE 403.<sup>211</sup>

As a threshold matter, the CAAF noted that the military rules of evidence are applicable at sentencing.<sup>212</sup> A military judge may relax the rules of evidence.<sup>213</sup> Relaxation of the rules, however, applies primarily to issues of authentication and does not permit the admission of otherwise inadmissible evidence.<sup>214</sup> Bias is always relevant and may be proven by extrinsic evidence, but extrinsic evidence must still survive a MRE 403 balancing test.<sup>215</sup> The CAAF found that the evidence was logically relevant to prove bias under 608(c), but its probative value was substantially outweighed by the danger of unfair prejudice.<sup>216</sup> The evidence tended to allege uncharged misconduct and suggested that the appellant had conspired with his wife to facilitate his escape.<sup>217</sup> In fact, trial counsel focused his argument on the theory that the appellant's wife had aided the appellant's escape.<sup>218</sup> The CAAF found that the military judge "clearly abused his discretion" in ignoring the danger of unfair prejudice posed by the evidence.<sup>219</sup> Nonetheless, the CAAF held that the error was harmless under the facts of the case and affirmed the decision.<sup>220</sup> The accused was tried in absentia, so the members knew he was not there.<sup>221</sup> The military judge gave careful instructions that the accused was to be punished only for offenses of which he was actually convicted.

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<sup>203</sup> Under RCM 1001(c)(3), a military judge can relax the rules of evidence during pre-sentencing proceedings for admitting letters, affidavits, certificates of military and civil officers, "and other writings of similar authenticity and reliability." MCM, *supra* note 4, R.C.M. 1001(c)(3).

<sup>204</sup> *Saferite*, 59 M.J. at 271.

<sup>205</sup> *Id.* at 271-72.

<sup>206</sup> *Id.* at 272.

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> *Id.* at 273.

<sup>213</sup> *Id.*

<sup>214</sup> *See id.* at 273.

<sup>215</sup> *See id.* at 274.

<sup>216</sup> *Id.* at 274.

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> *Id.* at 274-75.

<sup>221</sup> *Id.* at 274.

The maximum sentence was 230 years, the trial counsel asked for sixteen, and the members gave six, indicating they followed the military judge's instructions.<sup>222</sup>

*Saferite* provides a warning to trial counsel about the potential dangers of senseless rebuttal and the pointless impeachment of the accused's family members during pre-sentencing proceedings. Had the members given a higher sentence or the military judge neglected to provide adequate instructions, the military judge's abuse of discretion in admitting the evidence might not have been harmless. Some witnesses at sentencing (whether appearing in person or by affidavit) are so obviously biased that there is little point in risking appellate error by trying to prove the point, particularly if the trial counsel is going to suggest and argue that a witness and the accused participated in uncharged misconduct together. *Saferite* also teaches important lessons about the scope of RCM 1001(c)(3)'s provisions for relaxing the rules of evidence at pre-sentencing proceedings. As the CAAF made clear, relaxation is for the purposes of authentication and foundation, and not for the purpose of admitting otherwise inadmissible or prejudicial evidence. Military judges should use *Saferite* as an example for counsel who ask for relaxation and then act as if the pre-sentencing proceedings have become an evidentiary free-for-all. *Saferite* emphasizes that even at sentencing, the rules still matter.

#### *Military Rule of Evidence 611. Mode and Order of Interrogation and Presentation*

*United States v. Mason* arose from a rehearing of appellant's trial for raping the civilian spouse of a Soldier.<sup>223</sup> The primary issue at trial was identification of the rapist, and the government's case rested almost entirely on DNA evidence.<sup>224</sup> During the trial, defense counsel cross-examined the government's DNA expert and suggested that the confidence level of the DNA test could be increased if the crime lab had requested a second, independent laboratory to conduct a test of the material.<sup>225</sup> On re-direct, trial counsel asked the expert whether either party had requested such a test.<sup>226</sup> Defense counsel objected that the question was outside the scope of cross-examination and that it was an improper attempt to shift the burden of proof to the defense.<sup>227</sup> The military judge overruled both objections without explanation. The Army Court of Criminal Appeals (ACCA) concluded that the question was not outside the scope of cross-examination and that the military judge's instructions to members rendered any error harmless.<sup>228</sup>

The CAAF held that the military judge erred in permitting the question.<sup>229</sup> The question suggested that the appellant might have been obligated to request a retest, which shifted the burden of proof to the appellant.<sup>230</sup> It was constitutional error because the Due Process Clause of the Fifth Amendment requires the government to prove the defendant's guilt beyond a reasonable doubt.<sup>231</sup> Ultimately, however, the CAAF held that the error was harmless beyond a reasonable doubt. The DNA evidence in the case was overwhelming, with the odds of someone other than the appellant being the source of the DNA material 1 in 240 billion.<sup>232</sup> The military judge properly instructed the panel that the burden of proof never shifts to the accused. Furthermore, the government did not argue or suggest anywhere else that the defense should have asked for a retest.<sup>233</sup> The CAAF affirmed the ACCA decision.<sup>234</sup>

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<sup>222</sup> *Id.* at 275.

<sup>223</sup> 59 M.J. 416 (2004).

<sup>224</sup> *See id.* at 417.

<sup>225</sup> *See id.* at 423-24.

<sup>226</sup> *Id.* at 424.

<sup>227</sup> *Id.*

<sup>228</sup> *Id.*

<sup>229</sup> *Id.* at 424.

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> *Id.* at 424-25.

<sup>233</sup> *Id.* at 425.

<sup>234</sup> *Id.*

*Mason* illustrates the significance of a military judge maintaining control of interrogations and presentation of evidence under MRE 611.<sup>235</sup> Military judges should be alert to questions that subtly shift the burden of proof or could affect the constitutional rights of the accused. Had *Mason* been a close case, the CAAF might have been much less likely to find the constitutional error harmless beyond a reasonable doubt. *Mason* also demonstrates the danger of trial counsel rising to a defense counsel's baited suggestions that the government could have done more to investigate or prove a case. The natural temptation in the heat of battle is to ask why the defense counsel didn't ask for remedial measures if he was so concerned about the investigation or test procedures? It is far better, however, for trial counsel to endure the slings and arrows of defense outrage than to take up arms against such troubles by opposing them in kind.<sup>236</sup>

#### *Military Rule of Evidence 701. Lay Opinion Testimony*

*Military Rule of Evidence 701* permits lay witnesses to offer opinions that are helpful to the trier of fact, rationally based on the perception of the witness, and not based on scientific, technical, or other specialized knowledge.<sup>237</sup> In *United States v. Byrd*, the CAAF considered an issue of first impression in military law: the requirements for using lay opinion testimony to interpret the statements of others.<sup>238</sup>

The appellant in *Byrd* was convicted at a general court-martial of forcible sodomy with his daughter.<sup>239</sup> The defense lost a motion *in limine* at trial to prevent the admission of three letters the appellant had written to his wife and daughter, as well as the wife's opinion testimony interpreting several phrases in the letters for the members.<sup>240</sup> The government used Mrs. Byrd to interpret eight specific passages in the letters.<sup>241</sup> The purpose of her testimony was to demonstrate that the appellant was threatening his wife in order to impede the investigation against him.<sup>242</sup>

Because this was an issue of first impression in military law, the CAAF sought guidance from judicial interpretations of FRE 701, from which MRE 701 was taken without change.<sup>243</sup> The CAAF found the general rule in the federal civilian courts to be that lay witnesses are not normally permitted to testify about their subjective interpretations or conclusions about what has been said or written to them.<sup>244</sup> A lay witness can, however, interpret coded or code-like conversations.<sup>245</sup> The proponent must establish a foundation that the witness has a special basis for determining the speaker's true meaning.<sup>246</sup> The CAAF identified three basic types of conversations or statements upon which a lay witness might offer an interpretive opinion and established the foundational elements required for admitting the opinion testimony.<sup>247</sup>

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<sup>235</sup> See MCM, *supra* note 4, MIL. R. EVID. 611.

<sup>236</sup> Cf. WILLIAM SHAKESPEARE, *HAMLET*, act 3, sc. 1

Whether 'tis nobler in the mind to suffer  
The slings and arrows of outrageous fortune,  
Or to take arms against a sea of troubles,  
And by opposing end them?

<sup>237</sup> EVIDENCE MANUAL, *supra* note 119, § 701.01 (quoting the official text of MRE 701 and the 2002 amendments that have not yet been published in the MCM).

<sup>238</sup> 60 M.J. 4 (2004).

<sup>239</sup> *Id.* at 4.

<sup>240</sup> *Id.* at 5-6.

<sup>241</sup> *Id.* at 6.

<sup>242</sup> *Id.*

<sup>243</sup> *Id.* at 6.

<sup>244</sup> See *id.* at 7.

<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

<sup>247</sup> *Id.* at 7-8.

The first category was facially coherent statements capable of being understood by anyone without explanation.<sup>248</sup> For example, in one letter, the appellant wrote, “[e]ven if I did go away for the rest of my life, I’ll be unable to help financially in prison, but I’ll help mentally.”<sup>249</sup> Mrs. Byrd opined that this statement meant her husband thought he would go to jail if he were found guilty of charges of abuse.<sup>250</sup> Because the statement was plain on its face, Mrs. Byrd’s opinion interpreting it did not meet the helpfulness standard of MRE 701 and was, therefore, inadmissible.<sup>251</sup> In order to admit this type of statement, the government would have to establish a “foundation that called into question the apparent coherence of the conversation so that it no longer seemed clear, coherent, or legitimate.”<sup>252</sup>

The second category was ambiguous statements. One example was a letter in which the appellant wrote, “Well, I will. I won’t strike until you tell me your intentions. My thinking is, you care for me and want to help me get out of this. That’s what I think. I’ll wait till [sic] you decide the other.”<sup>253</sup> Mrs. Byrd interpreted this to mean that the appellant would wait to see whether she continued to resist cooperating with authorities.<sup>254</sup> If she continued resisting, she would continue receiving financial support. The CAAF held that the government failed in its foundational burden to demonstrate that appellant’s spouse had a special basis for determining his true meaning, “that words or phrases used in this passage had some established meaning in the couple’s communication.”<sup>255</sup>

The final category included statements referring to other events or facts. The appellant wrote,

[t]he main reason I told you what I did in the [car] before I left was to gain trust and answer your questions. I also did it because I know if I tell you the deal, there is a chance for our relationship. I mean, you did say so before . . . .<sup>256</sup>

In her testimony, Mrs. Byrd explained that the letter referenced a conversation the two of them had in which he offered to answer truthfully any question she asked, because she had told him that if he told the truth, the family would not leave him.<sup>257</sup> The CAAF held that Mrs. Byrd’s testimony was admissible to provide background references to other facts mentioned in the letters.<sup>258</sup>

The CAAF examined each of the eight statements, ruling on a case-by-case basis whether the military judge properly admitted Mrs. Byrd’s opinion testimony. The court held that the judge properly admitted two statements and erred in admitting the other six. The CAAF then tested the erroneous admissions for prejudice. The CAAF noted that the case was hard-fought, involving “extensive evidence presented by both the Government and the defense.”<sup>259</sup> In the end, the CAAF found no prejudice because the inadmissible testimony was “of limited materiality.”<sup>260</sup> It was not a focal point of the case, and in closing argument, trial counsel emphasized not Mrs. Byrd’s interpretations of the letters, but the appellant’s words.<sup>261</sup> Accordingly, the CAAF affirmed the ACCA.

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<sup>248</sup> *Id.* at 7.

<sup>249</sup> *Id.* at 8.

<sup>250</sup> *Id.*

<sup>251</sup> *See id.*

<sup>252</sup> *Id.* at 7.

<sup>253</sup> *Id.*

<sup>254</sup> *Id.* at 8.

<sup>255</sup> *Id.* at 7..

<sup>256</sup> *Id.* at 9.

<sup>257</sup> *Id.*

<sup>258</sup> *Id.* at 8.

<sup>259</sup> *Id.* at 10.

<sup>260</sup> *Id.*

<sup>261</sup> *Id.* at 11.

Then-Chief Judge Crawford concurred in the result, arguing, however, that the majority was incorrect to find that the military judge abused his discretion in admitting the statements under MRE 701.<sup>262</sup> According to Chief Judge Crawford, the witness's opinion was generally helpful to the fact-finder, thereby satisfying MRE 701. Chief Judge Crawford believed that the appellant demonstrated "a tendency to speak in cryptic, obfuscatory terms" and that Mrs. Byrd's testimony "added significant detail to the setting against which her opinions were offered."<sup>263</sup>

As a case of first impression, *Byrd* is instructive to practitioners seeking to introduce lay opinion testimony interpreting the conversations or statements of others. Laying the proper foundation to establish a base of common knowledge and special modes of communication between the witness and the other participant in the conversations is the key factor. The CAAF's framework of three categories of statements (self-evident, ambiguous, and referential) and its establishment of the differing foundational requirements for each should prove beneficial to counsel seeking to admit or oppose lay opinion testimony interpreting the statements of others. The case also provides a useful look at the way in which the opinions of Article III courts can be used to help shape military law. Counsel should remember to look beyond the military justice reporters when facing novel issues or issues that are rarely addressed in a military court. The opinions of Article III courts on evidentiary matters are not binding at courts-martial, but they can certainly prove persuasive and may carry the day for a diligent counsel who has prepared well for an admissibility argument.

### *Rule 702 and 703. Expert Opinion Testimony and Basis for Opinion*

Under the liberalized approach to expert opinion testimony provided by MRE 702 and the *Daubert* and *Kumho Tire* line of cases, experts can play a significant role in helping the trier of fact understand complex or counterintuitive issues at trial. Military Rule of Evidence 702 permits an expert to testify concerning scientific, technical, or other specialized knowledge provided that the expert is qualified by virtue of knowledge, skill, experience, training or education and if "(1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case."<sup>264</sup> Military Rule of Evidence 703 allows experts to base their opinions or inferences upon a wide variety of facts or data, provided that the facts or data are of a type "reasonably relied on by experts in the field."<sup>265</sup> In *United States v. Traum*,<sup>266</sup> the CAAF extended further the already considerable discretion granted to experts in rendering opinions at trial.

The appellant in *Traum* suffocated her 18-month-old daughter, Caitlyn, to death and eventually confessed to an OSI polygrapher.<sup>267</sup> The defense moved unsuccessfully to suppress the confession based on an OSI agent's allegedly improper failure to provide Article 31<sup>268</sup> rights prior to asking the appellant if she would be willing to take a polygraph examination.<sup>269</sup> At trial, the government called a forensic pediatrician, Dr. Cooper, to discuss child abuse and the counterintuitive notion of how a parent can kill her child.<sup>270</sup>

The defense filed a motion in limine to preclude Dr. Cooper from offering inadmissible profile evidence and evidence of parental behavior that the defense thought was more appropriately the subject of eyewitness testimony rather than expert testimony.<sup>271</sup> Pursuant to the motion, the expert's qualifications and scope of testimony were thoroughly litigated at a pretrial hearing. Dr. Cooper testified that she employed a three-part methodology in reaching her conclusions: first, she examined the reported medical history, particularly paying attention to changes in the history reported by the custodial parent over time;

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<sup>262</sup> See generally *id.* at 11-14 (Crawford, C.J., concurring).

<sup>263</sup> *Id.* at 13.

<sup>264</sup> EVIDENCE MANUAL, *supra* note 119, § 702.01 (quoting the official text of the amended MRE 702, which has not yet been published in the *MCM*).

<sup>265</sup> *MCM*, *supra* note 4, MIL. R. EVID. 703.

<sup>266</sup> 60 M.J. 226 (2004).

<sup>267</sup> *Id.* at 228-29.

<sup>268</sup> UCMJ Art. 31 (2000).

<sup>269</sup> *Traum*, 60 M.J. at 229.

<sup>270</sup> *Id.* at 231.

<sup>271</sup> *Id.*

second, she examined the grief behavior of the custodial parent; and third, she evaluated the physical examination of the child.<sup>272</sup> The military judge denied the motion, but limited the expert's testimony.<sup>273</sup>

At trial, pursuant to the military judge's ruling, the expert testified to the following matters: (1) overwhelmingly, the most likely person to kill a child would be his or her biological parent; (2) the most common cause of trauma death for children under four is child maltreatment; (3) for eighty percent of child abuse fatalities, there are no prior instances of reported abuse; (4) Caitlyn died of non-accidental asphyxiation.<sup>274</sup> There was no cross-examination.

The appellant appealed on two grounds. First, the appellant claimed that three of Dr. Cooper's opinions amounted to improper profile evidence.<sup>275</sup> Second, the appellant alleged that Dr. Cooper had an improper basis for her opinion because it was based on her review of the appellant's behavior in the emergency room.<sup>276</sup> The CAAF examined each of the issues, holding that the military judge did not abuse his discretion in admitting the evidence.<sup>277</sup>

The CAAF reviewed the requirements for expert testimony under MRE 702 and *United States v. Houser*,<sup>278</sup> a seminal military case on the admissibility and reliability of expert testimony. The CAAF outlined the general helpfulness standard of MRE 702 and the *Houser* reliability factors, noting that the true test is whether the panel is qualified without the expert testimony to determine "intelligently and to the best possible degree the particular issues without enlightenment from those having a specialized understanding of the subject."<sup>279</sup> The CAAF contrasted the proper use of expert testimony with the danger of profile evidence, which presents a "characteristic profile" of an offender to demonstrate guilt or innocence in a criminal trial.<sup>280</sup> Profile evidence of the offender is impermissible in a court-martial.<sup>281</sup>

In contrast to offender profile evidence, the CAAF explained, expert testimony concerning the victim profiles and characteristics of abused children—for example, battered child syndrome—can be helpful to a trier of fact.<sup>282</sup> The CAAF found that the expert's testimony that the most common cause of trauma death for children under four and that eighty percent of child abuse fatalities involved first-time reports of abuse was related to characteristics of the child victim in the case rather than the appellant.<sup>283</sup> Accordingly, the testimony was properly admitted.

The CAAF found the expert's opinion that "[o]verwhelmingly, the most likely person to kill a child is going to be his or her own biological parent"<sup>284</sup> more troubling, because it reached the characteristics of the victim and of the appellant. The testimony was particularly dangerous because it could leave the members with the impression that if the victim died from abuse, the probability was overwhelming that the appellant committed the offense.<sup>285</sup> The testimony was impermissible offender profile evidence that essentially "placed a statistical probability on the likelihood that Appellant committed the offense."<sup>286</sup> The error, however, was harmless for two reasons. First, in context, the evidence was introduced after appellant's confession had already been admitted in evidence.<sup>287</sup> Second, the issue in the case was not the identity of the

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<sup>272</sup> *Id.* at 231-32.

<sup>273</sup> *Id.* at 231-33.

<sup>274</sup> *Id.* at 233.

<sup>275</sup> *Id.*

<sup>276</sup> *Id.*

<sup>277</sup> *Id.* at 327.

<sup>278</sup> 36 M.J. 392 (C.M.A. 1993).

<sup>279</sup> *Traum*, 60 M.J. at 234 (quoting *Houser*, 36 M.J. at 398).

<sup>280</sup> *Id.*

<sup>281</sup> *See id.* (citing *United States v. Banks*, 36 M.J. 150, 161 (C.M.A. 1992)).

<sup>282</sup> *See id.* at 234-35 (recounting examples and precedents for use of battered child syndrome evidence).

<sup>283</sup> *Id.*

<sup>284</sup> *Id.* at 235.

<sup>285</sup> *Id.*

<sup>286</sup> *Id.* at 235-36.

<sup>287</sup> *Id.* at 236.

perpetrator, but whether the asphyxiation was accidental or intentional—there was no dispute that the appellant was alone with the victim at the time of the child’s injury.<sup>288</sup>

The CAAF spent less time on the second issue, the basis for Dr. Cooper’s testimony. Dr. Cooper testified at the Article 39(a) session that in forming her opinion, she considered the fact that appellant had given differing accounts of the event to the 911 operator, paramedics, and emergency room personnel.<sup>289</sup> She also considered statements the appellant made to other witnesses that were inappropriate grief responses (for instance, the appellant told one witness how glad she was that she saved receipts for toys she had given her daughter; and, on another occasion, in response to a comment on how beautiful her daughter had been, she stated that her daughter had been really mean).<sup>290</sup> The expert testified that her evaluation of these statements was part of a three-part methodology she used that was generally accepted as authoritative in the forensic pediatrics field.<sup>291</sup>

The CAAF held that Dr. Cooper’s opinion was based on proper factors. Military Rule of Evidence 703 permits an expert to base her opinion on a variety of sources, including personal knowledge, assumed facts, documents supplied by other experts, and the testimony of other witnesses at trial.<sup>292</sup> The expert’s testimony in this case indicated that she based her opinion not only on the appellant’s inappropriate grieving reaction to her daughter’s death, but also on a three-part methodology generally relied upon by experts in the field of forensic pediatrics.<sup>293</sup>

Judge Erdmann concurred in the result, finding, however, that all the evidence taken together constituted impermissible offender profiling.<sup>294</sup> The expert testified that eighty percent of children who die from child abuse, perish from a one-time event.<sup>295</sup> Because the appellant was alone with Caitlyn prior to her death, it was eighty percent likely that Traum was the case of the death.<sup>296</sup> Next, the expert testified that the most common cause of child trauma death is child mistreatment.<sup>297</sup> According to Judge Erdmann, this statement identified the death as resulting from trauma and the appellant as the only person who could have inflicted it.<sup>298</sup> Furthermore, the statement that a biological parent is overwhelmingly the most likely person to kill a child meant in context that the appellant was overwhelmingly the most likely person to have killed Caitlyn.<sup>299</sup> Finally, the military judge admitted the evidence to help the panel with the “counterintuitive” notion that a parent would kill his or her own child.<sup>300</sup> Thus, the very purpose for admission was to identify the appellant as part of a limited group who would or could have killed the child.<sup>301</sup> Nevertheless, because of the context of the evidence occurring after admission of appellant’s confession, Judge Erdmann would find the error harmless.

*Traum* comes very close to blurring the lines between victim and offender profile evidence. Judge Erdmann’s concurring opinion seems more accurately to capture the likely effect of the testimony on the members than the majority analysis. Essentially, the opinion testimony established a logical and statistical profile from which the appellant never could have distinguished herself, given the circumstances of the case. Perhaps the saving grace of this case is, as the majority and Judge Erdmann observed, the context of the expert’s testimony, which occurred only after the appellant’s confession had been introduced. In a closer case, the analysis of whether the profile evidence followed the logical path laid out by Judge Erdmann might have prevailed. Counsel and military judges alike should employ caution when faced with expert testimony

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<sup>288</sup> *Id.*

<sup>289</sup> *Id.*

<sup>290</sup> *Id.*

<sup>291</sup> *Id.* at 231.

<sup>292</sup> *Id.* at 236..

<sup>293</sup> *Id.*

<sup>294</sup> *Id.* at 237 (Erdmann, J., concurring in part and in the result).

<sup>295</sup> *Id.*

<sup>296</sup> *Id.*

<sup>297</sup> *Id.* at 237-38.

<sup>298</sup> *Id.* at 238.

<sup>299</sup> *Id.* at 238.

<sup>300</sup> *Id.* at 233.

<sup>301</sup> *Id.*

of the type elicited in *Traum*. The use of statistics, probabilities, and victim profiles that are closely related to offender profiles to box in the accused could very well, in a future case without a confession to support its strength, prove ultimately fatal to the government's case.

*Military Rule of Evidence 901. Authentication*

In *United States v. Craig*,<sup>302</sup> the CAAF clarified the foundational and authentication requirements for introducing transcripts of recorded conversations. The case arose from a conspiracy to import and distribute marijuana from Mexico into the United States.<sup>303</sup> The appellant, who was in an extra duty status, could not leave Fort Hood, so his friends made the 1200-mile round trip to El Paso without him and were caught and arrested at the border with two duffel bags full of marijuana.<sup>304</sup> At the direction of a DEA agent, one of the co-conspirators called the accused on the telephone two times and recorded the conversations, in which the accused made several incriminating statements.<sup>305</sup>

At trial, the government sought to introduce the audiotape of the incriminating conversations into evidence. Although the quality of the audiotape was poor, the military judge admitted it into evidence. No one could fully understand the tape, so the military judge called a recess for the government to obtain better playback equipment. During the recess a member of the legal staff accidentally recorded over part of the conversation. The government later produced a transcript of the tape, prepared by a court reporter, and introduced the transcript into evidence. The military judge permitted the members to read the transcript as they listened to the tape, and eventually, he permitted the members to take the transcript with them into the deliberation room.

The issue on appeal was whether the military judge abused his discretion in admitting into evidence a transcript of a poor-quality tape conversation. In affirming, the CAAF examined its own long-standing precedent as well as cases from the federal circuit courts of appeal. The court cited *United States v. Jewson*,<sup>306</sup> in which the COMA stated that it would be irrational to exclude a properly authenticated transcript of a recording.<sup>307</sup> The CAAF stated its continuing belief that where foundational requirements and appropriate procedural safeguards exist, transcripts of audio recordings are admissible to assist the fact finder in following the recordings as they are being played.<sup>308</sup> The poor quality of a recording does not normally render it inadmissible unless the unintelligible portions are so substantial as to render the entire recording untrustworthy.<sup>309</sup> The CAAF adopted a four-part test from the 9th Circuit for ensuring proper procedural protections in admitting a transcript: (1) the judge should review the transcript for accuracy; (2) the defense counsel should be permitted to highlight inaccuracies and introduce an alternative transcript; (3) the fact finder should be instructed that the tape, and not the transcript, is evidence; and (4) the fact finder should be permitted to compare the tape to the transcript and hear counsel's argument.<sup>310</sup> Furthermore, the fact-finder should be instructed to disregard anything in the transcript they did not hear on the tape.<sup>311</sup>

In the instant case, the CAAF held that the military judge sufficiently satisfied each of the four steps, although his efforts were "not a model for executing this four-step process."<sup>312</sup> First, he reviewed the transcript for accuracy, although he never stated on the record the results of that review.<sup>313</sup> Second, he granted the defense the opportunity to challenge the accuracy of

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<sup>302</sup> 60 M.J. 156 (2004).

<sup>303</sup> *Id.* at 157.

<sup>304</sup> *Id.* at 157-58.

<sup>305</sup> *Id.* at 158.

<sup>306</sup> 5 C.M.R. 80 (C.M.A. 1952).

<sup>307</sup> *Craig*, 60 M.J. at 159-60.

<sup>308</sup> *Id.* at 160.

<sup>309</sup> *Id.*

<sup>310</sup> *Id.* at 161 (citing *United States v. Delgado*, 357 F.3d 1-61, 1070 (9th Cir. 2004)).

<sup>311</sup> *Id.*

<sup>312</sup> *Id.*

<sup>313</sup> *Id.*

the transcript.<sup>314</sup> Third, he gave a cautionary instruction regarding the use of the tape, which “could have been more artfully drafted” but, adequately advised the members how to use the transcript.<sup>315</sup> The CAAF advised that the instruction must inform the panel that the transcript is merely an interpretation of the tape and that the members should disregard anything in the transcript that they do not hear on the recording itself.<sup>316</sup> Finally, he gave the members the chance to compare the tape and the transcript during their deliberations.<sup>317</sup> The last issue the CAAF considered was whether a transcript should be used only as demonstrative evidence in the courtroom or should be admitted into evidence to accompany the members into the deliberation room. The CAAF joined “the majority of the federal courts of appeals in holding that trial judges have considerable discretion in determining whether to allow the fact finder to consider such transcripts during deliberations.”<sup>318</sup> In the instant case, the military judge did not abuse his discretion in allowing the members to take the transcript with them into the deliberation room.<sup>319</sup>

*Craig* is an excellent practical case for trial and defense counsel and military judges. Good planning and compliance with the four procedural protections adopted by the CAAF will ensure the effective use of audio playback and transcripts at courts-martial. Counsel should ensure that they have adequate playback equipment and have tested it in the courtroom prior to trial. In addition, counsel who plan to use audio recordings should prepare a transcript in advance and provide copies to the military judge and opposing counsel. Military judges should consider a pretrial article 39(a) session to permit adequate review of the tape and transcript and development of objections from the opposing side. Finally, although it is a matter of discretion for the military judge, the CAAF has apparently embraced the practical benefits of sending the transcript and the audio recording into the deliberation room with the members as a way of ensuring the members have an adequate opportunity to compare the tape with the transcript.

#### *Change to MRE 608(b)*

Effective 1 December 2003, Federal Rule of Evidence 608(b) was changed to clarify that Rule 608(b)’s absolute prohibition on extrinsic evidence applies only when the *sole reason* for proffering the evidence is to attack or support a witness’s character for truthfulness.<sup>320</sup> The changes will be effective in the Military Rules of Evidence by operation of law under MRE 1102 on 1 June 2005.<sup>321</sup>

The text of MRE 608(b), with the changes underlined, follows:

(b) Specific instances of conduct.—Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness’ credibility character for truthfulness, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness’ character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified. The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused’s or the witness’ privilege against self-incrimination when examined with respect to matters which that relate only to credibility character for truthfulness.<sup>322</sup>

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<sup>314</sup> *Id.*

<sup>315</sup> *Id.* at 161-62.

<sup>316</sup> *Id.* at 161.

<sup>317</sup> *Id.* at 161-62.

<sup>318</sup> *Id.* at 162 (citations omitted).

<sup>319</sup> *Id.* at 157.

<sup>320</sup> See Proposed Amendment to the Federal Rules of Evidence, Advisory Committee Note to Rule 608(b) (Mar. 2003), available at <http://www.uscourts.gov/rules/congress0303.html> [hereinafter Advisory Note].

<sup>321</sup> Military Rules of Evidence 1102 provides that changes to the Federal Rules of Evidence become operative in the MRE eighteen months later, unless the President first takes other action to modify, amend, or refuse to adopt them in the MRE. See MCM, *supra* note 4, MIL. R. EVID. 1102.

<sup>322</sup> Advisory Note, *supra* note 3203.

## Conclusion

The 2004 term of court provides something for almost every trial practitioner. Defense counsel should be delighted by the CAAF's firm stance on the admissibility of uncharged misconduct evidence in *McDonald*, its clarification on the attorney-client privilege and classified evidence in *Schmidt*, its warning against the admission of unfairly prejudicial impeachment evidence in *Saferite*, and the restrictions on lay opinion testimony in *Byrd*. The CAAF didn't leave the government out, however, placing new toys in the prosecutor's playhouse with its relaxing of the corroboration rule for confessions in *Seay* and its blurring of the boundaries between offender and victim profile evidence in *Traum*. A frequent theme in many of the cases is the significant role the military judge plays as an evidentiary gatekeeper, safeguarding the rights of the accused as in *Mason*, protecting the dignity and protection of sexual misconduct victims as in *Banker*, and ensuring that the proper evidentiary foundations are laid and instructions given as in *Craig*. While it is true that no single unifying thread runs through these cases, it is also true that there is method in the CAAF's madness.<sup>323</sup>

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<sup>323</sup> Cf. WILLIAM SHAKESPEARE, *HAMLET*, act 2, sc. 2 ("Though this be madness, yet there is method in 't.").

## Annual Review of Developments in Instructions—2004

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This annual review of cases addressing instructions to court-martial panel members covers cases decided by the Court of Appeals for the Armed Forces (CAAF) during its 2004 term<sup>1</sup>, and a few published cases by the service courts during that same period. These decisions are organized in the order in which instructions are provided to court members during the trial: (1) offenses; (2) defenses; (3) evidentiary instructions; and (4) sentencing. This article is written for military trial practitioners, and it will frequently refer to relevant paragraphs in the *Military Judges' Benchbook (Benchbook)*.<sup>2</sup> The *Benchbook* is the primary resource for drafting instructions, and all military trial practitioners should be intricately familiar with it.

During 2004, some cases provided new law or new guidelines for military judges to use when instructing court members. Other cases reiterated the holdings of past cases or the current law. All of the cases, however, reminded judge advocates that military judges must be alert and pay attention to detail because the instructions to the members are important to a fair trial and require careful thought.

### **Offenses: Chapter 3, *Military Judges' Benchbook***

#### *Obscene or Indecent Language*

In *United States v. Negron*,<sup>3</sup> the CAAF found that the definition of “obscene,” which was used during the providence inquiry for the accused’s guilty plea to depositing obscene matter in the mail, was erroneous.<sup>4</sup> The court set aside the conviction and adopted a broader definition of “indecent language,” which goes back to the plain language of the definition in the *Manual for Court-Martial (MCM)*, for application to future cases.<sup>5</sup> Although this case involved a guilty plea before a judge alone, it is included in this article because of its significance on the instructions for the offenses of depositing obscene matter in the mail and indecent language.

While working as a postal clerk in Japan, Marine Corporal Negron wrongfully appropriated \$1,540 from a postal safe, and made and uttered a worthless check for \$500.<sup>6</sup> In an effort to repay the government and his credit union, he applied for a loan from the same credit union.<sup>7</sup> After reading a letter informing him that his loan application was rejected, he wrote a letter to the credit union and placed it in the United States mail.<sup>8</sup> The letter contained the following language.

Oh, yeah, by the way y’all can kiss my ass too!! Worthless bastards! I hope y’all rot in hell you scumbags. Maybe when I get back to the states, I’ll walk in your bank and apply for a blowjob, a nice dick sucking, I bet y’all are good at that, right?<sup>9</sup>

The accused pled guilty to several offenses,<sup>10</sup> including depositing obscene matter in the mail in violation of Article 134.<sup>11</sup>

<sup>1</sup> The 2004 term began on 1 October 2003 and ended on 30 September 2004.

<sup>2</sup> U.S. DEP’T OF ARMY, PAM. 27-9, LEGAL SERVICES: MILITARY JUDGES’ BENCHBOOK (15 Sept. 2002) [hereinafter BENCHBOOK].

<sup>3</sup> 60 M.J. 136 (2004).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 144.

<sup>6</sup> *Id.* at 137.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 138.

<sup>11</sup> MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 94c (2002) [hereinafter MCM].

The issue on appeal involved the definition of “obscene” that the military judge used during the providence inquiry. The *MCM* states that the definition of “obscene” is synonymous with “indecent,” as defined in the *MCM* explanation for the offense of indecent language under Article 134.<sup>12</sup> The *MCM* defines indecent language as “that which is grossly offensive to modesty, decency, or propriety, or shocks the moral sense, because of its vulgar, filthy, or disgusting nature, or its tendency to incite lustful thought.”<sup>13</sup>

The standard *Benchbook* instruction for depositing obscene matter in the mail, however, uses the definition of “indecent” for the offense of indecent acts, which is different from the definition of “indecent” for indecent language.<sup>14</sup> The *MCM* defines “indecent” for the offense of indecent acts as “that form of immorality relating to sexual impurity which is not only grossly vulgar, obscene, and repugnant to common propriety, but tends to excite lust and deprave the morals with respect to sexual relations.”<sup>15</sup>

Also, the standard instruction for depositing mail matter does not include the following language: “[t]he test is whether the particular language employed is calculated to corrupt morals or incite libidinous thoughts, and not whether the words themselves are impure,” which is in the standard instruction for indecent language.<sup>16</sup> During the providence inquiry, the military judge used the definition straight from the standard instruction in the *Benchbook*, which was erroneous.<sup>17</sup>

The court found that the erroneous definition did not focus the accused on the required intent.<sup>18</sup> He never stated that he intended to excite libidinous thoughts in the mind of the reader and he repeatedly stated that he only wanted to offend the reader.<sup>19</sup> The accused responded “Yes, sir” to the following question: “Do you believe and admit that this language used in your letter was calculated to corrupt morals or excite lustful thoughts?”<sup>20</sup> The court, however, found that the accused was only parroting answers to leading questions by the military judge.<sup>21</sup>

The exact definition of obscene or indecent language is a contentious issue, as the CAAF has highlighted in some of its more recent case law. In 1990, in *United States v. French*,<sup>22</sup> the Court of Military Appeals (COMA) stated that language must be “calculated to corrupt morals or excite libidinous thoughts” to be obscene.<sup>23</sup> This phrase appeared in military case law since 1959, when the Army Board of Review quoted that phrase from a legal treatise, *Wharton’s Criminal Law and Procedure*.<sup>24</sup> In most cases involving the definition of indecent language, the issue has been whether facially innocuous language was indecent because of the message it conveyed under the circumstances.<sup>25</sup> Courts, however, frequently cited that phrase in appellate opinions, and it became unclear whether indecent language must meet that test in every case.

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<sup>12</sup> “‘Obscene’ is synonymous with ‘indecent’ as the latter is defined in paragraph 89c.” *Id.*

<sup>13</sup> *Id.* para. 89.

<sup>14</sup> Compare BENCHBOOK, *supra* note 2, para. 3-94-1d (Mail—Depositing or Causing to Be Deposited Obscene Matter In), with *id.* para. 3-89-1d (Indecent Language Communicated to Another), and *id.* para. 3-90-1d (Indecent Acts with Another).

<sup>15</sup> *MCM*, *supra* note 11, pt. IV, ¶ 90.

<sup>16</sup> Compare BENCHBOOK, *supra* note 2, para. 3-89-1d (Indecent Language Communicated to Another), with *id.* para. 3-94-1d (Mail—Depositing or Causing to Be Deposited Obscene Matter In).

<sup>17</sup> *United States v. Negron*, 60 M.J. 136, 137-38 (2004).

<sup>18</sup> *Id.* at 142.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 139-40.

<sup>21</sup> *Id.* at 142-43. This question during the providency inquiry indicates that the military judge may have been aware that the standard instruction in the *Benchbook* was lacking and that “obscene” is synonymous with the definition of “indecent” for the offense of indecent language. This question comes from the definition of “indecent” for the offense of indecent language. See *MCM*, *supra* note 11, pt. IV, ¶ 89c; BENCHBOOK, *supra* note 2, para. 3-89-1d (Indecent Language Communicated to Another). The “Yes, sir” response to the military judge’s leading question, however, was inconsistent with what the accused had described in more detail earlier during the providence inquiry. See *Negron*, 60 M.J. at 138-39.

<sup>22</sup> 31 M.J. 57 (C.M.A. 1990).

<sup>23</sup> *Id.* at 60.

<sup>24</sup> See *United States v. Simmons*, 27 C.M.R. 654 (A.B.R. 1959).

<sup>25</sup> See, e.g., *United States v. Simmons*, 27 C.M.R. 654 (A.B.R. 1959); *United States v. Wainwright*, 42 C.M.R. 997 (C.M.A. 1970); *United States v. French*, 31 M.J. 57 (C.M.A. 1990).

In 1995, that test from *French* was added to the *MCM* explanation of the offense of indecent language.<sup>26</sup> In order to avoid a misinterpretation of the element as a specific intent element, however, the drafters rephrased it as, “Language is indecent if it tends reasonably to corrupt morals or incite libidinous thoughts.”<sup>27</sup>

In *United States v. Brinson*,<sup>28</sup> the CAAF unambiguously held that only language that is “calculated to corrupt morals or excite libidinous thoughts” is indecent, and “calculated” means intended or planned to bring about a certain result.<sup>29</sup> That test is much more restrictive than the original *MCM* definition. In her dissent in *Brinson*, then-Judge Crawford stated, “Paragraph 89c, Part IV, Manual for Courts-Martial, United States (1995 ed.), provides at least two definitions of ‘indecent language,’ either of which can be the basis for a conviction.”<sup>30</sup>

When the CAAF decided *Negron*, it was bound by the restrictive definition from *Brinson*, because it was the law at the time of the trial.<sup>31</sup> After deciding the case in front of it, however, the CAAF stated that the *MCM* clearly provides two alternate definitions for indecent language, either one of which could be the basis for a conviction.<sup>32</sup> The CAAF implicitly adopted, for future cases, the rationale in then-Judge Crawford’s dissent in *Brinson*. “We adopt and will apply this plain language of the Manual prospectively to cases tried after the date of this decision.”<sup>33</sup> Therefore, language is now indecent if it is *either* grossly offensive because of its tendency to incite lustful thought *or* it is grossly offensive to modesty, decency, or propriety, or shocks the moral sense, because of its vulgar, filthy, or disgusting nature.<sup>34</sup> The court pointed out that the element requiring the conduct to be prejudicial to good order and discipline or service discrediting will “filter[ ] out from punishment language that is colloquial vocabulary and may be routinely used by service members.”<sup>35</sup>

There are two important lessons on instructions to glean from this case. First, it is occasionally possible that the standard instruction in the *Benchbook* may be inaccurate, and practitioners need to tailor instructions to correctly reflect the current law. Second, all practitioners should annotate, in paragraphs 3-89-1d and 3-94-1d of their copies of the *Benchbook*, that the CAAF adopted the disjunctive definition of “indecent language.” Changes to those two paragraphs in the *Benchbook* are being staffed. In the meantime, practitioners with cases involving indecent language or obscene mail should read the *Negron* opinion and tailor the instructions accordingly.

#### *Wrongful Use of a Controlled Substance*

In *United States v. Hildenbrandt*,<sup>36</sup> a urinalysis case, the accused was convicted of wrongfully using cocaine.<sup>37</sup> On appeal, he contested the legal and factual sufficiency of the evidence, the constitutionality of the permissive inference of wrongful use, and the wording of the military judge’s instruction on the permissive inference.<sup>38</sup> The Navy-Marine Corps Court of Criminal Appeals found no error and affirmed the conviction.<sup>39</sup> The case confirms the appropriateness of the standard *Benchbook* instruction on the permissive inference of wrongful use.

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<sup>26</sup> See *MCM*, *supra* note 11, pt. IV, ¶ 89c, analysis (2002).

<sup>27</sup> *Id.*

<sup>28</sup> 49 M.J. 360 (1998).

<sup>29</sup> *Id.* at 364.

<sup>30</sup> *Id.* at 368 (Crawford, J., dissenting).

<sup>31</sup> *United States v. Negron*, 60 M.J. 136, 141 (2004).

<sup>32</sup> *Id.* at 144.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> 60 M.J. 642 (N-M. Ct. Crim. App. 2004).

<sup>37</sup> *Id.* at 643.

<sup>38</sup> *Id.* at 643-44.

<sup>39</sup> *Id.* at 644.

After finding the evidence legally and factually sufficient and finding the permissive inference constitutional under the Due Process Clause,<sup>40</sup> the court addressed the instruction. The appellant argued that the wording of the military judge's instruction could have resulted in the members applying less than a reasonable doubt standard.<sup>41</sup>

The military judge gave the standard definitions and other instructions in paragraph 3-37-2d of the *Benchbook*,<sup>42</sup> including the instruction concerning the permissive inferences. The military judge instructed the members as follows:

Use of a controlled substance may be inferred to be wrongful in the absence of evidence to the contrary. However, the drawing of this inference is not required.

Knowledge by the accused of the presence of the substance and the knowledge of its contraband nature may be inferred from the surrounding circumstances. You may infer from the presence of cocaine in the accused's urine that the accused knew he used cocaine. However, the drawing of this inference is not required.<sup>43</sup>

The military judge also gave the ignorance or mistake instruction for drug offenses found in paragraph 5-11-4 of the *Benchbook*, which only requires an honest mistake.<sup>44</sup> It also includes the reminder that the prosecution has the burden to establish the guilt of the accused, including the fact that he was not mistaken or ignorant, beyond a reasonable doubt.

During the trial, there was no objection to the instructions, so the accused forfeited any error, in the absence of plain error.<sup>45</sup> The court easily found that the military judge correctly instructed the members on the burden of proof and the permissive inferences, making it very clear that the members need not draw either inference. The court found no error, plain or otherwise.<sup>46</sup> This case reaffirms for trial practitioners that they are on firm ground when they follow the standard *Benchbook* instruction on permissive inferences in urinalysis cases.

#### *Lesser Included Offenses and the Statute of Limitations*

In *United States v. Thompson*,<sup>47</sup> the CAAF reversed the conviction because the instructions on the lesser-included offenses did not account for the statute of limitations. Sergeant First Class (SFC) Thompson was charged with raping his stepdaughter on divers occasions, on or between 1 September 1992 and 1 March 1996, at the three Army posts where SFC Thompson was assigned during that period.<sup>48</sup> The summary court-martial convening authority received the charge sheet on 3 January 2000.<sup>49</sup> The military judge instructed the members on the two lesser-included offenses of carnal knowledge in violation of Article 120 and indecent acts with a child in violation of Article 134.<sup>50</sup> The defense objected on the basis that it was not put on notice to defend against indecent acts with a child.<sup>51</sup>

After the members began deliberations, the government recognized a potential statute of limitations problem if the members found the accused guilty of a lesser-included offense.<sup>52</sup> During several RCM 802 conferences and Article 39(a)

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<sup>40</sup> *Id.* at 644-48.

<sup>41</sup> *Id.* at 648.

<sup>42</sup> BENCHBOOK, *supra* note 2, para. 3-37-2d (Drugs—Wrongful Use).

<sup>43</sup> *Hildebrandt*, 60 M.J. at 648.

<sup>44</sup> *Id.* See BENCHBOOK, *supra* note 2, para. 5-11-4 (Ignorance or Mistake—Drug Offenses).

<sup>45</sup> *Hildebrandt*, 60 M.J. at 648.

<sup>46</sup> *Id.* at 649.

<sup>47</sup> 59 M.J. 432 (2004).

<sup>48</sup> *Id.* at 434.

<sup>49</sup> *Id.* at 433.

<sup>50</sup> *Id.* at 434.

<sup>51</sup> *Id.*

<sup>52</sup> Article 43 bars prosecution for offenses committed more than five years before receipt of sworn charges by the summary court-martial convening authority, with a few exceptions including when the offense is punishable by death. UCMJ art. 43 (2002).

sessions, the military judge discussed solutions. The military judge determined that the proper solution was that, if the members found the accused guilty of a lesser-included offense that included a time period barred by the statute of limitations, the defense could move to exclude that portion of the finding.<sup>53</sup> The military judge indicated that he would grant the motion and order the specification to be amended.<sup>54</sup>

During deliberations, the court was opened three times, once for further instructions on the charged and lesser-included offenses and twice to rehear testimony of witnesses.<sup>55</sup> During deliberations, the military judge never inquired whether the accused wanted to waive the statute of limitations for the lesser-included offenses.<sup>56</sup> He also never took the opportunity to provide modified instructions and a modified findings worksheet to the members in order to amend the dates in the lesser-included offenses so they would be within the statute of limitations.<sup>57</sup>

The members found the accused guilty of indecent acts or liberties with a child on divers occasions on or between 1 September 1992 and 1 March 1996.<sup>58</sup> The defense moved for a finding of not guilty, because it was not possible to determine if the offenses occurred within the statute of limitations.<sup>59</sup> The military judge thought the evidence was clear that on at least one occasion there was an indecent touching within the statutory time period.<sup>60</sup> The defense disagreed.<sup>61</sup> The military judge denied the defense motion, announced he would amend the findings of the court, and stated that he would give the members an opportunity to evaluate the validity of the amendment to the verdict.<sup>62</sup>

After the members were informed of the amendment and given a chance to discuss among themselves whether the amendment did “violence to [their] verdict,” the President of the panel informed the military judge that they were satisfied.<sup>63</sup> The defense proposed that the military judge ask the members whether knowing a more precise date of one of the incidents would affect their verdict now that the time period had been amended.<sup>64</sup> The military judge, however, denied their request.<sup>65</sup>

The CAAF reversed the conviction finding that the military judge’s instructions were erroneous and the unambiguous findings could not be modified.<sup>66</sup> The court found a series of errors. First, the military judge erred by failing to conduct a statute of limitations waiver inquiry with the accused.<sup>67</sup> Second, while instructing on the lesser-included offenses, the military judge should have excluded any period outside the statute of limitations, unless the accused knowingly and voluntarily waived it.<sup>68</sup> Third, the military judge improperly modified unambiguous findings after they were announced.<sup>69</sup>

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<sup>53</sup> *Thompson*, 59 M.J. at 434.

<sup>54</sup> *Id.* at 435.

<sup>55</sup> *Id.* at 436.

<sup>56</sup> *See id.* at 439-40.

<sup>57</sup> *Id.* at 436. The military judge may have thought, because of the evidence, that the members would either find him guilty of rape or find him not guilty, and a finding of guilty to a lesser-included offense was unlikely.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 436-37.

<sup>60</sup> *Id.* at 437.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 436-37.

<sup>63</sup> *Id.* at 438.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 440.

<sup>67</sup> *Id.* at 439. As the court points out, it is possible that the defense may have waived the statute of limitations for tactical reasons. *Id.* at 440. In that case, there would be no problem with the court’s verdict.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

All three points in the previous paragraph are good lessons for practitioners. This case, however, is most helpful in illustrating how to correct an error when it is recognized during a trial. The real error was that the instruction on the lesser-included offenses included a time period that was barred by the statute of limitations and not waived by the accused. The government raised the issue during deliberations, and all parties agreed that there was an error in the instructions. It is easy to be a Monday morning quarterback when not in the middle of a trial, especially a hotly contested case like this one, but a military judge facing this situation in the future can take two steps to correct the error so it will not materially prejudice the rights of the accused.

First, the military judge should draw the accused's attention to the fact that prosecution for part of the time period in the lesser-included offense is barred by the statute of limitations, and then the military judge should inquire into whether the accused is willing to waive that right. If the accused is willing to waive the statute of limitations, the military judge should conduct the statute of limitations waiver inquiry with the accused, using the standard advice in paragraph 2-7-12 of the *Benchbook*.<sup>70</sup> If the accused knowingly and voluntarily waives the protections under the statute of limitations, then the instructions would no longer be erroneous and the issue is resolved.

If the accused is not willing to waive his right to assert the bar against prosecution in the statute of limitations, however, the erroneous instructions should be corrected. The military judge should open the court, inform the members that there was an error in the instructions, and instruct the members correctly. The findings worksheet and written findings instructions, if provided to the members, should be retrieved from the President and replaced with corrected copies. Clear and accurate corrected instructions before the members conclude deliberations will ensure a fair trial and avoid the problems encountered in *Thompson*.

## **Defenses: Chapter 5, Military Judges' Benchbook**

### *Self-Defense, Defense of Another, and Accident*

In *United States v. Jenkins*,<sup>71</sup> the Army Court of Criminal Appeals (ACCA) reversed a conviction for aggravated assault. The Army court held that the military judge's failure to provide instructions on the defense of accident and the revival of the right to self-defense by withdrawal was prejudicial error.<sup>72</sup>

Specialist (SPC) Jenkins had a dispute with SPC Taite and he received three death threats that he believed came from SPC Taite and SPC Keys.<sup>73</sup> The accused and six friends, including Sergeant (SGT) Eldridge, went to SPC Taite's barracks to resolve the problem.<sup>74</sup> After a noisy confrontation, the staff duty noncommissioned officer ordered the accused and his friends to leave.<sup>75</sup> As they walked back to their parked cars, SPC Taite, SPC Keys, and thirteen others approached the accused's group and stopped them from leaving by surrounding their cars.<sup>76</sup> Specialist Keys began to fight with SGT Eldridge, and SPC Taite's group held the accused's group back from stopping the fight.<sup>77</sup> Specialist Keys sat on top of SGT Eldridge while he was unconscious and punched him in the face.<sup>78</sup> The accused fired his .45 caliber pistol into the air twice at a forty-five degree angle.<sup>79</sup> The accused said that, while lowering the pistol to put it away, the pistol discharged again.<sup>80</sup> The round hit the abdomen of a soldier standing fifteen feet away.<sup>81</sup> The accused claimed the he had fired the pistol into the

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<sup>70</sup> BENCHBOOK, *supra* note 2, para. 2-7-12 (Statute of Limitations).

<sup>71</sup> 59 M.J. 893 (Army Ct. Crim. App. 2004).

<sup>72</sup> *Id.* at 895.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 896.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at n.6.

air twice because he thought SPC Keys was going to kill SGT Eldridge and he wanted to disperse the crowd to help SGT Eldridge.<sup>82</sup>

The military judge provided the members with the “defense of another” instruction and the self-defense instruction.<sup>83</sup> As part of the self-defense instruction, the military judge told the members that, if they found beyond a reasonable doubt that SGT Eldridge voluntarily engaged in mutual fighting, then he gave up the right to self-defense.<sup>84</sup> The defense requested the instruction that states that withdrawal revives the right to self-defense because SGT Eldridge was unconscious and not fighting back.<sup>85</sup> The military judge denied the request for the instruction.<sup>86</sup> Also, the defense requested the accident instruction.<sup>87</sup> The defense asserted that the initial firing of the weapon was lawfully in defense of another and the accused acted with due care and without negligence.<sup>88</sup> The military judge denied the defense request for the instruction because he determined that the accused wantonly and recklessly, or at least negligently, fired his pistol in the air in a garrison environment.<sup>89</sup>

During closing argument, the defense counsel referred to the injury as an unintentional accident.<sup>90</sup> The trial counsel objected to the use of the term “accident” and the military judge instructed the members that he determined as a matter of law that the defense of accident does not apply under the facts of the case.<sup>91</sup> During rebuttal argument, the trial counsel stated that the defense wanted them to think that it was an accident, but the judge just told them that it was not an accident.<sup>92</sup> After the defense counsel objected, the military judge told the members, “I did not say that.”<sup>93</sup> The trial counsel’s argument emphasized that, if SGT Eldridge was a provocateur or mutual combatant, then the accused was not entitled to claim defense of another.<sup>94</sup> The members found the accused guilty of aggravated assault by the intentional infliction of grievous bodily harm.<sup>95</sup>

Instructions for affirmative defenses must be given when, for each element of the defense, there is “some evidence” to which the members may attach credit if they so desire.<sup>96</sup> The ACCA opinion referred to this standard as the “mirror image” of the standard that the military judge uses when considering a motion for a finding of not guilty under RCM 917(d).<sup>97</sup> Under RCM 917, the military judge does not evaluate credibility of witnesses and views the evidence in a light most favorable to the government.<sup>98</sup> The Army court stated that any doubt on the sufficiency of the evidence to provide a defense requested instruction should be resolved in favor of the accused.<sup>99</sup>

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<sup>82</sup> *Id.* at 896.

<sup>83</sup> *Id.* at 897.

<sup>84</sup> *Id.* This instruction comes from the standard instruction on provocateur and mutual combatant. BENCHBOOK, *supra* note 2, para. 5-2-6 n.5 (Other Instructions (Self-Defense)).

<sup>85</sup> BENCHBOOK, *supra* note 2, para. 5-2-6 n.7 (Other Instructions (Self-Defense)).

<sup>86</sup> *Jenkins*, 59 M.J. at 897.

<sup>87</sup> *Id.* at 896.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 896-97.

<sup>92</sup> *Id.* at 897.

<sup>93</sup> *Id.* at 897.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 895.

<sup>96</sup> *Id.* at 897.

<sup>97</sup> *Id.* at 898.

<sup>98</sup> MCM, *supra* note 11, R.C.M. 917(d).

<sup>99</sup> *Jenkins*, 59 M.J. at 898.

The three elements of the defense of accident are that the death, injury, or event was the (1) *unintentional and unexpected result* of doing a (2) *lawful act* in a (3) *lawful manner*.<sup>100</sup> The Army court found that there was some evidence that the accused fired his pistol to prevent further injury to SGT Eldridge, that he showed the care a reasonably prudent person would have shown under the circumstances, that failing to engage the safety before lowering the pistol was not so clearly negligent as to bar the instruction, and that the injury was unintended.<sup>101</sup> Because doubts should be resolved in favor of the accused, the court concluded that the military judge erred by not giving the defense requested accident instruction.<sup>102</sup>

The Army court recognized that persuasive testimony that the beating of SGT Eldridge had ended before the shots were fired might have influenced the military judge in deciding to not instruct on accident.<sup>103</sup> The court, however, reminded trial judges that they cannot invade the province of the fact finders by sifting the evidence and judging credibility.<sup>104</sup> Even the unsupported testimony of the accused, in the face of an overwhelming prosecution case, is sufficient evidence to require the instruction.<sup>105</sup>

When the accused invokes defense of another, he stands in the shoes of the party defended.<sup>106</sup> Therefore, the principles of self-defense apply to defense of another.<sup>107</sup> Thus, deadly force in defense of another is permitted, if the accused reasonably apprehended that death or grievous bodily harm was about to be inflicted wrongfully on the person defended, and the accused believed that the amount of force used was necessary to protect the person from death or grievous bodily harm.<sup>108</sup> If the person defended, however, was the aggressor or engaged in mutual combat, then that person has lost the right to self-defense.<sup>109</sup>

There is an exception, however, when the aggressor, mutual combatant, or provocateur withdraws in good faith before the alleged offense occurred.<sup>110</sup> If an accused withdraws in good faith and indicates a desire for peace by words or actions, and the adversary continues the fight, then the right to self-defense is revived.<sup>111</sup> The court found that SGT Eldridge effectively withdrew from the mutual affray when he became unconscious and ceased resistance.<sup>112</sup> Therefore, his right to self-defense was revived, and defense of another was available to the accused.<sup>113</sup> The military judge's refusal to instruct on "withdrawal as reviving the right to self-defense" was error.<sup>114</sup>

The Army court held that "the military judge's multiple instructional errors, compounded by trial counsel's argument, cumulatively resulted in prejudicial error," and it reversed the aggravated assault conviction.<sup>115</sup> This case is full of lessons on instructing on affirmative defenses. As long as there is some evidence of each element of a defense, the military judge must give the instruction. As with RCM 917 motions, the military judge should not evaluate the credibility of the evidence. Also, the Army held that an aggressor, provocateur, or mutual combatant regains that right to self-defense when he becomes

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<sup>100</sup> MCM, *supra* note 11, R.C.M. 916(f) (emphasis added).

<sup>101</sup> *Jenkins*, 59 M.J. at 899.

<sup>102</sup> *Id.* at 900.

<sup>103</sup> *Id.* at 898.

<sup>104</sup> *Id.*

<sup>105</sup> *See id.*

<sup>106</sup> MCM, *supra* note 11, R.C.M. 916(e)(5).

<sup>107</sup> *Id.*

<sup>108</sup> *Jenkins*, 59 M.J. at 900.

<sup>109</sup> *Id.*

<sup>110</sup> MCM, *supra* note 11, R.C.M. 916(e)(5).

<sup>111</sup> *United States v. Lanier*, 50 M.J. 772, 778 n.20 (Army Ct. Crim. App. 1999).

<sup>112</sup> *Jenkins*, 59 M.J. at 900.

<sup>113</sup> *Id.* An alternative legal concept under which SGT Eldridge may have been entitled to use force in self-defense, even if he was initially an aggressor or mutual combatant, is if the opposing party escalated the conflict to a level of deadly force. *See United States v. Cardwell*, 15 M.J. 124, 126 (C.M.A. 1983). Because there is no model instruction on this concept, a tailored instruction would be necessary.

<sup>114</sup> *Jenkins*, 59 M.J. at 900.

<sup>115</sup> *Id.* at 902.

unconscious, because that is effectively a withdrawal.<sup>116</sup> In its opinion, the court advised counsel and judges that all conflicts should be submitted to the members with instructions on all lesser-included offenses and affirmative defenses raised, so the accused will have his day in court and needless reversals will be avoided.<sup>117</sup>

## Evidentiary Instructions: Chapter 7, Military Judges' Benchbook

### *Transcripts of Tape Recordings*

In *United States v. Craig*,<sup>118</sup> the CAAF held that it is within the discretion of the trial judge to admit the transcript of a tape recording, subject to proper foundation and appropriate procedural safeguards. As will be discussed, the required safeguards include proper instructions to the members on how they may use the transcript.

Specialist Craig was convicted of conspiracy to possess and distribute marijuana.<sup>119</sup> He asked another Soldier, Private First Class (PFC) Pearsall, to go to El Paso, Texas, in order to pick up marijuana for him. Border patrol stopped PFC Pearsall at an immigration checkpoint on the way back to Fort Hood. Border patrol agents found fifty-one pounds of marijuana in two duffle bags.<sup>120</sup> Law enforcement agents recorded telephone conversations, which they had arranged between PFC Pearsall and the accused.<sup>121</sup> During the conversations, the accused made incriminating statements.<sup>122</sup>

During the trial, the law enforcement agent that recorded the conversations and PFC Pearsall testified about the method in which the conversations were recorded.<sup>123</sup> The military judge admitted the cassette tape.<sup>124</sup> While the trial counsel played the tape for the members, the military judge directed that the tape be stopped because he was having difficulty understanding the tape.<sup>125</sup> When asked if the members could understand the tape, the president said, "Only partially."<sup>126</sup>

After a recess, the trial counsel offered a transcript of the contents of the tape, but the military judge found that an adequate foundation had not been laid for the transcript.<sup>127</sup> The court reporter that prepared the transcript testified that she listened to the tape using headphones, which helped her understand the tape, and she testified that the transcript was a fair and accurate representation of the tape.<sup>128</sup> The military judge admitted the transcript, because he found that it was helpful to the members in understanding the tape.<sup>129</sup>

The military judge gave a limiting instruction to the members, telling them that the transcript was prepared to assist them, if at all, in understanding the tape.<sup>130</sup> He instructed them that the tape was the evidence and that the transcript was not a substitute for the tape.<sup>131</sup> Further, he instructed them that they should consider the clarity of the tape in determining what

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<sup>116</sup> See *id.* at 900.

<sup>117</sup> *Id.*

<sup>118</sup> 60 M.J. 156 (2004).

<sup>119</sup> *Id.* at 157.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 158.

<sup>122</sup> *Id.* at 157-58.

<sup>123</sup> *Id.* at 158.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 158-59.

<sup>130</sup> *Id.* at 159.

<sup>131</sup> *Id.*

weight to give it.<sup>132</sup> During the remainder of his testimony, PFC Pearsall testified that the tape was an accurate account of his conversations with the accused.<sup>133</sup> Also, a squad leader identified the voices of the accused and PFC Pearsall on the tape.<sup>134</sup> When the court closed for deliberations, the military judge provided the members with the tape and the transcript, along with a tape recorder on which to play the tape.<sup>135</sup>

It is clear that the CAAF looks favorably upon adequately authenticated transcripts of recorded conversations. The court has long believed that it would be irrational to exclude such a transcript, especially in the military setting where the exigencies of service require the use of recordings of interviews.<sup>136</sup> “We continue to believe that, subject to foundational requirements and appropriate procedural safeguards, a transcript of an audio recording may be used at courts-martial.”<sup>137</sup> It is within the discretion of the trial judge to admit such transcripts as an aid in listening to tape recordings.<sup>138</sup>

Tape recordings of actual events, such as drug deals, are admissible despite problems with audibility because it directly portrays what happened.<sup>139</sup> If the recording, however, is substantially unintelligible, then it may render the entire recording untrustworthy.<sup>140</sup> In this case, the president stated that the members could understand it partially. Also, witnesses were able to identify voices on the tape.<sup>141</sup> The tape was properly admitted.<sup>142</sup> Because the tape was admitted, it was appropriate to provide the members with a “substantially accurate” transcript.<sup>143</sup>

The court provided a four-step process to guide military judges when ruling on the admissibility of transcripts of recordings.<sup>144</sup> First, the military judge should review the transcript for accuracy.<sup>145</sup> During this step, military judges should explicitly state what portions of the tape were audible and describe the results of the comparison of the audible portions of the tape with the transcript.<sup>146</sup> The transcript does not need to be perfectly verbatim, but it does need to be substantially accurate.<sup>147</sup>

Second, the defense counsel should be allowed to highlight any alleged inaccuracies and introduce alternative versions.<sup>148</sup> In this case, the defense counsel had repeated opportunities to challenge the transcript and did so at one point.<sup>149</sup>

The third step is a cautionary instruction on how the members can use the transcript.<sup>150</sup> The military judge should instruct the members that the tape recording is the evidence of the recorded conversations and the transcript is an

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<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 160.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *See id.* at 161.

<sup>142</sup> *Id.* at 160-61.

<sup>143</sup> *Id.* at 161.

<sup>144</sup> *Id.* (adopting the four procedural protections for use of transcripts of tape recordings from *United States v. Delgado*, 357 F.3d 1061, 1070 (9th Cir. 2004)).

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

interpretation of the tape.<sup>151</sup> The judge must instruct the members that they will disregard anything in the transcript that they do not hear themselves.<sup>152</sup> Also, the military judge should instruct the members to use the transcript only in conjunction with the recording.<sup>153</sup> The court stated that, although the instruction in this case did not include all of that guidance, it was sufficient without defense objection.<sup>154</sup>

The fourth step is that the military judge should give the members an opportunity to compare the tape and the transcript with the benefit of having heard the counsel's arguments on the meaning of the conversations.<sup>155</sup> In this case, the military judge accomplished this step by allowing the members to take the transcript with them during deliberations.<sup>156</sup> In line with the majority of federal courts of appeals, the CAAF held that the military judge has considerable discretion in determining whether to allow the members to consider the transcript during deliberation.<sup>157</sup>

Although the CAAF stated that this case is not a model for the four-step process, it held that the four procedural protections were sufficiently satisfied to allow the admission of the transcript.<sup>158</sup> In the future, trial practitioners will have the benefit of the *Craig* four-step process to guide them through this issue. The military judge has wide discretion in allowing the use of a substantially accurate transcript of recorded conversation, provided an adequate foundation has been laid and the requisite procedural safeguards are used.

### *Accomplice Testimony*

In *United States v. Simpson*,<sup>159</sup> the Army court held that the military judge erred by not giving the requested accomplice testimony instruction.<sup>160</sup> The accused was charged with conspiracy to steal a laptop computer.<sup>161</sup> The co-conspirator made two statements to Criminal Investigation Division investigators.<sup>162</sup> In the first statement, the co-conspirator admitted to stealing the computer to get even with the owner, and he did not mention the accused.<sup>163</sup> In the second statement, the co-conspirator admitted stealing the computer with the accused, and he portrayed the accused as the one who instigated, planned, and persisted in the commission of the larceny.<sup>164</sup> The government offered the second statement into evidence, and the military judge admitted it as a statement against interest.<sup>165</sup> The co-conspirator did not testify. He expressed his intent to invoke his right against self-incrimination, and the government did not give him testimonial immunity.<sup>166</sup>

The defense requested the accomplice testimony instruction.<sup>167</sup> The military judge denied the request to give the instruction, based on the erroneous belief that the instruction only applies when the purported accomplice testifies as a

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<sup>151</sup> *Id.*

<sup>152</sup> *Id.* (quoting *U.S. v. Holton*, 116 F.3d 1536, 1543 (D.C. Cir. 1997)).

<sup>153</sup> *Id.* (quoting *Holton*, 116 F.3d at 1543).

<sup>154</sup> *Id.* at 162.

<sup>155</sup> *Id.* at 161.

<sup>156</sup> *Id.* at 162.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 161.

<sup>159</sup> 60 M.J. 674 (Army Ct. Crim. App. 2004).

<sup>160</sup> *Id.* at 680.

<sup>161</sup> *Id.* at 675.

<sup>162</sup> *See id.* at 675.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at 675-76.

<sup>165</sup> *Id.* at 676. The Army court held that the admission of this statement violated the accused's right to confrontation under the sixth amendment. *Id.* at 678.

<sup>166</sup> The court found that the military judge erred by finding the co-conspirator unavailable, which was required for admissibility of the statement, because the government could have granted immunity and made the co-conspirator available. *Id.*

<sup>167</sup> *See* BENCHBOOK, *supra* note 2, para. 7-10 (Accomplice Testimony).

witness at trial.<sup>168</sup> The court held that, when either the in-court testimony or an out-of-court hearsay statement of an accomplice<sup>169</sup> is admitted, the military judge must give the members a properly tailored cautionary instruction regarding accomplice testimony.<sup>170</sup>

Although some of the language of the model *Benchbook* instruction specifically mentions the witness testifying in the case,<sup>171</sup> the purpose of the instruction applies as much or more to an out-of-court statement. The purpose is to instruct the members that they ought to receive the testimony of an accomplice, which incriminates an accused, with suspicion.<sup>172</sup> The members must receive it with more care and caution than the testimony of other witnesses.<sup>173</sup> The court stated, “In fact, the suspicious nature of the statement is heightened further where, as in this case, the declarant is not subject to cross-examination by the defense.”<sup>174</sup>

Because of the *Confrontation Clause*,<sup>175</sup> especially after *Crawford v. Washington*,<sup>176</sup> this will not be a common issue. In this case, the Army court held that the admission of the statement violated the confrontation clause, under both the old *Ohio v. Roberts*<sup>177</sup> analysis and the current *Crawford v. Washington* analysis. For those rare cases in which an accomplice’s out-of-court statement is admitted, however, the military judge must tailor the accomplice testimony instruction and instruct the members so they receive the evidence with the appropriate suspicion.

#### *Accused’s Failure to Testify*

In *United States v. Forbes*,<sup>178</sup> the military judge instructed the members, over defense objection, to disregard the fact that the accused did not testify and to not draw any adverse inference from it. The Navy-Marine court held that the accused has a military due process right to elect, through his defense counsel, whether or not the members are given that instruction, except in the interest of justice in the most unusual cases.<sup>179</sup> Under the facts of this case, the court found that the military judge erroneously gave the instruction over defense objection and that the “great risk of prejudice” required reversal.<sup>180</sup>

Quartermaster First Class (E-6) Forbes was a married Navy recruiter.<sup>181</sup> Complaints about his relationships with four high school girls resulted in charges of rape, indecent assault, sodomy, adultery, violation of a lawful general regulation, obstruction of justice, and other offenses.<sup>182</sup> The prosecution presented the testimony of the four complainants and

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<sup>168</sup> *Simpson*, 60 M.J. at 679-80.

<sup>169</sup> A witness is an “accomplice” if he could be convicted of the same crime. *Id.* at 680.

<sup>170</sup> *Id.*

<sup>171</sup> *E.g.*, BENCHBOOK, *supra* note 2, para. 7-10 (Accomplice Testimony) (“Whether (state the name of the witness), who testified as a witness in this case, was an accomplice is a question for you to decide.”).

<sup>172</sup> *See Simpson*, 60 M.J. at 680.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> “In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . .” U.S. CONST. amend. VI.

<sup>176</sup> 541 U.S. 36 (2004) (holding that, for testimonial evidence, the confrontation clause requires “unavailability and a prior opportunity for cross-examination”).

<sup>177</sup> 448 U.S. 56 (1980) (holding that the confrontation clause does not require the exclusion of an unavailable witness’s statement against a criminal defendant, if the statement bears adequate “indicia of reliability”), *overruled by* *Crawford v. Washington*, 541 U.S. 36 (2004).

<sup>178</sup> 59 M.J. 934 (N-M. Ct. Crim. App. 2004) (en banc), *review granted*, 2004 CAAF LEXIS 966 (Sept. 15, 2004).

<sup>179</sup> *Id.* at 941.

<sup>180</sup> *Id.* at 936.

<sup>181</sup> *Id.* at 935.

<sup>182</sup> *Id.*

substantial evidence that corroborated their testimony.<sup>183</sup> A “vigorous defense” was presented, but the accused did not testify.<sup>184</sup>

After the conclusion of presentation of evidence on the merits, the military judge discussed findings instructions with counsel during an Article 39(a) session.<sup>185</sup> The military judge stated that he intended to give the instruction on the accused’s silence.<sup>186</sup> The defense stated that it did not want that instruction, and it objected to the instruction.<sup>187</sup> The military judge stated that he would consider the defense objection and that his intent was to protect the accused from any adverse feelings by the members.<sup>188</sup>

After a one-hour recess, the military judge stated that he felt it was necessary to give the instruction, unless the defense counsel had case law stating he should not give it.<sup>189</sup> After the defense said it did not have case law, the military judge said he thought it was important to tell the members to not ask themselves why the accused did not testify.<sup>190</sup> The defense counsel then requested that the instruction on the accused’s silence not be the last instruction and the military judge said he would move it so that it would be before the instruction on findings by exceptions.<sup>191</sup> The military judge, however, apparently forgot to move it and he gave the instruction on the accused’s silence last.<sup>192</sup>

After the findings were announced, the defense moved for a mistrial based, in part, on the instruction on the accused’s silence, particularly the timing of the instruction.<sup>193</sup> The military judge stated that it was his error in giving the instruction

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<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* at 936.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Id.* The following discussion took place between the military judge and the assistant defense counsel.

MJ: . . . The instruction on the accused’s silence.

ADC: Sir, we would waive that reading, sir.

MJ: You don’t want to have that instruction?

ADC: No, sir.

MJ: Do you object to that instruction?

ADC: Yes, sir, we do. I don’t even—has that been even commented on, sir. Well, the fact that he didn’t testify, we would rather not draw attention to that.

MJ: It says, “The accused has an absolute right to remain silent. You are not to draw an inference adverse to the accused”—

ADC: Yes, sir. We want to waive—object to that, sir.

MJ: You object to it? Well, I will have to consider that. That is a standard instruction. Normally it is given and its intent—my intent is to protect the accused from any adverse feelings by the members. I know it calls attention to it, and that is probably your objection to it. I understand. Do you want to be heard further?

ADC: No, sir.

MJ: Let me think about that one.

*Id.*

<sup>189</sup> *Id.* at 937.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> *Id.* at 937-38.

last, but he denied the motion for a mistrial.<sup>194</sup>

The Discussion to RCM 920(e) states that, in an appropriate case, an instruction to not draw any adverse inference from the accused's failure to testify may be included in the findings instructions.<sup>195</sup> It refers the reader to Military Rule of Evidence (MRE) 301(g), which provides the following.

*Instructions.* When the accused does not testify at trial, defense counsel may request that the members of the court be instructed to disregard that fact and not to draw any adverse inference from it. Defense counsel may request that the members not be so instructed. Defense counsel's election shall be binding upon the military judge except that the military judge may give the instruction when the instruction is necessary in the interests of justice.<sup>196</sup>

The Analysis to MRE 301(g) reminds practitioners that the Supreme Court has stated that it is wise to not give the instruction over defense objection.<sup>197</sup> It also states that the Joint Service Committee's intent in drafting MRE 301(g) was "to leave the decision in the hands of the defense in all but the most unusual cases."<sup>198</sup>

This was not one of those most unusual cases. The only reason for the instruction that the military judge put on the record was his fear that the members would hold the silence of the accused against him.<sup>199</sup> Although a valid concern, it is a routine concern that usually exists in such cases. The President considered the standard fear that members might misuse the accused's silence, and the President decided to give the election to the defense team.<sup>200</sup>

The Navy-Marine court stated that it will give differing levels of deference to the trial judge, depending on how much of the analysis is articulated on the record. A judge that articulates the case-specific "interests of justice" and the balancing test on the record will be "accorded great deference under a standard of review of abuse of discretion."<sup>201</sup> A judge that articulates the "interests of justice" involved, but does not put the balancing analysis on the record will be accorded less deference.<sup>202</sup> If the judge does not even articulate the case-specific "interests of justice" involved, the court will use a *de novo* standard of review.<sup>203</sup>

In this case, after scrutinizing the record, the court could not find any mention by the military judge of an "interest of justice" beyond the routine concern that the members would hold the accused's silence against him.<sup>204</sup> There were no ambiguous comments during voir dire, questions by members, or comments during the trial concerning the accused's silence.<sup>205</sup> Using a *de novo* standard of review, the court found that there was no "interest of justice" beyond the standard fear that the members might hold the accused's silence against him.<sup>206</sup> The court held that the military judge erred by giving the instruction over defense objection.<sup>207</sup>

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<sup>194</sup> *Id.* at 938.

<sup>195</sup> MCM, *supra* note 11, R.C.M. 920(e) discussion.

<sup>196</sup> *Id.* MIL. R. EVID. 301(g).

<sup>197</sup> *Forbes*, 59 M.J. at 938 (quoting *Lakeside v. Oregon*, 435 U.S. 333, 340-41 (1978)).

<sup>198</sup> MCM, *supra* note 11, MIL. R. EVID. 301(g) analysis, at A22-7.

<sup>199</sup> *Forbes*, 59 M.J. at 939.

<sup>200</sup> *Id.* at 940.

<sup>201</sup> *Id.* at 939.

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> *Id.* at 940.

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

The issue of the proper test for material prejudice was an issue of first impression for the court.<sup>208</sup> After a lengthy discussion, it adopted a test that put the burden on the government, but the burden is not as high as the harmless error test for constitutional errors.

[W]hen a military judge commits error by giving this instruction over defense objection in the absence of articulated case-specific interests of justice, a presumption of prejudice results. The government then bears the burden of showing by a preponderance of the evidence why the appellant was not prejudiced by the instruction.<sup>209</sup>

In this case, the court found that the presumption of prejudice had not been rebutted.<sup>210</sup> It held that the error deprived the accused of military due process and it set aside the findings and sentence.<sup>211</sup>

If military judges are considering giving the failure to testify instruction over defense objection, then they must do carefully. They should clearly develop the record with their reasoning, by articulating the case-specific “interests of justice” that support their decision and articulating the balancing of those interests against the election of the defense. A military judge should not give the instruction over defense objection, except in the most unusual case when *case-specific* reasons make it necessary in the interests of justice.

### Variance

Within the last year, there were two CAAF opinions addressing variance. The court applied its holding in *United States v. Walters*,<sup>212</sup> which concerned an ambiguous verdict when the members enter a finding of guilty except the words “on divers occasions” without specifying which occasion, to *United States v. Seider*.<sup>213</sup> In *United States v. Lovett*,<sup>214</sup> the CAAF addressed solicitation—when the underlying offense in the findings differs from the underlying offense in the specification.

Airman First Class Seider was charged with wrongful use of cocaine on divers occasions and wrongful distribution of cocaine.<sup>215</sup> The government introduced evidence of two separate allegations of wrongful use of cocaine.<sup>216</sup> Three Airmen testified that, while playing cards and drinking at the accused’s apartment, the accused provided cocaine and used some himself.<sup>217</sup> One of the three airmen also testified that, a month earlier while at the accused home watching football, the accused provided cocaine and used some himself.<sup>218</sup>

During instructions on findings, the military judge gave the members the following variance instruction concerning the specification alleging wrongful use of cocaine:

As to Specification 1 of the Charge, if you have doubt the accused wrongfully used cocaine on divers occasions, but you are satisfied beyond a reasonable doubt that the accused wrongfully used cocaine once,

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<sup>208</sup> *Id.*

<sup>209</sup> *Id.* at 941.

<sup>210</sup> *Id.* at 942.

<sup>211</sup> *Id.*

<sup>212</sup> 58 M.J. 391 (2003).

<sup>213</sup> 60 M.J. 36 (2004).

<sup>214</sup> 59 M.J. 230 (2004).

<sup>215</sup> *Seider*, 60 M.J. at 36.

The specification alleging wrongful use of cocaine stated, “In that Airman First Class Shane T. Seider, United States Air Force, 559th Flying Training Squadron, Randolph Air Force Base, Texas, did, at or near Universal City, Texas, on divers occasions between on or about 1 October 2000 and on or about 31 December 2000, wrongfully use cocaine.” *Id.* at 37.

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

you may still reach a finding of guilty; however, you must change the specification by exception, i.e., deleting the words “on divers occasions.”<sup>219</sup>

The military judge did not instruct the members to specify a use and did not instruct them on how to make exceptions and substitutions on the findings worksheet.<sup>220</sup> The members found the accused guilty of the specification of wrongful distribution of cocaine and guilty of the specification of wrongful use of cocaine except the words “on divers occasions.”<sup>221</sup> There were no substituted words or figures specifying which one of the two uses was proven beyond a reasonable doubt and no one requested or provided any clarification of the findings.<sup>222</sup>

The CAAF held that, because the ambiguous finding of guilty of wrongful use of cocaine did not disclose the conduct on which it was based, the Air Force Court of Criminal Appeals (AFCCA) could not conduct a factual sufficiency review of the conviction.<sup>223</sup> The Government argued that the AFCCA resolved any ambiguity by finding beyond a reasonable doubt that the accused used and distributed cocaine while playing cards with the three other Airmen, and that the AFCCA also found beyond a reasonable doubt that the members’ verdict was based on that incident.<sup>224</sup> The CAAF, however, explained that, because of the fundamental principle that a court of criminal appeals cannot find as fact any allegation in a specification for which the fact-finder has found the accused not guilty, the AFCCA was prevented from even conducting a factual sufficiency review.<sup>225</sup> The CAAF reversed the decision of the AFCCA and set aside the finding of guilty of Specification 1 and the sentence.<sup>226</sup>

This case reiterates lessons from *Walters*. If a specification alleges “on divers occasions” and the evidence is such that the members might find the accused guilty beyond a reasonable doubt on one, but not more than one, occasion, the military judge should carefully tailor a variance instruction to advise the members how to specify the occasion by exceptions and substitutions.<sup>227</sup> Also, the findings worksheet should be tailored to assist the members in recording a verdict that is unambiguous.<sup>228</sup> In addition, when reviewing the findings worksheet to ensure it is in proper form before the findings are announced, if the worksheet shows a finding of guilty except the words “on divers occasions” without exceptions or substitutions specifying on which occasion the accused is found guilty, then the military judge should have the members clarify their findings. Fortunately for trial practitioners, when this situation arises in the future, there are now approved interim changes to the *Benchbook* that provide guidance and model instructions.<sup>229</sup> Because this situation is not uncommon,

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<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> *Id.* at 38.

<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

<sup>227</sup> *See id.* at 37-38.

<sup>228</sup> *See id.*

<sup>229</sup> On 16 September 2003, after the *Walters* opinion, the Army Trial Judiciary approved the following interim changes to the *Benchbook*:

[Add the following to the end of the first NOTE in paragraph 2-5-16.]

***If the words “divers occasions” or another specified number of occasions have been excepted, IAW U.S. v. Walters, 58 M.J. 391 (2003), the MJ must ensure there remains no ambiguity in the findings. Normally, that is accomplished by the panel substituting (a) relevant date(s), or other facts. See paragraph 7-25 for a suggested instruction on clarifying an ambiguous verdict.***

[Add the following new paragraph 7-25.]

**7-25. DIVERS OR SPECIFIED OCCASIONS**

**NOTE 1: “Divers occasions.”** *When a specification alleges that the offense occurred on “divers occasions,” the court members should be instructed substantially as follows:*

“Divers occasions” means two or more occasions.

trial practitioners must remain vigilant to detect potential *Walters* problems and to take the appropriate steps to avoid uncertainty in the verdict.

In *United States v. Lovett*, the accused was charged, *inter alia*, with raping his step-daughter and soliciting the murder of his wife.<sup>230</sup> The solicitation specification alleged that SSG Lovett solicited a man, LC, to murder his wife, TL, by telling him that he wanted his wife to disappear, providing him with a picture to identify his wife, and discussing how much it would cost to have him make his wife disappear.<sup>231</sup> LC testified that the accused told him that he wanted his wife to disappear, that the accused gave him a picture of his wife, and that he discussed how much this would cost.<sup>232</sup>

After all the evidence had been received, the government requested the military judge instruct the members on the lesser-included offense of soliciting a general disorder in violation of Article 134.<sup>233</sup> The defense objected to the instruction, but the military judge instructed the members on a lesser-included offense that the accused solicited LC to take some action to cause the accused's wife to disappear or to fail to appear in court.<sup>234</sup> After deliberations, the members excepted the word "murder" from the specification and found the accused guilty of soliciting LC "to cause [TL] to disappear or to wrongfully prevent her from appearing in a civil or criminal proceeding" by telling him that he wanted his wife to disappear, providing him a picture to identify his wife, and discussing how much it would cost to have him make his wife disappear.<sup>235</sup>

When the variance between pleadings and proof is material and prejudiced the accused, the variance is fatal.<sup>236</sup> A material variance can cause prejudice by putting the accused at risk of another prosecution, by misleading the accused to the extent that he is unable to adequately prepare for trial, or by changing the nature of the offense such that the accused is denied the opportunity to defend against the charge.<sup>237</sup>

On appeal, SSG Lovett argued that the variance prevented him from adequately preparing a defense.<sup>238</sup> Defending against a charge of soliciting murder is different from defending against a charge of soliciting a general disorder.<sup>239</sup> The CAAF agreed that the language in the charge did not put the accused on notice to defend against a lesser-included offense of

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**NOTE 2: When a specification alleges that the offense occurred on "divers occasions" or on a specified number of occasions and the members return a verdict substituting "one" for "divers" or reducing the number of occasions, IAW *U.S. v. Walters*, 58 M.J. 391 (2003), the court members should be instructed as follows:**

Your verdict appears to be in the proper form, with the exception of (the) Specification(s) (\_\_\_\_\_) of (the) (Additional) Charge(s) (\_\_\_\_\_\_). Because you have substituted (one) (\_\_\_\_\_) for the language ("divers occasions," ("\_\_ occasions,"), your findings must clearly reflect the specific instance(s) of conduct upon which your findings are based. That may be reflected on the findings worksheet by filling in (a) relevant date(s), or other facts clearly indicating which conduct served as the basis for your findings. Two thirds of the members, that is \_\_ members, must agree on the specific instance(s) of conduct upon which your findings are based. If two-thirds or \_\_ members do not agree on (at least one) (a) (the) specific instance(s) of conduct, then your finding as to (the) Specification(s) (\_\_\_\_\_) of (the) (Additional) Charge(s) (\_\_\_\_\_) [and (the) Charge(s)] must be changed to a finding of "Not Guilty."

**NOTE 3: The military judge should ordinarily provide a supplemental findings worksheet to assist the court members in identifying the date(s) or specific instance(s) of conduct upon which the finding of guilty is based. Counsel for both sides should be consulted before the supplemental findings worksheet is provided to the court members.**

NOTE 4: When the government has pled a course of conduct specification or specification alleging conduct on "divers occasions," the military judge should carefully consider the strength of the evidence adduced. If a variance instruction is warranted or findings by exceptions and substitutions are likely, careful tailoring of the original findings worksheet may obviate the necessity to give the instruction in NOTE 2 above.

<sup>230</sup> 59 M.J. 230, 232 (2004).

<sup>231</sup> *Id.*

<sup>232</sup> *Id.*

<sup>233</sup> *Id.*

<sup>234</sup> *Id.* at 232-33.

<sup>235</sup> *Id.* at 233.

<sup>236</sup> *Id.* at 235.

<sup>237</sup> *Id.* at 236.

<sup>238</sup> *Id.* At 235.

<sup>239</sup> *Id.*

soliciting a general disorder that was essentially obstruction of justice, and it held that the variance was fatal.<sup>240</sup> The CAAF set aside the solicitation conviction and the sentence.<sup>241</sup> When considering variance, trial practitioners should, as CAAF did in this case,<sup>242</sup> carefully analyze the explicit language in the specification and the impact it had on where the defense team channeled its efforts.

## Sentencing Instructions: Chapter 2, *Military Judges' Benchbook*

### *Instructions on Wheeler Factors*

In *United States v. Griggs*,<sup>243</sup> the AFCCA addressed the requirement of the military judge to instruct the members on extenuation and mitigation evidence. In *United States v. Wheeler*,<sup>244</sup> the COMA held that presentencing instructions must delineate the matters that the court-martial should consider in its deliberations.<sup>245</sup> Military appellate courts, however, have pointed out that military judges have considerable discretion and only need to tailor the sentencing instructions by selecting the general categories of mitigating and extenuating evidence.<sup>246</sup> The AFCCA followed this trend and reminded trial practitioners that the military judge does not need to list each and every piece of extenuation and mitigation evidence—providing general guidelines to the members is sufficient.<sup>247</sup>

Senior Airman Griggs pleaded guilty to using marijuana and pleaded not guilty the remaining offenses.<sup>248</sup> A panel of officer members convicted him of two specifications of using ecstasy and two specifications of distributing ecstasy.<sup>249</sup> The members adjudged a sentence of a bad-conduct discharge, confinement for 150 days, total forfeitures, and reduction to the grade of E-1.<sup>250</sup>

While discussing sentencing instructions at an Article 39(a) session, the defense counsel requested the military judge to highlight the following specific extenuation and mitigation evidence.

- (1) the fact the appellant was 24 years old at the time of the offenses;
- (2) the appellant's "personal background" and "family difficulties;"
- (3) his status as a parent of a two-year-old son;
- (4) his high school education;
- (5) the length of time he had been "under charges;"
- (6) his guilty plea;
- (7) his efficient duty performance as reflected in his performance reports;
- (8) his remorse;
- (9) his participation in a substance abuse awareness seminar;
- (10) his awards;
- (11) his desire to remain in the service; and
- (12) his desire to avoid a bad-conduct discharge.<sup>251</sup>

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<sup>240</sup> *Id.* at 236.

<sup>241</sup> *Id.* at 237.

<sup>242</sup> *Id.* at 236-37.

<sup>243</sup> 59 M.J. 712 (A.F. Ct. Crim. App. 2004).

<sup>244</sup> 38 C.M.R. 72 (C.M.A. 1967).

<sup>245</sup> *Id.* at 75.

<sup>246</sup> *See, e.g.,* *United States v. Hopkins*, 56 M.J. 393 (2002); *United States v. Blough*, 57 M.J. 528 (A.F. Ct. Crim. App. 2002).

<sup>247</sup> *Griggs*, 59 M.J. at 716-17.

<sup>248</sup> *Id.* at 713.

<sup>249</sup> *Id.*

<sup>250</sup> *Id.*

<sup>251</sup> *Id.* at 716.

The military judge declined to do so, but he advised the defense counsel that he was free to highlight the specific evidence during argument.<sup>252</sup> The military judge instructed the members as follows.

In determining the sentence, you should consider all the facts and circumstances of the offenses of which the accused has been convicted, and all matters concerning the accused whether presented before or after findings. Thus, you should consider the accused's background, his character, his service record, all matters in extenuation and mitigation, and any other evidence he presented.<sup>253</sup>

The military judge also gave the standard instruction that guilty pleas are a matter in mitigation and the instruction that the members must give appropriate consideration to the unsworn statement.<sup>254</sup>

When asked by the military judge, the defense did not object to the instructions.<sup>255</sup> The AFCCA stated that the defense waived any error, unless it was plain error.<sup>256</sup> The court could have found no plain error and relied on that to affirm the sentence. The court, however, went further and held that, even if there was no waiver, the military judge did not err.<sup>257</sup> The military judge has considerable discretion in tailoring instructions.<sup>258</sup> In this case, the military judge sufficiently instructed the members on the general categories of extenuating and mitigating evidence.<sup>259</sup>

For trial practitioners, this case confirms that the military judge must instruct the members on the general categories of mitigating and extenuating evidence, but the military judge is not required to provide a detailed list of specific extenuation or mitigation evidence. At their discretion, however, military judges may decide to provide more detail, when instructing the members on the sentencing evidence they should consider during deliberations.<sup>260</sup>

### Conclusion

This annual review of instructions illustrated that military trial practitioners must remain alert and pay attention to detail. The *Benchbook* is the primary resource when researching instructions in preparation for trial. The *Benchbook* should only be the first step, however, because it might not adequately reflect new case law or cover the law in a unique situation. Hopefully, this article assists military trial practitioners in understanding and staying current with developments in the area of instructions to court-martial members.

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<sup>252</sup> *Id.* at 716-17.

<sup>253</sup> *Id.* at 717.

<sup>254</sup> *Id.*

<sup>255</sup> *Id.*

<sup>256</sup> *Id.*

<sup>257</sup> *Id.*

<sup>258</sup> *Id.*

<sup>259</sup> *Id.*

<sup>260</sup> The *Benchbook* provides helpful guidance in this area. It contains a list of twenty-two possible types of extenuation and mitigation evidence and seven possible types of aggravation evidence. BENCHBOOK, *supra* note 2, para. 2-5-23 (Other Instruction); para. 2-6-11 (Other Instructions). The list goes into more detail than the law requires. If, however, military judges want to exercise their discretion to go into more detail, then this list is a good starting point for tailoring the instructions.

## Defending the Citadel of Reasonableness: Search and Seizure in 2004

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Recent search and seizure history is largely one of defense, retrenchment and counterattack. The U.S. Supreme Court has spent much of its time reiterating its benchmark standard of reasonableness in general and, more specifically, totality of the circumstances regarding probable cause. The Court has fended off, in particular, the U.S. Court of Appeals for the Ninth Circuit's (Ninth Circuit) continuous attempts to categorize and pigeonhole the requirements for probable cause. Since its defeat in *United States v. Banks*<sup>1</sup> in 2003, the Ninth Circuit and its allies have mounted additional attacks. The Supreme Court has continued to repulse these attacks, and has even mounted its own counterattacks by affirming two cases which followed its previous law. This article looks at four cases in which the Court defends against assaults on its standards by reversing lower courts, as well as two in which it affirms lower courts which follow established law. In a seventh case a divided Court explained several interpretations of reasonableness and probable cause. This article also addresses five significant cases from the Court of Appeals for the Armed Forces (CAAF), as well as several from the Navy Marine Corps Court of Criminal Appeals (NMCCA) and the Air Force Court of Criminal Appeals (AFCCA).

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The U.S. Supreme Court defended a bold frontal assault on its precedent by the Ninth Circuit in *Devenpeck v. Alford*.<sup>2</sup> The Court found that probable cause existed for an arrest, even though the offense charged was not the same offense articulated by the arresting officer.<sup>3</sup> In doing so, the Court reasserted two of its fundamental rules: (1) probable cause is based on reasonable conclusions drawn from the facts known to the officer at the scene;<sup>4</sup> and (2) the officer's subjective intent for arrest is not a basis for invalidating the arrest.<sup>5</sup> The Court rejected the Ninth Circuit's ruling that an arrest was improper when the probable cause for that arrest was not closely related to the offense articulated by the officer at the scene.

Mr. Alford apparently had a "wannabe cop" complex.<sup>6</sup> He monitored police radio and had "wig wag" headlights on his car. In November 1997, he stopped on Route 16 in Pierce County, Washington, alongside a motorist who was having difficulty with his car. Meanwhile, driving in the opposite direction, police officer Joi Haner noticed the two vehicles, one with its headlights flashing alternately. When the officer returned to investigate, Mr. Alford drove away. The stranded motorist informed Officer Haner that he believed that Mr. Alford was a law enforcement officer. Officer Haner pursued and eventually stopped Mr. Alford. Sergeant Devenpeck joined Officer Haner on the scene.<sup>7</sup>

The two law enforcement officers were suspicious that Mr. Alford was impersonating a police officer, as they saw police scanners, handcuffs and the flashing lights on his car. Mr. Alford was vague and evasive when questioned. Sergeant Devenpeck noticed that Mr. Alford had been tape recording the roadside encounter.<sup>8</sup> Officer Haner arrested Mr. Alford for violation of the Washington State Privacy Act.<sup>9</sup> He was also charged with an infraction for the "wig wag" headlights.<sup>10</sup> The

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<sup>1</sup> 540 U.S. 31 (2003).

<sup>2</sup> 125 S. Ct. 588 (2004).

<sup>3</sup> *Id.* at 595.

<sup>4</sup> *See* *Maryland v. Pringle*, 540 U.S. 366 (2003).

<sup>5</sup> *See* *Whren v. United States*, 517 U.S. 806 (1996).

<sup>6</sup> *Devenpeck*, 125 S. Ct. at 591.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 591-92.

<sup>9</sup> *Id.* at 592. The pertinent portion of the Act reads:

Except as otherwise provided in this chapter, it shall be unlawful for any individual, partnership, corporation, association, or the state of Washington, its agencies, and political subdivisions to intercept, or record any . . . private conversation, by any device electronic or otherwise designed to record or transmit such conversation regardless how the device is powered or actuated without first obtaining the consent of all the persons engaged in the conversation.

WASH. REV. CODE § 9.73.030(1)(b) (1994).

<sup>10</sup> *Devenpeck*, 125 S. Ct. at 592.

officers consulted a county prosecutor and considered charges of impersonating a police officer, obstructing law enforcement and making false representations, but declined to charge these offenses as part of a policy that discourages “piling on” of charges.<sup>11</sup>

The state trial court dismissed both charges against Mr. Alford.<sup>12</sup> He then brought a cause of action in federal district court under 42 U.S.C. § 1983 and under state law, for unlawful arrest and imprisonment, claiming that the officers lacked probable cause to arrest him that evening.<sup>13</sup> The district court instructed the jury that, in order to prevail, Mr. Alford would have to show that the officers arrested him without probable cause, and defined probable cause as: “if the facts and circumstances within the arresting officer’s knowledge are sufficient to warrant a prudent person to conclude that the suspect has committed, is committing or was about to commit a crime.”<sup>14</sup> The unanimous jury found in favor of the police officers.<sup>15</sup>

The Ninth Circuit reversed the trial court’s findings, holding that there was “no evidence to support the jury’s verdict.”<sup>16</sup> The court found that the officers could not have had probable cause to arrest Mr. Alford because recording the roadside stop was not a crime.<sup>17</sup> The divided panel rejected the officers’ contention that they had probable cause to arrest for impersonating an officer and obstructing law enforcement, because those offenses were not “closely related” to the offenses for which Mr. Alford was actually arrested and charged.<sup>18</sup> The Ninth Circuit found the probable cause inquiry irrelevant and declined to rule as to probable cause based on those offenses.<sup>19</sup>

Justice Scalia, writing for a unanimous Supreme Court,<sup>20</sup> rejects the “closely related” rule advanced by the Ninth Circuit in this case.<sup>21</sup> First, he points out the basic principle that a warrantless arrest is considered reasonable under the Fourth Amendment if it is supported by probable cause.<sup>22</sup> Next, the Court cites *Maryland v. Pringle*<sup>23</sup> for the proposition that the probable cause inquiry “depends upon the reasonable conclusion to be drawn from the facts known to the arresting officer at the time of arrest.”<sup>24</sup> Justice Scalia reminds the Ninth Circuit that “[o]ur cases make clear that an arresting officer’s state of mind (except for the facts he knows) is irrelevant to the existence of probable cause.”<sup>25</sup>

The Court simply rejects the idea that the offense articulated by the officer at the time of arrest is the only offense for which the arrest can be valid. Recounting the “closely related” argument made nine years ago in *Whren*, the Court states: “[w]e rejected the argument there, and we reject it again here. Subjective intent of the arresting office, *however* it is determined . . . is simply no basis for invalidating an arrest. Those are lawfully arrested whom the facts known to the arresting officers give probable cause to arrest.”<sup>26</sup>

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<sup>11</sup> *Id.*

<sup>12</sup> *Id.* Washington State caselaw made it clear that tape recording a traffic stop was not a violation of the Privacy Act. *See id.* at 593.

<sup>13</sup> *Id.* at 592.

<sup>14</sup> *Id.* at 592-93 (quoting *Alford v. Washington State Police*, Case No. C99-5586RJB (W.D. Wash., Nov. 30, 2000)).

<sup>15</sup> *Id.* at 592.

<sup>16</sup> *Alford v. Haner*, 333 F.3d 972, 975 (9th Cir. 2003).

<sup>17</sup> *Devenpeck*, 125 S. Ct. at 593 (citing *Alford*, 333 F.3d at 976). Washington caselaw was clear and uncontested on this point. *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 595. The Chief Justice did not participate in the decision.

<sup>21</sup> *Id.* at 594 n.2. The Court also rejected a variation on the rule presented by the Fifth Circuit Court of Appeals and the First Circuit Court of Appeals, which focuses on the offenses stated at booking, rather than at arrest. “Most of our discussion in this opinion, and our conclusion of invalidity, applies to this variation as well.” *Id.* Thus, the U.S. Supreme Court foiled a supporting attack by two apparent allies of the Ninth Circuit using a preemptive strike against their staging area. *See Gassner v. Garland*, 864 F.2d 394, 398 (5th Cir. 1989); *Sheehy v. Plymouth*, 191 F.3d 15, 20 (1st Cir. 1999).

<sup>22</sup> *Devenpeck*, 125 S. Ct. at 593.

<sup>23</sup> 540 U.S. 366 (2003).

<sup>24</sup> *Devenpeck*, 125 S. Ct. at 593.

<sup>25</sup> *Id.* (citing *Whren v. United States*, 517 U.S. 806, 812-13 (1996)).

<sup>26</sup> *Id.* at 594.

The Court went on to point out the perverse practical consequences. Rather than stopping sham arrests, which is the stated goal of supporters of the “closely related” rule, such logic would actually serve to the detriment of citizens arrested by the police. Officers would simply stop giving a reason for arrest, or, alternatively, offer every possible related reason for arrest.<sup>27</sup> Thus, sham arrests would not be foregone, and the citizen would actually lose the important benefit of being informed of the reason for arrest.

*Devenpeck* was a classic frontal assault on U.S. Supreme Court caselaw by the Ninth Circuit. The U.S. Supreme Court conducted a counterattack when it granted *certiorari* in *United States v. Flores-Montano*<sup>28</sup> in which the Court reasserted its rules regarding searches at international borders. The Court held that there is no suspicion requirement to search vehicles at a U.S. border checkpoint.<sup>29</sup>

Mr. Flores-Montano tried to enter the United States by car at the Otay Mesa Port of Entry in southern California.<sup>30</sup> Customs officials inspected his vehicle, including the gas tank, as part of a routine entry inspection. A mechanic removed the gas tank and U.S. Customs officers found thirty-seven kilograms of marijuana inside. The entire process took around one hour.<sup>31</sup>

At trial, the defense brought a suppression motion claiming lack of reasonable suspicion to stop and inspect the vehicle.<sup>32</sup> Rather than try to show that reasonable suspicion existed, the government argued to the district court that Ninth Circuit precedent, in the form of *United States v. Molina-Tarazon*,<sup>33</sup> was wrongly decided.<sup>34</sup> That case required reasonable suspicion to inspect a gas tank.<sup>35</sup> The district court duly granted the suppression motion, in accordance with the precedent.<sup>36</sup> The Ninth Circuit summarily affirmed.<sup>37</sup> The U.S. Supreme Court granted *certiorari*.<sup>38</sup>

The U.S. Supreme Court reversed the Ninth Circuit, holding unanimously that “the reasons that might support a requirement of some level of suspicion in the case of highly intrusive searches of the person—dignity and privacy interests of the person being searched—simply do not carry over to vehicles.”<sup>39</sup> The Court found that the Ninth Circuit erroneously had “seized on language from our opinion in *United States v. Montoya de Hernandez* . . . and fashioned a new balancing test, and extended it to searches of vehicles.”<sup>40</sup> The Court specifically rejected that test, and stated in no uncertain terms that “[c]omplex balancing tests to determine what is a ‘routine’ search of a vehicle . . . have no place in border searches of vehicles.”<sup>41</sup> The Court stated that the government’s interests are at their “zenith at the international border” and found that the property interest in one’s gas tank is far outweighed by “the government’s paramount interest in protecting the border.”<sup>42</sup> The Court sums up the government’s strong interests: “It is axiomatic that the United States, as sovereign, has the inherent authority to protect, and a paramount interest in protecting, its territorial integrity.”<sup>43</sup>

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<sup>27</sup> *Id.* at 595.

<sup>28</sup> 124 S. Ct. 1582 (2004).

<sup>29</sup> *Id.* at 1585.

<sup>30</sup> *Id.* at 1584.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 1584-85.

<sup>33</sup> 279 F.3d 709 (9th Cir. 2002).

<sup>34</sup> *Flores-Montano*, 124 S. Ct. at 1584-85.

<sup>35</sup> *Id.* at 1584 (citing *Montoya de Hernandez*, 279 F. 3d at 717).

<sup>36</sup> *Id.* at 1585.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* (internal citations omitted).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 1586.

In *Groh v. Ramirez*,<sup>44</sup> the Ninth Circuit successfully assaulted the U.S. Supreme Court Citadel, forcing a truce in the form of a 5-4 Supreme Court decision that affirmed a Ninth Circuit ruling. The question was whether Alcohol, Tobacco and Firearms (ATF) Special Agent (SA) Groh executed an unconstitutional search when the warrant did not specify the items to be seized, even though the application for the warrant did so specify.<sup>45</sup> The answer was yes.<sup>46</sup>

In 1997, SA Groh received information that Mr. Ramirez and his family were stockpiling weapons on their ranch in Butte-Silver Bowe County, Montana.<sup>47</sup> Special Agent Groh prepared a warrant application, accompanied by a detailed affidavit that specifically listed automatic weapons, grenade launchers and other weapons as the items to be searched for and seized. He also prepared the warrant form itself, which the magistrate signed. However, in the portion of the warrant calling for a description of the evidence to be seized, SA Groh had mistakenly placed a description of the home to be searched. Since the warrant did not incorporate the application or the affidavit by reference, it did not technically contain a description of the evidence sought, as required by the Fourth Amendment.<sup>48</sup> Special Agent Groh led the team that conducted the search, which uncovered no illegal weapons. Special Agent Groh left a copy of the search warrant with Mrs. Ramirez at the home, and later provided a copy of the affidavit at the request of the Ramirez's attorney.<sup>49</sup>

The Ramirez family filed suit against SA Groh and the other officers under *Bivens v. Six Unknown Fed. Narcotics Agents*.<sup>50</sup> The district court entered summary judgment in favor of all defendants, finding no Fourth Amendment violation, and further finding that even if there was, the defendants were entitled to qualified immunity.<sup>51</sup> The Ninth Circuit affirmed the trial court as to all of the agents except SA Groh, who led the investigation and the search.<sup>52</sup> As to SA Groh, the Ninth Circuit ruled that he had violated the constitutional rights of the Ramirez family by executing a search based on a clearly defective warrant. The Ninth Circuit also found that SA Groh was not entitled to qualified immunity for his actions.<sup>53</sup>

The Supreme Court affirmed the Ninth Circuit's ruling in a 5-4 decision, in an opinion written by Justice Stevens. "The warrant was plainly invalid"<sup>54</sup> because it did not state with particularity the evidence sought.<sup>55</sup> The Court went on to make clear that the application and affidavit were not sufficient to meet the particularity requirement, since they were not incorporated by reference.<sup>56</sup> It was clear from the collected documents—warrant, application and affidavit—that SA Groh had specific items in mind for which to search. He had merely committed an administrative error by putting the wrong information in the block on the warrant that calls for evidence sought. But this mattered not. Since the accompanying papers were not incorporated by reference, they were not technically part of the warrant, and thus the warrant itself was defective on its face.<sup>57</sup>

The government argued that SA Groh conducted the search reasonably and within the limits of his application and that his search should therefore be considered the functional equivalent of a valid warrant search.<sup>58</sup> The Court disagreed. "[O]ur cases have firmly established the 'basic principle of Fourth Amendment law' that searches and seizures inside a home

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<sup>44</sup> 540 U.S. 551 (2004).

<sup>45</sup> *Id.* at 554-55.

<sup>46</sup> *Id.* at 557.

<sup>47</sup> *Id.* at 554.

<sup>48</sup> *Id.* at 554-55.

<sup>49</sup> *Id.* at 555.

<sup>50</sup> *Id.* at 555 (citing *Bivens*, 403 U.S. 388 (1971)).

<sup>51</sup> *Id.* at 555-56.

<sup>52</sup> *Id.* at 556.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 557.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 557-58.

<sup>58</sup> *Id.* at 558.

without a warrant are presumptively unreasonable.”<sup>59</sup> Even more, the presumption of unconstitutionality applies equally to a warrant whose only defect is a lack of particularity.<sup>60</sup> Special Agent Groh’s search, though reasonable in effect, was still considered unconstitutional because it was considered warrantless.<sup>61</sup>

Justice Thomas authored a dissent, joined by Justice Scalia, in which he argues that the search should not be presumptively unreasonable because it is warrantless.<sup>62</sup> Justice Thomas raises the argument that the Fourth Amendment can be interpreted such that not all searches must be authorized by a warrant, but if a warrant is issued, that it must meet certain requirements.<sup>63</sup> This view holds that the search must be reasonable, and can be without a warrant. This is not, however, the current state of the law, and thus remains a dissent.

The battle is not over; the Supreme Court is preparing its latest foray against the attacking Ninth Circuit. In another counter offensive, the Court has granted *certiorari* in *Muehler v. Mena*.<sup>64</sup> The granted issues are:

(1) Whether, in light of this Court’s repeated holdings that mere police questioning does not constitute a seizure, the Ninth Circuit erred in ruling that law enforcement officers who have lawfully detained an individual pursuant to a valid search warrant engage in an additional, unconstitutional “seizure” if they ask that person questions about criminal activity without probable cause to believe that the person is or has engaged in such activity.

(2) Whether, in light of this Court’s ruling in *Michigan v. Summers*, 452 U.S. 692 (1981), that a valid search warrant carries with it the implicit authority to detain occupants while the search is conducted, the Ninth Circuit erred in ruling that a two to three hour detention of the occupant of a suspected gang safe-house while officers searched for concealed weapons and other evidence of a gang-related drive-by shooting was unconstitutional because the occupant was initially detained at gun-point and handcuffed for the duration of the search.<sup>65</sup>

The case was argued on 9 December 2004 and the Court has yet to determine if this counterattack will be successful, or whether the Ninth Circuit has gained another foothold.

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Apparently, the Ninth Circuit has an ally in its efforts to assault the U.S. Supreme Court’s reasonableness bastion. In a supporting attack, the Illinois Supreme Court held unconstitutional a search based on a drug dog’s alert to the trunk of a car during a routine traffic stop.<sup>66</sup> In *Illinois v. Caballes*,<sup>67</sup> the Illinois Supreme Court found that the introduction of a drug dog “unjustifiably enlarg[ed] the scope of a routine traffic stop into a drug investigation.”<sup>68</sup>

Illinois State Trooper Daniel Gillette stopped Mr. Caballes for a speeding violation. Trooper Craig Graham heard the dispatch call and immediately responded to the scene with his drug detection dog. While Trooper Gillette wrote Mr. Caballes a warning for speeding, Trooper Craig walked his dog around the car. The dog alerted on the car’s trunk and the officers’ search resulted in the seizure of a significant amount of marijuana. The encounter lasted less than ten minutes from the time

<sup>59</sup> *Id.* at 559 (quoting *Payton v. New York*, 445 U.S. 573, 586 (1980)).

<sup>60</sup> *Id.* at 559.

<sup>61</sup> *Id.* at 560.

<sup>62</sup> *Id.* at 572 (Thomas, J., dissenting).

<sup>63</sup> *Id.* at 571-73 (Thomas, J., dissenting). Both this dissent and another authored by Justice Kennedy, and joined by the Chief Justice, dispute the majority’s finding that SA Groh was not entitled to qualified immunity. *Id.* at 566 (Kennedy, J., dissenting).

<sup>64</sup> 124 S. Ct. 2842 (2004) (mem.).

<sup>65</sup> United States Supreme Court, *Questions Presented*, 03-1423, at <http://www.supremecourtus.gov/qp/03-01423qp.pdf> (last visited Apr. 28, 2005). As this article is going to publication, the Court decided this case, reversing the Ninth Circuit as to both issues. See 125 S.Ct. 1465 (2005).

<sup>66</sup> *Illinois v. Caballes*, 802 N.E. 2d 202, 205 (Ill. 2003), *vacated*, 125 S. Ct. 834 (2005).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

Trooper Gillette stopped Mr. Caballes to the time of the seizure.<sup>69</sup> Mr. Caballes was convicted of drug offenses and sentenced him to twelve years imprisonment and a quarter million dollar fine.<sup>70</sup> At trial, the judge denied a motion to suppress the marijuana.<sup>71</sup> The intermediate appellate court affirmed the conviction but the Illinois Supreme Court reversed.<sup>72</sup> The U.S. Supreme Court granted *certiorari* on the narrow issue of: “Whether the Fourth Amendment requires reasonable, articulable suspicion to justify using a drug-detection dog to sniff a vehicle during a legitimate traffic stop.”<sup>73</sup>

The Court disagreed with the Illinois Supreme Court’s assertion that the fundamental nature of the encounter was changed with the introduction of the dog: “In our view, conducting a dog sniff would not change the character of a traffic stop that is lawful at its inception . . . unless the dog sniff infringed respondent’s constitutionally protected interest in privacy. Our cases hold that it did not.”<sup>74</sup> The Court cited *United States v. Jacobsen*<sup>75</sup> for the proposition that a citizen may not claim a privacy interest in the possession of contraband. Thus, any government action which reveals the presence of such contraband, and only such contraband, cannot violate a privacy interest and thus cannot violate the Fourth Amendment, “This is because the expectation ‘that certain facts will not come to the attention of the authorities’ is not the same as an interest in ‘privacy that society is prepared to consider reasonable.’”<sup>76</sup> The Court’s precedents have held a dog sniff to be inobtrusive to the extent that it is not a search.<sup>77</sup> Since the dog’s alert exposes only the presence of drugs, it is not an invasion of any protected privacy interest, and thus not an impermissible search.

The Court confined its ruling to an otherwise lawful encounter. Had the officers detained Mr. Caballes longer than was necessary to carry out the traffic stop, a different outcome would likely have resulted.<sup>78</sup> Had Officer Gillette been required to keep Mr. Caballes on the roadside after issuing the warning citation in order for Officer Graham to arrive with the dog, the Court would probably have reached a different conclusion. Under those facts, the initially permissible stop would degenerate into an illegal detention, and then the subsequent dog sniff and search would be unlawful.

Justices Souter and Ginsburg each offered dissenting opinions. First, each questioned the “infallible” nature of the dog’s results being *sui generis*, claiming that the dog detected the presence of property other than just contraband.<sup>79</sup> More importantly, each dissenting justice, particularly Justice Ginsburg, found that the nature of the encounter was indeed fundamentally altered with the introduction of the drug dog: “Injecting an animal into a routine traffic stop changes the character of the encounter between the police and motorist. The stop becomes broader, more adversarial, and (in at least some cases) longer.”<sup>80</sup> Both dissenting justices invoke the *Terry v. Ohio*<sup>81</sup> stop framework for their analysis. They find that the “reasonably related” prong is not satisfied under these circumstances.<sup>82</sup> Apparently, the dissenting justices are concerned that, under the Court’s ruling, the government will routinely use dogs as part of traffic stops, engendering concerns of a police state, where cops “Cry havoc, and slip the dogs of war.”<sup>83</sup>

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<sup>69</sup> *Caballes*, 125 S. Ct. at 836.

<sup>70</sup> *Caballes*, 802 N.E. 2d at 203.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 204-05.

<sup>73</sup> *Caballes*, 125 S. Ct. at 837.

<sup>74</sup> *Id.*

<sup>75</sup> 466 U.S. 109 (1984).

<sup>76</sup> *Caballes*, 125 S. Ct. at 838 (citing *United States v. Jacobsen*, 466 U.S. 109, 122 (1984)).

<sup>77</sup> See *Indianapolis v. Edmond*, 531 U.S. 32, 40 (2000); *United States v. Place*, 462 U.S. 696 (1983).

<sup>78</sup> *Caballes*, 125 S. Ct. at 838. The Court related the case *People v. Cox*, 782 N. E. 2d. 275 (2002), in which the Illinois Supreme Court found the use of a drug dog and consequent seizure unconstitutional because it followed an unreasonably prolonged traffic stop. “We may assume that a similar result would be warranted in this case of the dog sniff had been conducted while respondent was being unlawfully detained.”

<sup>79</sup> *Caballes*, 125 S. Ct. at 838 (Souter, J., dissenting), 843 (Ginsburg, J., dissenting).

<sup>80</sup> *Id.* at 845 (Ginsburg, J., dissenting).

<sup>81</sup> 392 U.S. 1 (1968). An officer may stop and frisk a citizen based on observations of suspicious behavior, but “the officer’s actions [must be] ‘justified at its inception, and . . . reasonably related in scope to the circumstances which justified the interference in the first place.’” *Caballes*, 125 S. Ct. at 843 (quoting *Terry*, 392 U.S. at 19-20 (Ginsburg, J., dissenting)).

<sup>82</sup> *Caballes*, 125 S. Ct. at 841, 844 (Souter & Ginsburg, JJ., dissenting).

<sup>83</sup> WILLIAM SHAKESPEARE, *JULIUS CAESAR* act 3, sc. 1.

The U.S. Supreme Court found its own ally in the Court of Appeals for the Fourth Circuit (Fourth Circuit) in *Thornton v. United States*.<sup>84</sup> Here, the venerable decision in *New York v. Belton*<sup>85</sup> was followed by both the trial court and the Fourth Circuit. The U.S. Supreme Court found itself in the pleasant—if unaccustomed—position of affirming a circuit court which had applied U.S. Supreme Court precedent. The Court was even able to extend that precedent somewhat, though the extension has caused a break in the line of defense. Several justices differed with the opinion of the Court, arguing that the precedent has been carried too far. The Court ruled that as part of a search incident to arrest, a police officer may search a vehicle recently occupied by the arrestee, even though the arrestee had exited the vehicle before he was “accosted” by the police officer.<sup>86</sup>

Officer Nichols of the Norfolk Police Department, Norfolk, Virginia, while driving an unmarked police car, became suspicious of Mr. Thornton and followed him to a parking lot. Mr. Thornton got out of his vehicle and began to walk across the parking lot when Officer Nichols accosted him. Officer Nichols asked for and received consent to pat down Mr. Thornton and found several bags of marijuana and crack cocaine. Officer Nichols then made a proper arrest, handcuffed Mr. Thornton and placed him in the back seat of the police car. Officer Nichols then conducted a search of the car Mr. Thornton had been driving, and found a 9 mm handgun.<sup>87</sup> At trial, the defense sought to suppress, amongst other things, the gun. The trial judge denied the suppression motion, finding a valid search incident to arrest per *Belton*.<sup>88</sup> The Fourth Circuit affirmed.<sup>89</sup>

The U.S. Supreme Court also affirmed.<sup>90</sup> The Court made clear that there is a real need for the bright-line rule enunciated in *Belton* which allows officers to ensure their safety by searching the passenger compartment of a vehicle incident to a valid arrest. In an opinion by Chief Justice Rehnquist, the Court stated: “So long as an arrestee is the sort of ‘recent occupant’ of a vehicle such as petitioner was here, officers may search that vehicle incident to the arrest.”<sup>91</sup> The Court further stated: “There is simply no basis to conclude that the span of the area generally within the arrestee’s immediate control is determined by whether the arrestee exited the vehicle at the officer’s direction, or whether the officer initiated contact with him while he remained in the car.”<sup>92</sup> The Court did not offer any further guidance regarding the recency of occupancy, or the proximity to the car, necessary for a valid search incident to arrest.

Justice Scalia, joined by Justice Ginsburg, concurred in the judgment but felt that this case stretched the *Belton* rule to a “breaking point.”<sup>93</sup> Justice Scalia opined that police officers have incorrectly come to view searching a suspect’s vehicle as an entitlement. He essentially rejects the entire *Belton* bright-line rule, and calls for a search of a vehicle in “cases where it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.”<sup>94</sup> This sounds very much like probable cause, as defined by MRE 315(f)(2).<sup>95</sup>

Justice O’Connor also concurred, agreeing with Justice Scalia, but declining to adopt his proposed rule because it was not the issue granted and had not been fully briefed and argued.<sup>96</sup> Even the Chief Justice indicated that he might find merit in Justice Scalia’s reasoning, but agreed with Justice O’Connor that this case was not ripe for decision on this issue.<sup>97</sup> This may

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<sup>84</sup> 124 S. Ct. 2127 (2004).

<sup>85</sup> 453 U.S. 454 (1981).

<sup>86</sup> *Thornton*, 124 S. Ct. at 2132.

<sup>87</sup> *Id.* at 2129.

<sup>88</sup> *Id.* at 2129-30.

<sup>89</sup> 325 F.3d 189 (2003).

<sup>90</sup> *Thornton*, 124 S. Ct. at 2133.

<sup>91</sup> *Id.* at 2132.

<sup>92</sup> *Id.* at 2131.

<sup>93</sup> *Id.* at 2133 (Scalia, J., concurring in judgment).

<sup>94</sup> *Id.* at 2137 (Scalia, J., concurring in judgment).

<sup>95</sup> MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 315(f)(2) (2002) [hereinafter MCM].

<sup>96</sup> *Thornton*, 124 S. Ct. at 2133 (O’Connor, J., concurring in part).

<sup>97</sup> *Id.* at 2132-33 n.4.

not be the last we hear of search incident to arrest and cars.

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There was action in a secondary theater of operations when the Supreme Court affirmed a ruling by the Nevada Supreme Court which upheld a conviction by a local court. The U.S. Supreme Court took this opportunity to extend its precedents. The Court addressed the constitutionality of Nevada's "stop and identify" statute in *Hiibel v. Sixth Judicial District Court of Nevada, Humboldt County, et al.*<sup>98</sup> The Court determined that a suspect must identify himself when stopped by a police officer in accordance with *Terry v. Ohio*.<sup>99</sup>

Police responded to a report of assault to find a woman in a truck on the side of Grass Valley Road in Humboldt County, Nevada. Also present was a man—who turned out to be Mr. Hiibel—standing in the road, evidently inebriated. Mr. Hiibel refused to identify himself, in violation of *Nevada Revised Statutes Section 171.123*,<sup>100</sup> the "stop and ID" statute. In fact, he taunted the officer by placing his hands behind his shirtless back and walking towards the officer.<sup>101</sup>

Mr. Hiibel was arrested and charged with obstructing justice.<sup>102</sup> The government argued that Mr. Hiibel had obstructed the police officer in that he failed to comply with Section 171.123 when he refused to identify himself.<sup>103</sup> The trial court agreed, convicted Mr. Hiibel and fined him \$250.<sup>104</sup> Both the intermediate appellate court and the Nevada Supreme Court rejected Mr. Hiibel's contention that the statute violated his Fourth and Fifth Amendment rights.<sup>105</sup>

The U.S. Supreme Court affirmed the conviction.<sup>106</sup> "The stop, the request [for identification], and the State's requirement of a response did not contravene the guarantees of the Fourth Amendment."<sup>107</sup> The Court examined in detail its own line of cases in this area and found the Nevada statute in compliance with constitutional protections and the Court's own precedents.<sup>108</sup>

In 1979, the Court invalidated a conviction based on a stop and identification (ID) statute in Texas.<sup>109</sup> In that case, there were insufficient facts to support reasonable suspicion by the officer that a crime was being committed. In 1983, the Court invalidated a stop and ID statute in California because it was vague.<sup>110</sup> That statute required a person to produce "credible

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<sup>98</sup> 124 S. Ct. 2451 (2004).

<sup>99</sup> *Id.* at 2456 (citing *Terry*, 392 U.S. 1 (1968)).

<sup>100</sup> *Id.* at 2455-56. Section 171.123 provides in relevant part:

1. Any peace officer may detain any person whom the officer encounters under circumstances which reasonably indicate that the person has committed, is committing or is about to commit a crime.

...

3. The officer may detain the person pursuant to this section only to ascertain his identity and the suspicious circumstances surrounding his presence abroad. Any person so detained shall identify himself, but may not be compelled to answer any other inquiry of any peace officer.

*Id.* at 2455-56 (quoting NEV. REV. STAT. § 171.123 (2003)).

<sup>101</sup> *Id.* at 2455.

<sup>102</sup> *Id.* He was charged with violating Section 199.280 of the Nevada Revised Statutes. Specifically, "willfully resist[ing], delay[ing], or obstruct[ing] a public officer in discharging or attempting to discharge any legal duty of his office." *Id.*

<sup>103</sup> *Id.* at 2456.

<sup>104</sup> *Id.*

<sup>105</sup> See *Hiibel v. Sixth Judicial Dist. Court*, 118 Nev. 868 (Nev. 2002).

<sup>106</sup> *Hiibel*, 124 S. Ct. at 2461.

<sup>107</sup> *Thornton*, 124 S. Ct. at 2460.

<sup>108</sup> *Id.* at 2457 ("The present case begins where our prior cases left off.").

<sup>109</sup> *Brown v. Texas*, 443 U.S. 47 (1979).

<sup>110</sup> *Kolender v. Lawson*, 461 U.S. 352 (1983).

and reliable” identification.<sup>111</sup> The Court found this lacked a standard for determining how a citizen must comply and gave “virtually unrestrained power to arrest and charge persons with a violation.”<sup>112</sup> In the instant case, however, there were sufficient grounds to suspect Mr. Hiibel of a crime and the statute clearly states what is required of the citizen. Moreover, the question as to identity was reasonably related to the facts which justified the stop. The Court ultimately ruled: “A state law requiring a suspect to disclose his name in the course of a valid *Terry* stop is consistent with the Fourth Amendment prohibitions against unreasonable searches and seizures.”<sup>113</sup>

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The CAAF had no such vigorous activity at its lines of defense as did the U.S. Supreme Court. Rather, the CAAF sat in review of the service courts at its leisure. In short, the CAAF was in a far less active theater of operations than was the U.S. Supreme Court in 2004.

In *United States v. Mason*,<sup>114</sup> the CAAF undertook to determine whether probable cause existed to issue a search authorization for a blood sample.<sup>115</sup> More importantly, it addressed whether omitted information invalidated the search authorization.<sup>116</sup>

A woman was raped in her base quarters early one weekday morning. Following a lengthy and complicated series of events, suspicion eventually fell upon Staff Sergeant (SSG) Mason and he was required to provide a blood sample. Staff Sergeant Mason’s DNA matched the DNA in the semen taken from the victim.<sup>117</sup> Investigators from the Criminal Investigation Division (CID) obtained the authorization to seize the blood sample from the base magistrate, based on physical description, known proximity to the quarters, similar gloves and blood type evidence.<sup>118</sup>

The CID investigators did not provide certain information to the magistrate. They did not inform the magistrate that during a photo lineup, the victim identified another soldier, whom she knew, as closely resembling the rapist, but stated that he was not actually the rapist. The investigators did not inform the magistrate that there was a latent fingerprint lifted from inside the victim’s front door knob which did not match that of SSG Mason. The investigators did not tell the magistrate that SSG Mason had a prominent gold tooth and that the victim had not mentioned this in her description of her assailant.<sup>119</sup>

Staff Sergeant Mason was convicted of rape.<sup>120</sup> The ACCA reversed the conviction based on an erroneous ruling by the military judge (MJ) regarding a voir dire challenge.<sup>121</sup> Staff Sergeant Mason was retried and again convicted of rape.<sup>122</sup> The ACCA this time affirmed.<sup>123</sup>

The CAAF unanimously affirmed.<sup>124</sup> “We agree with the military judge that, in noting the totality of these circumstances and applying her common sense, the magistrate had a substantial basis to conclude that probable cause

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<sup>111</sup> *Thornton*, 124 S. Ct. at 2457.

<sup>112</sup> *Id.* (quoting *Kolender*, 461 U.S. at 360) (quoting *Lewis v. New Orleans*, 415 U.S. 130, 135 (1974) (Powell, J., concurring in the result)).

<sup>113</sup> *Id.* at 2459.

<sup>114</sup> 59 M.J. 416 (2004).

<sup>115</sup> *Id.* at 420.

<sup>116</sup> *Id.* at 421.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 418-19.

<sup>119</sup> *Id.* at 422.

<sup>120</sup> *Id.* at 417.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 425.

existed.”<sup>125</sup> As to the omissions, the court drew from MRE 311(g)(2) and its caselaw to determine that “the defense must demonstrate that the omissions were *both* intentional or reckless, *and* that their hypothetical inclusion would have prevented a finding of probable cause.”<sup>126</sup> The CAAF went on to draw from U.S. Supreme Court caselaw: “[I]f [the defense shows intentional or reckless disregard], and if, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required.”<sup>127</sup> The CAAF found that the omissions were neither reckless nor intentional, nor would they have prevented the proper finding of probable cause, had they been included.<sup>128</sup>

In *United States v. Rodriguez*,<sup>129</sup> the CAAF next took up the distinction between an arrest and an investigatory stop. “The question . . . is whether or not Appellant’s roadside encounter with ATF was consensual, and if not, whether the encounter constituted an arrest supported by probable cause, or an investigatory stop supported by reasonable suspicion.”<sup>130</sup>

Yeoman Third Class (YO3) Rodriguez was suspected of buying guns in Virginia and illegally transporting and selling them in his home state of New York. After gathering substantial evidence through surveillance, agents of the Bureau of ATF and the Naval Criminal Investigative Service (NCIS, then known as NIS) followed YO3 Rodriguez on a trip from Virginia to New York to ascertain the identity of his customers and contacts.<sup>131</sup>

As the federal agents followed YO3 Rodriguez in unmarked police cars, a Maryland State Trooper stopped one of the agents for speeding. After explaining the situation, they co-opted Maryland Trooper Pearce into the operation. Trooper Pearce eventually pulled over YO3 Rodriguez for following too closely. After issuing a warning, Trooper Pearce asked YO3 Rodriguez for consent to a routine search for contraband. Yeoman Third Class Rodriguez did consent, in writing, about ten minutes after Trooper Pearce’s initial stop. Ten ATF and NCIS agents then arrived and spent about ninety minutes thoroughly searching the car. Also, an NBC news crew, which was riding with the law enforcement agents in anticipation of the New York investigation and arrest, filmed the encounter, focusing on the officers’ search of YO3 Rodriguez’s car.<sup>132</sup>

The officers found no contraband in the car. However, while other agents conducted the search, ATF Agent Grabman confronted YO3 Rodriguez with the evidence against him. After about ten minutes of discussion, YO3 Rodriguez confessed to the gunrunning operation.<sup>133</sup> An enlisted panel convicted YO3 Rodriguez at a general court-martial and the NMCCA affirmed the conviction.<sup>134</sup>

The CAAF upheld the conviction.<sup>135</sup> Appellant made three distinct seizure arguments. First, that the police illegally seized him by surrounding him on the freeway; second, that Trooper Pearce’s stop became an unlawful detention after the warning was issued; and third, that the actual search by the ATF/NCIS agents transformed the original consensual encounter into an unlawful seizure.<sup>136</sup> In each case, the court found “[t]he critical question [was] ‘whether a reasonable person would feel free to decline the officer’s requests or otherwise terminate the encounter.’”<sup>137</sup>

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<sup>125</sup> *Id.* at 421.

<sup>126</sup> *Id.* at 422 (citing *United States v. Figueroa*, 35 M.J. 54, 56-57 (C.M.A. 1992)).

<sup>127</sup> *Id.* (alterations in original) (citing *Franks v. Delaware*, 438 U.S. 154, 171-72 (1978)).

<sup>128</sup> *Mason*, 59 M.J. at 423.

<sup>129</sup> 60 M.J. 239 (2004).

<sup>130</sup> *Id.* at 250.

<sup>131</sup> *Id.* at 242-3.

<sup>132</sup> *Id.* at 244.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 241. Note that there was a period of UA and considerable litigation, including a CAAF ordered a *Dubay* hearing [*United States v. Dubay*, 37 C.M.R. 411 (C.M.A. 1967)], regarding the availability of video footage from the *NBC* cameras. *Id.* Thus, the seizure issue did not finally come before the CAAF until 2003, despite the offense occurring in 1991.

<sup>135</sup> *Id.* at 242.

<sup>136</sup> *Id.* at 241-42.

<sup>137</sup> *Id.* at 247 (quoting *Florida v. Bostick*, 501 U.S. 429, 436 (1991)).

As to the moving blockade, YO3 Rodriguez himself testified that he was unaware he was surrounded by police until after he was pulled over.<sup>138</sup> Thus, he could not have felt that he was not free to go. Next, the court found that “after the brief detention for the traffic stop concluded, the encounter between Appellant and Trooper Pearce was consensual in nature and not a seizure subject to Fourth Amendment scrutiny.”<sup>139</sup> Thus, the court quickly disposed of the defense’s first and second arguments.

In addressing the appellant’s third contention, the court gets to the heart of this case—“[w]hether the reasonable limits of an investigatory stop have been exceeded thus transforming a seizure into an arrest . . . .”<sup>140</sup> The court found that a reasonable person would not have felt free to leave once the ten officers began the search of his car.<sup>141</sup> The consensual encounter was, then, changed to a seizure. But the court then found that the seizure was an investigatory detention, supported by reasonable suspicion, rather than an arrest, requiring probable cause. Key among the several factors considered in coming to this conclusion was that only twenty minutes elapsed from the initial stop to YO3 Rodriguez’s first admission, which then gave probable cause to continue the search.<sup>142</sup> The court sums up with “we conclude as a matter of law that Appellant was the subject of a lawful investigatory stop supported by reasonable suspicion and that his subsequent statements were admissible.”<sup>143</sup>

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Even though it is more an evidentiary issue than one of search and seizure, the CAAF’s opinion in *United States v. Simmons*,<sup>144</sup> bears mentioning. In *Simmons*, the court decided whether admission of an unlawfully obtained handwritten letter and subsequent videotaped confession was harmless error.

First Lieutenant (1LT) Simmons was charged with multiple offenses, including conduct unbecoming an officer and assault, in violation of Articles 133 and 128, respectively, of the Uniform Code of Military Justice (UCMJ), concerning his homosexual relationship with a private first class in his company.<sup>145</sup> During a search incident to arrest for assault, civilian police found a handwritten letter by 1LT Simmons exposing the relationship.<sup>146</sup> First Lieutenant Simmons subsequently gave a video taped confession.<sup>147</sup>

The military judge admitted both the letter and its derivative video tape, finding no ownership interest by 1LT Simmons in the letter,<sup>148</sup> which had been given to the private first class. A general court-martial convicted 1LT Simmons of conduct unbecoming an officer and of assault.<sup>149</sup> The ACCA concluded that the military judge erred in admitting the letter and tape but found that introduction of the letter, the tape and even 1LT Simmons’ in court testimony was harmless error, given the other evidence arrayed against him.<sup>150</sup>

The CAAF reversed and set aside the ACCA’s decision as to the assault and the portion of the Article 133 violation regarding an intimate sexual relationship, but affirmed as to a close personal relationship.<sup>151</sup> In accordance with the

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<sup>138</sup> *Id.* at 247-48.

<sup>139</sup> *Id.* at 249.

<sup>140</sup> *Id.* at 250.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 251.

<sup>143</sup> *Id.*

<sup>144</sup> 59 M.J. 485 (2004).

<sup>145</sup> *Id.* at 486.

<sup>146</sup> *Id.* at 487.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 486.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 491.

controlling U.S. Supreme Court precedent, *Chapman v. California*,<sup>152</sup> the CAAF inquired as to whether “it appears ‘beyond reasonable doubt that the error complained of did not contribute to the verdict[s] obtained.’”<sup>153</sup> The CAAF concluded the letter did contribute to the verdict. “We also cannot conclude, beyond reasonable doubt, that the admission of the letter and the derivative videotaped statement by Simmons concerning the sexual nature of his relationship with PFC W ‘did not contribute to’ that portion of the guilty finding regarding ‘an intimate relationship involving sexual contact.’”<sup>154</sup> The CAAF also found that the accused might not have testified if not for the letter and tape.<sup>155</sup> As to the assault, the government’s theory of the case was so reliant upon the “alleged unrequited homosexual ‘obsession’ with PFC W”<sup>156</sup> and the letter was so pervasive in trial counsel’s arguments that the improper evidence must have contributed to the verdict.<sup>157</sup>

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Though by and large all was quiet on the CAAF front, that court did have to quell a minor rebellion by reversing the NMCCA in *United States v. Daniels*.<sup>158</sup> In this case, the CAAF had to remind the lower court of its own precedent and of U.S. Supreme Court precedent, stating: “[T]he question of whether a private actor performed as a government agent does not hinge on motivation, but rather ‘on the degree of the Government’s participation in the private party’s activities.’”<sup>159</sup>

Electronics Technician Seaman Apprentice (ETSA) Daniels brought a vial of powdery substance into his barracks room and told his roommates it was cocaine. One of the roommates reported this to Chief Petty Officer Wilt, who told the roommate to go get the drugs. Chief Wilt testified, however, that he thought ETSA Daniels was joking about the powder, and just trying to irritate his roommate. The powder was, indeed, cocaine.<sup>160</sup>

At trial, the defense moved to suppress the drugs, as the result of an illegal search. The military judge denied the motion, basing his ruling on the roommate’s actions, and finding that Chief Wilt’s participation was a “red herring” and not relevant to the case.<sup>161</sup> The NMCCA upheld the military judge’s ruling, but found Chief Wilt’s motives to be the key factor.<sup>162</sup> The court’s theory was that because he did not honestly believe his order would result in retrieval of drugs, Chief Wilt did not initiate an official search.<sup>163</sup> Thus, the roommate was acting in his private capacity, and did not conduct a search prohibited by the Fourth Amendment. “Given Chief Wilt’s honest belief that ETSA Voitlein’s expressed concerns about Appellant actually having illegal drugs in their barracks room were unreasonable, we conclude that Chief Wilt’s directions did not make ETSA Voitlein a Government agent on a quest for incriminating evidence.”<sup>164</sup>

The CAAF reversed, in a *per curiam* opinion.<sup>165</sup> The CAAF found Chief Wilt’s motivation irrelevant. “First, contrary to the CCA’s motivational approach, the Supreme Court defines a Fourth Amendment ‘search’ as a government intrusion into an individual’s reasonable expectation of privacy.”<sup>166</sup> Next, the CAAF addressed “the question of whether a private actor performed as a government agent,” and cited U.S. Supreme Court caselaw in finding that it “does not hinge on motivation,

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<sup>152</sup> 386 U.S. 18 (1967).

<sup>153</sup> *Simmons*, 59 M.J. at 489.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at 489-90.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at 490.

<sup>158</sup> 60 M.J. 69 (2004).

<sup>159</sup> *Id.* at 71.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* at 69-70.

<sup>162</sup> *Id.* at 70.

<sup>163</sup> *Id.* at 70-71.

<sup>164</sup> 58 M.J. 599, 605 (N-M. Ct. Crim. App. 2003).

<sup>165</sup> *Daniels*, 60 M.J. at 69.

<sup>166</sup> *Id.* at 71 (citing *Soldal v. Cook County*, 506 U.S. 56, 69 (1992) (“suggesting a motivational approach is unworkable”)).

but rather ‘on the degree of the Government’s participation in the private party’s activities.’”<sup>167</sup> The CAAF drew from *Skinner* that “there must be ‘clear indices of the Government’s encouragement, endorsement, and participation’ in the challenged search.”<sup>168</sup> Since Chief Wilt’s “specific order . . . triggered SA Voitlein’s actual seizure of the vial”<sup>169</sup> it was clear that SA Voitlein acted as Chief Wilt’s agent.<sup>170</sup> The CAAF found that the search was an improper government intrusion, and thus reversed the NMCCA and set aside the findings.<sup>171</sup>

In *United States v. Garcia*,<sup>172</sup> the CAAF reversed the lower court’s findings. However, the court did not address the search and seizure issue in that case, and thus, the NMCCA’s finding in this area remains good law. The important principle from this case is that the on premises refusal of consent to search by a co-tenant does not outweigh the off premises consent of a co-tenant.<sup>173</sup>

Agents of the Naval Criminal Investigative Service (NCIS) suspected Staff Sergeant (SSgt) Garcia of possessing stolen cars and armed robbery and arrested him at this home in North Carolina. Staff Sergeant Garcia consented to allow the NCIS agents in his home to talk, but declined to consent to a search of his home. Meanwhile, civilian police arrested SSgt Garcia’s wife at her work site, and she consented to their searching the family home. Weapons and other evidence were obtained during the search.<sup>174</sup>

At trial, the defense did not raise the issue, but on appeal, SSgt Garcia sought to suppress the weapons and stolen property, claiming that SSgt Garcia’s on premises declination outweighed his wife’s off premises consent.<sup>175</sup> The NMCCA reviewed for plain error, since the defense failed to raise the issue at trial.<sup>176</sup> The court pointed out that military law recognizes that third party consent to a search is valid.<sup>177</sup> As to SSgt Garcia’s claim that his refusal was weightier than his wife’s consent, the court found no military precedent. The court then created some by citing significant civilian caselaw<sup>178</sup> and holding that his refusal was insignificant, so long as the wife shared equal access to the premises, which she did.<sup>179</sup>

The CAAF granted review of this issue, along with several others, but then reversed the NMCCA on ineffective assistance of counsel grounds.<sup>180</sup> Consequently, the NMCCA’s ruling regarding the consensual search remains good caselaw.

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The NMCCA and AFCCA each made significant contributions to the body of search and seizure law. Unfortunately the Air Force court chose to designate its more important decisions as unpublished. Nonetheless, several cases bear examination.

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<sup>167</sup> *Id.* (quoting *Skinner v. Ry. Labor Executives’ Ass’n*, 489 U.S. 602, 614-15 (1989)).

<sup>168</sup> *Id.* (quoting *Skinner v. Ry. Labor Executives’ Ass’n*, 489 U.S. 602, 615-16 (1989)).

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at 72.

<sup>172</sup> 59 M.J. 447 (2004).

<sup>173</sup> *United States v. Garcia*, 57 M.J. 716 (N-M. Ct. Crim. App. 2002), *rev’d on other grounds* 59 M.J. 447 (2004).

<sup>174</sup> *Garcia*, 59 M.J. at 449-50; *see also Garcia*, 57 M.J. 716, 718 (N-M. Ct. Crim. App. 2002).

<sup>175</sup> *Garcia*, 57 M.J. at 719.

<sup>176</sup> *Id.* at 720.

<sup>177</sup> *Garcia*, 57 M.J. at 719; *see also United States v. Clow*, 26 M.J. 176, 183 (1988); *United States v. Reister*, 40 M.J. 666, 669 (N.M.C.M.R. 1994), *aff’d* 44 M.J. 409, 416 (1996).

<sup>178</sup> *Garcia*, 57 M.J. at 720. The court cites the following cases: *United States v. Morning*, 64 F.3d 531, 536 (9th Cir. 1995); *United States v. Donlin*, 982 F.2d 31, 33 (1st Cir. 1992); *United States v. Hendrix*, 595 F.2d 883, 885 (D.C. Cir. 1979); *United States v. Baldwin*, 644 F.2d 381, 383 (5th Cir. 1981); *Charles v. Odum*, 664 F. Supp. 747, 751-52 (S.D.N.Y. 1987); *Cranwell v. Mesec*, 890 P.2d 491, 501 n.16 (Wash. Ct. App. 1995); *People v. Sanders*, 904 P.2d 1311, 1313 (Colo. 1995); *State v. Ramold*, 511 N.W.2d 789, 792-93 (Neb. Ct. App. 1994); *Laramie v. Hysong*, 808 P.2d 199, 203-04 (Wyo. 1991); *State v. Douglas*, 498 A.2d 364, 370 (N.J. Super. Ct. App. Div. 1985); *People v. Haskett*, 640 P.2d 776, 786 (Cal. 1982); *In re Anthony F.*, 442 A.2d 975, 978-79 (Md. 1982); *State v. Frame*, 609 P.2d 830, 833 (Or. Ct. App. 1980); *People v. Cosme*, 397 N.E.2d 1319, 1322 (N.Y. 1979).

<sup>179</sup> *Garcia*, 57 M.J. at 720.

<sup>180</sup> 59 M.J. 447 (2004).

In *United States v. Toy*,<sup>181</sup> the NMCCA found that violation of a Hawaii state statute prohibiting nonconsensual wire communications intercepts and recordings did not render the evidence inadmissible in federal court, so long as the recording was not made with a tortious or criminal purpose.

Petty Officer First Class (PO1) Toy met his wife in Rhode Island and committed sexual acts with her daughter, who was then ten years old. The family moved to Hawaii, where PO1 Toy committed more sexual acts with his stepdaughter, including sexual intercourse, over the course of several years. In an effort to abate these proceedings, Mrs. Toy insisted that, whenever he was in the house, PO1 Toy was to be handcuffed to the bed in their bedroom. Petty Officer First Class Toy agreed and this arrangement lasted for about a year. He eventually tired of his enforced confinement and the couple argued. Mrs. Toy secretly recorded one of their arguments, in which PO1 Toy made incriminating statements regarding his actions with his stepdaughter. Mrs. Toy also videotaped PO1 Toy while he was handcuffed to the bed.<sup>182</sup>

These tapes were used as evidence in PO1 Toy's court-martial for several offenses, including rape and indecent acts, in violation of Articles 120 and 134, UCMJ, respectively.<sup>183</sup> The military judge denied a defense motion to suppress the tapes and PO1 Toy was convicted of forcible sodomy, sodomy and indecent acts, in violation of Articles 125 and 134, UCMJ, respectively.<sup>184</sup>

The NMCCA affirmed the findings, though set aside two specifications on other grounds.<sup>185</sup> On appeal, the defense claimed that the military judge admitted the tapes in error, by disregarding MRE 317(a), which prohibits admission of such intercepts "if such evidence may be excluded under a statute applicable to members of the armed forces."<sup>186</sup> The pertinent statute, the defense claims, is 18 U.S.C. § 2511 (through 18 U.S.C. § 2515) which prohibits interception of oral communication, despite one party consent, if the purpose is tortious or criminal under the U.S. Constitution or the law of any state.<sup>187</sup> Hawaii Revised Statutes Section 803-42 prohibits "installation in any private place, without consent of the person or persons entitled to privacy therein, of any device for recording, amplifying, or broadcasting sounds or events in that place."<sup>188</sup> Thus, Mrs. Toy had violated the Hawaiian law by secretly recording her argument with PO1 Toy. The defense argued that because of that state law violation, the tapes should be excluded under § 2511(2)(d).<sup>189</sup>

The court rejected this argument, citing extensive federal precedent.<sup>190</sup> "[E]vidence admissible under federal law cannot be excluded because it would be inadmissible under state law. This is because it is not unlawful under federal law for a person not acting under color of law to intercept a wire, oral or electronic communication where such person is party to the communication."<sup>191</sup> Thus, the court explains, the defense would have had to "show that [the wife] acted with a criminal purpose, over and above having violated the Hawaii Revised Statutes Section 803-42 by installing a recording device in a private place without his consent."<sup>192</sup>

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<sup>181</sup> 60 M.J. 598 (N-M. Ct. Crim. App. 2004).

<sup>182</sup> *Id.* at 605-06.

<sup>183</sup> *Id.* at 600-01.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* The case has an interesting discussion on statutes of limitations, but that is outside the scope of this article.

<sup>186</sup> MCM, *supra* note 73, MIL. R. EVID. 317(a).

<sup>187</sup> 18 U.S.C. § 2511(2)(d) (2000). The statute reads, in pertinent part:

It shall not be unlawful under this chapter for a person not acting under color of law to Intercept a wire, oral, or electronic communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or law of the United States or any State.

*Id.*

<sup>188</sup> HAW. REV. STAT. §§ 803-04 (1998).

<sup>189</sup> *Toy*, 60 M.J. at 604.

<sup>190</sup> *Id.* at 604-05 (citing *United States v. Morrison*, 153 F.3d 34, 57 (2d Cir. 1998); *United States v. Horton*, 601 F.2d 319, 323 (7th Cir.), *cert. denied*, 444 U.S. 937 (1979); *United States v. Felton*, 592 F. Supp. 172, 193 (W.D. Pa. 1984), *rev'd on other grounds*, 753 F.2d 256 (3d Cir. 1985)).

<sup>191</sup> *Id.*

<sup>192</sup> *Id.* at 605.

The Air Force court gets full credit for applying recent precedent. In *United States v. Torres*,<sup>193</sup> the court applied the recent U.S. Supreme Court decision in *Thornton v. United States*<sup>194</sup> to address an automobile search. Moreover, the court found that “the permissible scope of an automobile search is oftentimes . . . incremental and may change as the search progress[es] and circumstances change. What may start as a search incident to a lawful arrest may quickly develop into a search of the entire vehicle based upon probable cause.”<sup>195</sup>

In April 2001, Wichita Falls Police Officers Sullivan and Bohn were investigating a vandalism call, looking for a fourteen-year old runaway and known miscreant. The girl’s mother told them they could find her sleeping in a car on the side of Gregg Road. The police found the girl and another young runaway asleep together in the back of a car, with Airman First Class (A1C) Torres in the driver’s seat. As the girls got out of the car, one of the officers approached A1C Torres and saw a Wichita Falls Police Department badge “protruding from under the console.”<sup>196</sup> The officers arrested A1C Torres for possessing a peace officer’s badge, in violation of Texas law.<sup>197</sup>

They then conducted a search of the passenger compartment of the car and found another badge, a camera they believed had been stolen from a police car the week prior, some hand tools and a small metal box that contained marijuana and methamphetamine.<sup>198</sup> The officers searched the entire vehicle, including the trunk, and found various items that had been reported stolen the previous day.<sup>199</sup> Airman First Class Torres was arrested and held in a civilian confinement facility.<sup>200</sup>

The case eventually ended up at court-martial. The military judge denied a suppression motion, finding that “the initial search of the passenger compartment . . . was incident to the arrest . . . for possession of the sheriff’s badge, which was in plain view.”<sup>201</sup> The search of the entire car, including the trunk where the hand tools were found, was properly based on probable cause developed during the search incident to arrest. Airman First Class Torres was convicted.<sup>202</sup>

The AFCCA affirmed. The court found that because the arrest for possession of the badge was valid, the search incident to the arrest could include the passenger area of the car.<sup>203</sup> The court cited *Thornton* for the proposition that the officers could search incident to a valid arrest, presumably because it is the most recent case on point. Note, however, that police first encountered A1C Torres when he was inside the vehicle, so that the rule under *Belton* would have sufficed. The court went on to say that the search of the entire vehicle was supported by probable cause based on the discovery of the badge alone, but also once the hand tools and drugs were found.<sup>204</sup> Finally, the court dismissed the defense’s argument that a third officer joining the search and finding the objects in the trunk violated the temporal proximity requirement of a search incident to arrest.<sup>205</sup>

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In the first of three unpublished cases, the AFCCA again gets credit for noting and applying recent precedent—here from

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<sup>193</sup> 60 M.J. 559 (A.F. Ct. Crim. App. 2004).

<sup>194</sup> *Thornton*, 124 S. Ct. 2127 (2004).

<sup>195</sup> *Torres*, 60 M.J. at 563.

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> *Id.* at 561-62.

<sup>199</sup> *Id.* at 562.

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> *Id.* at 560.

<sup>203</sup> *Id.* at 563.

<sup>204</sup> *Id.* at 564-65.

<sup>205</sup> *Id.* at 564.

the CAAF—when it utilized the standard set in *United States v. Mason*<sup>206</sup> in *United States v. Bethea*.<sup>207</sup> In *Bethea*, the AFCCA delved into whether the absence of technical information regarding the potential results of a hair analysis invalidated a search authorization.

Master Sergeant (MSG) Bethea tested positive for cocaine during a random urinalysis, with a rather high nanogram level.<sup>208</sup> Master Sergeant Bethea, however, told AFOSI investigators that he had never used drugs. The investigators sought authorization to seize a hair sample from MSG Bethea. They did not inform the magistrate that use of a small amount of the drug would not necessarily show up, and that the hair analysis was most useful to indicate chronic or binge usage. The sample was obtained and tested positive for cocaine use on divers occasions.<sup>209</sup> Master Sergeant Bethea was convicted at general court-martial.<sup>210</sup>

The AFCCA affirmed the conviction.<sup>211</sup> The defense argued that because there was no evidence of binge or chronic use from the urinalysis test, there was no probable cause to seek a hair analysis.<sup>212</sup> The court cited *Mason* in determining that neither was there intentional or reckless behavior, nor would the probable cause outcome have been affected by the omitted information.<sup>213</sup>

In January 2005, the CAAF granted review in this case on the following issue:

WHETHER THE MILITARY JUDGE ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS HIS HAIR TEST RESULTS WHEN THERE WAS NO PROBABLE CAUSE FOR THE SEARCH AUTHORIZATION USED TO SECURE APPELLANT'S HAIR.<sup>214</sup>

In the second case, the AFCCA ventured into uncharted waters when it directly addressed the issue of reasonable expectation of privacy in a personal computer in a dormitory room.<sup>215</sup> In *United States v. Conklin*,<sup>216</sup> the court made three important rulings. First and foremost, there is a reasonable expectation of privacy in a personal computer in the person's government owned quarters.<sup>217</sup> Next, the court ruled that the government exceeded the scope of the health and comfort inspection in order to find the contraband.<sup>218</sup> Finally, the court found that Airman First Class (A1C) Conklin's consent – though uninformed – nevertheless validated the search.<sup>219</sup> The court ultimately found the evidence admissible.<sup>220</sup> This is the first time a military court has directly addressed the issue of reasonable expectation of privacy in computers in this setting. Unfortunately, the decision is unpublished, so it is of limited utility.

Airman First Class Conklin was stationed at Keesler Air Force Base, Mississippi, undergoing training. His quarters were the government-owned, barracks-type setting with two men to a room. Airman First Class Conklin kept a personal desktop computer on the dresser/desk provided him in his room. During a routine inspection, SSgt Roy entered A1C Conklin's room

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<sup>206</sup> 59 M.J. 416 (2004).

<sup>207</sup> No.35381, 2004 CCA LEXIS 175 (A.F. Ct. Crim. App. Jul. 20, 2004) (unpublished).

<sup>208</sup> *Id.* at \*2. Master Sergeant Bethea's urine sample revealed the presence of 238 nanograms of cocaine per milliliter, 138 nanograms higher than the Department of Defense cut-off of 100 nanograms per milliliter. *Id.* at \*2, \*5.

<sup>209</sup> *Id.* at \*2.

<sup>210</sup> *Id.* at \*1

<sup>211</sup> *Id.* at \*7.

<sup>212</sup> *Id.* at \*4.

<sup>213</sup> *Id.* at \*5.

<sup>214</sup> No. 05-0041, 2005 CAAF LEXIS 43 (Jan. 11, 2005) (unpublished).

<sup>215</sup> Though the Air Force refers to them as dormitory rooms, military quarters of this type are typically called barracks.

<sup>216</sup> No. 35217, 2004 CCA LEXIS 290 (A.F. Ct. Crim. App. Dec. 30, 2004) (unpublished).

<sup>217</sup> *Id.* at \*12.

<sup>218</sup> *Id.* at \*15.

<sup>219</sup> *Id.* at \*16.

<sup>220</sup> *Id.* at \*16-\*17.

and, in the process of inspecting, opened and closed the desk drawer. This motion caused the monitor of the computer to power up, from a hibernate mode.<sup>221</sup> Staff Sergeant Roy saw on the screen a picture of the actress Tiffany Thiessen wearing a see-through black fishnet top that clearly revealed her breasts.<sup>222</sup> Such a display violated the base instruction which prohibits the “open display of pictures, statues, or posters which display the nude or partially nude human body.”<sup>223</sup> Staff Sergeant Roy then enlisted the assistance of a more experienced noncommissioned officer, Technical Sergeant (TSgt) Schlegel, who examined the contents of the computer’s hard drive, eventually finding a folder labeled “porn” which contained photos of naked young girls.<sup>224</sup>

Technical Sergeant Schlegel reported his findings to his commander, who brought in the Office of Special Investigations agents. These investigators sought and obtained A1C Conklin’s consent to search his room and computer. They did not, however, inform him of the discoveries of the two sergeants. The agents then examined the contents of the computer and found a large number of pornographic pictures of children. Airman First Class Conklin eventually confessed to transferring hundreds of adult and child pornographic images onto his personal computer from compact disks borrowed from a friend.<sup>225</sup>

The AFCCA declared its threshold question to be “whether the appellant had a reasonable expectation of privacy in the desktop computer in his dormitory room.”<sup>226</sup> It went on to set the left and right lateral limits of the firing zone. Previously, the CAAF has ruled that a servicemember has an expectation of privacy in a personal computer in his home.<sup>227</sup> The CAAF also has held that a servicemember has a reduced expectation of privacy in his government computer in an unsecured office shared with co-workers.<sup>228</sup> The *Conklin* case fell in between those established precedents, thus the court found that while A1C Conklin violated the regulation by displaying the semi-nude photo on his computer, he did have an expectation of privacy in the contents of his personal computer.<sup>229</sup> The CAAF said, “We find, under these circumstances, that the appellant had a reasonable expectation of privacy in the files stored in his personal desktop computer.”<sup>230</sup> This is a significant step forward in the jurisprudence of privacy law in the military regarding computers. Too bad it is an unpublished opinion.

The court next addressed the scope of the inspection. “The question before us is whether TSgt Schlegel exceeded the scope of the inspection when he examined the contents of the appellant’s computer. We conclude that he did.”<sup>231</sup> The court found that the purpose of the inspection was for orderliness, cleanliness, safety and security.<sup>232</sup> However, by accessing the file storage system in the computer, TSgt Schlegel exceeded that scope, particularly given the base instructions on room inspections.<sup>233</sup> Technical Sergeant Schlegel offered testimony that he often thumbed through suspicious magazines to determine if they were permissible under the regulations, and that perusing the contents of the computer was essentially the same.<sup>234</sup> The court disagreed:

[T]he fact that appellant had violated the “open display” prohibition did not logically form any basis to extend the inspection (or justify the search) into computer files that were not openly displayed. Under

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<sup>221</sup> *Id.*

<sup>222</sup> *Id.* at \*3.

<sup>223</sup> *Id.* at \*3 (citing KEESLER AIR FORCE BASE INST. 32-6003, DORMITORY SECURITY AND LIVING STANDARDS FOR NON-PRIOR SERVICE AIRMEN 4.2.3 (30 Aug. 2003)).

<sup>224</sup> *Id.* at \*4.

<sup>225</sup> *Id.* at \*4-\*5.

<sup>226</sup> *Id.* at \*9.

<sup>227</sup> *United States v. Maxwell*, 45 M.J. 406 (1996).

<sup>228</sup> *United States v. Tanksley*, 54 M.J. 169 (2000), *overruled in part on other grounds by United States v. Inong*, 58 M.J. 460 (2003).

<sup>229</sup> *Conklin*, 2004 CCA LEXIS 290, at \*12.

<sup>230</sup> *Id.* at \*12.

<sup>231</sup> *Id.* at \*13.

<sup>232</sup> *Id.*

<sup>233</sup> *Id.* at \*5-\*6.

<sup>234</sup> *Id.* at \*8.

these circumstances, we conclude that TSgt Schlegel's perusal of the electronic files on the appellant's computer exceeded the authorized scope and purpose of the inspection.<sup>235</sup>

The court thus found that A1C Conklin had a reasonable expectation of privacy in his computer in his dormitory room, and that TSgt Schlegel had violated that expectation. Nonetheless, the court affirmed the lower court's decision to deny the suppression motion. The AFCCA found that A1C Conklin had given valid consent to the OSI agents and that their subsequent search was permissible and its results admissible.<sup>236</sup> This despite the fact that the agents would never have addressed the request for consent to A1C Conklin if not for the impermissible findings of TSgt Schlegel. The court did not offer any rationale for this seeming inconsistency.

Finally, in the third unpublished AFCCA case, Senior Airman (SrA) Ashea Fuller offered a novel variation on the innocent ingestion defense. In *United States v. Fuller*,<sup>237</sup> SrA Fuller claimed that the metabolite benzoylecgonine (BZE) her body produced, and which was later detected by a random urinalysis, was present because she had sex with her boyfriend the night before, and he was under the influence of a painkiller due to dental work.<sup>238</sup> Thus, she claimed innocent ingestion through injection of contaminated semen into her body.<sup>239</sup>

When questioned by AFOSI, she denied the knowing use of cocaine. She posited that cocaine could have entered her system after she had sex with her boyfriend the night before the urinalysis. The boyfriend had been prescribed Lorset by a dentist, and that drug could have been in his semen, which passed to SrA Fuller's body. She offered to provide a hair sample, which eventually tested positive for the use of cocaine on many different occasions over a fifteen-month period. Senior Airman Fuller admitted that she had been seeing her boyfriend for fewer than fifteen months prior to the drug test.<sup>240</sup>

At trial, Dr. Matthew Selavka, a laboratory drug expert, testified that it was possible that the positive test result could have resulted from sexual intercourse as SrA Fuller claimed. However, she would have had to have had sex with at least seven different males who had recently used a recreational dose of cocaine, and the sexual activity would have to have occurred within a short time before the urinalysis.<sup>241</sup> Finally, Dr. Selavka testified that Lorset did not contain any cocaine.<sup>242</sup> The court-martial convicted SrA Fuller of illicit drug use on divers occasions.<sup>243</sup>

The AFCCA affirmed.<sup>244</sup> Senior Airman Fuller challenged, on appeal, the military judge's use of the inference of wrongfulness found in Article 112a, UCMJ.<sup>245</sup> The court found that the inference did not wrongfully shift the burden of proof to the defense.<sup>246</sup>

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The U.S. Supreme Court has been relatively successful at defending its concept of flexible application of the Fourth Amendment restrictions on government action. Despite the determined assaults of the Ninth Circuit and its allies, the Court resists the temptation to create pigeon holes and checklists for government agents. Reasonableness and totality of the circumstances still hold the field. However, the Court remains at stand to, vigilant against the further attacks that are sure to come.

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<sup>235</sup> *Id.* at \*15.

<sup>236</sup> *Id.* at \*16-\*17.

<sup>237</sup> No. 35058, 2004 CCA LEXIS 182 (A.F. Ct. Crim. App. June 23, 2004) (unpublished).

<sup>238</sup> *Id.* at \*2-\*3.

<sup>239</sup> *Id.* at \*3.

<sup>240</sup> *Id.* at \*3-\*6.

<sup>241</sup> *Id.* at \*3-\*4.

<sup>242</sup> *Id.* at \*4.

<sup>243</sup> *Id.* at \*1.

<sup>244</sup> *Id.* at \*17.

<sup>245</sup> *Id.* at \*14.

<sup>246</sup> *Id.* at \*17.

## To Be or Not To Be Testimonial? *That Is the Question:*<sup>1</sup> 2004 Developments in the Sixth Amendment

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*Full fathom five thy father lies;  
Of his bones are coral made:  
Those are pearls that were his eyes:  
Nothing of him that doth fade,  
Both doth suffer a sea-change  
Into something rich and strange.*<sup>2</sup>

### Introduction

With the March 2004 release of the Supreme Court's decision in *Crawford v. Washington*,<sup>3</sup> it has been a banner year for the Sixth Amendment's Confrontation Clause.<sup>4</sup> Not since the Court issued the 1984 decision *Ohio v. Roberts*<sup>5</sup> has the Court released such a significant case in Confrontation Clause jurisprudence. *Crawford* fundamentally altered the legal landscape of confrontation<sup>6</sup> and its relationship to hearsay by severing, for all intents and purposes, the relationship between the two. Last year's Sixth Amendment article discussed the opinion and some of the more obvious ramifications.<sup>7</sup> This year, many state and federal courts have trekked into the uncharted waters of *Crawford* and tried to navigate their way through what was supposed to be a simple analysis, all with varying degrees of success and consistency. Because of the opinion's importance, the practitioner, whether a trial or a defense counsel, must understand *Crawford* and its effects. The necessity of understanding *Crawford* is not limited to the trial practitioner, but also extends to the military judiciary, which will have to make decisions at trial as to whether a statement is or is not affected by *Crawford*. Further, Office of the Staff Judge Advocate's leadership must understand the case because they must determine the best way to advise a convening authority when *Crawford* issues arise in a case. For example, should the trial counsel make and pay for travel arrangements for a civilian witness at an Article 32, Uniform Code of Military Justice, investigation or hope that the key witness answers a subpoena at the time of trial or flies from the United States if the case is tried overseas? Whether *Crawford* is a return to the Framers' original intent<sup>8</sup> or is a marker to some place rich and strange remains to be seen.<sup>9</sup> The trip, however, is for anyone involved in military justice.

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<sup>1</sup> A variation on a quotation: WILLIAM SHAKESPEARE, *HAMLET*, act III, sc. i.

<sup>2</sup> WILLIAM SHAKESPEARE, *THE TEMPEST*, act I, sc. ii.

<sup>3</sup> 541 U.S. 36 (2004).

<sup>4</sup> "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . ." U.S. CONST. amend. VI.

<sup>5</sup> 448 U.S. 56 (1984) (holding that a hearsay statement from an absent declarant could satisfy the Confrontation Clause if it possessed sufficient guarantees of trustworthiness shown either by the statement's fitting with a firmly rooted exception to the hearsay rule or by the statement's having particularized guarantees of trustworthiness).

<sup>6</sup> One court commented, "So what's all the fuss about? A paradigm shift in confrontation clause analysis, that's what." *People v. Cage*, 15 Cal. Rptr. 3d 846 (Cal. Ct. App. 2004), *review granted*, 19 Cal. Rptr. 3d 824 (Cal. 2004).

<sup>7</sup> See Major Robert Wm. Best, *2003 Developments in the Sixth Amendment: Black Cats on Strolls*, *ARMY LAW.*, July 2004, at 55.

<sup>8</sup> Justice Scalia, writing for the seven-member majority, noted the following:

[t]he text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts. Rather, the 'right . . . to be confronted with the witnesses against him' [citation omitted] is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions *established at the time of the founding*.

*Crawford v. Washington*, 541 U.S. 36, 54 (2004) (emphasis added).

<sup>9</sup> Chief Justice Rehnquist (joined by Justice O'Connor) observed that the Court's decision "casts a mantle of uncertainty over future criminal trials in both federal and state courts. . . ." *Id.* at 69 (Rehnquist, C.J., concurring in the judgment).

## Back to the Future:<sup>10</sup> *Crawford v. Washington*

The facts of the case are straight forward. On 5 August 1999, several weeks after being informed by his wife Sylvia that Mr. Rubin Richard Lee attempted to rape her, Mr. Michael Crawford, with assistance from Sylvia, located Mr. Lee and confronted him.<sup>11</sup> During the confrontation, Michael pulled a knife and stabbed Mr. Lee in the torso.<sup>12</sup> The police arrested Crawford and his wife later the same night.<sup>13</sup> After law enforcement advised them of their *Miranda* rights,<sup>14</sup> each gave two videotaped statements.<sup>15</sup>

The initial statements were generally consistent: the Crawfords went to visit Mr. Lee at his apartment; Michael left briefly to go to the store whereupon Mr. Lee made sexual advances toward Sylvia, which she fought off; Michael returned and heard his wife's yelling; Michael and Mr. Lee started fighting; and Mr. Lee was stabbed.<sup>16</sup> The subsequent statements, however, differed.<sup>17</sup> The second statements indicated that the alleged sexual assault occurred several weeks earlier; that Michael became angry at someone mentioning Mr. Lee while the couple was visiting friends; that he and Sylvia left the gathering to find Mr. Lee; that they knocked on the wrong apartment door, but Mr. Lee answered the door; that they talked for a short while and then Michael stabbed Mr. Lee.<sup>18</sup> Michael indicated in his second statement that Mr. Lee may have had something in his hand when he stabbed him.<sup>19</sup> Sylvia's stated, however, that Mr. Lee may have grabbed for something only *after* Michael stabbed Mr. Lee.<sup>20</sup> Thus, Michael claimed that he acted in self-defense, while Sylvia's statement shed substantial doubt on that claim.<sup>21</sup>

At trial, Crawford invoked the Washington state marital privilege to prevent his wife from testifying.<sup>22</sup> In view of that invocation, the state moved to admit Sylvia's two statements.<sup>23</sup> With respect to the first statement, the state's argument was that it was not admitted for its truth, but rather to show that the Crawfords lied in their initial statements; therefore, the first statement was not hearsay.<sup>24</sup> The second statement was admissible hearsay, the state argued, because Sylvia's statement was

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<sup>10</sup> BACK TO THE FUTURE (Universal Studios 1985).

<sup>11</sup> *Crawford*, 541 U.S. at 38.

<sup>12</sup> *Id.*

<sup>13</sup> *See id.*

<sup>14</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966) (holding that before a custodial interrogation, a subject must be warned that he has a right to remain silent, to be informed that any statement made may be used as evidence against him, and to the presence of an attorney).

<sup>15</sup> *Crawford*, 541 U.S. at 38.

<sup>16</sup> *See id.* at 38-39; *State v. Crawford*, 54 P.3d 656, 658 (Wash. 2002).

<sup>17</sup> *Crawford*, 54 P.3d at 658.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* (stating, "[T]he main distinguishing factor in these second statements was the Crawford alluded that Lee *may* have had something in his hand *when* Crawford stabbed Lee, while Sylvia implied that Lee *may* have grabbed for something *after* Crawford stabbed Lee.").

<sup>21</sup> *Id.* at 662.

<sup>22</sup> *See Crawford*, 541 U.S. at 39. The marital privilege does not allow a wife to be examined for or against her husband without his consent. *See id.* There was much ink spilled by the lower courts discussing the issue of waiver of Crawford's confrontation right. *See State v. Crawford*, No. 25307-1-II, 2001 Wash. App. LEXIS 1723, at \*3-5 (Wash. Ct. App. 2001); *Crawford*, 54 P.3d at 658-60 (en banc). Ultimately, the state courts decided that Crawford's invocation of the state marital privilege did *not* waive his confrontation right claim. The Washington Supreme Court declared,

To force a defendant to choose the more difficult position of confronting his spouse on the stand, or to assume that he has waived his confrontation right by electing not to call his wife, presents a similarly untenable choice [between selecting one right to the exclusion of the other] and undermines the marital privilege itself. Therefore, we hold that Crawford did not waive his right to confrontation when he invoked the marital privilege.

*Crawford*, 54 P.3d at 660. Interestingly, the state abandoned the waiver argument before the U.S. Supreme Court; therefore, the Court did not have the occasion to pass on the issue. *Crawford*, 541 U.S. at 42 n.1.

<sup>23</sup> *See Crawford*, 2001 Wash. App. LEXIS 1723 at \*7.

<sup>24</sup> *See id.* at \*7.

one against her penal interest.<sup>25</sup> The trial court concluded that because Sylvia led Crawford to Lee's apartment, her statement, on the whole, was indeed admissible as a statement against her penal interest.<sup>26</sup> The Washington Court of Appeals agreed that portions of Sylvia's second statement were against her penal interest,<sup>27</sup> but, applying a nine-factor test,<sup>28</sup> found that the statement "was plainly untrustworthy."<sup>29</sup> The court held that under *Lilly v. Virginia*,<sup>30</sup> the statement did not fall within a firmly rooted exception to the hearsay rule and that the statement did not possess sufficient particularized guarantees under *Lilly*'s residual trustworthiness test to satisfy the Confrontation Clause; therefore, the statement's admission violated the Sixth Amendment requiring reversal.<sup>31</sup> The state petitioned the Washington Supreme Court for review, which the court granted, ultimately reversing the lower appellate court's decision.

In its review, the Washington Supreme Court applied a different test than the lower court did. A statement that is not firmly rooted may be admissible for Confrontation Clause purposes, the court declared, if it possesses some indicia of reliability, shown either by applying the nine-factor test to determine "relative reliability" or by analyzing a statement to determine whether it "interlocks" with another statement.<sup>32</sup> The court determined that "[b]ecause Sylvia's and Michael's [second statements were] virtually identical, admission of Sylvia's statement satisf[ied] the requirement of reliability under the confrontation clause."<sup>33</sup> The court, therefore, reinstated Crawford's conviction. Crawford then appealed to the U.S. Supreme Court, stating that "[t]his case presents this Court with an opportunity to clarify the operation of the Confrontation Clause and to refasten this critical provision to its historical and textual underpinnings."<sup>34</sup> The Supreme Court took up that opportunity and fundamentally altered the then-existing relationship between hearsay and the Confrontation Clause.

After reviewing the facts, the Court began its analysis by reviewing the historical pedigree of the Confrontation Clause, focusing its attention on the abuses of what the Court called the civil-law mode of criminal prosecution.<sup>35</sup> The civil-law model of criminal procedure permitted private examination of witnesses and conviction of defendants without an opportunity for cross-examination.<sup>36</sup> Describing the encroachment of *ex parte* examination by judicial officers in England as best evidenced by the treason trial of Sir Walter Raleigh,<sup>37</sup> the Court believed that the Framers of the Confrontation Clause were strongly motivated to provide a particular procedure to assess reliability: "testing in the crucible of cross-examination."<sup>38</sup> Stated another way, reliability is a byproduct of the constitutionally mandated procedure of cross-examination. As a result of the Court's *Ohio v. Roberts* opinion,<sup>39</sup> in lieu of confrontation, a defendant could be convicted based on the "reliability" of a

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<sup>25</sup> *Id.* at \*8.

<sup>26</sup> *Id.* at \*9.

<sup>27</sup> *Id.* at \*10.

<sup>28</sup> *See id.* at \*12-17.

<sup>29</sup> *Id.* at \*19.

<sup>30</sup> 527 U.S. 116 (1999) (plurality opinion) (holding that accomplices' confessions are not within a firmly rooted exception to the hearsay rule and thus subject to the "residual trustworthiness test" of the Confrontation Clause).

<sup>31</sup> *See Crawford*, 2001 Wash. App. LEXIS 1723 at \*20-21.

<sup>32</sup> *State v. Crawford*, 54 P.3d 656, 661 (Wash. 2002). Such an approach clearly violated the dictates of *Idaho v. Wright*, which held that "the 'particularized guarantees of trustworthiness' required for admission under the Confrontation Clause must . . . be drawn from the totality of the circumstances *that surround the making of the statement* and that render the declarant particularly worthy of belief." 497 U.S. 805, 820 (1990) (emphasis added). Further, the Court observed, "To be admissible under the Confrontation Clause, hearsay evidence used to convict a defendant must possess indicia of reliability by virtue of *its inherent trustworthiness, not by reference to other evidence at trial.*" *Id.* at 822 (emphasis added).

<sup>33</sup> The court reached its conclusion because neither Crawford's nor Sylvia's statement clearly stated that Mr. Lee had a weapon in his hand when Crawford was defending himself. "And it is this omission by both that interlocks the statements and makes Sylvia's statement reliable." *Crawford*, 54 P.3d at 664.

<sup>34</sup> Brief for Petitioner at 1, *Crawford v. Washington*, 541 U.S. 36 (2004) (No. 02-9410).

<sup>35</sup> *See Crawford*, 541 U.S. at 50.

<sup>36</sup> The Court observed that "English common law has long differed from continental civil law in regard to the manner in which witnesses give testimony in criminal trials. The common-law tradition is one of live testimony in court subject to adversarial testing, while the civil law condones examination in private by judicial officers." *Id.* at 43.

<sup>37</sup> The Court called the political trials of the 16th and 17th centuries, which included the Sir Walter Raleigh trial, the "most notorious instances of civil-law examination." It was after these trials, the Court noted, that "English law developed a right of confrontation that limited these abuses." *Id.* at 44.

<sup>38</sup> *Id.* at 61.

<sup>39</sup> 448 U.S. 56 (1984).

hearsay statement—reliability being a solely judicial determination.<sup>40</sup> As Justice Scalia, the majority opinion’s author, noted in the *Crawford* opinion, “The legacy of *Roberts* in other courts vindicates the Framers’ wisdom in rejecting a general reliability exception [to the Confrontation Clause]. The framework is so unpredictable that it fails to provide meaningful protection from even core confrontation violations.”<sup>41</sup> The Court declared, “The unpardonable vice of the *Roberts* test, however, is not its unpredictability, but its demonstrated capacity to admit core testimonial statements that the Confrontation Clause plainly meant to exclude.”<sup>42</sup> Given *Roberts*’ vice and the goal of the Confrontation Clause, the Court sought to unmoor the two:

Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment’s protection to the vagaries of the rules of evidence, much less to amorphous notions of “reliability.” . . . Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation.<sup>43</sup>

To be admissible at trial, the Court held, the proponent of a testimonial hearsay statement must show that the declarant is unavailable and that the accused had a prior opportunity to cross-examine the declarant.<sup>44</sup> It is this concept of “testimonial hearsay” that has caused the lower courts the most difficulty, because the Court does not provide a comprehensive definition for the key concept of the case.<sup>45</sup>

Eschewing clarity, the Court defined testimonial minimally: “Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations”<sup>46</sup> (the lattermost example itself being defined colloquially, rather than legally).<sup>47</sup> The Court, however, provided hints as to a broader definition of testimonial in its discussion of the “various formulations” of the core class of testimonial statements:

[E]x parte in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examination, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that the declarants would reasonably expect to be used prosecutorially; extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions; 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.<sup>48</sup>

The last phrase seems to be the focus of the majority of lower courts in determining whether a statement falling outside the narrow definition is testimonial.

Among the many questions generated by the Court’s opinion, one fundamental question is most unclear: What is the reach of “testimonial hearsay”? Given the Court’s focus on the Framers’ motivations and the civil-law mode of criminal procedure, there is much support for the argument that the range of statements falling within the testimonial parameter is narrow.<sup>49</sup> On the other hand, given the Court’s observation that “[v]arious formulations of this core class of ‘testimonial’ statements exist,”<sup>50</sup> there is similar room to argue that “testimonial” covers statements that are outside of the formalized,

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<sup>40</sup> See *supra* note 5 and accompanying text.

<sup>41</sup> *Crawford*, 541 U.S. at 62-63.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 61.

<sup>44</sup> See *id.* at 53-54.

<sup>45</sup> The majority acknowledges that its failure to provide a comprehensive definition is problematic: “We acknowledge THE CHIEF JUSTICE’s objection . . . that our refusal to articulate a comprehensive definition in this case will cause interim uncertainty.” *Id.* at 68 n.10.

<sup>46</sup> *Id.* at 68.

<sup>47</sup> *Id.* at 53 n.4.

<sup>48</sup> *Id.* at 51-52 (internal citations omitted) (emphasis added).

<sup>49</sup> “The constitutional text, like the history underlying the common-law right of confrontation, thus reflects an especially acute concern with a specific type of out-of-court statement.” *Id.* at 51.

<sup>50</sup> *Id.*

affidavit-type statements.<sup>51</sup> In any case, the lower courts are grappling not only with the scope of the word “testimonial,”<sup>52</sup> but also with a key term provided by the Court—“interrogation.” To be sure, the Court has sent the criminal lawyer and trial and appellate judges into the Sea of We Do Not Know.<sup>53</sup> All is not lost, however, because the outer limits of the Confrontation Clause will be defined by trial and defense counsel in cases tried throughout the world. Rather than despairing, ambitious, zealous counsel should relish the opportunity to push the boat back into harbor, clarifying for the journeyman Judge Advocate what testimonial really means outside of the minimal definition provided in *Crawford*.

### The Certainty of *Crawford*: Statements to Nongovernmental Actors<sup>54</sup>

Undergirding much of the *Crawford* opinion is the majority’s concern about government involvement in statements created with an eye toward prosecution.<sup>55</sup> This key component of the opinion guides lower courts’ take on *Crawford* with respect to what is *nontestimonial*.<sup>56</sup> To the extent that a statement does not involve a governmental actor seeking information for later prosecution, state and federal courts have had no difficulty classifying the statements at issue as *nontestimonial*.<sup>57</sup> As of the end of 2004, these courts uniformly have treated statements made to family members, friends, co-workers, and strangers as *nontestimonial* hearsay.<sup>58</sup> To the *Crawford* Court, such a statement is “a casual remark to an acquaintance” that must be distinguished from a statement made to a government officer.<sup>59</sup>

Lower courts’ treatment of such statements ranges from the conclusory to the authoritative. An example of the former is *People v. Griffin*.<sup>60</sup> The case involved the trial court’s admission of a murdered sexual abuse victim’s statement to a

<sup>51</sup> See *United States v. Saget*, 377 F.3d 223 (2d Cir. 2004) (noting that “[b]y denominating these types of statements as constituting the ‘core’ of the universe of testimonial statements, the Court left open the possibility that the definition of testimony encompasses a broader range of statements”); Robert P. Mosteller, *Crawford v. Washington: Encouraging and Ensuring the Confrontation of Witnesses*, 39 U. RICH. L. REV. 511, 527 (2005) (observing that the Court offers “tantalizing hints . . . that leave open the door for a broader view . . .”).

<sup>52</sup> Lower courts, cast adrift by the majority’s refusal to comprehensively define the key distinction, are struggling to classify informal statements, nonofficial statements, medical statements, and 911 phone calls as testimonial or *nontestimonial*. The focus for courts in that struggle seems to be falling on Justice Scalia’s discussion of the “core” class of testimonial statements. *Crawford*, 541 U.S. at 51.

<sup>53</sup> The Chief Justice aptly wrote in his concurrence in the judgment:

The Court grandly declares that “[w]e leave for another day any effort to spell out a comprehensive definition of ‘testimonial.’” But the thousands of federal prosecutors and the tens of thousands of state prosecutors need answers as to what beyond the specific kinds of “testimony” the Court lists, is covered by the new rule. They need them now, not months or years from now. Rules of criminal evidence are applied every day in courts throughout the country, and parties should not be left in the dark in this manner.

*Id.* at 75-76 (Rehnquist, C.J., concurring in the judgment) (internal citations omitted).

<sup>54</sup> All the cases discussed in this article involve statements made by unavailable witnesses at trial. The reasons are not important for purposes of this article. Given the Court’s requirement, however, that the prosecution show a declarant’s unavailability, this area of the law is important and likely to see growth. The Court spelled out the current standard for Confrontation Clause purposes in *Roberts*: “The basic litmus of Sixth Amendment unavailability is established: ‘[A] witness is not “unavailable” for purposes of . . . the exception to the confrontation requirement unless the prosecutorial authorities have made a *good-faith effort* to obtain his presence at trial.’” *Ohio v. Roberts*, 448 U.S. 56, 74 (1980) (quoting *Barber v. Page*, 390 U.S. 719, 724-725 (1968)) (emphasis in original).

<sup>55</sup> See *Crawford*, 541 U.S. at 56 n.7 (“Involvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse—a fact borne out time and again throughout a history with which the Framers were keenly familiar.”).

<sup>56</sup> Once a court determines that the statement at issue is *nontestimonial*, the issue then becomes whether *Roberts* applies. The Court observed that where *nontestimonial* evidence is at issue “it is wholly consistent with the Framers’ design to afford the States flexibility in their development of hearsay law—as does *Roberts*, and as would an approach that exempted such statements from *Confrontation Clause* scrutiny altogether.” *Id.* at 68. Courts still apply *Roberts* for *nontestimonial* hearsay. See, e.g., *Horton v. Allen*, 370 F.3d 75 (1st Cir. 2004), *cert. denied*, 125 S. Ct. 971 (2005); *United States v. McClain*, 377 F.3d 219 (2d Cir. 2004); *Leavitt v. Arave*, 383 F.3d 809 (9th Cir. 2004). The rationale for such decisions was best expressed in *United States v. Saget*, 377 F.3d 223 (2d Cir. 2004), *cert. denied*, 125 S. Ct. 938 (2005) (observing the “*Crawford* Court expressly declined to overrule *White [v. Illinois]*, 502 U.S. 346 (1992)], in which the majority of the Court considered and rejected a conception of the Confrontation Clause that would restrict the admission of testimonial statements but place no constitutional limits on the admission of out-of-court *nontestimonial* statements”). The trial practitioner must, therefore, still be able to articulate why a *nontestimonial* hearsay statement satisfies the Confrontation Clause and why such a statement is admissible under the hearsay rules.

<sup>57</sup> See cases cited *infra* note 71.

<sup>58</sup> See cases cited *infra* note 71.

<sup>59</sup> *Crawford*, 541 U.S. at 51 (“An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.”).

<sup>60</sup> 93 P.3d 344 (Cal. 2004).

schoolmate that the defendant had been fondling her and that she intended to confront him if he continued.<sup>61</sup> The California Supreme Court observed in a footnote that “*Crawford* [did] not affect the present case, because the out-of-court statement here at issue . . . is not ‘testimonial hearsay’ within the meaning of *Crawford*.”<sup>62</sup> The court offered nothing else in support of what it apparently thought was an obvious conclusion. On the other end of the spectrum is the case *People v. Compan*.<sup>63</sup> The statements at issue in *Compan* were made by a battered wife, who called a friend, stating the defendant was angry and yelling at her.<sup>64</sup> Fifteen minutes later, she called saying the defendant hurt her.<sup>65</sup> When her friend came to the house, the “upset and agitated” victim recounted the abuse: the defendant punched and kicked her, threw her against a wall, and pulled her hair.<sup>66</sup> The court took pains to explain its view of *Crawford*’s definition of testimonial, noting that:

[I]t appears that testimonial statements under *Crawford* will generally be (1) solemn or formal statements (not casual or off-hand remarks), (2) made for the purpose of proving or establishing facts in judicial proceedings (not for business or personal purposes), (3) to a government actor or agent (not someone unassociated with government activity).<sup>67</sup>

The court concluded that the victim’s statements were nontestimonial because they possessed none of the noted characteristics.<sup>68</sup> Similarly, the Wisconsin Court of Appeals in *State v. Manuel*<sup>69</sup> hewed its opinion closer to *Crawford*’s language in holding a co-defendant’s statement to his girlfriend implicating the defendant was nontestimonial:

The statement was not made to an agent of the government or to someone engaged in investigating the shooting. The statement thus does not fall within any of the categories of testimonial statements expressly identified in *Crawford* (prior trial, preliminary-hearing and grand-jury testimony, and statements made during police interrogations). Neither does it appear to be the type of statement the Court found had historically been the “primary object” of the framer’s concerns in enacting the Confrontation Clause.<sup>70</sup>

Although the Wisconsin court took its support from *Crawford*’s language rather than using its own construction, a comparison between *Compan* and *Manuel* reveals virtually identical reasoning: a casual statement made for a nongovernmental reason to a nongovernmental agent is not testimonial.<sup>71</sup> In *United States v. Savoca*,<sup>72</sup> the District Court

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<sup>61</sup> *Id.* at 369.

<sup>62</sup> *Id.* at 372 n.19.

<sup>63</sup> 100 P.3d 522 (Colo. Ct. App. 2004), *cert. granted*, 2004 Colo. LEXIS 849 (Colo. Oct. 25, 2004). The Colorado Supreme Court granted review on whether “admission of an extended narration as an ‘excited utterance’ exception to the hearsay rule when such evidence was never tested by cross-examination as required by *Crawford v. Washington* (citation omitted).”

<sup>64</sup> *Id.* at 535.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 537. *Accord* *People v. T.T.*, 815 N.E.2d 789, 800 (Ill. Ct. App. 2004) (noting that *Crawford* indicates that governmental involvement in some fashion in the creation of a formal statement is necessary to render the statement testimonial in nature”). Similarly, Professor Mosteller points out, “[T]he purpose for which a statement is made is the critical determiner of whether it is testimonial.” Mosteller, *supra* note 51, at 549.

<sup>68</sup> *Compan*, 100 P.3d at 538.

<sup>69</sup> 685 N.W.2d 525 (Wis. Ct. App. 2004), *rev. granted*, 689 N.W.2d 55 (Wis. 2004).

<sup>70</sup> *Manuel*, 685 N.W.2d at 162.

<sup>71</sup> *See also* *People v. Vigil*, 104 P.2d 258 (Colo. Ct. App. 2004), *cert. granted in part, denied in part*, 2004 Colo. LEXIS 1030 (Colo. Dec. 20, 2004) (holding that child sexual abuse victim’s statement to his father and his father’s friend was nontestimonial because the statement was not a solemn or formal statement made to a nongovernmental actor); *Demons v. State*, 595 S.E.2d 76 (Ga. 2004) (holding that decedent’s statements to a co-worker about the source of bruises on his upper arms and chest and about a threat communicated by the defendant “were not remotely similar” to prior testimony at a grand jury hearing, preliminary hearing, or prior trial or to police interrogation); *State v. Rivera*, 844 A.2d 191 (Conn. 2004) (holding that uncle’s statements to his nephew were outside the core category of *ex parte* testimonial statements of concern in *Crawford*); *People v. Rolandis G.*, 817 N.E.2d 183 (Ill. Ct. App. 2004) (holding that the victim’s statement to his mother were “more in the nature of a ‘casual remark to an acquaintance’ that the Court implied would not be testimonial”); *People v. West*, No. 1-02-2358, 2005 Ill. App. LEXIS 62 (Ill. Ct. App. Jan. 5, 2005) (holding that a victim’s statements to a Ms. Jackson were not testimonial because Ms. Jackson was not acting as a governmental officer seeking evidence); and *State v. Blackstock*, 598 S.E.2d 412 (N.C. Ct. App. 2004) (holding that armed robbery victim’s statements to his wife and daughter were not testimonial because the statements were not made under a reasonable belief that they would be used prosecutorially (victim made statement when health was improving, but he died later)). There are several federal cases that also use the same reasoning. *See, e.g.*, *Horton v. Allen*, 370 F.3d 75 (1st Cir. 2004) (holding that that co-accused’s statements made to witness regarding what co-accused said to the witness on the day of murders were not testimonial because the statements were not *ex parte* testimony or its equivalent; were not contained in formalized documents; were not made during custodial confession; and were made to a private person and not under circumstances that would lead an objective witness to believe that the statements would be available for use a later trial); *Evans v. Luebbers*, 371 F.3d 438

provided a succinct summary of what it considered testimonial hearsay, stating, “All the examples provided [in *Crawford*’s minimal definition] contain an ‘official’ element. While statements may or may not have been sworn, each example was made to an authority figure in an authoritarian environment. *This element of officiality appears to be the hallmark of a ‘testimonial statement.’*”<sup>73</sup> Whether this conclusion is supportable in light of the Confrontation Clause’s text is an open matter, but practically speaking, the courts’ focus follows from *Crawford*.

The Court made very clear in *Crawford* that the Confrontation Clause is not solely concerned with those who actually testify in court: “[W]e once again reject the view that the Confrontation Clause applies of its own force only to in-court testimony . . . .”<sup>74</sup> Similarly, why is the Court’s construction of the Confrontation Clause concerned only with those witnesses who are official? In answering this question, the Court looked to the history of the Confrontation Clause, concluding that “the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused.”<sup>75</sup> To suggest, however, that the Confrontation Clause is only concerned with official statements is not supported in the text of the Confrontation Clause.<sup>76</sup> The Court’s attempt to restrict the reach of the Confrontation Clause and the lower courts’ implementing interpretations of *Crawford* misconstrues the Confrontation Clause’s plain text. Nowhere is the word “official” or “governmental” used as an adjective before the word “witness.” If the Court is going to interpret the Confrontation Clause expansively to include out-of-court declarants as “witnesses” within the ambit of the Confrontation Clause, why would it, at the same time, restrict the type of witnesses who qualify as “witnesses” under the Confrontation Clause? The Court should not read a *qualifier* for the word “witness,” notwithstanding the motivation of the Framers at the time they drafted the Confrontation Clause. Indeed, if confrontation is the goal and if the Confrontation Clause is to prescribe a *procedure*,<sup>77</sup> on what grounds can the Court graft a qualifier onto the word “witness”? Where in the plain text is the qualifier “official” or “governmental”? Why should it be significant as a matter of *procedural* constitutional law<sup>78</sup> that a witness be somehow tied to an official purpose? Cannot a private declarant bear witness to a friend, a family member, or a co-worker against an accused in the form of an accusatory statement that *should be* subject to cross-examination?<sup>79</sup> These are points that arguably can be made by a defense counsel in support of an expansive understanding of confrontation. Because the Court has unmoored confrontation jurisprudence from hearsay law, it should matter little the status or even purpose of the listener. What should matter is bringing witnesses in the courtroom for confrontation—as the text of the Confrontation Clause clearly states.

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(8th Cir. 2004) (holding that later-murdered victim’s (who was Evans’ estranged wife) numerous out-of-court statements that she was scared of Evans, that she was verbally and physically abused by Evans, that she intended to divorce Evans, and that she obtained a protective order against Evans made to ten different witnesses were not testimonial because the statements did not fit within the expressed definitions of testimonial set out by the *Crawford* court); *United States v. Lee*, 374 F.3d 637 (8th Cir. 2004) (holding that statements made by co-defendant to his mother were nontestimonial because they were casual conversations that did not implicate the core concerns of the Confrontation Clause).

<sup>72</sup> 335 F. Supp. 2d 385 (S.D.N.Y. 2004) (noting that statements at issue were nontestimonial because they were made by the co-defendant to his then live-in girlfriend, not to a government official).

<sup>73</sup> *Id.* at 392-93 (emphasis added).

<sup>74</sup> *Crawford v. Washington*, 541 U.S. 36, 50 (2004).

<sup>75</sup> *Id.* There are others, however, who suggest that the Court’s view of the history supporting its interpretation is wrong. *See, e.g., People v. Cortes*, 781 N.Y.S.2d 401, 409 (2004) (noting that “history does not support the proposition that hearsay subject to confrontation is limited to deposition, affidavits and other formal documents”).

<sup>76</sup> Mosteller, *supra* note 51, at 575 (noting that “the Confrontation Clause has no requirement of government involvement”).

<sup>77</sup> “To be sure, the Clause’s ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands . . . that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.” *Crawford*, 541 U.S. at 61.

<sup>78</sup> *See supra* note 38 and accompanying text.

<sup>79</sup> An argument can be made that hearsay law and the Clause are inextricably intertwined notwithstanding the Court’s attempt to divorce them. *See, e.g., People v. Cortes*, 781 N.Y.S.2d 401, 407 (noting that the history of the hearsay rule and the confrontation rule are “inexorably intertwined”). To require cross-examination of declarants who make inherently reliable statements, the argument goes, is an exercise in futility because there is nothing new to be gained. Therefore, to the extent that a hearsay statement involves the power of the State, but at the same time is inherently reliable, there is no *need* for confrontation in the courtroom. This idea was crystallized in *Idaho v. Wright*, 497 U.S. 805 (1990), where the Court stated that “if the declarant’s truthfulness is so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility, then the hearsay rule does not bar admission of the statement at trial.” *Id.* at 820. And, for that matter, the Confrontation Clause did not bar that statement’s admissibility either. Indeed, for twenty-four years, *Roberts* stood for that proposition. Discussion with Major Christopher W. Behan, Professor, Criminal Law Department, US Army Judge Advocate General’s Legal Center and School (on file with the author).

## Crawford and Statements to Social Workers and other Medical Professionals

As discussed, lower courts have focused on the status of the listener, the circumstances under which the statement is given, and the purpose the statement is taken. In the medical field, these lines can get blurry, but the results in 2004 have been uniform. The extent of government agents' involvement, insofar as those agents are concerned with building a case against an accused, seems to be determinative of whether a resulting statement is testimonial. The cases *T.P. v. State*,<sup>80</sup> *People v. Sisavath*,<sup>81</sup> *People v. Rolandis G.*,<sup>82</sup> *Snowden v. Maryland*,<sup>83</sup> *State v. Courtney*,<sup>84</sup> *State v. Bobadilla*,<sup>85</sup> and *State v. Mack*<sup>86</sup> all involved interviews by social or child advocacy workers at the request of or on referral from law enforcement. In each case, the reviewing court concluded that the resulting statements were testimonial. Decisive in each of these cases was the courts' uniform conclusion that the interview was conducted "for the purpose of developing the case"<sup>87</sup> against the defendants. Even in the one case that did not involve a referral or direct involvement by law enforcement, *People v. T.T.*,<sup>88</sup> the court determined that because the interviewer took a formal statement with an eye toward prosecution, the hearsay statement was testimonial.<sup>89</sup> The lesson for counsel is, therefore, clear: be able to articulate that an interview's purpose was or was not to develop a case against an accused. If the referral's purpose was *not* to develop a case against the accused, the argument can be made that, although there was government involvement in the creation of the statement, the primary *purpose* was other than prosecution of the accused and; therefore, any subsequent statement is not testimonial.

At least one court did not find the employment status of the social or advocacy worker necessarily determinative of a statement's testimonial character.<sup>90</sup> *People v. Sisaveth*<sup>91</sup> involved a child's statement to a nongovernmental employee; yet the court still found the statement at issue to be testimonial<sup>92</sup> because "there is no serious question but that Victim 2's 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.'"<sup>93</sup> Noting the *Crawford* Court's reference to "an objective witness," the *Sisaveth* court squarely addressed the vexing question of just who the objective witness is supposed to be:

Conceivably, the Supreme Court's reference to an "objective witness" should be taken to mean an objective witness in the same category of persons as the actual witness – here an objective four-year-old. But we do not think so. It is more likely that the Supreme Court meant simply that if a statement was given under circumstances in which its use in a prosecution is reasonably foreseeable by an objective observer, then the statement is testimonial.<sup>94</sup>

<sup>80</sup> No. CR-03-0574, 2004 Ala. Crim App. LEXIS 236 (Ala. Crim. App. Oct. 29, 2004).

<sup>81</sup> 13 Cal. Rptr. 3d 753 (Cal. Ct. App. 2004).

<sup>82</sup> 817 N.E.2d 183 (Ill. Ct. App. 2004).

<sup>83</sup> 846 A.2d 36 (Md. Ct. Spec. App. 2004), *aff'd*, 2005 Md. LEXIS 35 (Md. Feb. 7, 2005).

<sup>84</sup> 682 N.W.2d 185 (Minn. Ct. App. 2004), *review granted*, 2004 Minn. LEXIS 575 (Minn. Sept. 29, 2004).

<sup>85</sup> 690 N.W.2d 345 (Minn. Ct. App. 2004).

<sup>86</sup> 101 P.3d 349 (Ore. 2004).

<sup>87</sup> *Courtney*, 682 N.W.2d at 196.

<sup>88</sup> 815 N.E.2d 789 (Ill. Ct. App. 2004).

<sup>89</sup> *Id.* at 802.

<sup>90</sup> This point is of interest because at most installations, social workers are either government employees or government contract employees. If the key is employment status, every statement to every child and adolescent therapist or family advocacy worker would be testimonial.

<sup>91</sup> 13 Cal. Rptr. 3d 753 (Cal. Ct. App. 2004). *Compare id.*, with *People v. Geno*, 683 N.W.2d 687, 692 (Mich. Ct. App. 2004) (noting in *dicta* that after referral by Children's Protective Services statement of child that she had an "owie" to the executive director of Children's Assessment Center (a nongovernment employee) was nontestimonial because was not in the nature of *ex parte* in-court testimony or its equivalent).

<sup>92</sup> The court specifically rejected the People's arguments, *inter alia*, that the statement at issue was not testimonial because the interviewer was not a government employee and because the Multidisciplinary Interview Center was a neutral site where the interview might have been for a therapeutic purpose. The court noted that because the interview took place after prosecution was initiated, attended by the prosecutor, and was conducted by a forensically trained interviewer, "[i] does not matter what the government's actual intent was in setting up the interview, where the interview took place or who employed the interviewer." *Sisaveth*, 13 Cal. Rptr. 3d at 758.

<sup>93</sup> *Id.* (quoting *Crawford v. Washington*, 541 U.S. 36, 52 n.3 (2004)).

<sup>94</sup> *Sisaveth*, 13 Cal. Rptr. 3d at 758 n.3.

The seemingly clear lines regarding social workers get less distinct in cases involving medical personnel.

Whether a statement made to medical personnel is testimonial is a complex area, which raises numerous questions in light of *Crawford*. For example, if a child sexual abuse or assault victim is referred to a medical doctor for an examination by law enforcement, does this alone make any subsequent statement testimonial? If a medical examination occurs before a referral, is it not foreseeable to an objective witness that any statement may be available for use at a later trial, particularly when there is a duty to report suspected abuse? Does it matter that the doctor or nurse is not asking questions about what happened and who did what for a forensic purpose, but only to assess the healthcare needs of the declarant? Finally, is the declarant's subjective intent in making the statement relevant?

Some of the answers to these questions were provided in *People v. Cage*.<sup>95</sup> Cage allegedly assaulted her 15-year-old son, John, by cutting his face with a piece of a broken glass table.<sup>96</sup> After being taken to the hospital by a sheriff's deputy, an emergency room doctor, Dr. Russell, asked John what happened.<sup>97</sup> John replied that his mother cut him while his grandmother held him.<sup>98</sup> In assessing the situation, the court observed that "Dr. Russell was not a police officer or even an agent of the police. He was not performing any function remotely resembling that of a Tudor, Stuart, or Hanoverian justice of the peace."<sup>99</sup> The court also noted that *Crawford* emphasized the significance of government involvement in the creation of the statement,<sup>100</sup> which in this case, did not occur except insofar as the deputy brought the victim to the hospital for medical treatment. In response to the defendant's argument that John did not distinguish between the deputy's questions<sup>101</sup> and the doctor's, the court noted that *Crawford* did not adopt any of the formulations of the "core class" of testimonial hearsay statements; rather, the court stated that the *Crawford* Court "merely noted that they 'exist,' that they 'share a common nucleus,' and that certain indisputably testimonial hearsay statements also fall within that nucleus."<sup>102</sup> For counsel looking to narrow the scope of *Crawford*, the *Cage* court offered this important point:

[E]ven under the [*Crawford* Court's] proposed formulations, the declarant's subjective understanding is irrelevant. They state an objective, "reasonable person" test. No reasonable person in John's shoes would have expected his statements to Dr. Russell to be used prosecutorially, at defendant's trial. This is true even if he thought the doctor might relay his statements to the police. After all, *anyone* who obtains information relevant to a criminal investigation might (and certainly should) pass it along to the police.<sup>103</sup>

Thus, *Cage* supports an argument that even if the declarant expects his statement to be passed onto police, that expectation will not decide the issue: What would an objective, reasonable person expect? As part of that determination, these questions must be answered: What is the purpose of the *listener*? On whom *should* be focus be? On the objective, reasonable declarant or the listener? The next case sheds some light on this issue.

The primary point in *Cage*—the participation of government officials in the creation of the statement—is repeated in other cases involving similar statements. For example, in *People v. Vigil*,<sup>104</sup> the court addressed whether a doctor's interview with the child-victim at the request of law enforcement was testimonial. A police officer investigating the alleged abuse asked a doctor, who was a member of a child protection team providing consultations at hospitals in cases of suspected child abuse, to conduct a "forensic sexual abuse examination."<sup>105</sup> Noting that before performing the examination, the doctor spoke

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<sup>95</sup> 15 Cal. Rptr. 3d 846 (Cal. Ct. App. 2004), *rev. granted*, 19 Cal. Rptr. 3d 824 (Cal. 2004).

<sup>96</sup> *Cage*, 15 Cal. Rptr. 3d at 848-49.

<sup>97</sup> *Id.* at 849.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 854.

<sup>100</sup> "*Crawford* repeatedly emphasized the significance of government involvement in a testimonial hearsay statement." *Id.*

<sup>101</sup> Before being treated, the deputy sheriff investigating the case asked the victim what happened. The court determined that the responses were not testimonial. *Id.* at 855-57.

<sup>102</sup> *Id.* at 855.

<sup>103</sup> *Id.* The Oregon Supreme Court made a similar point with respect to the declarant's intent, but also placed emphasis on methodology of government involvement: "The primary focus in *Crawford* was on the method by which government officials elicited out-of-court statements for use in criminal trials, not on the declarant's intent or purpose in making the statement." *State v. Mack*, 101 P.3d 349 (Ore. 2004).

<sup>104</sup> 104 P.2d 258 (Colo. Ct. App. 2004), *cert. granted in part, denied in part*, 2004 Colo. LEXIS 1030 (Colo. Dec. 20, 2004).

<sup>105</sup> *Vigil*, 104 P.2d at 256.

to the police officer about the case, the court found that “[t]he statements were made under circumstances that would lead an objective witness reasonably to believe that they would be used prosecutorially. Although the doctor himself was not a government officer or employee, he was not a person ‘unassociated with government activity.’”<sup>106</sup> Unlike the court in *Cage*, however, the *Vigil* court seemed to place the objective witness spotlight on the *listener* of the statement: “The doctor elicited the statements after consultation with the police, and he necessarily understood that information he obtained would be used be used in a subsequent prosecution for child abuse.”<sup>107</sup> In the world of confrontation, is this the correct focus?

Focusing on the *listener* makes sense if governmental involvement is the defining characteristic of a testimonial statement, because the intent of the declarant (objective or subjective) is of no interest. This focus also makes sense if the Confrontation Clause’s limit is to formalized, affidavit, *ex parte*-type statements and police interrogations, because even if the declarant does not want the information to be used, the government was still involved with an eye toward prosecution. If the Confrontation Clause’s concern, however, is on those who bear “witness,” then it should not matter what the *listener* expects, wants, or does, because that person only becomes a witness at trial if declarant’s unavailability makes him one.<sup>108</sup> The true “witness” is the declarant and the listener is merely the transmitter of the witness’ hearsay statement against the accused. If the Confrontation Clause is to have its textual meaning, the focus should be on the declarant, who is viewed objectively to determine whether he would reasonably believe that the statement being made is likely to be available for use at a later trial—as any accusatory statement is. If this declarant-centered focus is correct, then logically it makes no difference whether the government is involved in the creation of the statement. What matters is whether the declarant reasonably could expect a statement that accuses someone of a crime to be available for use at a later prosecution. Therefore, the *Vigil* court mistook the meaning of “witness” and placed the focus on the wrong person.

Likewise, focusing on a medical examination purpose places the emphasis on the wrong question and the wrong person.<sup>109</sup> *Cage* and *Vigil* placed emphasis on the purpose of the examination and whether the subsequent statement had the trappings of the *Crawford* Court’s description of testimonial statements.<sup>110</sup> Similarly, in *State v. Vaught*,<sup>111</sup> the Nebraska court decided the case based upon the purpose of the exam and the statement’s dissimilarity to testimonial statements listed in *Crawford*. *Vaught* involved the admission of a statement made by a victim of child sexual abuse to a doctor.<sup>112</sup> The 4-year-old victim identified the perpetrator in response to a doctor’s question about happened.<sup>113</sup> The court held that the victim’s statement was not testimonial because “the victim’s identification of Vaught as the perpetrator was a statement made for the purpose of medical diagnosis or treatment,” which statement did not fit within any of the *Crawford* Court’s core class of testimonial statements.<sup>114</sup> In support of its conclusion, the court observed that the evidence showed the only purpose of the examination was to obtain medical treatment: “[T]here was no indication of a purpose to develop testimony for trial, nor was there an indication of government involvement in the initiation or course of the examination.”<sup>115</sup> Was the 4-year-old’s statement made for the purpose of medical treatment or was it merely an unknowing response to a specific question? It is doubtful that the victim in the case understood the significance of the question or its answer. Why should it matter that the government did not cause the statement to be made? Isn’t the effect the same—identifying the perpetrator? One court opinion, discussed in the next paragraph, notes that a governmental referral of a victim to a medical doctor makes no difference as to whether a subsequent statement is testimonial.<sup>116</sup> Further, this same court made a critical distinction between a statement made for treatment and one that *identifies* a perpetrator.<sup>117</sup>

<sup>106</sup> *Id.* at 256 (quoting, *People v. Compan*, 100 P.3d 522 (Colo. Ct. App. 2004), *cert. granted*, 2004 Colo. LEXIS 849 (Colo. Oct. 25, 2004)).

<sup>107</sup> *Id.* (emphasis added).

<sup>108</sup> This point assumes that the statement at issue is offered for its truth and not some other evidentiary purpose.

<sup>109</sup> These questions still have to get answered, however, as an *evidentiary* matter: What rule of evidence will be used to get the evidence into the courtroom? Perhaps the courts have not been able to divorce hearsay law and the Clause just yet.

<sup>110</sup> *See People v. Cage*, 15 Cal. Rptr. 3d 846, 854-855 (Cal. Ct. App. 2004); *Vigil*, 104 P.3d at 265-66.

<sup>111</sup> 682 N.W.2d 284 (Neb. 2004).

<sup>112</sup> *Id.* at 286.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 291.

<sup>115</sup> *Id.*

<sup>116</sup> *People v. T.T.*, 815 N.E.2d 789, 803 (Ill. Ct. App. 2004).

<sup>117</sup> *See id.* at 804.

*People v. T.T.* involved a sexual assault of a 7-year-old girl by a 14-year-old boy.<sup>118</sup> A worker for the Department of Children and Family Services (DCFS) referred the victim to the emergency room five months after the alleged assault.<sup>119</sup> Doctor Lorand explained to G.F. (the victim) that she would conduct a physical examination and asked G.F. what, if anything, happened to her.<sup>120</sup> G.F. indicated that the defendant was the person who hurt her in her private parts or buttocks area.<sup>121</sup> The court held that “a victim’s statements to medical personnel regarding ‘descriptions of the cause of symptom, pain or sensations, or the inception or general character of the cause or external source thereof,’ are not testimonial in nature where such statements do not accuse or identify the perpetrator of the assault.”<sup>122</sup> The court rejected the defendant’s attempt to characterize the entire statement as testimonial because “[s]uch an analysis overlooks the crucial ‘witness against’ phrase of the confrontation clause and casts too wide a net in categorizing nonaccusatory statements by sexual assault victims to medical personnel as implicating the confrontation clause’s core concerns regarding government production of *ex parte* evidence against a criminal defendant.”<sup>123</sup> Aside from making an appropriate distinction and giving meaning to the text of the Confrontation Clause, of particular interest to military practitioners is the court’s comment that it did “not find controlling the fact that G.F.’s medical exam was the result of a referral from DCFS.”<sup>124</sup> The court, therefore, seems to suggest, at least with respect to medical statements, that government involvement is not determinative—it is the accusatory character of the statement that carries the day.<sup>125</sup> To be sure, the court took an important step in pushing the Confrontation Clause toward its plain meaning, but the court still used the *Crawford* Court’s vocabulary of “core concerns” of the Confrontation Clause.<sup>126</sup>

What should trial and defense counsel take from these medical statement cases? First, look for government involvement in the creation of the statement. Second, determine the purpose of the statement with focus on the objective witness. Third, parse the statement into its components. To the extent that law enforcement remained on the sideline, trial counsel should be able to argue that any statement is not testimonial. If the purpose was to develop a case against the accused, defense counsel should be able to argue that any statement is testimonial. If the purpose was truly for medical purposes, however, the trial counsel has ample support for a nontestimonial finding by a military judge. At the same time, the defense counsel can point to *People v. T.T.* to support an argument that an accusatory statement made by a declarant should be considered testimonial, particularly when an objective declarant would expect the statement to be available for later use at trial. The purpose of the Confrontation Clause would be better served if judges would make a clean break in their minds between the constitutional question and the evidentiary issue in this area. To the extent that a child, teenager, or an adult accuses someone of some act against him, that person should be required to come into a courtroom, take an oath, be observable by the finders of fact, be subject to cross-examination<sup>127</sup> and tell the panel the accused did what he told a doctor, nurse, social worker, or therapist he did. Such a requirement has the beauty of not only complying with the Confrontation Clause, but also being very easy to implement.

### The 911 Phone Call Debate: Are They Testimonial?

911 OPERATOR #24: “WHAT’S YOUR EMERGENCY?”

A: “HE JUST HIT ME WITH A BAT!”

Q: “WHO? CAN YOU DESCRIBE WHO HIT YOU?”

A: “MIKE SMITH, WHITE GUY, BLUE JEANS, RED SHIRT, YELLOW CAP, 6’1”, 200 LBS.! HELP ME!!”

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<sup>118</sup> *Id.* at 792-93.

<sup>119</sup> *Id.* at 794.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 794-95.

<sup>122</sup> *Id.* at 804 (quoting 725 Illinois Compiled Statutes Annotated 5/115-10 (West 2000)) (emphasis added).

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 803.

<sup>125</sup> *See id.* at 804.

<sup>126</sup> *See id.*

<sup>127</sup> As the Supreme Court has noted, there are four elements of confrontation: physical presence, oath, cross-examination, and observation of demeanor by the trier of fact. *Maryland v. Craig*, 497 U.S. 836, 846 (1990) Sometimes, however, the physical presence element may be laid aside if necessary to further an important public policy and the reliability of the evidence can otherwise be assured. *Id.*; MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 611(d)(3) (2002) (permitting remote testimony of child witnesses upon a finding of necessity by the judge).

Q: "WHERE ARE YOU?"  
A: "2483 EARNHARDT WAY."  
[PHONE LINE GOES DEAD.]

It is common knowledge today that if there is an emergency, one should dial 911 for assistance.<sup>128</sup> If someone makes a 911 phone call, he presumably understands that some agent of the government is on the other end of the line and that help in the form of emergency medical personnel or law enforcement will respond to a request for assistance. It is also common knowledge that 911 operators are trained to get as much information about the situation as possible, to include a description, if not the actual identity, of the alleged perpetrator. An issue facing the courts is whether 911 phone calls are testimonial hearsay. The courts are split on this issue, and some courts make a *T.T.*-like distinction between the identity of the perpetrator and other information. In this area, the various undercurrents in *Crawford* come together creating not clarity, but confusion.

One of the first cases to address *Crawford* after the Court released its opinion on March 8, 2004, was *People v. Moscat*.<sup>129</sup> The case involved a 911 phone call by the complainant in a domestic violence prosecution against Moscat, who moved *in limine* to exclude the recording of the call.<sup>130</sup> The court, one dedicated solely to trying cases of alleged domestic violence, discussed the case in the context of "victimless prosecutions," in which prosecutors try to prove domestic violence cases without a victim because the victim usually does not appear at trial due to fear, economic or emotional dependence on the defendant, or reluctance to break up their families.<sup>131</sup> As the court pointed out, prosecutors commonly use victims' hearsay statements to doctors as statements made for medical diagnosis or treatment and statements to responding police officers as excited utterances.<sup>132</sup> The court also noted that "the most common form of such evidence is a call for help made by a woman to 911."<sup>133</sup>

Against this backdrop, the court determined that "[a] 911 call for help is essentially different in nature than the 'testimonial' materials that *Crawford* tells us the Confrontation Clause was designed to exclude."<sup>134</sup> In support of this conclusion, the court pointed to two key facts that underline the difference between a *Crawford* testimonial statement and a 911 phone call: the call is not initiated by the police and the call is not generated by a desire of the prosecution or police to seek evidence against someone.<sup>135</sup> Rather, a 911 call is generated by "the urgent desire of a citizen to be rescued from immediate peril."<sup>136</sup> Noting that "[a] testimonial statement is produced when the government summons a citizen to be a witness," the court found the typical 911 call is not testimonial because the relationship between the caller and the government is inverted.<sup>137</sup> That the victim is "trying to save her own life" without consciously "bearing witness" was sufficient for the court to determine that the phone call "is simply *not* the equivalent to a formal pretrial examination by a Justice of the Peace in Reformation England."<sup>138</sup> *People v. Cortes*<sup>139</sup> was the responding salvo in the 911 phone call arena. *Cortes* involved a slightly different phone call—a call to report a crime rather than to request assistance or a "cry for help."<sup>140</sup>

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<sup>128</sup> See *People v. Cortes*, 781 N.Y.S.2d 401 (N.Y. Gen. Term 2004).

<sup>129</sup> 777 N.Y.S.2d 875 (N.Y. Crim. Ct. 2004).

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 878.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 879. In fact, the court noted that the phone call can be considered part of the crime itself. *Id.* at 880.

<sup>135</sup> *Id.* at 879.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 880.

<sup>139</sup> 781 N.Y.S.2d 401 (N.Y. Gen. Term 2004).

<sup>140</sup> *Id.* at 402.

*Cortes* involved two 911 phone calls regarding a shooting in the Bronx.<sup>141</sup> The caller responded to several questions about the event, gave a description of the shooter and the shooter's direction of flight.<sup>142</sup> The court reviewed the history of the Confrontation Clause, coming to a different conclusion than the Supreme Court did.<sup>143</sup> The judge found that historical research concluded that the decision to include the right of confrontation had more to do with the "the adversarial system in the American courts made part of the Federal and State bill of rights to protect against [the] government" than with the English experience and the common law.<sup>144</sup> This conclusion is important because it allowed the judge in this case to cast over the limits the *Crawford* Court imposed on the scope of the Confrontation Clause.<sup>145</sup> The judge proposed an objective test more in line with what he called the "highly prized" right of confrontation: "[W]hether the pretrial statement of a person . . . admitted through the testimony of another person, on tape or in writing, was made primarily for . . . [a] purpose [other than investigation or prosecution of a crime]. If so, it need not be confronted."<sup>146</sup> Applying the test to the facts, the court concluded that a 911 phone call made to report a crime and supply information about the circumstances and the people involved is testimonial, requiring an opportunity for cross-examination.<sup>147</sup> The court noted that an objective witness "knows that when he or she reports a crime the statement will be used in an investigation and at proceedings relating to a prosecution."<sup>148</sup> The court did not attempt to distinguish between a call for help and a call to report a crime.<sup>149</sup> One may surmise that given the care with which the court drafted its opinion, the phrase "report a crime" was chosen purposefully and any discussion beyond the facts of the case is unwarranted. Thus, although *Cortes* is an immensely important case, a cry for help-type 911 phone call is untouched by *Cortes*.<sup>150</sup> This case, however, is not the last word on the matter in New York.

*People v. Dobbin*<sup>151</sup> presented a strong argument in favor of the testimonial nature of a 911 phone call that can be described as a report of a crime. The court reasoned that a 911 phone call reporting a crime is testimonial because: (1) the call contains "a solemn declaration" officially reporting a crime to a government agency;<sup>152</sup> (2) an objective witness would reasonably believe that after reporting a crime to police, he would be called to testify, and the information supplied would be available for use at a later trial;<sup>153</sup> (3) the 911 phone call has many features that are the functional equivalent of a police interrogation; both report a crime to police, both initiate police and/or prosecutorial action, both are accusatory, and both feature structured police questioning;<sup>154</sup> and (4) the hearsay nature of the statement—the "very fact that a hearsay exception is necessary for admissibility shows that the statement is testimonial, since hearsay exceptions, when applied to statements, only apply to those that are testimonial; that is, those that contain a 'declaration or affirmation made for the purpose of

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<sup>141</sup> *Id.* at 402-04.

<sup>142</sup> *Id.* at 404.

<sup>143</sup> *See id.* at 407-15

<sup>144</sup> *Id.* at 409-10.

<sup>145</sup> *Supra* note 75 and accompanying text.

<sup>146</sup> *Cortes*, 781 N.Y.S.2d at 414.

<sup>147</sup> *Id.* at 415.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 402.

<sup>150</sup> In a later case, *People v. Isaac*, No. 23398/02, 2004 N.Y. Misc. LEXIS 814 (N.Y. Dist. Ct. June 16, 2004), the court had the benefit of both *Moscat* and *Cortes* and chose the reasoning of *Moscat* as the better-reasoned. The judge observed:

This Court agrees that at the least, the "excited utterances" identified by Judge Greenberg in *Moscat* fall outside the reach of *Crawford* not because they fall within a hearsay exception, but because the characteristics which bring them within this particular hearsay exception negate the characteristics which would be required to make them "testimonial."

*Id.* at \*\*9.

<sup>151</sup> No. 7284/95, 2004 N.Y. Misc. LEXIS 2848 (N.Y. Sup. Ct. Dec. 22, 2004).

<sup>152</sup> *Id.* at \*\*7-8.

<sup>153</sup> *Id.* at \*\*9.

<sup>154</sup> *Id.* at \*\*10-11.

establishing or proving some fact.”<sup>155</sup> While this last point is not very persuasive, the case is instructive for counsel seeking to keep a 911 phone call that reports a crime out of court if the declarant is not available to testify.<sup>156</sup>

Two other cases support the conclusion that a 911 call reporting a crime is testimonial: *People v. West*<sup>157</sup> and *State v. Powers*.<sup>158</sup> *West* applies similar reasoning to *People v. T.T.*:<sup>159</sup> a 911 phone call must be parsed into its testimonial—that is, accusatory—and nontestimonial components. The key inquiries are whether the 911 phone call was “(1) volunteered for the purpose of initiating police action or criminal prosecution; or (2) provided in response to an interrogation, the purpose of which was to gather evidence for use in a criminal prosecution.”<sup>160</sup> If the answer to either question is yes, the phone call is testimonial.<sup>161</sup> Similarly, the court in *Powers* rejected a bright-line rule admitting 911 phone calls as excited utterances, finding instead “that the trial court, on a case-by-case basis, can best assess the proposed admission of a 911 recording as testimonial or nontestimonial and whether the statement originates from interrogation.”<sup>162</sup>

On the other side of the equation are *State v. Wright*<sup>163</sup> and *People v. Caudillo*.<sup>164</sup> *Wright* held that the victim’s 911 phone call made “moments after the criminal offense and under the stress of the event” was not testimonial.<sup>165</sup> The court based its conclusion on the idea that “[s]tatements in a 911 call by a victim struggling for self-control and survival moments after an assault simply do not qualify as knowing responses to structured questioning in an investigative environment in which the declarant reasonably expects that the responses will be used in later judicial proceedings.”<sup>166</sup> There can be little doubt that a victim’s statement calling for help is *qualitatively* different from the statements that concerned the *Crawford* Court. An issue for defense counsel, however, is whether a victim’s statement is functionally different from the 911 phone call described in the next case.

The court in *Caudillo* dealt with an anonymous bystander’s 911 phone call reporting “men with guns,” while also providing a license plate number and a description of the two vehicles involved.<sup>167</sup> In holding that the call was *not* testimonial, the court compared the *Crawford* Court’s formulations of the core class of testimonial statements, finding that the phone call was not *ex parte* in-court testimony or its functional equivalent, not an extrajudicial statement in formalized materials, and not made under circumstances an objective witness would reasonably believe would make it available for later use at trial.<sup>168</sup> The court found the following: the 911 call was placed to provide “assistance to any victims and apprehending the gunman to prevent any further violence”; the call’s purpose “was to advise the police of the situation so that they could take appropriate action to protect the community”; and “the caller was simply requesting help from the police by describing what she saw without thinking about whether her statements would be used at a later date.”<sup>169</sup> The focus on the subjective expectation of the caller is not the correct focus for determining whether a statement is testimonial. While such an argument

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<sup>155</sup> *Id.* at \*\*12-15 (quoting *Crawford v. Washington*, 541 U.S. 36, 51 (2004)).

<sup>156</sup> Another possible avenue of approach for counsel is the forfeiture by wrongdoing doctrine. The greater weight of available authority applies the doctrine to the same conduct for which the defendant is on trial. *See, e.g.*, *State v. Meeks*, 88 P.3d 789, 795 (Kan. 2004) (holding that the defendant forfeited his confrontation rights and hearsay objections because he killed the declarant); *People v. Giles*, 19 Cal. Rptr. 3d 843 (Cal. Ct. App. 2004), *rev. granted*, 102 P.3d 930 (Cal. 2004). The Court accepted the doctrine of forfeiture by wrongdoing; thus the doctrine survives *Crawford*. *Crawford*, 541 U.S. at 61-62.

<sup>157</sup> No. 1-02-2358, 2005 Ill. App. LEXIS 62 (Ill. Ct. App. Jan. 5, 2005). Although the opinion is dated 2005, the court’s original opinion was dated 22 December 2004, thus the opinion is appropriate in a discussion of 2004 new developments.

<sup>158</sup> 99 P.3d 1262 (Wash. Ct. App. 2004).

<sup>159</sup> 815 N.E.2d 789 (Ill. Ct. App. 2004).

<sup>160</sup> *West*, 2005 Ill. App. LEXIS 62 at \*22.

<sup>161</sup> *Id.* at \*23.

<sup>162</sup> *Powers*, 99 P.3d at 1266.

<sup>163</sup> 686 N.W.2d 295 (Minn. Ct. App. 2004). The Minnesota Supreme Court granted review on the *Crawford* issue.

<sup>164</sup> 19 Cal. Rptr. 3d 574 (Cal. Ct. App. 2004), *rev. granted*, 23 Cal. Rptr. 3d 294 (Cal. 2005).

<sup>165</sup> *Wright*, 686 N.W.2d at 302.

<sup>166</sup> *Id.*

<sup>167</sup> *Caudillo*, 19 Cal. Rptr. 3d at 576. The occupants of the two vehicles were members of different street gangs. *Id.*

<sup>168</sup> *Id.* at 1439-40.

<sup>169</sup> *Id.* at 1440.

inures to the benefit of the government, the language from *Crawford* clearly indicates that any test regarding the declarant is objective.<sup>170</sup> Notwithstanding *Caudillo*'s incorrect focus on the subjective expectation of the caller, there are greater issues to be answered.

Why is there a distinction between a cry for help by a victim and a report of a crime by a bystander? To be sure, the intents of the declarants are different, but the practical effect is the same: the information is used by the government to assist in the prosecution of a case, and if the case is prosecuted, both are witnesses against the accused. What is the constitutional difference between a victim's and a bystander's statements with respect to the protection afforded by the Confrontation Clause? Why should the result be different? As a practical matter, the language of *Crawford* gives ample support for the difference and trial and defense counsel have precedent to argue the merits of their respective positions before a military judge.

Trial counsel argue that a victim's call made while under the stress of the event is not testimonial because the call is placed to summon immediate assistance, not to initiate prosecution. *Wright, Caudillo, West, Powers, and Moscat* all offer varying degrees of support for that proposition. The other cases, *Cortes* and *Dobbin*, are distinguishable on the facts. For the defense counsel, *West, Powers, Cortes, and Dobbins* also offer support that 911 phone calls are not automatically admissible—the Confrontation Clause cannot be swept easily away by the emotion of the events that gave rise to the phone call. These 911 phone call cases point to the difficulty courts are having in the absence of a comprehensive definition of testimonial. To be sure, the real-life drama played on 911 tapes makes it challenging to analyze the issues logically. Nonetheless, the law is the dictate of reason,<sup>171</sup> not emotion. An accused's right to confront witnesses should not be eliminated because emotion leads justice.

### What Should Be Simple Is Not: The Meaning of Interrogation

It should be simple to determine what amounts to interrogation: "In sum, even if the Sixth Amendment is not solely concerned with testimonial hearsay, that is its primary object, and interrogations by law enforcement officers fall squarely within that class."<sup>172</sup> Alas, for the trial practitioner, the Court muddied the waters: the Court used the term "interrogation" in its colloquial sense, rather than in any legal sense.<sup>173</sup> The Court seemed to believe what constitutes an interrogation is so self-evident—even in a colloquial sense—that it spent no time explaining what the term *might* encompass. Like its definition of testimonial, the Court left more questions than answers in this key area of its opinion. Whatever else can be said about the *Crawford* opinion, the issue of Sylvia's statement given during a police interrogation was *the* issue of the case; everything else the Court addressed served as background for the question before it.<sup>174</sup> Other testimonial issues can be distinguished as dicta because *Crawford* is not on point for those issues. *Crawford* supplies a general approach for answering the question of what is testimonial hearsay, but the opinion certainly is not the definitive answer, as the cases discussed above amply demonstrate. Nonetheless, regarding issues for which *Crawford* is on point, there is no agreement about what constitutes an "interrogation."

The primary area of disagreement mirrors the dispute regarding 911 phone calls: if a statement to a police officer is an excited utterance, the majority of courts are finding such a statement to be nontestimonial.<sup>175</sup> The conclusion is premised on the lack of resemblance to the formalized, structured police questioning endemic to the civil-law mode of criminal procedure. Further, if police officers arrive at a scene having no firm understanding that a crime has been committed, of the identity of the perpetrator, or other preliminary information, appellate courts have found statements made during that initial period on the scene to be nontestimonial.<sup>176</sup> Courts have also found statements made during preliminary field investigations before a scene is secured to be nontestimonial.<sup>177</sup> When a witness is at the police station and subjected to formalized, structured

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<sup>170</sup> See *supra* text accompanying note 48.

<sup>171</sup> *Lex est dictamen rationis*. BLACK'S LAW DICTIONARY 910 (6th ed. 1990).

<sup>172</sup> *Crawford, v. Washington*, 541 U.S. 36, 53 (2004).

<sup>173</sup> *Id.* at 53 n.4.

<sup>174</sup> "We granted certiorari to determine whether the State's use of Sylvia's statement [given during police interrogation] violated the *Confrontation Clause*." *Id.* at 42.

<sup>175</sup> See *infra* text accompanying notes 179-215.

<sup>176</sup> See *infra* text accompanying notes 232-269.

<sup>177</sup> See *infra* text accompanying notes 248-269.

police questioning, the courts have had little difficulty finding “interrogation.”<sup>178</sup> Because these latter cases are straightforward, this article will not analyze them. Instead, this article will address the more difficult questions presented when police officers arrive at scene or question a victim at a hospital.

The cases in this area can be broken down into two areas. First are those cases involving police officers arriving on a scene and encountering a putative victim. The case holdings dealing with this fact pattern are as dispersed as those dealing with the fringe areas (outside the minimum definition) of testimonial hearsay. Second are those cases dealing with police officers interviewing putative victims at places other than the scene, for example at a hospital. Not surprisingly, the holdings in those cases are inconsistent as well. The lesson for counsel from these cases is that the decision by the trial judge often will be made based on counsel’s advocacy. Counsel on both sides of the issue can borrow language from the *Crawford* opinion and case law from lower courts to serve as support. These cases show the *Crawford* Court understood that hearsay law and confrontation should be divorced, but the terms of the divorce need some simplification and clarification.

Indiana courts first addressed the issue of interrogation after *Crawford*. *Hammon v. State*<sup>179</sup> and *Fowler v. State*<sup>180</sup> were decided on the same day, 9 August 2004, and each involved domestic abuse victims who made statements to responding police officers. In *Hammon*, a police officer arrived at a private residence and spoke with A.H., whom the officer thought was “timid and frightened.”<sup>181</sup> The police officer entered the residence to find the living room in disarray with broken items littering the floor.<sup>182</sup> After the defendant, Hammon, claimed that the argument was not physical, the officer separated A.H. and Hammon.<sup>183</sup> A.H. told the officer that the defendant threw her into glass from a broken heater and punched her twice in the chest.<sup>184</sup> At trial, A.H. did not testify, but the officer testified to A.H.’s statements.<sup>185</sup> The trial court admitted A.H.’s statement as an excited utterance,<sup>186</sup> a conclusion the appellate court affirmed.<sup>187</sup> The court then reviewed *Crawford*’s effect on the case, holding that A.H.’s statement was not testimonial.<sup>188</sup> The court noted that “the common denominator underlying the *Crawford*’s court’s discussion of what constitutes a ‘testimonial’ statement is the official and formal quality of such a statement.”<sup>189</sup> In deciding whether the statement was the product of interrogation, the court stated, “[P]olice ‘interrogation’ is not the same as, and is much narrower than police ‘questioning.’”<sup>190</sup> Given the narrow interpretation of “interrogation” as a premise, the court held:

[W]hen police arrive at the scene of an incident in response to a request for assistance and begin informally questioning those nearby immediately thereafter *in order to determine what happened*, statements giving in response thereto are not “testimonial.” Whatever else police “interrogation” might be, we do not believe that word applies to preliminary investigatory questions asked at the scene of a crime shortly after it occurred.<sup>191</sup>

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<sup>178</sup> See, e.g., *People v. Pirwani*, 14 Cal. Rptr. 3d 673 (Cal. Ct. App. 2004) (holding that a victim’s videotaped statement to police was testimonial); *People v. Vigil*, 104 P.2d 258 (Colo. Ct. App. 2004), cert. granted in part, denied in part, 2004 Colo. LEXIS 1030 (Colo. Dec. 20, 2004) (holding that victim’s videotaped statement to law enforcement was testimonial); *United States v. Simpson*, 60 M.J. 674 (Army Ct. Crim. App. 2004) (holding that a co-accused sworn statement given to agents of the U.S. Army Criminal Investigation Command (CID) at the CID office was testimonial). The *Simpson* case is the first case from a military court to discuss *Crawford*. The Court of Appeals for the Armed Forces (CAAF) has several cases pending before it having *Crawford* issues: *United States v. Taylor*, 60 M.J. 349 (2004); *United States v. Rhodes*, 60 M.J. 378 (2004); *United States v. Scheurer*, 60 M.J. 117 (2004).

<sup>179</sup> 809 N.E.2d 945 (Ind. Ct. App. 2004), transfer granted, 2004 Ind. LEXIS 1031 (Ind. Dec. 9, 2004).

<sup>180</sup> 809 N.E.2d 960 (Ind. Ct. App. 2004), transfer granted, 2004 Ind. LEXIS 1030 (Ind. Dec. 9, 2004).

<sup>181</sup> *Hammon*, 809 N.E.2d at 947.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.* at 948.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* at 950.

<sup>188</sup> *Id.* at 952.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Id.* (emphasis added).

The court also went further, noting that “the very concept of an ‘excited utterance’ is such that it is difficult to perceive how such a statement could ever be ‘testimonial.’”<sup>192</sup> Given the Supreme Court’s emphasis on formality, the inquisitorial nature of criminal procedure, and the involvement of government agents with an eye toward prosecution in *Crawford*, the court’s decision in *Hammon* should come as no surprise. Is this conclusion, however, supportable? The officer was dispatched in response to a request,<sup>193</sup> so he knew that a problem was afoot. Given that he entered the home and saw the telltale signs of a domestic disturbance, coupled with his observations of the victim,<sup>194</sup> one cannot seriously argue that the officer did not know A.H. was likely a victim of an assault. Therefore, how can one persuasively maintain that what followed was not interrogation, at least in a colloquial sense? As the court noted, officers arriving on the scene ask questions “in order to determine what happened.”<sup>195</sup> Isn’t that also what a trial is for? What is the functional difference between A.H.’s statement at the scene of the crime and Sylvia Crawford’s statement to police officers at the stationhouse? If the distinction is the presence of structured police questioning, and that excited utterances by definition are not testimonial, then the exceptions swallow the rule. Nonetheless, those distinctions—the presence or absence of structured police questioning and the excited nature of the statement—are ones that other courts have grasped tightly to justify their decisions. For example, the other case decided by the Indiana Court of Appeals on the same day as *Hammon* presented very similar facts and an identical holding.

The officers in *Fowler* were dispatched in response to a 911 phone call.<sup>196</sup> On arrival, Officer Decker met Fowler and his wife, A.R.<sup>197</sup> Officer Decker observed that A.R. had a bloody nose and had blood on her shirt and pants.<sup>198</sup> After being on the scene for ten minutes, Officer Decker asked A.R. what happened.<sup>199</sup> Moaning and crying, A.R. told the officer that Fowler punched her in the face several times.<sup>200</sup> Quoting extensively from the decision in *Hammon*,<sup>201</sup> the court in *Fowler* held that A.R.’s excited utterance was not testimonial, declaring that her statement did not “remotely” resemble “an inquiry before King James I’s Privy Council,” nor did it resemble the “classic ‘police interrogation’” referred to in *Crawford*.<sup>202</sup> As with the statement in *Hammon*, the responding officer had a clear understanding that a crime occurred, that the wife was the victim, and that the husband was very likely the guilty party.<sup>203</sup> The accused’s right of confrontation was brushed aside in favor of presenting the hearsay statement by the police officer because the wife refused to testify as to the assault.<sup>204</sup> Other courts faced with similar fact patterns have arrived at similar conclusions.

For example, in *State v. Forrest*,<sup>205</sup> the court dealt with a statement from a kidnapping victim made immediately after being rescued by police officers. Law enforcement agents were sent to the home of Cynthia Moore, the defendant’s aunt.<sup>206</sup> According to the court, the police had reason to believe that Forrest was armed with a knife and gun.<sup>207</sup> During the police’s hour-long observation, they saw Forrest come out of the home a number of times with a knife to Moore’s body and throat.<sup>208</sup>

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<sup>192</sup> *Id.*

<sup>193</sup> *Id.* at 947.

<sup>194</sup> *Id.* at 948.

<sup>195</sup> *Id.* at 952.

<sup>196</sup> 809 N.E.2d 960, 961 (Ind. Ct. App. 2004).

<sup>197</sup> *Id.* at 961.

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> *Id.* at 962-64.

<sup>202</sup> *Id.* at 964.

<sup>203</sup> *See id.* at 961.

<sup>204</sup> A.R. stated during her examination, “I don’t want to testify no more!” *Id.* at 961 (quoting the trial transcript, Tr. p. 7). Because the court did not discuss waiver, one may surmise that there was no waiver of the opportunity to cross-examine A.R. *See, e.g.,* United States v. Bridges, 55 M.J. 60 (2001); United States v. McGrath, 39 M.J. 158 (C.M.A. 1994).

<sup>205</sup> 596 S.E.2d 22 (N.C. Ct. App. 2004), *rev. denied*, 2004 N.C. LEXIS 1207 (N.C. Dec. 2, 2004).

<sup>206</sup> *Id.* at 23.

<sup>207</sup> *Id.*

<sup>208</sup> *Id.* at 23-24.

After Forrest walked down the street with a knife to Moore's throat, police moved in to disarm Forrest, arrest him, and free Moore.<sup>209</sup> After being freed, Moore, while bleeding, shaking, crying and in a state of nervousness, told a detective what Moore had done to her while in the house.<sup>210</sup> The court looked to the *Moscat* decision and applied its rationale to the facts before it, concluding that Moore's statement was not testimonial.<sup>211</sup> The court observed, "Just as with a 911 call, a spontaneous statement made to police immediately after a rescue can be considered 'part of the criminal incident itself, rather than as part of the prosecution that follows.'"<sup>212</sup> The court also noted that Moore "was not providing a formal statement, deposition, or affidavit, was not aware that she was bearing witness, and was not aware that her utterances might impact further legal proceedings."<sup>213</sup> The court's focus on what the victim was aware of, apparently not applying the objective test, is misplaced and is not supported by *Crawford*.<sup>214</sup> What is more puzzling is why the court downplayed the facts known to the officers when they arrived at the scene and after they saw the accused's actions. There is no doubt they knew there was a crime and they knew who was responsible. That Moore spontaneously made accusatory statements makes no constitutional difference as to whether she was bearing witness against Forrest.

In *People v. Mackey*,<sup>215</sup> the court addressed the statements of an assault victim who approached officers in a van, and in response to the question, "What is wrong?," told them that her boyfriend punched her in the face and pushed her down.<sup>216</sup> The importance of this case is the test the court articulated to determine whether a statement is testimonial:

A fact-specific analysis of the particular nature and circumstances of the statements is applied to determine whether the statements are testimonial. The analysis takes into consideration the extent of formalized setting in which the statements were made, if and how the statements were recorded, the declarant's primary purpose in making the statements, whether an objective declarant would believe those statements would be used to initiate prosecutorial action and later at trial, and specifically with cases involving statements to law enforcement, the existence of any structured questioning and whether the declarant initiated the contact.<sup>217</sup>

The court concluded that the victim initiated contact with police to seek immediate protection, not to initiate prosecutorial action.<sup>218</sup> Further, the statement was not in response to structured police questioning and was informal.<sup>219</sup> Analysis of the test reveals a number of issues. Is a request for assistance a broad concept that includes telling the police the identity of the perpetrator? Need police officers wait for someone to say something to them, not record the conversation in any formalized way, and ask only open-ended questions to avoid the strictures of the Confrontation Clause? Should the prosecution be allowed to show that the subjective intent of the declarant was not to initiate prosecution in order to avoid the "testimonial" moniker on an accusatory statement? If the statement is excited, along with everything else noted, does that automatically mean that the statement is nontestimonial? The Florida Court of Appeals answered this last question negatively in *Lopez v. State*.<sup>220</sup>

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<sup>209</sup> *Id.* at 24.

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> *Id.* at 27 (quoting *People v. Moscat*, 777 N.Y.S.2d 875, 880 (N.Y. Crim. Ct. 2004)).

<sup>213</sup> *Id.* (citation omitted).

<sup>214</sup> *See supra* text accompanying note 48.

<sup>215</sup> 785 N.Y.S.2d 870 (N.Y. Crim. Ct. 2004).

<sup>216</sup> *Id.* at 871.

<sup>217</sup> *Id.* at 873-74.

<sup>218</sup> *Id.* at 874.

<sup>219</sup> *Id.* The Maine Supreme Court came to a similar conclusion in *State v. Barnes*, No. 854 A.2d 208 (Me. 2004). There, the court held that the defendant's mother's 1998 statement to police officer (mother killed by defendant in 1999) that defendant had assaulted her and repeatedly threatened to kill her were not testimonial because police did not seek her out, the statements were made under stress of assault, and not made in response to tactically structured police questioning. The 9th Circuit also reached the conclusion that statements made to an investigating officer are not testimonial. *Leavitt v. Arave*, 371 F.3d 663 (9th Cir. 2004). The court held that murdered victim's statements that she believed a prowler at her home to be the defendant to police officers responding to 911 call were not testimonial because the victim was not being interrogated by police officers who were at victim's home to assist her.

<sup>220</sup> 888 So. 2d 693 (Fla. Ct. App. 2004).

Police officers were dispatched to an apartment complex to investigate a report of kidnapping and assault.<sup>221</sup> A police officer met the victim, who was nervous and appeared to be upset, in the parking lot.<sup>222</sup> Officer Gaston asked the victim what happened, and the victim stated that a man abducted him at gunpoint in the victim's car.<sup>223</sup> The victim then pointed to Lopez and shortly thereafter told the officer that the weapon was in the victim's car.<sup>224</sup> The court doubted that the conversation could be called an interrogation,<sup>225</sup> but the court concluded that the conversation was testimonial.<sup>226</sup> The victim, the court determined, "knew that he was making a formal report of the incident and that his report would be used against the defendant."<sup>227</sup> Importantly, the court noted the following:

[W]hether a statement falls within the third category of testimonial statements [that is, statements made under circumstances that would lead an objective witness to reasonably believe that the statements would be available for use at a later trial] identified in *Crawford* depends on the purpose for which the statement is made, *not on the emotional state of the declarant.*<sup>228</sup>

This observation should be heartening to defense counsel seeking to have an excited utterance to a police officer classified as a testimonial statement. Indeed, as the court pointed out, "the statement does not lose its character as a testimonial statement merely because the declarant was excited at the time it was made."<sup>229</sup> One can easily imagine numerous situations where an excited victim or witness makes a report in response to a question from a police officer that is not necessarily reliable<sup>230</sup> and should be subject to cross-examination.

Another case in which the court focused on the lack of formality and purpose of the statement is *People v. Cage*.<sup>231</sup> Recall that this case involved John, who was slashed in the face with a piece of glass by his mother. After John arrived at the hospital, Deputy Mullin asked him what happened.<sup>232</sup> John told the deputy about the argument he had with his mother, that his grandmother held him, that his mother grabbed a piece of glass from the broken coffee table, and that his mother cut him.<sup>233</sup> The court could not "believe that the [f]ramers would have seen a 'striking resemblance' between Deputy Mullin's interview with John at the hospital and a justice of the peace's pretrial examination."<sup>234</sup> Incredibly, the court believed that Deputy Mullin had not determined whether a crime had been committed and, if so, by whom.<sup>235</sup> The conversation was, rather, just an open-ended request for John "to tell his story."<sup>236</sup> The lack of a known crime and the lack of suspect, coupled with an open-ended invitation, was apparently sufficient to have an accusatory statement deemed nontestimonial. That

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<sup>221</sup> *Id.* at 695.

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> *Id.* at 697.

<sup>226</sup> *Id.* at 700.

<sup>227</sup> *Id.*

<sup>228</sup> *Id.* at 699 (emphasis added).

<sup>229</sup> *Id.* at 699-700.

<sup>230</sup> "[U]nder *Crawford*, reliability has no bearing on the question of whether a statement was testimonial." *Id.* at 699.

<sup>231</sup> 15 Cal. Rptr. 3d 846 (Cal. Ct. App. 2004), *review granted*, 19 Cal. Rptr. 3d 824 (Cal. 2004).

<sup>232</sup> *Id.* at 849.

<sup>233</sup> *Id.*

<sup>234</sup> *Id.* at 856.

<sup>235</sup> *Id.* Although Deputy Mullin testified that he had no reason to think a crime had been committed, his testimony and the court's belief of his testimony are at least facially questionable given the information Mullin knew after he went to the site of the assault—the defendant picking up pieces of glass and a coffee table missing its top. He also spoke to the defendant, her mother, and her daughter. *Id.* at 849. An hour after going to the house, he was dispatched to look for an injured person, finding John with a large cut on the side of his face. *Id.*

<sup>236</sup> *Id.* at 856-57.

conclusion rests on a thin reed indeed, one that nevertheless finds support in two other cases, *Cassidy v. State*<sup>237</sup> and *People v. Kilday*.<sup>238</sup>

The Texas court in *Cassidy* evaluated an assault victim's statement to an investigating officer while the victim was in the hospital.<sup>239</sup> Austin Police Officer Benfer was dispatched to a convenience store, where an employee had been stabbed.<sup>240</sup> On arriving, he saw medical personnel working on the clerk, Shoukat.<sup>241</sup> He also observed a large amount of blood behind the counter and elsewhere in the store.<sup>242</sup> About an hour after the assault, Officer Benfer interviewed Shoukat, who through an interpreter gave the officer a description of the assailant matching a description provided by two other witnesses.<sup>243</sup> Shoukat also told Officer Benfer that a man entered the store, asked to cash a check, and when Shoukat refused, the man stabbed him.<sup>244</sup> The court, in a conclusory fashion, held that Benfer's interview of Shoukat was not an interrogation; therefore, the statement was not testimonial.<sup>245</sup> This case is at least distinguishable from *Cage* because Officer Benfer knew that there was a crime, although he was not sure who committed it. Nonetheless, a police officer's knowledge of a crime did not seem to matter to the Texas court; the characterization of the statement as an excited utterance (a characterization not disputed by *Cassidy*)<sup>246</sup> seemed to carry the day.

*Kilday* is the last case to discuss a lack of certainty in the analysis of whether a statement testimonial. The manager of a hotel testified that he observed burns on the legs of the victim, Patricia Kiernan, who previously told the manager that she wore a bandage because of a work injury.<sup>247</sup> He asked to see the injury and, after seeing it, concluded that it could not have been an accident.<sup>248</sup> He asked the victim what happened and she reluctantly told him that her live-in boyfriend intentionally burned her with an iron; the manager then called the police.<sup>249</sup> Two police officers, Officers Cirina and Federico, arrived and met Kiernan, who was upset, frightened, and reluctant to speak to the officers.<sup>250</sup> Officer Federico observed that Kiernan had several injuries.<sup>251</sup> The victim told Officer Cirina that her boyfriend cut her arm and burned her leg with an iron.<sup>252</sup> She also told him that that night before, her boyfriend pulled her hair and threw her into walls.<sup>253</sup> She told Officer Federico that Kilday cut her wrist and arm with a piece of glass, held her down and burned her leg with an iron, pushed her into the street during a fight the night before, and pulled her hair and threw her against a wall that morning.<sup>254</sup> Because Kiernan was

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<sup>237</sup> 149 S.W.3d 712 (Tex. App. 2004).

<sup>238</sup> 20 Cal. Rptr. 3d 161 (Cal. Ct. App. 2004), *review granted*, 2005 Cal. LEXIS 565 (Cal. Jan. 19, 2005).

<sup>239</sup> *Cassidy*, 149 S.W.3d at 714.

<sup>240</sup> *Id.* at 713.

<sup>241</sup> *Id.*

<sup>242</sup> *Id.*

<sup>243</sup> *Id.* at 714.

<sup>244</sup> *Id.*

<sup>245</sup> *Id.* at 716. There is one Texas case that came to a similar conclusion, *Wilson v. State*, 151 S.W.3d 694 (Tex. Ct. App. 2004). In *Wilson*, police officers at the scene of a just-ended police chase spoke to the defendant's girlfriend, who came up to them, asking what happened to the car and the passengers in the car. She told police that the car had been stolen, that she was the girlfriend of the driver of the car, and that his initials were A.D. The court held that the statements were not testimonial because the girlfriend initiated contact, her statements were made in the course of inquiring about the car and its passengers, and she was not responding to structured police questioning.

<sup>246</sup> *Id.* at 714.

<sup>247</sup> *People v. Kilday*, 20 Cal. Rptr. 3d 161, 164 (2004).

<sup>248</sup> *Id.* at 165.

<sup>249</sup> *Id.*

<sup>250</sup> *Id.*

<sup>251</sup> *Id.* ("a bruise on her right shoulder and arm, a cut on her left wrist and arm, and a bump on the back of her head").

<sup>252</sup> *Id.*

<sup>253</sup> *Id.*

<sup>254</sup> *Id.*

reluctant to speak to the officers, Cirina summoned a female detective to the scene to talk to her.<sup>255</sup> The officers briefed the detective after she arrived and told her that they needed a more detailed statement.<sup>256</sup> Kiernan relayed much of the same information to the detective as she relayed to the officers (the second statement).<sup>257</sup> After her boyfriend returned to the hotel, officers arrested him.<sup>258</sup> The detective then conducted a tape-recorded interview with the victim (the third statement).<sup>259</sup> During that statement, Kiernan detailed a longer history of abuse at the hands of her boyfriend.<sup>260</sup>

The court declared that statements obtained through police questioning at or near the scene of a crime are testimonial if the officer is acting “in an investigative capacity to produce evidence in anticipation of a potential criminal prosecution.”<sup>261</sup> Applying its premise, the court found that Kiernan’s second and third statements were testimonial.<sup>262</sup> The court spent more time on the second statement, noting that the police had secured the scene when the detective arrived and exigent matters were resolved.<sup>263</sup> Thus, by the time the detective arrived, “the overarching purpose of the interaction [with Kiernan] was obtaining a detailed statement” for prosecutorial purposes.<sup>264</sup> The first statement, however, posed more of a problem.

The court stated that Officers Cirina and Federico initially encountered an unsecured and uncertain situation.<sup>265</sup> For reasons deriving from its premise, the court noted that there was nothing in the record to suggest “the officers were aware of the nature of the crime at issue or the identity of the alleged assailant.”<sup>266</sup> Because the officers “were still principally in the process of accomplishing the preliminary tasks of securing and assessing the scene, we conclude that the statement elicited is not testimonial.”<sup>267</sup> The court wisely made it clear, however, that it was not adopting a blanket rule that “all statements obtained from victims or witnesses by police officers responding to emergency calls are necessarily nontestimonial,”<sup>268</sup> but the court made it difficult for future defendants in California to argue that such statements are testimonial.

There are several cases on the other side of the fence from *Kilday*, *Cassidy*, *Cage*, *Mackey*, and *Forrest*. In *People v. Victors*,<sup>269</sup> the court adopted a very simple test to determine whether police questioning at the scene of a crime is testimonial: “[T]estimonial evidence encompasses out-of-court statements that are offered to establish or disprove an element of the offense charged or a matter of fact.”<sup>270</sup> This case involved statements made by a domestic violence victim to an officer responding to a report of domestic battery.<sup>271</sup> He first talked to witnesses who heard an argument between the defendant and the victim, and then he talked to the victim, whom he described as crying, upset, and frightful.<sup>272</sup> Just like the cases above, the police officer responded to a call for assistance and conducted an investigation into the possible commission of a crime.

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<sup>255</sup> *Id.*

<sup>256</sup> *Id.*

<sup>257</sup> *See id.*

<sup>258</sup> *Id.*

<sup>259</sup> *Id.*

<sup>260</sup> *See id.* at 165-66.

<sup>261</sup> *Id.* at 170.

<sup>262</sup> *Id.* at 171-72.

<sup>263</sup> *Id.* at 171.

<sup>264</sup> *Id.* The court found that the detective was aware of the general nature of the crime and the likely perpetrator. *Id.*

<sup>265</sup> *Id.* at 172.

<sup>266</sup> *Id.*

<sup>267</sup> *Id.* at 174.

<sup>268</sup> *Id.* at 173.

<sup>269</sup> 819 N.E.2d 311 (Ill. Ct. App. 2004).

<sup>270</sup> *Id.* at 320.

<sup>271</sup> *Id.* at 314.

<sup>272</sup> *Id.*

This time, however, the court found the statements were testimonial.<sup>273</sup> Although the prosecution argued that the victim's statement was an excited utterance,<sup>274</sup> the court disagreed.

*State v. Wall*<sup>275</sup> is factually similar to *Victors* and virtually identical to *Cassidy*. A police officer interviewed a victim of an assault while the victim was hospitalized as a result of the assault.<sup>276</sup> The victim answered questions and identified Wall as the assailant.<sup>277</sup> The court noted the holding in *Cassidy*, yet it made an opposite finding: the statement of the victim was testimonial because the interview was structured police questioning.<sup>278</sup> The trial court's conclusion that the statement was an excited utterance,<sup>279</sup> did not figure into the court's analysis. This court's holding is not without company from other courts: *People v. Sisavath*,<sup>280</sup> *People v. Adams*,<sup>281</sup> *People v. T.T.*,<sup>282</sup> *People v. Rolandis G.*,<sup>283</sup> and *People v. West*<sup>284</sup> all stand for similar propositions.

What is the trial practitioner to take from all these cases and their varied conclusions? The trend, perhaps wrongly so, is preliminary statements—primarily excited utterances—that are obtained by police assessing the situation in response to a report of a crime are nontestimonial. To the extent the interviews are more formalized, the police have a better idea what the situation is and who is involved, and the more calm the interviewee, the more likely courts are to find the statements testimonial. Whether there is a constitutional difference between a preliminary investigation and a later investigation is a dubious distinction at best. What can be clearly deduced from the fallout with regard to a core term from *Crawford*—interrogation—is that the Court needs to provide greater clarity as to its terms. The Court does trial practitioners no favors when it uses an important term and then casts the bar adrift to find its own way. Perhaps the Court's refusal to define interrogation means that the Court does not know what the term means in the varied practices of the states.

### What *Crawford* Does not Implicate

*Crawford* only extends to testimonial hearsay.<sup>285</sup> If the proponent has a nonhearsay purpose for introducing the statement, *Crawford* does not apply.<sup>286</sup> Also, *Crawford* is no impediment to the admissibility of statements if the declarant

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<sup>273</sup> *Id.* at 320.

<sup>274</sup> *Id.* at 319.

<sup>275</sup> 143 S.W.2d 846 (Tex. Ct. App. 2004).

<sup>276</sup> *Id.* at 848.

<sup>277</sup> *Id.*

<sup>278</sup> *Id.* at 851.

<sup>279</sup> *Id.* at 848.

<sup>280</sup> 13 Cal. Rptr. 3d 753 (Cal. Ct. App. 2004) (holding that a child sexual abuse victim's statement to a police officer responding to call was testimonial because it was knowingly given in response to structured police questioning).

<sup>281</sup> 16 Cal. Rptr. 3d 237 (Cal. Ct. App. 2004), *rev. granted*, 19 Cal. Rptr. 3d 824 (Cal. 2004) (holding that a calm assault victim's statements to sheriff deputy at the scene of an assault as well as during an interview approximately forty-five minutes later at the hospital were testimonial hearsay).

<sup>282</sup> 815 N.E.2d 789 (Ill. Ct. App. 2004) (holding that a sexual abuse victim's statements to the police detective at the scene clearly fell within the definition of testimonial).

<sup>283</sup> 817 N.E.2d 183 (Ill. Ct. App. 2004) (holding that the victim's statement to police officer responding to and investigating a report of sexual assault was testimonial because it was the result of formal and systemic questioning).

<sup>284</sup> No. 1-02-2358, 2005 Ill. App. LEXIS 62 (Ill. Ct. App. Jan. 5, 2005) (holding that the victim's statements to the police officers taken at the hospital when the defendant was already in custody and the officers had some knowledge of his involvement were testimonial). This case also has a nontestimonial statement by the victim. The court also held that the victim's statement to a police officer at a third party's house were not testimonial because the statement was obtained in response to the officer's preliminary task of attending to the victim's medical needs shortly after the commission of the crime.

<sup>285</sup> *See Crawford v. Washington*, 541 U.S. 36, 68 (2004).

<sup>286</sup> "The Clause also does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." *Id.* at 59 n.9. *See, e.g., People v. Lanier*, 687 N.W.2d 370 (Mich. Ct. App. 2004) (approving use of a testimonial statement of dead declarant who implicated the defendant because the statement was not offered for its truth, but to impeach the defendant's testimony that the declarant was the shooter).

testifies at trial.<sup>287</sup> Finally, the Confrontation Clause does not bar admission of business records,<sup>288</sup> statements of co-conspirators,<sup>289</sup> and (probably) dying declarations.<sup>290</sup> To some extent, *Crawford* is naturally clearer about what is outside its scope than what is inside.

### What Does It All Mean?

There can be absolutely no doubt that *Crawford* fundamentally alters the way criminal cases are tried. Under *Roberts*, if the victim or primary witness did not appear at trial for whatever reason, the prosecution could still go forward if the victim's or witness's statement possessed the requisite "indicia of reliability."<sup>291</sup> No more. Now counsel must determine whether a statement is testimonial, a daunting task. As has been argued above, to the extent that a statement is accusatory, the declarant's statement should be considered testimonial. Most courts, however, have taken a different approach, looking at government involvement in the creation of the statement, the statement's purpose, whether the statement is an excited utterance, and to whom the statement was made.

*Crawford* may spell doom for the admission of statements gathered with government involvement, for the purpose of building a case against the accused, or made to a government agent (as opposed to a friend or family member). The statement may still be admissible if the proponent of the testimonial statement can show unavailability and a prior opportunity for cross-examination. Caution must be exercised, however, because the meanings of unavailability and "opportunity for cross-examination,"<sup>292</sup> have long languished under *Roberts*. Counsel should expect renewed emphasis in these two areas if military judges declare a lot of hearsay statements testimonial.

In everyday practice, given the new paradigm, counsel must re-evaluate how to handle the Article 32 investigation and the use of depositions,<sup>293</sup> and must also ensure that all statements by a victim or witness are disclosed to defense.<sup>294</sup> How much of the case should be tried at the hearing? Should the government seek to depose important witnesses? What if the victim refuses to come to the hearing? What if the defense is aware one statement, but not another (and neither is the trial counsel)?

Because the way ahead is so unclear and the waters are uncharted, counsel will find a rare opportunity to influence the future direction of courts-martial practice. Because the way ahead is not certain, counsel must keep up with the rapidly developing case law in this area if they are to marshal the latest interpretation in support of their arguments. Every week, at least twenty opinions are released that make a citation to *Crawford*. Armed with the newest cases and making the best argument, counsel may have *the* case on the desk at this very moment that will clear the air and show that the end of the journey is indeed a place rich and strange: an occupied witness box where under *Roberts* there wasn't one.

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<sup>287</sup> *Crawford*, 541 U.S. at 59 ("The Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it.").

<sup>288</sup> *Id.* at 56. Whether records created solely for litigation are testimonial is open question. Compare, *City of Las Vegas v. Walsh*, 91 P.3d 591 (Nev. 2004) (holding that a healthcare professional's affidavit prepared solely for the prosecution's later use at trial was testimonial), and *People v. Rogers*, 780 N.Y.S.2d 393 (N.Y. App. Div. 2004) (holding that a report of blood test results (admitted as a business record) of alleged rape victim incapable of consent because of intoxication was testimonial because the test requested by and prepared for law enforcement for the purpose of prosecution), with *State v. Dedman*, 102 P.3d 628 (N.M. 2004) (holding that a blood alcohol report, generated by the Scientific Laboratory Division of the Department of Health, was not investigative or prosecutorial, and although prepared for trial, the "process is routine, non-adversarial, and made to ensure an accurate measurement").

<sup>289</sup> *Crawford*, 541 U.S. at 56.

<sup>290</sup> *Id.* at 56 n.6.

<sup>291</sup> See *Ohio v. Roberts*, 448 U.S. 56, 66 (1980).

<sup>292</sup> The meaning of the "opportunity for cross-examination" has been long dominated by the case *United States v. Owens*, 484 U.S. 554 (1988), which held that the Confrontation Clause was not violated by admission of the victim's out-of-court identification of the defendant from a photo line-up even though he was unable, because of a memory loss, to testify concerning the basis for the identification.

<sup>293</sup> See generally MCM, *supra* note 127, R.C.M. 702.

<sup>294</sup> See, e.g., *People v. Ochoa*, 18 Cal. Rptr. 3d 635 (Cal. Ct. App. 2004), review granted, 101 P.3d 575 (Cal. 2004) (approving the People's concession that *Crawford* "would preclude the admission of testimonial statements that were not disclosed or identified at the preliminary hearing").

**USALSA Report**  
*U.S. Army Legal Services Agency*

*Trial Judiciary Note*

**Trial Judiciary Announces Publication of *Military Judges' Benchbooks* for Trials of Enemy Prisoners of War and Provost Courts**

Against the backdrop of ongoing military operations in Iraq and Afghanistan, the U.S. Army Trial Judiciary recently published two *Military Judges' Benchbooks*, which are tailored for trials of enemy prisoners of war and civilians in occupied territories. The most extensive of these *Benchbooks* is *Department of the Army Pamphlet 27-9-1, Military Judges' Benchbook for Trial of Enemy Prisoners of War* (EPW Benchbook).<sup>1</sup> The other is *Department of the Army Pamphlet 27-9-2, Military Judges' Benchbook for Provost Courts* (Provost Court Benchbook).<sup>2</sup>

Both publications are companions to the original *Military Judges' Benchbook*<sup>3</sup> and retain its basic format and many of its provisions. The new publications, however, go well beyond the original *Benchbook* by incorporating procedural requirements that are set forth in the Geneva Conventions relating to POWs<sup>4</sup> and civilians.<sup>5</sup> Additionally, the *EPW Benchbook* contains pattern instructions for law of war offenses<sup>6</sup> and defenses.<sup>7</sup> By contrast, the *Provost Court Benchbook* contains no instructions for offenses or defenses. Rather, it reserves Chapters 3 and 5 for substantive offenses and defenses that may be applicable in a particular occupied territory.<sup>8</sup>

Should the United States someday seek to prosecute EPWs or civilian internees, the *EPW* and *Provost Court Benchbooks* will, undoubtedly, play a preeminent role in such trials by navigating the military judge and counsel through a maze of unique legal requirements and complexities. Ultimately, they will help to ensure that an accused receives a fair trial and one that preserves his rights under the Geneva Conventions.

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<sup>1</sup> U.S. DEP'T OF ARMY, PAM. 27-9-1, LEGAL SERVICES: MILITARY JUDGES' BENCHBOOK FOR TRIAL OF ENEMY PRISONERS OF WAR (4 Oct. 2004) [hereinafter EPW BENCHBOOK].

<sup>2</sup> U.S. DEP'T OF ARMY, PAM. 27-9-2, LEGAL SERVICES: MILITARY JUDGES' BENCHBOOK FOR PROVOSTS COURTS (4 Oct. 2004).

<sup>3</sup> U.S. DEP'T OF ARMY, PAM. 27-9, LEGAL SERVICES: MILITARY JUDGES' BENCHBOOK (1 Apr. 2001).

<sup>4</sup> Geneva Convention, Relative to the Treatment of Prisoners of War, August 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC].

<sup>5</sup> Geneva Convention, Relative to the Treatment of Civilian Persons in Time of War, August 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV].

<sup>6</sup> See EPW BENCHBOOK, *supra* note 1, paras. 3A–D. The *EPW Benchbook* also contains all of the original *Benchbook's* instructions for Uniform Code of Military Justice offenses. See *id.* para. 3; see also UCMJ art. 2(9) (2002) (providing specifically that EPWs may be tried for post-capture UCMJ offenses, as well as those arising under law of war).

<sup>7</sup> See EPW BENCHBOOK, *supra* note 1, para. 5-A. The *EPW Benchbook* also retains all defense instructions that are contained in the original *Benchbook*. See *id.* para. 5.

<sup>8</sup> See GC IV, *supra* note 5, para. 64.

The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention. Subject to the latter consideration and to the necessity for ensuring the effective administration of justice, the tribunals of the occupied territory shall continue to function in respect of all offences covered by the said laws.

*Id.*

## Book Reviews

### THE CAROLINA WAY: LEADERSHIP LESSONS FROM A LIFE IN COACHING<sup>1</sup>

REVIEWED BY MAJOR MICHAEL S. DEVINE<sup>2</sup>

*Play hard; play together; play smart.*<sup>3</sup>

This simple, three-term phrase constituted Dean Smith's entire coaching philosophy during his remarkable thirty-six year career as the head basketball coach at the University of North Carolina.<sup>4</sup> Smith's philosophy of "play hard; play smart; play together" is presented in this book as the "Carolina Way."<sup>5</sup> Throughout the book, Smith strips down this already simple coaching philosophy and defines good leadership as simply caring about people.<sup>6</sup> This deeply held belief and practice of Smith's proves to be the message of *The Carolina Way*—even more so than Smith's coaching philosophy itself. *The Carolina Way* offers leaders, aspiring leaders, college basketball fans, and mere supporters of human decency an inside look at the means and methods Smith used to become a premier coach, teacher, and leader. As such, it is a highly recommended read.

Smith's thesis is that good leadership qualities are transferable from one occupation to another.<sup>7</sup> This thesis was apparently not one that Smith thought consciously of during his coaching career and seems mainly attributable to co-author Gerald Bell<sup>8</sup> and book contributor John Kilgo.<sup>9</sup> However, Smith generally accepts their idea and develops it throughout the book.

The authors use a compelling three-pronged approach to support their thesis. Each chapter begins with Smith detailing some aspect of his coaching philosophy, including personal anecdotes about his success or failure in implementing that particular aspect of his philosophy. Smith follows each of those entries with powerful and often emotional testimonials from former players or others associated with the program.<sup>10</sup> As Smith astutely points out, his players "were students in the classroom known as North Carolina basketball, and their observations provide the thread that ties the entire book together in a way that would otherwise be impossible."<sup>11</sup> Following the testimonials, Bell applies a business perspective to each of Smith's coaching philosophies. Though the book is primarily credited to Smith, the book is driven by this application of Bell's business perspectives to Smith's coaching philosophies.

The authors break the book into five parts—The Foundations; Playing Hard; Playing Together; Playing Smart; and Lessons Learned. The middle three parts of the book deal with the tripartite elements of Smith's coaching philosophy and are similar to each other in their structure. However, the first and last parts differ substantially in

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<sup>1</sup> DEAN SMITH & GERALD D. BELL, *THE CAROLINA WAY: LEADERSHIP LESSONS FROM A LIFE IN COACHING* (2004).

<sup>2</sup> U.S. Army. Written while assigned as a student, 53d Judge Advocate Officer Graduate Course, The Judge Advocate General's Legal Center and School, U.S. Army, Charlottesville, Virginia.

<sup>3</sup> SMITH & BELL, *supra* note 1, at 20.

<sup>4</sup> *See id.* at 1. Dean Smith coached the University of North Carolina men's basketball team from 1958 until 1998 and his teams won more games (879) than any other NCAA Men's Division 1 basketball coach and he also coached the U.S. Olympic team to a gold medal in the 1976 Summer Olympics. *See id.* at 338.

<sup>5</sup> *See id.* at 2.

<sup>6</sup> *See id.* at 3.

<sup>7</sup> *See id.* at 1.

<sup>8</sup> *See id.* Mr. Bell heads a leadership training company and has taught at the University of North Carolina's Keenan-Flagler Business School for over thirty years. *See id.* at 338. Mr. Bell's "leadership training sessions have been attended by approximately five hundred thousand managers in more than four-thousand seven-hundred organizations." *Id.*

<sup>9</sup> *See id.* at 338. Mr. Kilgo is an award winning newspaper columnist in North Carolina who has known Smith for over twenty years. This book was Kilgo's idea and he brought the idea to Smith. *Id.* at 3. Kilgo also co-authored Smith's first book. *See* DEAN SMITH, JOHN KILGO, & SALLY JENKINS, *A COACH'S LIFE: MY FORTY YEARS IN COLLEGE BASKETBALL* (2000).

<sup>10</sup> *See generally* SMITH & BELL, *supra* note 1, at 5-6; *see also* Cecil Johnson, *The Carolina Way: Leadership Lessons from a Life in Coaching*, FORT WORTH STAR-TELEGRAM, Mar. 1, 2004, available at <http://www.dfw.com/mld/dfw/business/8076509.htm%20> (last visited Apr. 6, Mar. 2005) (raising the same idea).

<sup>11</sup> SMITH & BELL, *supra* note 1, at 6.

both their structure and focus and are reviewed independently from the middle three parts. Each part of the book has individual chapters and each chapter is presented in the three-part style discussed above—Smith’s presentation of his philosophy in action, personal testimonials, and business applications and anecdotes.

#### A. Part One: *Introduction* and *The Foundations*

In the book’s first chapter, Smith introduces the reader to his personal background. Smith grew up in the Midwest as the son of a father who was a high school sports coach and a mother who was a teacher.<sup>12</sup> He also briefly reviews his basketball career beginning when he was a player at the University of Kansas and then an assistant coach at the Air Force Academy and the University of North Carolina before accepting the head coaching position at the University of North Carolina in 1961.<sup>13</sup>

Still in the first part of the book, Smith first introduces the reader to the broad details of his philosophy in the second chapter, titled “Play Hard; Play Together; Play Smart.”<sup>14</sup> “*Hard* meant with effort, determination, and courage; *together* meant unselfishly, trusting your teammates, and doing everything possible not to let them down; and *smart* meant with good execution and poise, treating each possession as if it were the only one in the game.”<sup>15</sup> In this chapter Smith discusses how and why he taught his players his philosophy.<sup>16</sup> Smith recognized that occasionally his teams would have bad luck or face a particularly good team or player on their best night, but he believed that if his teams simply concentrated on those things within their control, then they would generally be successful.<sup>17</sup> Smith provides a more detailed description of his philosophy’s three components later in the book in Parts Two, Three, and Four, but this early exposure provides a terrific introduction to Smith’s philosophy. In fact, when coupled with the business perspectives in Part One, the authors’ point is virtually complete, leaving little but a more detailed discussion to follow in the remaining chapters. The detailed discussions of the philosophies’ three components later in the book actually produce one of the book’s weaknesses—repetitiveness of concepts and anecdotes.<sup>18</sup>

In these early chapters, Smith comes as close as he ever does throughout the entire book to fully buying into Bell’s thesis on coaching and business leadership by stating that

[the co-author] believes that readers can take things from our [basketball coaching] philosophy and benefit from them, and I agree that *could* be the case. Whether you’re leading a basketball team, a nurses’ school, a small insurance office, or a large corporation, there are certain common denominators. Honesty, integrity, discipline administered fairly, not playing favorites, recruiting the right people, effective practice and training, and caring are foundations that any organization would be wise to have in place . . . .<sup>19</sup>

Also in these initial chapters Smith identifies one of the weaknesses in trying to apply his coaching philosophy to other business-related industries admitting that, “[m]aybe it was easier for me to lead my players, who wanted to be there, than it is for a business manager to lead members of her sales department who feel they have to be there.”<sup>20</sup> The business reality that requires leaders to deal with experienced employees who generally have greater freedom to switch employers than a typical college scholarship athlete has to transfer universities is rarely recognized throughout the book and is one of its fundamental weaknesses.

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<sup>12</sup> See *id.* at 9-10.

<sup>13</sup> See *id.* at 10.

<sup>14</sup> *Id.* at 28.

<sup>15</sup> *Id.* at 28-29.

<sup>16</sup> See *id.* at 15 and 28-31. A book written by a former North Carolina player presents a broader array of leadership principals which the author attributes to learning from Smith such as “The Reciprocal Law of Loyalty,” “Success Requires a Flexible Vision,” “The Power of Positive Words,” and several others. See DR. DAVID CHADWICK, *TWELVE LEADERSHIP PRINCIPLES OF DEAN SMITH* (1999). Coach Smith, however, does not adopt those expansive principles as his own. See SMITH & BELL, *supra* note 1, at 3.

<sup>17</sup> See SMITH & BELL, *supra* note 1, at 1.

<sup>18</sup> Examples of repetitive concepts or anecdotes used in the book include the fact that his team lost to Wake Forest because they were tired after returning from an overseas trip, *id.* at 51, 294; and the team’s emphasis on senior leadership, *id.* at 17, 108, 158, 172, 174, 175, and 207.

<sup>19</sup> See *id.* at 3.

<sup>20</sup> *Id.*; see also Alex Coffin, *Dean Smith Shares His Leadership Lessons*, CHARLOTTE OBSERVER, Feb. 15, 2004, at H6 (arguing the similar point that thirty-five year old MBA graduates may not be quite as receptive to certain parts of the Carolina Way as eighteen to twenty-two year old student athletes might).

This part of the book also contains the first of many perspectives written by a former player which sets the theme for all the other perspectives throughout the book.<sup>21</sup> The initial perspective strongly supports the authors' goal for the introduction, which is to establish Smith as a caring, brilliant leader who was interested more in molding each player's individual character than he was in building individual players.<sup>22</sup> Despite the enormous on-court successes of his teams, players, and assistant coaches, it is clear throughout the book that Smith is most proud of the fact that the vast majority of his players developed into outstanding citizens.<sup>23</sup> In fact, ninety-six percent of his players earned their undergraduate degrees, and more than thirty-three percent continued on to earn graduate or professional degrees.<sup>24</sup> There is little doubt that this success is largely based on the lessons he taught his players while at North Carolina.<sup>25</sup> The life lessons discussed in the personal perspectives, the passion with which they are written, and the near reverent awe the writers seem to have for Smith are common threads in the player perspectives sprinkled throughout the book.<sup>26</sup>

#### B. Parts Two, Three and Four: *Playing Hard; Playing Together; Playing Smart*

These three separate parts of the book form its core. These parts detail and fully develop how Smith executed his coaching philosophy. Each part is divided into chapters specifically focusing on one part of the overall concept. Among the most helpful chapters in these parts from a leadership perspective for the typical business, government, or military leader are the chapters on "Recruiting the Players," "Team Building Techniques," and "One-on One Meetings."<sup>27</sup>

In "Recruiting the Players," the authors emphasize the need to carefully select employees, focusing not only on each employee's abilities, but also on how each of their goals and attitudes will fit with organizational goals. "Hire smart, manage easy" and "hire slowly, . . . fire quickly" are the themes of this chapter.<sup>28</sup> These concepts strongly support the authors' thesis because they have near universal applicability across the spectrum of leadership challenges.<sup>29</sup>

In "Team Building Techniques" Smith discusses rewarding players, praising performances that are beneficial to the team, and showing respect for all players who are trying their best for the team, regardless of the outcome of their efforts.<sup>30</sup> The practical benefits of these approaches are highly lauded in both the player perspectives and the business perspectives sections of the chapter.<sup>31</sup> The authors provide several examples of how these techniques can be applied to business in ways such as starting each meeting by praising individual efforts, large or small, that helped the team,<sup>32</sup> and by treating with greater respect those senior employees who are not part of the management team.<sup>33</sup>

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<sup>21</sup> See SMITH & BELL, *supra* note 1, at 20-24. Charles McNairy was a player on the 1997 North Carolina team. *Id.* In this personal perspective he talks about Coach Smith's personal decency and expectation of excellence as well as how Coach Smith prepared his team for every possibility. *Id.* He uses a particularly exciting game against Wake Forest and their All-American center, Tim Duncan, to describe how Coach Smith taught basketball and life lessons to his players. *Id.*

<sup>22</sup> See *id.* at 20 (providing a player perspective from Charles McNairy who believed that Carolina basketball success was attributable to Coach Smith's philosophy of life, which is one of personal decency, treating people equally, and expecting excellence).

<sup>23</sup> See *id.* at 323.

<sup>24</sup> See *id.* at 218.

<sup>25</sup> See generally *id.* at 161-62 (describing life experiences of former player, Dr. Joseph Jenkins, class of 1988); *id.* at 194-95 (describing life experiences of former manager, Charles Lisenbee, class of 1995); and *id.* at 234 (describing life experiences of former player, Kim Hubbard, class of 1972).

<sup>26</sup> See for example player perspectives by Steve Previs, Class of 1972, talking about how Coach Smith would accept physical errors but not mental ones—*i.e.*, play smart; and Phil Ford, Class of 1997, discussing Smith's recruiting him by discussing primarily citizenship, race relations, and academics as opposed to basketball. *Id.* at 31 and 92.

<sup>27</sup> *Id.* at 88, 132, 155, 199, and 215.

<sup>28</sup> *Id.* at 93-95.

<sup>29</sup> *Id.* at 93.

<sup>30</sup> See *id.* at 155-56.

<sup>31</sup> See *id.* at 161-62, 166.

<sup>32</sup> See *id.* at 171-72.

<sup>33</sup> See *id.* at 176-78.

Finally, in the chapter titled “One-on-One Meetings,” Smith outlines his methods and reasons for holding one-on-one meetings with his players throughout the year.<sup>34</sup> The premises of this idea are that leaders do too much “doing” and not enough teaching, and that most employees are too hurried in their daily activities to get a good feel and understanding of the company’s goals and missions.<sup>35</sup> The authors suggest that leaders should have monthly meeting with each employee.<sup>36</sup> The authors assert, generally, that by conducting regular one-on-one meetings, a leader can remain in-tune with employees, and the employees can remain in-tune with the leader’s expectations.<sup>37</sup> Military leaders would be wise to recognize the value of Smith’s practices and apply them to both mandatory and discretionary counseling sessions with the troops under their command or influence. In addition to the value of leaders directly communicating their expectations and performance assessment of their subordinates, such individual counseling sessions also provide an opportunity for subordinates to raise problems or concerns that they might not otherwise be comfortable raising in the more formal work setting. By discussing the concerns, the leader should better be able to further the organizations goals.

### C. Part V: *Lessons Learned*

Failing to provide any significant “lessons learned,” this part of the book should more aptly have been titled, *Other Stuff Unrelated to the “Carolina Way.”* In fact, the whole part could have been discarded because it added little to the authors’ thesis. The last chapter, titled “Hopes for the Future,” is a particularly unnecessary and distracting chapter in this otherwise engaging book. In “Hopes for the Future,” Smith rambles on about such varied topics as a proposition to pay college players a stipend, fighting the war on poverty, abolishing the death penalty, and improving the social status of teachers.<sup>38</sup> While all these may be valid subjects worthy of debate, their undeveloped placement in a leadership book is completely inappropriate. Unfortunately, following Smith’s ramble, Bell decides to add several of his own unrelated, unsubstantiated, and unproven musings. Even when he actually references leadership principles in the last part of this chapter, Bell does not develop the brand new leadership topics he raises.<sup>39</sup>

While this part of the book is generally disappointing, one very valuable portion is the chapter on Smith’s experience as coach of the 1976 Men’s Olympic Basketball Team. Unlike his treatment of his job at North Carolina, where he viewed the process and individual development of his players as his primary objectives, his only goal as coach of the Olympic team was to win.<sup>40</sup> This chapter discusses the different leadership skills necessary to lead a makeshift organization to success in a very limited amount of time. This chapter is especially applicable for military environments, particularly in an age of transformation, where different teams of people are being put together at various times to accomplish critical, but often short-term, missions. While completely independent of Coach Smith’s true “Carolina Way” philosophy, this is a critical chapter in the book because in many situations, such as combat or professional business, winning is the primary goal and Smith’s general coaching philosophies do not address such a concept.

### D. Final Thoughts

While the book contains several excellent leadership techniques that leaders in various industries should follow, the book does have several weaknesses. First, the foundational source for the book, Smith’s basketball program, is not the ideal model upon which to apply the business leadership principles the authors want to develop because most leaders face a much wider variety of challenges than a college athletics coach. Further, except for the owners themselves, business leaders rarely have the autonomy or the authority that a head coach at a major university has to implement their leadership strategies. The coach

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<sup>34</sup> *Id.* at 215.

<sup>35</sup> *See id.*

<sup>36</sup> *See id.* at 223.

<sup>37</sup> *See id.*

<sup>38</sup> *See id.* at 318-22.

<sup>39</sup> *See id.* at 326-28. One point the author raises for the first time in the last chapter, and yet fails to develop, is that “leaders should devote good effort to enhancing what I call the seven skills of effective communication: listening, delivering ideas, confronting people being open and non-defensive, developing a sense of humor, honing their presentations, and understanding the nonverbal patterns of ourselves and others.” *Id.* at 328.

<sup>40</sup> *See id.* at 307. Smith felt that winning the Olympics was particularly important in 1976 because the U.S. had lost the Olympic final in 1972 to the Soviet Union on a controversial last second call by the officials resulting in the first time the United States did not win the Olympic gold medal in men’s basketball. *Id.* at 309.

holds virtually all the “cards” with regard to scholarships and playing time which allows him to influence and motivate players in ways not available to most leaders.<sup>41</sup>

Next, the leadership strategies required for a few hours a day over a six-month basketball season are somewhat different than the longer term strategies needed for a long-term, 365 days a year business. Finally, in the business application section of each chapter’s leadership principal, Bell appropriately uses numerous anecdotes from the corporate world to support each point. However, Bell rarely identifies the specific name of a leader or company in his examples, referring to them only in the abstract such as “a vice president of sales in a pharmaceutical company with large sales force . . . ,”<sup>42</sup> and “I know a CEO that . . . .”<sup>43</sup> These vague references prevent the investigative-minded reader from testing the validity of the Bell’s assertions with regard to these anecdotes.<sup>44</sup>

Despite these weaknesses, the authors effectively translate Smith’s coaching philosophy and leadership principles to a wide variety of business challenges. The authors cover several helpful leadership concepts such as identifying ways to effectively deal with the varying personalities, backgrounds, and agendas that the people in one’s organization bring with them, as opposed to simply implementing a one-size-fits-all bureaucratic management system. Thought-provoking and entertaining, *The Carolina Way*’s readers will be better equipped to handle their own personal leadership challenges. The reader will also come away with a tremendous appreciation and respect for Dean Smith as a leader and coach, but more importantly, one will acquire an appreciation of him as a *human* being who has positively influenced generations of young men.

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<sup>41</sup> *See id.* at 264 (showing that Smith recognizes and acknowledges this difference between college basketball and running a business).

<sup>42</sup> *Id.* at 176.

<sup>43</sup> *Id.* at 166.

<sup>44</sup> Bell never says why he does this, though it may be that he was under agreement with companies with whom he works to remain confidential so people could talk freely.

# THE CAROLINA WAY: LEADERSHIP LESSONS FROM A LIFE IN COACHING<sup>1</sup>

REVIEWED BY MAJOR JAYANTH JAYARAM<sup>2</sup>

Every college basketball fan is familiar with Dean Smith's reign as coach of the University of North Carolina men's basketball team from 1961 to 1997.<sup>3</sup> With 879 wins, Smith is the winningest coach for men's basketball in the National Collegiate Athletic Association.<sup>4</sup> His longevity and consistency, combined with a very high graduation rate and unfettered admiration from his players and assistant coaches, is a testament to the success of Smith's goals: play hard, play together, play smart.<sup>5</sup>

In *The Carolina Way*, Coach Smith and Gerald D. Bell,<sup>6</sup> try to "fully explain[] . . . [Smith's] entire coaching philosophy and show readers how to apply it to the leadership and team-building challenges in their own lives."<sup>7</sup> Divided into five titled parts,<sup>8</sup> the book consists of chapters written in three segments, offering Smith's views and thoughts of his former players; Bell then provides a business perspective for each topic.<sup>9</sup>

The authors do a good job of describing Smith's coaching techniques, intertwined with interesting stories about players and situations. Coach Smith details his building and continued improvement of his different teams, since each year its composition changed.<sup>10</sup> Throughout the book, he describes how he recruited prospects, conducted practice, made personnel decisions, and interacted with players, coaches, and media. Understanding these processes would certainly assist those in the coaching field and inform those interested in how Smith was able to keep his program at such a high level for decades, while gaining the admiration of his players. A fair critique of the book, however, must include an examination of the internal inconsistencies in the authors' analyses as well as an assessment of the applicability of their findings. Although the book provides insight on leadership lessons and ways to make a team perform effectively and efficiently, this review contends that the book is, at times, internally inconsistent and does not provide convincing applicability of all of Smith's techniques to the military. *The Carolina Way* does not rise to the "must read" level for the military judge advocate.

Smith and Bell identify many traits of successful leaders: "Honesty, integrity, discipline administered fairly, not playing favorites, recruiting the right people, effective practice and training, and caring are foundations that any organization would be wise to have in place."<sup>11</sup> They discuss effective leaders as those who are flexible,<sup>12</sup> confident,<sup>13</sup> loyal,<sup>14</sup> modest,<sup>15</sup>

<sup>1</sup> DEAN SMITH & GERALD D. BELL, *THE CAROLINA WAY: LEADERSHIP LESSONS FROM A LIFE IN COACHING* (2004).

<sup>2</sup> U.S. Army. Written while assigned as a student, 53d Judge Advocate Officer Graduate Course, The Judge Advocate General's Legal Center and School, U.S. Army, Charlottesville, Virginia.

<sup>3</sup> See Basketball Hall of Fame, *Hall of Famers*, at <http://www.hoophall.com/halloffamers/SmithDean.htm> (last visited Feb. 17, 2005).

<sup>4</sup> See *id.* As a head coach, Smith's teams won 879 games and lost 254 games: a winning percentage of over seventy-seven percent. See *id.* On 1 December 2004, McKendree College Men's Basketball Coach Harry Statham passed Dean Smith for most wins by a basketball coach. See *Statham Makes Dean's List*, CHI. TRIB., Dec. 2, 2004, at C10. Statham accumulated all his wins in the National Association of Intercollegiate Athletics (NAIA). See *id.*

<sup>5</sup> See SMITH & BELL, *supra* note 1, at inside flap. Smith's players had a graduation rate of over ninety-six percent. See *id.* But see Andrew Jones, *Krzyzewski Climbs Ranks of Coaching Legends*, STAR NEWS (Wilmington, N.C.), Dec. 15, 2004, at 1C (citing a graduation rate of over ninety-eight percent for Smith's players). Many collegiate basketball teams today have graduation rates at below fifty percent for their players. See *Basketball's Academic Fouls*, USA TODAY, Apr. 6, 2004, at 12A.

<sup>6</sup> Dr. Bell has developed leadership training sessions that "have been attended by approximately five hundred thousand managers" worldwide. See SMITH & BELL, *supra* note 1, at 338.

<sup>7</sup> *Id.* at inside flap.

<sup>8</sup> See *id.* at vii-viii (titling the parts as follows: *The Foundations*, *Playing Hard*, *Playing Together*, *Playing Smart*, and *Lessons Learned*).

<sup>9</sup> Bell takes Smith's leadership techniques developed in coaching and tries to apply them to various business settings.

<sup>10</sup> See *id.* at 12.

<sup>11</sup> *Id.* at 3.

<sup>12</sup> See *id.* at 12-13.

<sup>13</sup> See *id.* at 14.

<sup>14</sup> See *id.* at 15.

<sup>15</sup> See *id.* at 26.

unselfish,<sup>16</sup> dedicated,<sup>17</sup> and able to foster an environment in which his or her “players” can play hard, play together, and play smart.<sup>18</sup> Readers can gain perspective from how Coach Smith embodies these traits through his coaching philosophy and how Dr. Bell translates these into fundamental traits of a good leader.<sup>19</sup>

*The Carolina Way* offers many valuable tips on leadership, but there are several inconsistencies within the book. The most glaring inconsistency is the order in which Smith lists the basis of his basketball philosophy. The book is structured in the order of play hard, play together and play smart.<sup>20</sup> In at least two places, however, Smith switched the order to play hard, play smart, and play together.<sup>21</sup> This does not necessarily invalidate the underlying principles for his teams’ success, but it reduces the credibility of other portions of the book.

One technique Smith implemented to add some perspective for his players was the “Thought for the Day,”<sup>22</sup> later testing his players to recite the day’s message. If a player was unsuccessful, the entire team would do extra sprints.<sup>23</sup> With this as background, the “Thought for the Day” seems pale in comparison to the *essence* of Smith’s basketball philosophy.<sup>24</sup> Smith’s inability to enunciate his basketball philosophy consistently demonstrates his failure to follow his own drill and negates the effectiveness of “Thought for the Day” exercise.

Although Smith identifies many foundational principles for leaders in the book’s introduction,<sup>25</sup> he only addresses some of them in Part One, *The Foundations*. In this section, the authors fail to follow up with the principles of disciplining evenly and not playing favorites.<sup>27</sup> If these are basic principles, they should be discussed in further detail in the proper section of the book.

Another inconsistency is the equation he uses when discussing hard work. In the introduction he states, “Hard work that results in success equals confidence.”<sup>28</sup> In the chapter titled *Building Confidence*, however, Smith writes, “Hard work equals success, which equals confidence.”<sup>29</sup> These two statements are not synonymous. Confidence in the first statement occurs only when the results are successful through hard work. In the latter definition, confidence only requires hard work, irrespective of the results.

Reconciling Smith’s stance on peer pressure is difficult. He believes that “peer pressure is more effective in building good habits and morale than motivation created by fear, reward, or other means.”<sup>30</sup> He continues, “Peer pressure can be a valuable weapon.”<sup>31</sup> He believes, however, that teammates should not criticize each other for making mistakes.<sup>32</sup> Instead,

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<sup>16</sup> See *id.* at 18.

<sup>17</sup> See *id.* at 15.

<sup>18</sup> See *id.* at 20.

<sup>19</sup> See *id.* at 9-27.

<sup>20</sup> See *id.* at vii-viii.

<sup>21</sup> See *id.* at 28, 323. “It was our mission statement, our strategic plan, our entire approach in a nutshell: Play hard; play *smart*; play *together*.” *Id.* at 28 (emphasis added). “The Carolina Way isn’t the only way, that’s for certain. But playing hard, playing *smart*, playing *together* certainly worked well for us.” *Id.* at 323 (emphasis added).

<sup>22</sup> See *id.* at 76.

<sup>23</sup> See *id.*

<sup>24</sup> Smith’s basketball philosophy is a combination of: play hard; play together; play smart. See *supra* text accompanying notes 20-21.

<sup>25</sup> See SMITH & BELL, *supra* note 1, at 1-6; see also text accompanying notes 12-18 (listing the numerous leadership principles identified by Coach Smith).

<sup>27</sup> See text accompanying note 11.

<sup>28</sup> See SMITH & BELL, *supra* note 1, at 15.

<sup>29</sup> *Id.* at 237.

<sup>30</sup> *Id.* at 262.

<sup>31</sup> *Id.* at 135.

<sup>32</sup> See *id.* at 161.

they should unequivocally support each other.<sup>33</sup> This belief is further obfuscated by Smith giving the players the option to be criticized by him in front of the team or on an individual basis.<sup>34</sup> If peer pressure is such a powerful motivator, he should not give the players the option to be counseled individually when the criticism could benefit or influence other players on the team.<sup>35</sup> If teammates are there only to support, and not criticize, the motivating force of peer pressure would be reduced and therefore detrimental to the team's success. But, despite not allowing teammates to criticize one another, Smith also discusses how he had all the players review and grade each shot taken during a game.<sup>36</sup> How can peer pressure be a powerful, motivating force if teammates can only provide support? If criticism of a teammate is not permitted, why are players evaluating each other? This illustrates the confusion Smith creates on this issue with his inconsistent assertions on peer pressure.

Another disconnect is Smith's position on winning. Winning was not the goal, but rather, the result of the process of playing hard, together, and smart.<sup>37</sup> He believes, "[M]aking winning the goal can actually get in the way of winning."<sup>38</sup> Smith concedes, however, that winning was the only goal when he coached the 1976 United States Olympic men's basketball team.<sup>39</sup> He distinguishes the Olympic team from his collegiate team in that the team represented a nation, not a university.<sup>40</sup> He also attempts to differentiate his approach because he did not recruit the members of the Olympic team.<sup>41</sup> These distinctions appear completely arbitrary and are not persuasive.

The book discusses many worthy topics but could have been better organized; several chapters seem misplaced. For instance, Smith lists many traits, such as caring, as foundational principles.<sup>42</sup> The chapter titled *Caring*, however, is not even in *The Foundations* part, but in *Playing Hard*.<sup>43</sup> Similarly, the chapter *Every Man on the Team Is Important* was situated in the *Playing Smart* part, but it would fit better in *Playing Together*.<sup>44</sup> *Don't Dwell on the Past*, which discusses how to handle mistakes, was put in *Lessons Learned* instead of *Playing Smart*.<sup>45</sup>

Weak in comparison to the other parts of the book, some of the chapters in *Playing Smart* did not directly relate to "smart playing." Rather than discussing how a team that plays hard and together can improve its skill level, *Playing Smart* discusses a hodgepodge of issues such as the importance of treating everyone on the team fairly,<sup>46</sup> taking care of the details,<sup>47</sup>

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<sup>33</sup> See *id.*

<sup>34</sup> See *id.* At the start of each season during individual meetings, Smith gave players the option of being criticized privately in the office or in front of his teammates, but he cannot recall any player who opted for the private office counseling. See *id.*

<sup>35</sup> See *id.*

<sup>36</sup> See *id.* at 145. Smith had the players grade each shot anonymously. See *id.* Even when done anonymously, however, it is still criticism.

<sup>37</sup> See *id.* at 29.

<sup>38</sup> *Id.* (citing Tom Osborne, former head football coach of the University of Nebraska). Osborne ranks in the top fifteen for college football head coaches in wins with 255 victories. See RECORDS: OFFICIAL 2004 NCAA FOOTBALL, Aug. 2004, at 376 (including a section on *Coaches With 200 Or More Victories*), at [http://www.ncaa.org/library/records/football\\_records\\_book/2004/2004\\_d1\\_football\\_records.pdf](http://www.ncaa.org/library/records/football_records_book/2004/2004_d1_football_records.pdf) (last visited Feb. 17, 2005).

<sup>39</sup> See SMITH & BELL, *supra* note 1, at 307. Smith believed that winning was the only goal because the United States for the first time did not win the gold medal in 1972. See *id.*

<sup>40</sup> *Id.* at 308.

<sup>41</sup> *Id.*

<sup>42</sup> See *id.* at 3 (Smith writes, "The most important thing in good leadership is truly caring").

<sup>43</sup> See *id.* at vii.

<sup>44</sup> See *id.* at viii.

<sup>45</sup> See *id.*

<sup>46</sup> See *id.* at 191-93.

<sup>47</sup> See *id.* at 199-209.

conducting one-on-one meetings,<sup>48</sup> and earning the support of the bigger team.<sup>49</sup> Although these may be important to Coach Smith's overall philosophy, these chapters had little relevance to "playing smart."<sup>50</sup>

Smith is not the only author who displayed weakness within the book. Dr. Bell, an individual who has studied and taught leadership, collaborated with Smith to write this book to present business applications of Smith's coaching techniques.<sup>51</sup> Some of Bell's examples, however, were oversimplified, generalized, and inconsistent. The chapter on *Winning*, exposes some such oversimplifications: "The moral of the story is: Managers who focus entirely on winning neglect the processes for performing well and run over their people, thus usually end up losing."<sup>52</sup> The statement is not convincing, because the author illogically assumes that the focus on winning automatically leads to neglecting the performance process and running over people. Similarly, Bell asserts, "Smart business leaders focus on factors that produce winning rather than on winning itself."<sup>53</sup> Do "dumb" business leaders focus only on winning? Are they "dumb" if they focus only on winning and actually win?

Further, Bell makes several unquantifiable and baseless generalizations about people's behavior:

Leaders in all professions, industries, and organizations throughout the world must come to understand that about 95 percent of *all* people are good people who have good intentions, who desire to be helpful and productive. About 5 percent are negative people, and only about 1 or 2 percent of these are truly mean.<sup>54</sup>

Can anyone come to this conclusion without some indicia of proof? Bell does not mention any statistical methods used to make this assertion. The statement detracts from the author's credibility as a renown leadership trainer.

Bell provides another generalization with the following comment: "Self- and group[-] control is 100 percent more powerful than boss control."<sup>55</sup> Again, Bell measures concepts that are not quantifiable, without offering a rational basis. The assertion seems completely dependent on the characteristics of the individual, the group, and the boss, as well as the group's objective.<sup>56</sup> Furthermore, Bell's statement appears to contradict Smith's. Smith would not permit criticism from teammates, a form of group-control.

The business perspectives at times were internally inconsistent as well as inconsistent with Smith's coaching techniques and principles. Bell writes, "the most *effective* leaders are *always* focused on how to help the individual as well as their organizations succeed personally."<sup>57</sup> This would indicate that effective leaders are always "on the job" trying to help the organization and its members succeed. Bell, however, contradicts this in another part of the book:

Studies show that the maximum most people can work and be consistently effective is ten hours a day, five days a week. The key to staying at your peak all day long is to work intensely for about fifty minutes and then take a ten-minute break, starting with the first hour of work.<sup>58</sup>

Reconciling these two assertions is difficult as the latter statement places a durational cap with breaks for effective work, but the former declaration requires a constant focus to be an effective leader.<sup>59</sup>

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<sup>48</sup> See *id.* at 215-25.

<sup>49</sup> See *id.* at 248-60.

<sup>50</sup> Some of these would fit better in *Playing Together* or perhaps an "administration" section.

<sup>51</sup> See *id.* at 338.

<sup>52</sup> *Id.* at 46.

<sup>53</sup> *Id.* at 44.

<sup>54</sup> *Id.* at 326.

<sup>55</sup> *Id.* at 163.

<sup>56</sup> One can probably think of group situations when an individual's pride and peer pressure were more powerful than boss control, and vice-versa.

<sup>57</sup> *Id.* at 70 (emphasis added).

<sup>58</sup> *Id.* at 185.

<sup>59</sup> See *supra* text accompanying notes 57-58.

One of Dr. Bell's examples is inconsistent with Coach Smith's principle on goal-setting.<sup>60</sup> Bell considered a woman who transformed a bank and mortgage business from nothing to a lucrative business.<sup>61</sup> Due to many long days at work, however, she burned out and hired a manager to maintain the company; the owner kept her role as the leader and strategy setter.<sup>62</sup> She then took long vacations without delegating her strategic authority, and "[i]n three years, the company went from a hundred-million-dollar business to one that was doing forty million dollars' worth."<sup>63</sup> Bell criticizes this entrepreneur for not taking appropriate action to keep the business growing.<sup>64</sup> He suggests that "a business leader should have been hired to build the company, with the goal of making it excel."<sup>65</sup> According to Webster's Dictionary, "to excel" is "to be superior to or to surpass others."<sup>66</sup> All of these terms seem synonymous to winning, a goal that Coach Smith did not make, except for the 1976 Olympics.<sup>67</sup>

Although the book provides many good examples of leadership traits, it discusses issues that are not directly applicable to the military culture. Personnel decisions play a critical role in all three components of Smith's basketball philosophy: playing hard, playing together, and playing smart.<sup>68</sup> Throughout the book, Smith and Bell stress the importance of recruiting the right people to fit organizational needs: "Recruitment is one of the most crucial elements in producing a successful business . . . ."<sup>69</sup> However, in the military context, mid- to high-level leaders do not recruit the vast majority of their workers. Military recruiters hire most military members through enlistment contracts to fill certain positions. Although attempts may be made to try to match recruits in their preferred areas, it is mainly a numbers game to meet certain quotas within specific timelines. For instance, the Army's goal for fiscal year 2005 is to recruit 80,000 for the active component and 22,175 for the reserve component.<sup>70</sup>

Bell's model for an organization's personnel decisions does not fit well with the military system. For example,

A company should hire slowly, researching the candidate objectively and asking all the right questions. But it should fire quickly. It shouldn't compound the problems created by a bad hire by allowing the employee to stay around for months or years and poison the atmosphere or destroy the performance of others.<sup>71</sup>

A small business or organization may have the luxury to thoroughly screen candidates and select a few members to fill their ranks. The armed forces, however, would have difficulty in using such a process. The military has limited ability in terms of firing an individual quickly. Procedures are in place to remove a Soldier for unsatisfactory performance; however, it is not a quick process and can often take months to effect.<sup>72</sup>

*The Carolina Way* is a great book for coaches to see how Dean Smith built and managed the University of North Carolina men's basketball team, a perennial powerhouse for over three decades. For fans, the book provides an insider's look

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<sup>60</sup> See SMITH & BELL, *supra* note 1, at 185-86 (Bell suggests winning as a goal). *But see id.* at 29 (Smith did not make winning a goal). However, Coach Smith appears inherently inconsistent on this topic as well. See *supra* text accompanying notes 37-41.

<sup>61</sup> See SMITH & BELL, *supra* note 1, at 185-86.

<sup>62</sup> See *id.*

<sup>63</sup> *Id.* at 186.

<sup>64</sup> See *id.*

<sup>65</sup> *Id.*

<sup>66</sup> WEBSTER'S COLLEGIATE DICTIONARY 432 (9th ed. 1983).

<sup>67</sup> Smith admits that winning was the goal in the 1976 Olympics. See *supra* text accompanying notes 37-41.

<sup>68</sup> See SMITH & BELL, *supra* note 1, at 20.

<sup>69</sup> *Id.* at 93.

<sup>70</sup> See United States Army Recruiting Command G5, *U.S. Army Recruiting Command Goals*, at <http://www.usarec.army.mil/hq/apa/goals.htm> (last visited Feb. 9, 2005). The Army exceeded its recruiting goals for fiscal year 2004 with 77,587 active and 21,278 reserve recruits (target was 77,000 active and 21,000 reserve). See *id.*

<sup>71</sup> SMITH & BELL, *supra* note 1, at 94-95.

<sup>72</sup> See U.S. DEP'T OF ARMY, REG. 635-200, ACTIVE DUTY ENLISTED ADMINISTRATIVE SEPARATIONS ch. 13 (15 July 2004). The goal for processing separations involving the notification procedure is fifteen working days; for those involved in the board procedure, the goal is fifty working days. See *id.* at para. 1-7. However, failure to meet these goals, as is often the case, does not prevent the separation process. See *id.*

into how the individual players and teams reacted or interpreted many situations they faced. The basic tenets of Coach Smith's philosophy apply to military leadership and management. The authors' approach to business management, however, has limited applicability to the military. Despite the limitations and weaknesses of the book, *The Carolina Way* offers readers valuable insight on leadership lessons and ways to make a team perform effectively and efficiently.

## CLE News

### 1. Resident Course Quotas

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

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

Questions regarding courses should be directed to the Deputy, Academic Department at 1-800-552-3978, dial 1, extension 3304.

When requesting a reservation, please have the following information:

TJAGSA Code—181

Course Name—155th Contract Attorneys Course 5F-F10

Course Number—155th Contract Attorneys Course 5F-F10

Class Number—155th Contract Attorneys Course 5F-F10

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

The Judge Advocate General's School, 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. TJAGSA CLE Course Schedule (August 2004 - September 2006)

Course Title	Dates	ATRRS No.
<b>GENERAL</b>		
53d Graduate Course	16 August 04—25 May 05	5-27-C22
54th Graduate Course	15 August 05—25 May 06	5-27-C22
167th Basic Course	31 May—23 June 05 (Phase I—Ft. Lee)	5-27-C20
	24 June—1 September 05 (Phase II—TJAGSA)	5-27-C20
168th Basic Course	13 September—6 October 05 (Phase I—Ft. Lee)	5-27-C20
	7 October—15 December 05 (Phase II—TJAGSA)	5-27-C20
169th Basic Course	3—26 January 06 (Phase I—Ft. Lee)	5-27-C20
	27 January—7 April 06 (Phase II—TJAGSA)	5-27-C20
170th Basic Course	30 May—22 June (Phase I—Ft. Lee)	5-27-C20
	23 June—31 August (Phase II—TJAGSA)	5-27-C20
171st Basic Course	12 September 06—TBD (Phase I—Ft. Lee)	5-27-C20

10th Speech Recognition Training	17—28 October 05	512-71DC4
17th Court Reporter Course	25 April—24 June 05	512-27DC5
18th Court Reporter Course	1 August—5 October 05	512-27DC5
19th Court Reporter Course	31 January—24 March 06	512-27DC5
20th Court Reporter Course	24 April—23 June 06	512-27DC5
21st Court Reporter Course	31 July—6 October 06	512-27DC5
6th Court Reporting Symposium	31 October—4 November 05	512-27DC6
187th Senior Officers Legal Orientation Course	13—17 June 05	5F-F1
188th Senior Officers Legal Orientation Course	12—16 September 05	5F-F1
189th Senior Officers Legal Orientation Course	14—18 November 05	5F-F1
190th Senior Officers Legal Orientation Course	30 January—3 February 06	5F-F1
191st Senior Officers Legal Orientation Course	27—31 March 06	5F-F1
192d Senior Officers Legal Orientation Course	12—16 June 06	5F-F1
193d Senior Officers Legal Orientation Course	11—15 September 06	5F-F1
12th RC General Officers Legal Orientation Course	25—27 January 06	5F-F3
35th Staff Judge Advocate Course	6—10 June 05	5F-F52
36th Staff Judge Advocate Course	5—9 June 06	5F-F52
8th Staff Judge Advocate Team Leadership Course	6—8 June 05	5F-F52S
9th Staff Judge Advocate Team Leadership Course	5—7 June 06	5F-F52S
2006 JAOAC (Phase II)	8—20 January 06	5F-F55
36th Methods of Instruction Course	31 May—3 June 05	5F-F70
37th Methods of Instruction Course	30 May—2 June 06	5F-F70
2005 JAG Annual CLE Workshop	3—7 October 05	5F-JAG
16th Legal Administrators Course	20—24 June 05	7A-270A1
17th Legal Administrators Course	19—23 June 06	7A-270A1
3d Paralegal SGM Training Symposium	6—10 December 2005	512-27D-50
17th Law for Paralegal NCOs Course	27—31 March 06	512-27D/20/30
16th Senior Paralegal NCO Management Course	13—17 June 05	512-27D/40/50
9th Chief Paralegal NCO Course	13—17 June 05	512-27D- CLNCO
4th 27D BNCOC	20 May—17 June 05	
5th 27D BNCOC	23 July—19 August 05	
6th 27D BNCOC	10 September—9 October 05	
2d 27D ANCOC	18 March—10 April 05	
3d 27D ANCOC	24 July—16 August 05	
4th 27D ANCOC	17 September—9 October 05	
12th JA Warrant Officer Basic Course	31 May—24 June 05	7A-270A0
13th JA Warrant Officer Basic Course	30 May—23 June 06	7A-270A0
JA Professional Recruiting Seminar	12—15 July 05	JARC-181
JA Professional Recruiting Seminar	11—14 July 06	JARC-181

6th JA Warrant Officer Advanced Course	11 July—5 August 05	7A-270A2
7th JA Warrant Officer Advanced Course	10 July—4 August 06	7A-270A2
<b>ADMINISTRATIVE AND CIVIL LAW</b>		
4th Advanced Federal Labor Relations Course	19—21 October 05	5F-F21
59th Federal Labor Relations Course	17—21 October 05	5F-F22
56th Legal Assistance Course (Family Law focus)	16—20 May 05	5F-F23
57th Legal Assistance Course (Estate Planning focus)	31 October—4 November 05	5F-F23
58th Legal Assistance Course (Family Law focus)	15—19 May 06	5F-F23
2005 USAREUR Legal Assistance CLE	17—21 October 05	5F-F23E
30th Admin Law for Military Installations Course	13—17 March 06	5F-F24
2005 USAREUR Administrative Law CLE	12—16 September 05	5F-F24E
2006 USAREUR Administrative Law CLE	11—14 September 06	5F-F24E
2005 Maxwell AFB Income Tax Course	12—16 December 05	5F-F28
2005 USAREUR Income Tax CLE	5—9 December 05	5F-F28E
2006 Hawaii Income Tax CLE	TBD	5F-F28H
2005 USAREUR Claims Course	28 November—2 December 05	5F-F26E
2006 PACOM Income Tax CLE	9—13 June 2006	5F-F28P
23d Federal Litigation Course	1—5 August 05	5F-F29
24th Federal Litigation Course	31 July—4 August 06	5F-F29
3d Ethics Counselors Course	18—22 April 05	5F-F202
4th Ethics Counselors Course	17—21 April 06	5F-F202
<b>CONTRACT AND FISCAL LAW</b>		
7th Advanced Contract Attorneys Course	20—24 March 06	5F-F103
154th Contract Attorneys Course	Not conducted	
155th Contract Attorneys Course	25 July—5 August 05	5F-F10
156th Contract Attorneys Course	24 July—4 August 06	5F-F10
7th Contract Litigation Course	20—24 March 06	5F-F102
2005 Government Contract & Fiscal Law Symposium	6—9 December 05	5F-F11
71st Fiscal Law Course	25—29 April 05	5F-F12
72d Fiscal Law Course	2—6 May 05	5F-F12
73d Fiscal Law Course	24—28 October 05	5F-F12
74th Fiscal Law Course	24—28 April 06	5F-F12
75th Fiscal Law Course	1—5 May 06	5F-F12
2d Operational Contracting Course	27 February—3 March 06	5F-F13
12th Comptrollers Accreditation Course (Hawaii)	26—30 January 04	5F-F14

13th Comptrollers Accreditation Course (Fort Monmouth)	14—17 June 04	5F-F14
7th Procurement Fraud Course	31 May —2 June 06	5F-F101
2006 USAREUR Contract & Fiscal Law CLE	28—31 March 06	5F-F15E
2006 Maxwell AFB Fiscal Law Course	6—9 February 06	
<b>CRIMINAL LAW</b>		
11th Military Justice Managers Course	22—26 August 05	5F-F31
12th Military Justice Managers Course	21—25 August 06	5F-F31
48th Military Judge Course	25 April—13 May 05	5F-F33
49th Military Judge Course	24 April—12 May 06	5F-F33
24th Criminal Law Advocacy Course	12—23 September 05	5F-F34
25th Criminal Law Advocacy Course	13—17 March 06	5F-F34
26th Criminal Law Advocacy Course	11—15 September 06	5F-F34
29th Criminal Law New Developments Course	14—17 November 05	5F-F35
2006 USAREUR Criminal Law CLE	9—13 January 06	5F-F35E
<b>INTERNATIONAL AND OPERATIONAL LAW</b>		
5th Domestic Operational Law Course	24—28 October 05	5F-F45
84th Law of War Course	11—15 July 05	5F-F42
85th Law of War Course	30 January—3 February 06	5F-F42
86th Law of War Course	10—14 July 06	5F-F42
44th Operational Law Course	8—19 August 05	5F-F47
45th Operational Law Course	27 February—10 March 06	5F-F47
46th Operational Law Course	7—18 August 06	5F-F47
2004 USAREUR Operational Law Course	29 November—2 December 05	5F-F47E

### 3. Civilian-Sponsored CLE Courses

For addresses and detailed information, see the March 2005 issue of *The Army Lawyer*.

### 4. Phase I (Correspondence Phase), RC-JAOAC Deadline

The suspense for submission of all RC-JAOAC Phase I (Correspondence Phase) materials is ***NLT 2400, 1 November 2005***, for those judge advocates who desire to attend Phase II (Resident Phase) at TJAGLCS in the year 2006 (“2006 JAOAC”). This requirement includes submission of all JA 151, Fundamentals of Military Writing, exercises.

This requirement is particularly critical for some officers. The 2006 JAOAC will be held in January 2006, and is a prerequisite for most judge advocate captains to be promoted to major.

A judge advocate who is required to retake any subcourse examinations or “re-do” any writing exercises must submit the examination or writing exercise to the Non-Resident Instruction Branch, TJAGLCS, for grading by the same deadline (1 November 2005). If the student receives notice of the need to re-do any examination or exercise after 1 October 2005, the notice will contain a suspense date for completion of the work.

Judge advocates who fail to complete Phase I correspondence courses and writing exercises by 1 November 2005 will not be cleared to attend the 2006 JAOAC. If you have not received written notification of completion of Phase I of JAOAC, you are not eligible to attend the resident phase.

If you have any additional questions, contact Lieutenant Colonel JT. Parker, telephone (434) 971-3357, or e-mail JT.Parker@hqda.army.mil.

## 5. Mandatory Continuing Legal Education Jurisdiction and Reporting Dates

<u>Jurisdiction</u>	<u>Reporting Month</u>
Alabama**	31 December annually
Arizona	15 September annually
Arkansas	30 June annually
California*	1 February annually
Colorado	Anytime within three-year period
Delaware	Period ends 31 December; confirmation required by 1 February if compliance required; if attorney is admitted in even-numbered year, period ends in even-numbered year, etc.
Florida**	Assigned month every three years
Georgia	31 January annually
Idaho	31 December, every third year, depending on year of admission
Indiana	31 December annually
Iowa	1 March annually
Kansas	Thirty days after program, hours must be completed in compliance period 1 July to June 30
Kentucky	10 August; completion required by 30 June
Louisiana**	31 January annually; credits must be earned by 31 December
Maine**	31 July annually
Minnesota	30 August annually
Mississippi**	15 August annually; 1 August to 31 July reporting period
Missouri	31 July annually; reporting year from 1 July to 30 June
Montana	1 April annually
Nevada	1 March annually

New Hampshire**	1 August annually; 1 July to 30 June reporting year
New Mexico	30 April annually; 1 January to 31 December reporting year
New York*	Every two years within thirty days after the attorney's birthday
North Carolina**	28 February annually
North Dakota	31 July annually for year ending 30 June
Ohio*	31 January biennially
Oklahoma**	15 February annually
Oregon	Period end 31 December; due 31 January
Pennsylvania**	Group 1: 30 April Group 2: 31 August Group 3: 31 December
Rhode Island	30 June annually
South Carolina**	1 January annually
Tennessee*	1 March annually
Texas	Minimum credits must be completed and reported by last day of birth month each year
Utah	31 January annually
Vermont	2 July annually
Virginia	31 October completion deadline; 15 December reporting deadline
Washington	31 January triennially
West Virginia	31 July biennially; reporting period ends 30 June
Wisconsin*	1 February biennially; period ends 31 December
Wyoming	30 January annually

\* Military exempt (exemption must be declared with state).

\*\*Must declare exemption.

## Current Materials of Interest

### 1. The Judge Advocate General's On-Site Continuing Legal Education Training and Workshop Schedule (2004-2005).

16 - 17 Apr 05	Ayer, MA 94th RRC	International and Operational Law, Administrative and Civil Law	SFC Daryl Jent (978) 784-3933 darly.jent@us.army.mil
23 - 24 Apr 05	Indianapolis, IN INARNG	Contract Law, Administrative and Civil Law	COL George Thompson (317) 247-3491 george.thompson@in.ngb.army.mil
14 - 15 May 05	Nashville, TN 81st RRC	Contract Law, Administrative and Civil Law	CPT Kenneth Biskner (205) 795-1511 kenneth.biskner@us.army.mil
14 - 15 May 05	Chicago (Oakbrook) IL 91st LSO	Administrative and Civil Law, International and Operational Law	CPT Frank W. Ierulli (309) 999-6316 Frank.ierulli@us.army.mil
20 - 22 May 05	Kansas City, MO 89th RRC	Criminal Law, Administrative and Civil Law, Claims	MAJ Anna Swallow (800) 892-7266, ext. 1228 (316) 681-1759, ext. 1228 lynette.boyle@us.army.mil

### 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**

For detailed information of TJAGSA Publications Available Through the LAAWS XXI JAGCNet, see the March 2005 issue of *The Army Lawyer*.

### **4. TJAGLCS Legal Technology Management Office (LTMO)**

The TJAGLCS, U.S. Army, Charlottesville, Virginia continues to improve capabilities for faculty and staff. We have installed new computers throughout TJAGLCS, all of which are compatible with Microsoft Windows XP Professional and Microsoft Office 2003 Professional.

The TJAGLCS faculty and staff are available through the Internet. Addresses for TJAGLCS personnel are available by e-mail at [jagsch@hqda.army.mil](mailto: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 TJAGLCS personnel are available on TJAGLCS 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 TJAGLCS classes, please ensure that your office e-mail is available via the web. Please bring the address with you when attending classes at TJAGLCS. 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 TJAGLCS 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.

### **5. 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 Mrs. Dottie Evans, The Judge Advocate General's School, U.S. Army, ATTN: CTR-MO, 600 Massie Road, Charlottesville, Virginia 22903-1781. Telephone DSN: 521-3278, commercial: (434) 971-3278, or e-mail at [Dottie.Evans@hqda.army.mil](mailto:Dottie.Evans@hqda.army.mil).



By Order of the Secretary of the Army:

**PETER J. SCHOOMAKER**  
*General, United States Army*  
*Chief of Staff*

Official:

*Sandra R. Riley*

SANDRA L. RILEY  
*Administrative Assistant to the*  
*Secretary of the Army*  
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Department of the Army  
The Judge Advocate General's School  
U.S. Army  
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Charlottesville, VA 22903-1781

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