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MILITARY JUSTICE SYMPOSIUM II

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New Developments

Administrative & Civil Law

Legal Assistance

Eligibility for Legal Assistance—Former Spouses

The Legal Assistance Policy Division was recently asked to revisit the question of whether former spouses are eligible for legal assistance services. In the process of denying service to one potential client, a legal assistance office discovered that the glossary section of AR 27-3, *The Army Legal Assistance Program*, provides “[a]s to eligibility for legal assistance, ‘family members’ include,” among others, “[a] sponsor’s former spouse who is eligible for commissary and exchange privileges under the Uniform Services Former Spouses Protection Act and applicable regulations.”¹

Based on the legal assistance office’s request for clarification, the Legal Assistance Policy Division reviewed the history of former spouse eligibility and found the following.

(1) The Uniform Services Former Spouses Protection Act (USFSPA) was part of the 1983 DoD Authorization Act. The USFSPA allowed for the divisibility of military retired pay during a divorce action. It also granted certain benefits to qualified 20/20/20 spouses. These benefits include medical, commissary and PX benefits. It did not include Legal Assistance within the list of eligible benefits.

(2) The 1984 version of AR 27-3, which was published shortly after the USFSPA, did not address the eligibility of former spouses.

(3) The 1989 version of AR 27-3 contained language similar to that in the current regulation, but this eligibility language appeared in the body of the regulation rather than in the glossary.

Based on the language contained in the glossary of the current AR 27-3, it is appropriate to extend legal assistance services to individuals who meet the criteria described above. Those individuals should possess an identification card that says “Unremarried Former Spouse.” —Lieutenant Colonel Oren H. McKnelly

¹ U.S. DEP’T OF ARMY, REG. 27-3, THE ARMY LEGAL ASSISTANCE PROGRAM glossary (21 Feb. 1996).

Military Personnel Law

“Don’t Ask, Don’t Tell”—Update

On 25 March 2010, Secretary of Defense Robert Gates announced Department of Defense (DoD) implementation changes to the “Don’t Ask, Don’t Tell” policy. The modifications affect DoD Instructions 1332.14² and 1332.30.³ Specific items of interest include: only a general officer (GO) may initiate a fact-finding inquiry or administrative separation for homosexual conduct; only an O-5 or above may conduct a fact-finding inquiry; only a GO may separate a Soldier for homosexual conduct; “credible information” required for initiating the fact-finding inquiry should be given under oath and reliance on hearsay should be dissuaded; a “reliable person” who may have motivation to harm a Soldier by raising an allegation should be carefully scrutinized; and information from or provided to the following sources will not be used to substantiate homosexual conduct discharges: lawyers, clergy, psychotherapists (Military Rules of Evidence 502⁴ and 513⁵), medical or public health professionals for the purposes of treatment, professionals involved in domestic or physical abuse assistance, and security clearance investigations. All changes are effective immediately and shall be applied to existing matters.

Army Substance Abuse Program (ASAP), Army Regulation (AR) 600-85

The Department of the Army issued a Rapid Action Revision (RAR) to AR 600-85, *The Army Substance Abuse Program*, on 2 December 2009. The RAR includes a number of notable changes. Battalion commanders should ensure that the number of unit inspection urinalysis tests administered under the “unit sweep” category should be limited to seventy-five percent of the number of random inspections submitted annually.⁶ Additionally, commanders in the grade of O-6 and above are authorized to suspend or reduce drug testing programs while deployed, for safety, security, or operational concerns.⁷

² U.S. DEP’T OF DEF., INSTR. 1332.14, ENLISTED ADMINISTRATIVE SEPARATIONS (28 Aug. 2008) (C1, 29 Mar. 2010).

³ U.S. DEP’T OF DEF., INSTR. 1332.30, SEPARATION OF REGULAR AND RESERVE COMMISSIONED OFFICERS (11 Dec. 2008) (C1, 29 Mar. 2010).

⁴ MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 502 (2008).

⁵ *Id.* MIL. R. EVID. 513.

⁶ U.S. DEP’T OF ARMY, REG. 600-85, THE ARMY SUBSTANCE ABUSE PROGRAM para. 4-2e (2 Feb. 2009) (RAR, 2 Dec. 2009).

⁷ *Id.* para. 4-7b.

Army Grade Determination Review Board (AGDRB), United States Army Reserve (USAR)

On 19 February 2010, USAR Command implemented a policy charging all major subordinate commands and general officer commands with determining whether to initiate an AGDRB review for retirement-eligible officers.

Officer Separations, USAR, AR 135-175

On 9 December 2009, U.S. Army Reserve Command issued procedural requirements for the elimination of officers under AR 135-175, *Separation of Officers*.⁸ Specific changes of interest are that major subordinate command and general officer commanders must notify a respondent officer in writing of an impending involuntary separation action, and the duty may not be delegated. Other procedural requirements and templates may be found in the memorandum.⁹ —Major James A. Barkei

Training Developments Directorate—Distributive Learning

JAGU: The e-Learning Home of The Judge Advocate General's Legal Center and School

The Judge Advocate General's Legal Center and School (TJAGLCS) has a long history of providing excellence in residential education and training to The Judge Advocate General's Corp (JAGC). A key component of TJAGLCS's educational mission in today's Information Age is JAG University (JAGU), the e-learning home for the Army's JAGC. The Training Developments Directorate, Distributed Learning Division (TDD-DL) at TJAGLCS maintains JAGU and uses state-of-the-art technology to distribute operationally-oriented training and education vital to the success of judge advocates in the contemporary operating environment. JAGU, supports a number of e-learning tools, including (1) the online components of resident courses on JAGU, such as the Judge Advocate Officer Advanced Course (JAOAC) and Judge Advocate Officer Graduate Courses, (2) The Judge Advocate General's University Video Library, which houses Standard Training Packages as one of its collections, and (3) standalone, online courses, such as Judge Advocate Tactical Staff Officer Course (JATSOC).

In addition, JAGU contains a number of organizations, such as the JAG Reserve Component, which is managed by the U.S. Army Reserve (USAR) Legal Command in cooperation with TDD-DL. The JAG Reserve Component organization consists of mandatory directives for USAR Soldiers assigned to the Legal Command; however, the directives do not necessarily apply outside of the Legal Command. The JAG Reserve Component organization and other JAGU organizations are open to all JAGU users.

To enroll in an organization, such as the JAG Reserve Component or TJAG Training 2010, users should follow these simple steps:

(1) Log onto JAGU from <https://www.jagcnet.army.mil>.

(2) Click on the "Community" tab found directly to the right of the JAGU Home tab. The "Community" tab provides access to the JAGU Organization Catalog, as well as a direct link to any organizations in which you are enrolled.

(3) Select "JAG Organization," and a listing of the JAG Organizations will appear.

(4) You may enroll in any listed organization by clicking on the "Enroll" button located to the right of the organization's name. You will then be prompted to follow the enrollment procedures specific to the organization.

(5) Once you have enrolled in an organization, the organization will appear under the "Community" tab. Follow steps (1) and (2) for subsequent access to organizations in which you have enrolled. (If you enroll in the JAG Reserve Component, the JAG Reserve Component tab to the right of the JAGU Home tab will become operational; you will be able to access the JAG Reserve Component organization using its tab or the "Community" tab. No other organization has its own tab at this time.)

For further information, including help with enrolling in courses or organizations on JAGU, contact the JAGU Helpdesk at <https://jag.learn.army.mil>. —Ms. Sonya N. Bland-Williams

⁸ U.S. DEP'T OF ARMY, REG. 135-175, SEPARATION OF OFFICERS (28 Feb. 1987).

⁹ Memorandum from Headquarters, U.S. Army Reserve Command, for Deputy Chiefs of Staff, G-1, USAR Major Subordinate Commands (MSC) and General Officer Commands (GOCOM), subject: Procedural Guidance for Officer Involuntary Separations Under Army Regulation (AR) 135-175, Separation of Officers, Chapter 2 (9 Dec. 2009).

Lore of the Corps

The True Story of a Colonel's Pigtail and a Court-Martial

Fred L. Borch III
Regimental Historian & Archivist

Editor's note: "Lore of Corps" is a new monthly feature in The Army Lawyer.

In July 1805, Lieutenant Colonel (LTC) Thomas Butler, Jr. was court-martialed for refusing an order to crop his hair short and for "mutinous conduct" in appearing publicly in command of troops with his hair in a pig-tail or "queue" as it was called. He was found guilty of both charges and sentenced to a year's suspension from command and of pay. What follows is the true story of how Butler—a senior officer who had fought in the Revolutionary War and had spent nearly thirty years in uniform—was prosecuted for refusing to cut off his pigtail.

Hairstyles in the Army have usually reflected the civilian fashion of the period. In the late 1960s, for example, most young men had long hair (whites had hair over their ears; African-Americans wore the popular "Afro"). Moustaches and beards were popular, too. More than a few Soldiers—many of whom were draftees—who wanted to look like their civilian counterparts faced the wrath of their First Sergeant, who usually sported a crew-cut. Those who did not listen to "Top" and get their hair cut shorter always had the option to appear before their company commander for an Article 15.

The Army of the Revolutionary War era was no different. Soldiers in General George Washington's Continental Army wore their hair in accordance with the longish styles of the day. This explains why Continental Army General Orders published by Washington's headquarters required Soldiers "to wear their hair short or plaited (braided) up." But a Soldier also had the option to wear his long hair "powdered and tied."¹

Continental Army personnel who did powder and tie their hair did so with a mixture of flour and tallow, a hard animal fat. Powdered hair was usually tied in a pigtail or queue. According to Randy Steffen in *The Horse Soldier 1776-1943*, cavalymen preferred a "clubbed" hairstyle in which hair, gathered at the back of the neck, was tied in a firm bundle, folded to the side, and then tied again in a club. Mounted Soldiers liked the club because it "was likely to stay in place during the excitement and violent action of a mounted fight."²

The practice of wearing long hair—tied in a club or simple queue—continued in the Army after the Revolutionary War. By the early 1800s, shorter hairstyles had become fashionable in civilian America, but Soldiers continued to prefer to wear their hair in a pigtail. According to an article published in *Infantry Journal* in 1940, this fashion was considered by some Soldiers "almost as a prerogative—a badge of their caste."³

Imagine their horror and dismay when, on 30 April 1801, the Army's Commanding General, Major General (MG) James Wilkinson, announced in General Orders that all hair would be "cropped, without exceptions of persons." The practice of wearing a queue, club, or pigtail had been abolished.

At least one historian has speculated that Wilkinson's decision to end the wearing of long hair in powdered queues, clubs, and other types of pigtails was motivated by a desire to curry favor with then-President Thomas Jefferson, who wore his own hair short and not powdered.⁴ However, this is merely speculation, and it is just as likely that Wilkinson simply believed 18th century aristocratic hair styles were ill-suited to the new United States, where every male citizen was asked to reject old European (and aristocratic) fashions and adopt a true republican lifestyle—and shorter hair.

Regardless of Wilkinson's motivation in directing U.S. Soldiers to cut their hair short, his order provoked considerable resistance. Some Soldiers were outraged because they considered the hair order to be nothing short of required self-mutilation. Others did not want to serve in an Army that infringed on their natural rights. For example, Captain Daniel Bissell wrote his brother, "I was determined not to cut my hair . . . I wrote my Resignation & showed it, but . . . the Col. was not empowered [sic] to accept, nor was the pay Master here."⁵ It seems that Bissell could only resign his commission if he traveled 1800 miles (Bissell was located on a remote frontier post in Wilkinsonville, Georgia) to Washington, D.C., and submitted his resignation papers personally. Being unable to make such a journey, Bissell

¹ RANDY STEFFEN, 1 THE HORSE SOLDIER 1776–1943, at 35 (1977).

² *Id.*

³ Frederick P. Todd, *The Ins and Outs of Military Hair*, INFANTRY J. 166 (Mar.–Apr. 1940).

⁴ Frederick B. Wiener, *The Colonel's Queue*, ARMY 39 (Feb. 1973).

⁵ *Id.*

“was obliged to submit to the act that [he] despised” and cut his hair short.⁶

While the rank-and-file and officers like Bissell eventually acquiesced and cut their queues, there was a lone hold-out: LTC Thomas Butler. He adamantly refused to cut off his pigtail. Initially, at his own request and “in consideration of his infirm health,”⁷ Butler obtained an exemption from the cropping order, but the reprieve, which Butler had obtained from Wilkinson personally, was short-lived. The Secretary of War, Dr. William Eustis, rescinded the exemption.

Butler, his feelings hurt and his honor insulted, refused to comply with the Secretary’s order. As a result, Butler appeared before a general court-martial in Fredericktown (now Frederick), Maryland, in November 1803. He was found guilty of disobeying the April 1801 hair order and was sentenced to be reprimanded.

In authoring the reprimand MG Wilkinson wrote that “rank & responsibility go hand in hand. . . . [T]hey are inseparable.” While the actions of a younger officer might be excused, “gray hairs” should know better, and while such “gray hairs, wounds, scars & a broken constitution present strong claims to our compassion . . . they illy [sic] apply to the vindications of military trespasses.”⁸

Butler, however, continued to resist. After he repeatedly refused to cut off his queue, he was court-martialed a second time in July 1805. This time, a general court-martial sitting in New Orleans, Louisiana, convicted him of two charges: disobedience of a lawful order (to cut his hair) and “mutinous conduct by appearing publicly in

command of troops with his hair cued.”⁹ Knowing that the reprimand imposed by the first court-martial had not corrected Butler’s conduct, the second court-martial sentenced him to be suspended from command and of pay for twelve months. This was a severe punishment, given Butler’s seniority and three decades of service. Major General Wilkinson, then on duty in St. Louis, Missouri, approved this sentence on September 20, 1805.

Unknown to Wilkinson, however, Butler had died thirteen days earlier in New Orleans, probably of yellow fever. He was unrepentant to the end, having refused to crop his hair. In fact, when Butler was near death, he asked his friends to “bore a hole through the bottom of my coffin right under my head, and let my queue hang through it, that the damned old rascal (Wilkinson) may see that, even when dead, I refused to obey his orders.”¹⁰ As a result, Butler was in fact buried in a coffin with a hole that allowed his queue to protrude through it—for all to see and to report to MG Wilkinson.

So ends the true story of a colonel’s pigtail and a court-martial. Twice defeated in life, LTC Butler was seemingly victorious in death.

More historical information can be found at

The Judge Advocate General’s Corps
Regimental History Website

*Dedicated to the brave men and women who have served
our Corps with honor, dedication, and distinction.*

<https://www.jagcnet.army.mil/8525736A005BE1BE>

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ Dorothy van Woerkom, *Colonel Butler’s Queue*, AM. HIST. ILLUSTRATED 25 (Feb. 1973).

¹⁰ *Id.*

Judge Advocates Struggle with Aggravation

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Introduction

The 2009 term of court demonstrated the complexity of applying Rule for Courts-Martial (RCM) 1001(b)(4)¹ to identify proper aggravation evidence. During the term of court, the Court of Appeals of the Armed Forces (CAAF), and the service appellate courts, issued eight published opinions dealing with RCM 1001(b)(4). These eight opinions reflect a continued misunderstanding of proper aggravation evidence at the trial level.² This article will analyze all eight opinions to identify common problems with using aggravation evidence at courts-martial.

There are three facets of RCM 1001(b)(4) practice that all trial participants should study and understand. First, defense counsel must understand the importance of objecting to improper aggravation evidence. Second, all trial participants must understand the importance of the military judge conducting a Military Rule of Evidence (MRE) 403³ balancing test on the record. Third, all trial participants must look beyond the text of RCM 1001(b)(4) to determine what evidence is admissible. These three themes—objection, MRE 403 balancing, and “beyond the rule”—are not all present in each of the term’s eight aggravation cases, but each case addresses at least one of these key themes. Counsel should use these three themes to identify “lessons learned” that they can apply to their advocacy training and preparation.

*United States v. Sanders*⁴—MRE 403 Balancing

During sentencing, the trial counsel submitted a handwritten letter found in the appellant’s pretrial confinement cell.⁵ The letter was the appellant’s last will

and testament, but it also accused the judge of “ma[king] her decesion [sic] prior to trial” and “constantly remain[ing] in eye contact with the female prosecutor.”⁶ It also accused “these people” at his trial of lying and said the “lies were ignored by the judge.”⁷ In the document’s margin was written “I didn’t do anything I was charged with.”⁸ The military judge admitted the letter “as evidence of Appellant’s rehabilitative potential.”⁹

The Air Force Court of Criminal Appeals (AFCCA) held the letter was “clearly aggravation evidence and therefore admissible. . . . We need not address whether the evidence was admissible as evidence of rehabilitative potential because the ‘fact that evidence may be inadmissible under one rule does not preclude its admissibility under a different rule.’”¹⁰

The CAAF took the case “to consider whether the military judge erred by admitting” the letter.¹¹ The appellant argued that the letter was improper rehabilitation and aggravation evidence, that the letter was “highly prejudicial because of its attack on the military judge,” and that the judge failed to conduct an MRE 403 balancing test on the record.¹² The CAAF did not address the theories of admissibility for the letter, but simply held if there was error in admitting the evidence, it “was not prejudicial.”¹³ Although the military judge did not explicitly perform an MRE 403 balancing on the record, the court identified three reasons why there was no error. First, “the military judge stated that she would not consider the personal attack on her” in the letter.¹⁴ Second, “a military judge is presumed to know the law and apply it correctly, absent clear evidence to

opinion does not say when the letter was found, but the language in the letter indicates it was found sometime after the government’s case-in-chief.

⁶ *Id.* at 345.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *United States v. Sanders*, 2008 WL 2852962, at *4 (A.F. Ct. Crim. App. 2008) (unpublished) (quoting *United States v. Gogas*, 58 M.J. 96, 98 (C.A.A.F. 2003)).

¹¹ *Sanders*, 67 M.J. at 344.

¹² *Id.* at 345.

¹³ *Id.* (finding no prejudicial error under Article 59(a) of the UCMJ). Under Article 59(a), UCMJ, an error of law with respect to a sentence can provide a basis for relief only where that error “materially prejudices the substantial rights of the accused.” UCMJ art. 59(a) (2008).

¹⁴ *Sanders*, 67 M.J. at 346.

¹ MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1001(b)(4) (2008) [hereinafter MCM].

² See, e.g., Major Maureen A. Kohn, *Discovery and Sentencing—2008 Update*, ARMY LAW., Mar. 2009, at 35, 45–47 (reviewing *United States v. Maynard*, 66 M.J. 242 (C.A.A.F. 2008), to highlight the importance of objecting to improper aggravation evidence and having the military judge conduct a MRE 403 balancing test for aggravation evidence); Major Maureen A. Kohn, *Military Sentencing 101—Back to the Basics*, ARMY LAW., June 2008, at 70 (analyzing the problems counsel have with presenting aggravation evidence).

³ MCM, *supra* note 1, MIL. R. EVID. 403.

⁴ 67 M.J. 344 (C.A.A.F. 2009).

⁵ *Id.* at 345. The accused was convicted by a judge alone general court-martial of forcible sodomy, assault, and indecent assault. *Id.* at 344. The

the contrary.”¹⁵ Third, the court looked at the entire record and found “no indication that the military judge gave significant weight to [the prejudicial aspects] of the letter in arriving at the adjudged sentence.”¹⁶ Although the *Sanders* court did not fully discuss the importance of an MRE 403 balancing on the record, it is clear that an MRE 403 balancing on the record will make it easier for an appellate court to analyze the admissibility of aggravation evidence.

***United States v. Stephens*¹⁷—“Beyond the Rule” and MRE 403 Balancing**

The appellant was convicted by members of attempted carnal knowledge, attempted sodomy, and indecent acts.¹⁸ The victim was the appellant’s thirteen-year-old cousin by marriage.¹⁹ During sentencing, the girl’s father provided standard victim impact evidence, but then the trial counsel asked, “How about the effect of this process, the investigation and her testifying and what not, how has that impacted her and how has it impacted you?”²⁰ The defense counsel objected because the question “penalize[d] the Defendant for invoking his right to have a trial and the process involved with that.”²¹ The military judge overruled the objection “in one sense,” saying the trial counsel had to “focus it a little more.”²² Specifically, the military judge said the witness “can go through what the effect of it [sic] since this has come about until now and she has had to testify, the impact and the effect on her and that means as she has gone through the process, just the impact, emotionally on her.”²³ With that less than clear guidance, trial counsel did not re-phrase, or “focus,” the question, and the witness answered:

It has been totally devastating, what she has had to go through, what she had to put up with; the constant retelling to different people, to different systems of the court system. I mean, to keep bringing it slamming it in her face, I mean, ya’ll just don’t have a clue what this has done to my daughter. She is nowhere near the same

daughter that she was before. It has just totally changed her one hundred percent.²⁴

Stephens was convicted, and the AFCCA affirmed.²⁵

The CAAF identified two issues with the father’s testimony but ultimately held it was “relevant victim impact evidence and properly admitted under RCM 1001(b)(4).”²⁶ The issues that concerned the court directly relate to two of three facets of RCM 1001(b)(4) practice that are the focus of this article. First, the text of RCM 1001(b)(4) does not provide all of the answers for the admissibility of aggravation evidence. The court found that the father’s testimony about the trial’s impact on his daughter “certainly comes within the rather broad ambit of this rule. . . . [but] a rule or other provision of the *Manual for Courts-Martial* cannot sanction a violation of Appellant’s constitutional rights.”²⁷ This is a reminder to trial counsel that the broad language of RCM 1001(b)(4)²⁸ has been both expanded and limited by case law in many different areas. In this case, the concern is that the father’s testimony, although proper on the face of the rule, improperly commented on the appellant’s right to a trial and to confront the witnesses against him.²⁹

The court found the testimony proper, however, because “there was no explicit comment by the trial counsel or the father concerning appellant’s invocation of his rights but rather, a brief reference to the effect of the entire proceeding (including, but not limited to, the trial) on Appellant’s victim.”³⁰ The court believed that the father’s “brief reference” was different from earlier cases about impermissible comment on an accused’s right to a trial

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at 236.

²⁷ *Id.* at 235.

²⁸ The plain language of the rule would seem to be inherently permissive in nature: “The trial counsel may present evidence as to any aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty.” MCM, *supra* note 1, R.C.M. 1001(b)(4).

²⁹ *Stephens*, 67 M.J. at 235. The *Stephens* court distinguished the facts of the case from the cases cited by the appellant, where the prosecutor “explicitly commented” on the accused’s constitutional rights. *Id.* at 236. See generally *United States v. Mobley*, 31 M.J. 273 (C.M.A. 1990) (vacating and remanding when trial counsel asked rhetorical questions of a non-testifying accused during closing argument and provided his own answers); *United States v. Carr*, 25 M.J. 637 (A.C.M.R. 1987) (reassessing sentence when trial counsel was allowed to argue in aggravation about the impact of confrontation and cross-examination on the victim); *Burns v. Gammon*, 260 F.3d 892, 896 (8th Cir. 2001) (noting that “[t]he prosecutor asked the jury, while considering guilt and sentencing, to consider the fact that Burns, by exercising his constitutional right to a jury trial and to confront witnesses, forced the victim to attend trial, take the stand and relive the attack”).

³⁰ *Stephens*, 67 M.J. at 236.

¹⁵ *Id.*

¹⁶ *Id.* (noting that the military judge only sentenced the appellant to fourteen years confinement out of a potential sentence of life without eligibility for parole).

¹⁷ 67 M.J. 233 (C.A.A.F. 2009), *cert. denied*, 130 S. Ct. 139 (2009).

¹⁸ *Id.* at 234.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.* at 235.

where the questioned comments were part of an overall theme of the case for the Government during argument.³¹

An issue left open by the court, however, is what constitutes a permissible “brief reference.” With no defined limit for what is a permissible comment, trial counsel should be very careful when discussing the effect of the trial on a victim.³² The court seemed to recognize this open area and warned trial counsel “to use care in eliciting testimony that may cross the line into impermissible comment on an accused’s invocation of his constitutional rights.”³³

The second sentencing lesson learned from *Stephens* is the need to conduct an MRE 403 balancing on the record. The MRE 403 balancing is required for all sentencing evidence.³⁴ In this case, the military judge “limited the ambit of the father’s testimony, [but] she did not perform the balancing test on the record.”³⁵ When a judge performs the balancing test on the record, the “ruling will not be overturned absent a clear abuse of discretion; the ruling of a military judge who fails to do so will receive correspondingly less deference.”³⁶ Even with this lesser amount of deference accorded to the military judge, the court found no abuse of discretion because there was only a “remote” chance the “court members might misuse [the father’s] testimony as a comment on Appellant’s right to confront and cross-examine the witness.”³⁷

The end result in *Stephens* was the same as *Sanders*—no prejudice—but the discussion of MRE 403 in *Stephens* should alert trial counsel of the need to protect the record. If the balancing test is not on the record, the military judge’s decision to admit aggravation evidence will be given less deference on appeal than most judicial decisions. In response to a defense objection to aggravation evidence, trial counsel should not only explain why a piece of evidence satisfies RCM 1001(b)(4) and applicable case law, but also articulate why it passes the MRE 403 balancing test. If the military judge overrules the objection and allows the evidence, trial counsel must then ensure the MRE 403 balancing test is incorporated into the record. Of course, defense counsel does not always object, so trial counsel are encouraged to use an aggressive pre-trial motion practice.

³¹ *Id.* at 235–36. See *supra* note 29.

³² This open issue is even more troubling to trial counsel considering that the two-judge concurrence found the father’s testimony improper. *Stephens*, 67 M.J. at 237 (Baker, J., concurring) (finding that the “military judge was obliged to address whether the proffered testimony was directly related to the offense and legally relevant under Military Rule of Evidence (M.R.E.) 403”). The opinion concurred in the result, however, because it found no prejudice. *Id.* at 236–237 (Baker, J., concurring).

³³ *Id.* at 236.

³⁴ *United States v. Rust*, 41 M.J. 472, 478 (C.A.A.F. 1995).

³⁵ *Stephens*, 67 M.J. at 235.

³⁶ *Id.*

³⁷ *Id.* at 236.

These motions should fully discuss RCM 1001(b)(4) and MRE 403 to create an adequate record of all relevant issues.

*United States v. Scheurman*³⁸—MRE 403 Balancing

The appellant was convicted of two specifications of absence without leave (AWOL) by a judge-alone general court-martial.³⁹ The appellant’s first AWOL occurred when the appellant did not return to Iraq after mid-deployment leave in the United States.⁴⁰ While on leave, the appellant heard his unit was going to be extended, so he did not return.⁴¹ After spending approximately three weeks in a civilian behavioral health center for alleged post-traumatic stress disorder (PTSD), the appellant eventually surrendered to military control and underwent medical evaluation.⁴² When military medical officials cleared him to return to Iraq, the appellant went AWOL again for five months, eventually turning himself in and requesting administrative separation for PTSD.⁴³

The appellant’s platoon sergeant from the time period after the second AWOL testified during presentencing. He testified that he saw the appellant “‘degrade’ the Army to new soldiers in the unit, saying they did not know what they were getting into, how bad the Army was, and things along that line in general.”⁴⁴ The platoon sergeant felt this “badmouth[ing]” of the Army had a negative impact on the Army.⁴⁵ The military judge overruled a defense objection that the Government was using specific instances of conduct to show a lack of rehabilitative potential.⁴⁶ On appeal to the Army Court of Criminal Appeals (ACCA), the appellant asserted the platoon sergeant’s comments were improper rehabilitation evidence, improper aggravation evidence, and also failed the MRE 403 balancing test.⁴⁷

The lesson learned in this case deals with MRE 403 balancing.⁴⁸ Similar to *Stephens*, the military judge failed to

³⁸ 67 M.J. 709 (A. Ct. Crim. App. 2009).

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 709–10.

⁴³ *Id.* at 710.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ The court found the platoon sergeant’s testimony was proper evidence in aggravation. *Id.* at 711–12 (finding that Army was the victim in the case and that “appellant’s remarks demonstrate a lack of remorse for the offenses of which he was convicted and, as such, are relevant in fashioning an appropriate response”). The court did not analyze if it was also proper evidence of rehabilitative potential, “for the fact that evidence may be inadmissible under one rule does not preclude its admissibility under a

conduct the MRE 403 balancing on the record, so the ACCA “conducted our own balancing” with “less deference . . . to the judge’s ruling.”⁴⁹ The court felt the platoon sergeant’s testimony was “very succinct and balanced” and showed that the appellant’s derogatory statements “had the potential to affect morale [even though they] had no negative impact.”⁵⁰ The court’s actual MRE 403 analysis, although only one paragraph long, noted that the “trial was by military judge alone” and found no prejudice.⁵¹ Trial counsel should note the comment about the case being in front of a military judge-alone. Military judges are “presumed to know the law and apply it correctly.”⁵² In a trial by members, however, the appellate court will not presume the panel considered evidence only for a proper limited purpose in the absence of a judicial instruction to do so. In members cases, therefore, it is even more important for trial counsel to get the MRE 403 balancing on the record and to get proper limiting instructions.

***United States v. Fisher*⁵³—Objection and “Beyond the Rule”**

The appellant was convicted, pursuant to his pleas, of two specifications of wrongful possession of a controlled substance with intent to distribute.⁵⁴ The appellant confessed to the charged drug offenses on 30 May 2007, charges were preferred in October 2007, and the trial was finished on 8 January 2008.⁵⁵ During sentencing, the trial counsel called one witness, the appellant’s first sergeant, who testified (1) that the length of time it took between offense and trial caused the command to be perceived as “soft on-on the major crimes,” and (2) that the trial hurt the command’s mission because of the large number of man-hours required to deal with the case.⁵⁶ Defense counsel did not object to the testimony or the questions that elicited it, but during cross-examination, defense counsel got the witness to admit that “at some level” the speed of the trial process was determined by the command and that the accused attempted to plead guilty in November.⁵⁷ The defense’s case in extenuation and mitigation included good

military character evidence and witness testimony about the appellant’s good duty performance in Afghanistan.⁵⁸ Trial counsel’s sentencing argument referenced the first sergeant’s testimony to explain the “aggravating impact on the unit” of the appellant’s actions.⁵⁹ Specifically, the trial counsel cited “the man-hours used in dealing with this incident, approximately 60 man-hours, dealing with the legal paperwork, counselings, and taking the accused to and from appointments,” as well as “the crime itself.”⁶⁰ Defense did not object to the argument and the military judge made no comment on the evidence or argument.⁶¹

The ACCA court found that the judge committed “clear, obvious error” by admitting the first sergeant’s testimony and allowing trial counsel to comment on it during argument.⁶² Plain or clear error is error “‘so egregious and obvious’ that a trial judge and prosecutor would be ‘derelict’ in permitting it in a trial held today.”⁶³ Despite this error, the court found no material prejudice and found the appellant was “not entitled to any relief.”⁶⁴

The two lessons learned in this case are failure to object and looking beyond the text of RCM 1001(b)(4). Defense’s failure to object to the testimony or argument waived any issue related to improper aggravation evidence “absent plain error.”⁶⁵ “Plain error is established when [the defense shows] (1) an error was committed; (2) the error was plain, or clear, or obvious; and (3) the error resulted in material prejudice to substantial rights.”⁶⁶ Aside from the defense’s heightened burden of showing “plain error” and “material prejudice,” the *Fisher* court pointed out two additional difficulties in winning a plain error argument on appeal. First, “in a judge-alone trial, an appellant faces a particularly high hurdle. A military judge is presumed to know the law and apply it correctly.”⁶⁷ Second, a “military judge is presumed to ‘distinguish between proper and improper sentencing arguments.’”⁶⁸ Because of this presumption of judicial correctness, defense counsel need to articulate their objections to aggravation evidence on the record. However, sometimes this can present a tactical dilemma for defense counsel. In *Fisher*, the court noted “instead of objecting,

different rule.” *Id.* at 711 (quoting *United States v. Gogas*, 58 M.J. 96, 98 (C.A.A.F. 2003)).

⁴⁹ *Scheurman*, 67 M.J. at 712.

⁵⁰ *Id.* “The relevance of an offender’s attitude toward his offense ‘can hardly be exaggerated.’” *Id.* (citations omitted).

⁵¹ *Id.*

⁵² *United States v. Fisher*, 67 M.J. 617, 622 (A. Ct. Crim. App. 2009).

⁵³ 67 M.J. 617 (A. Ct. Crim. App. 2009).

⁵⁴ *Id.*

⁵⁵ *Id.* at 618.

⁵⁶ *Id.* at 618–19 (estimating the command spent nearly sixty man-hours of time on the appellant’s case).

⁵⁷ *Id.* at 619.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* at 619–20.

⁶² *Id.* at 621.

⁶³ *Id.* at 620 (citations omitted).

⁶⁴ *Id.* at 623.

⁶⁵ *Id.* at 620.

⁶⁶ *United States v. Hardison*, 64 M.J. 279, 281 (C.A.A.F. 2007) (citing *United States v. Powell*, 49 M.J. 460, 463–65 (C.A.A.F. 1998)).

⁶⁷ *Fisher*, 67 M.J. at 622 (citations omitted).

⁶⁸ *Id.* (citations omitted).

trial defense counsel chose to attack the improper evidence through effective cross-examination, and to attack the improper argument through counter-argument.”⁶⁹ Although these “tactical choices effectively minimized both [the first Sergeant’s] testimony and trial counsel’s argument,”⁷⁰ the court noted that “[a]ppellant’s arguments would carry more weight if trial defense counsel objected at trial or if this case was tried before members instead of by military judge alone.”⁷¹

If the military judge had admitted the improper evidence over defense objection, the Government would have had the burden to show the admitted evidence was harmless, instead of defense having to show plain error.⁷² Objecting at trial does not guarantee an accused success, but it does shift the burden on appeal and also creates a more developed record.⁷³ The tactical decision of when to object is closely related to the second lesson learned in *Fisher*.

Defense counsel cannot make sound objections if they do not understand the scope of RCM 1001(b)(4). In *Fisher*, the Government conceded the first sergeant’s testimony about the time spent on the court-martial, and the trial counsel’s related argument, were both error.⁷⁴ The court held the testimony and argument were also “clear, obvious error.”⁷⁵ An error of this caliber arises when counsel and judges misapply or misunderstand the application and scope of RCM 1001(b)(4). Facially, the rule appears very broad, but it requires a “‘higher standard’ than ‘mere relevance.’”⁷⁶ In addition to this higher relevance standard, existing case law may place limitations on specific types of aggravation evidence. In *Fisher*, counsel did not seem to understand one of these limitations, specifically, the limitation on commenting on an accused’s constitutional right to a trial.

In *United States v. Stapp*,⁷⁷ the ACCA held that “evidence of the administrative burden of the court-martial process is ordinarily not ‘evidence of significant adverse impact on the mission, discipline, or efficiency of the command directly and immediately resulting from the accused’s offense.’”⁷⁸ When the trial counsel in *Fisher* discussed the “administrative burdens . . . the time spent counseling . . . and the length of time between the offense and the trial”⁷⁹ in his closing argument, he clearly violated the holding in *Stapp*. This is just one example of how case law limits evidence that appears to be proper under the text of RCM 1001(b)(4). The “beyond the rule” lesson in this case is that simply arguing a but-for proposition—but for the accused’s crime, this aggravation evidence “X” would not have occurred—will not always carry the day when trying to admit aggravation evidence.

*United States v. McDonald*⁸⁰—Objection

The appellant was convicted, *inter alia*, by a judge-alone special court-martial of one specification of wrongful use of marijuana, and four unauthorized absence offenses.⁸¹ During sentencing, the appellant’s supervisor testified about the negative impact the appellant’s absence had on the unit’s ability to conduct its mission.⁸² When the trial counsel asked the supervisor about the appellant’s drug use, the witness said “the first I heard of it” was “the other day when you called me.”⁸³ During argument, the trial counsel said, “His drug use alone *and the impact that it has on our service and the unit of CUTTER SHERMAN as a law enforcement cutter* deserves a bad conduct [sic] discharge.”⁸⁴ The defense counsel did not object to the trial counsel’s argument.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* at 623.

⁷² *Id.* at 622.

⁷³ In dictum, the *Fisher* court made a similar observation regarding military judges:

While not necessary to trigger the presumption that he knows the law and follows it, a transparent statement by the military judge that he is not considering improper evidence or argument forcefully moots any potential issues and, we believe, further increases the perception of fairness in the military justice system.

Id. at 623 n.5.

⁷⁴ *Id.* at 621.

⁷⁵ *Id.*

⁷⁶ *United States v. Rust*, 41 M.J. 472, 478 (C.A.A.F. 1995) (citation omitted).

⁷⁷ 60 M.J. 795 (A. Ct. Crim. App. 2004).

⁷⁸ *Id.* at 801 (quoting RCM 1001(b)(4)). In *Stapp*, the court thought that allowing such testimony would enable the Government “to argue to the sentencing authority at trial that an accused may be punished more harshly for the inconvenience of the trial. This would be akin to allowing comment upon the right to plead not guilty or remain silent, and we cannot countenance such an unjust outcome.” *Id.*

⁷⁹ *Fisher*, 67 M.J. at 621.

⁸⁰ 67 M.J. 689 (C.G. Ct. Crim. App. 2009).

⁸¹ *Id.* at 689. The four absence offenses consisted of three specifications of unauthorized absence and one specification of missing movement. *Id.* The appellant was also convicted of one specification of disrespect toward a superior commissioned officer. *Id.* at 690.

⁸² *Id.* at 690–91.

⁸³ *Id.* at 691.

⁸⁴ *Id.* (emphasis in original).

The Coast Guard Court of Criminal Appeals (CGCCA) found error, but not plain error, and therefore did not find prejudice.⁸⁵ The error was that the trial counsel argued facts not in evidence because the supervisor's testimony never linked the drug use to the mission impact.⁸⁶ Mission impact is a proper form of aggravation evidence,⁸⁷ but the supervisor only discussed how the appellant's absence affected the mission.⁸⁸ The court determined the argument was not plain error because "it was a small part of the argument amid other portions that were proper."⁸⁹ The court pointed out that "plain error before a military judge sitting alone is rare."⁹⁰

The lesson learned here is the consequence of failing to object to improper aggravation evidence. The lack of objection meant the court reviewed the alleged error using a plain error analysis.⁹¹ It is unclear why the defense failed to object in this case, but perhaps it was simply a failure to pay close attention to the trial counsel's argument. The trial counsel did not violate RCM 1001(b)(4); rather, trial counsel argued facts not in evidence, so the argument may have sounded "legally" proper even if it was not "factually" proper. The next case shows how essentially the same argument was both legally and factually proper.

*United States v. Harris*⁹²—"Beyond the Rule"

The appellant was convicted of wrongful distribution and use of ecstasy, and wrongful use of cocaine.⁹³ During sentencing, the Government called the operations officer of the appellant's cutter.⁹⁴ Without defense objection, the operations officer testified that prior to discovery of the appellant's drug use, the cutter participated in a "counter-narcotics patrol" that "interdicted two shipments of illegal cocaine."⁹⁵ The operations officer "was personally appalled to learn of the Appellant's drug use, as it was wholly inconsistent to the counter-narcotics mission of the [cutter],

and opined that as a result of the Appellant's drug use, the entire counter-narcotics patrol was 'a waste.'"⁹⁶ Trial counsel highlighted this testimony during argument as evidence in aggravation.⁹⁷

The CGCCA found that the operations officer's testimony was proper aggravation evidence.⁹⁸ If it seems like this case is a straightforward application of the text of RCM 1001(b)(4), it is. The text of the rule clearly allows for mission impact,⁹⁹ and the operations officer was clearly qualified to offer opinions on that impact. His testimony that he was personally appalled meant "[t]he military judge could have inferred from this evidence that the morale of the entire unit was similarly affected, to the likely detriment of its mission, discipline or efficiency."¹⁰⁰ This simple example of good advocacy—putting facts on the record that demonstrate proper aggravation evidence and then arguing those facts—was something not present in *McDonald*.¹⁰¹

The learning point for trial counsel is to make sure they lay a proper foundation for their sentencing argument. The *Harris* and *McDonald* cases highlight how close the line is between proper and improper aggravation evidence.¹⁰² There is a more nuanced layer of analysis to these two cases, however, which may be why the CGCCA published two opinions on the issue. In both cases, the appellant worked for a unit with a law enforcement mission. There is a strong temptation for a trial counsel to use the law enforcement link in aggravation. What better way to show aggravation than by showing that the accused is a member of the law enforcement community, a community meant to protect society from criminals? "[I]t is natural that government counsel would seek to link drug use by Coast Guard personnel with the mission itself. But . . . those linkages cannot be made universally; R.C.M. 1001(b)(4) requires more."¹⁰³ The "more" really is just a strict interpretation of the "directly relating" language of RCM 1001(b)(4). Remember, aggravation evidence requires a "higher standard

⁸⁵ *Id.* at 691–92.

⁸⁶ *Id.* at 691.

⁸⁷ MCM, *supra* note 1, R.C.M. 1001(b)(4) ("Evidence in aggravation includes . . . evidence of significant adverse impact on the mission, discipline, or efficiency of the command directly and immediately resulting from the accused's offense.").

⁸⁸ *McDonald*, 67 M.J. at 691.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* at 690. Plain error exists if the appellant shows "(1) that there was error, (2) that the error was plain or obvious, and (3) that the error materially prejudiced one of Appellant's substantial rights." *Id.*

⁹² 67 M.J. 550 (C.G. Ct. Crim. App. 2009).

⁹³ *Id.* at 551.

⁹⁴ *Id.* at 552.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* at 553.

⁹⁹ "Evidence in aggravation includes . . . evidence of significant adverse impact on the mission, discipline, or efficiency of the command directly and immediately resulting from the accused's offense." MCM, *supra* note 1, R.C.M. 1001(b)(4).

¹⁰⁰ *Harris*, 67 M.J. at 553 (finding the operations officer's testimony was proper aggravation evidence).

¹⁰¹ See *supra* notes 80–91 and accompanying text.

¹⁰² Even though the *McDonald* court did not find prejudice, the trial counsel's use of facts not in evidence was still technically an error. See *supra* notes 85–90 and accompanying text.

¹⁰³ *Harris*, 67 M.J. at 553 (citing *United States v. Skidmore*, 64 M.J. 655 (C.G. Ct. Crim. App. 2007)). In *Skidmore* the trial counsel also improperly attempted to link the accused's drug use to the unit's law enforcement mission. *Skidmore*, 64 M.J. at 661.

than mere relevance.”¹⁰⁴ The “more” required when using law enforcement status in aggravation is laying a proper foundation with a witness who can link the crime and status to an identifiable impact on the unit or mission.

*United States v. Moore*¹⁰⁵—“Beyond the Rule” and Objection

Moore is one of two AFCCA cases this past term that analyzes a specific type of aggravation evidence: uncharged misconduct. Although *Moore* was eventually reversed in a summary disposition by the CAAF,¹⁰⁶ the analysis used by the AFCCA is still relevant and informative. In *Moore*, the appellant pled guilty and was convicted, at a judge-alone special court-martial, of wrongful use of alprazolam (Xanax), divers uses of marijuana, and larceny.¹⁰⁷ During providency, the appellant admitted to marijuana use on divers occasions between 28 December 2007 and 7 February 2008, which was within the charged period of 4 December 2007 and 8 February 2008.¹⁰⁸ There was no discussion of any other marijuana use during the providency inquiry.¹⁰⁹ During presentencing, the Government introduced, with no objection, two reports from the base’s “Drug Demand Reduction Program” showing the appellant tested positive for marijuana on random urinalysis tests on 18 March 2008 and 6 May 2008.¹¹⁰ The reports were not “full drug testing report[s],” and there was no evidence the “appellant was ever made aware of these test results or suggesting they were a part of his personnel records.”¹¹¹ The trial counsel argued that the reports were evidence of lack of potential for rehabilitation, but on appeal, both sides agreed that the only proper basis for the reports could have been as evidence in aggravation.¹¹²

The *Moore* court held that the appellant’s uncharged drug use was “certainly” aggravation, just not RCM 1001(b)(4) aggravation.¹¹³ To understand the court’s holding, it is helpful to revisit some of the basic principles underlying the use of aggravation evidence. First, there are “two primary limitations” on the use of aggravation evidence: (1) Aggravation evidence “must be ‘directly

relating’ to the offenses of which the accused has been found guilty,” and (2) the evidence must pass an MRE 403 balancing test.¹¹⁴ The directly relating limitation “imposes a ‘higher standard’ than ‘mere relevance.’”¹¹⁵ Even if you meet all of these requirements, the analysis to RCM 1001(b)(4) indicates the section “does not authorize introduction in general of evidence of . . . uncharged misconduct.”¹¹⁶ Although the language of the rule and the analysis indicate that uncharged misconduct is generally not admissible during sentencing, case law—looking “beyond the rule”—shows that uncharged misconduct may be admissible in specific situations.

Uncharged misconduct in aggravation may be admissible if it is part of a “continuous course of conduct” related to the charged offenses.¹¹⁷ In *Moore*, the court looked at three Court of Military Appeals (CMA) cases that allowed uncharged misconduct as aggravation when it showed “the continuous nature of the charged conduct and its full impact on the military community.”¹¹⁸ If the Government can show this continuous course of conduct, then the uncharged misconduct can be admitted as “directly related” to the charged offenses. In 2007, the CAAF further refined this analysis in *United States v. Hardison*.¹¹⁹ In *Hardison*, the accused was convicted of a single specification of drug use and the Government tried to introduce evidence of the accused’s pre-service drug use as aggravation.¹²⁰ The court said uncharged misconduct used in aggravation must be “closely related in time, type, and/or often outcome, to the convicted crime.”¹²¹ Although *Hardison*’s use of drugs after signing a pledge to not use them was “morally ‘aggravating,’ it [did] not logically or

¹⁰⁴ *United States v. Rust*, 41 M.J. 472, 478 (C.A.A.F. 1995).

¹⁰⁵ 67 M.J. 753 (A.F. Ct. Crim. App. 2009).

¹⁰⁶ *United States v. Moore*, No. 09-5005/AF (C.A.A.F. Jan. 22, 2010).

¹⁰⁷ 67 M.J. at 754.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.* at 754–55.

¹¹² *Id.* at 755. In a footnote, the court also noted that there was no evidence the records were “personnel records” admissible under RCM 1001(b)(2). *Id.* at n.2.

¹¹³ *Id.* at 756.

¹¹⁴ *Id.* at 755 (citing *United States v. Wilson*, 35 M.J. 473, 476 n.5 (C.M.A. 1992)).

¹¹⁵ *United States v. Rust*, 41 M.J. 472 (C.A.A.F. 1995) (quoting *United States v. Gordon*, 31 M.J. 30, 36 (C.M.A. 1990)).

¹¹⁶ MCM, *supra* note 1, R.C.M. 1001(b)(4) analysis, at A21-72 (2008).

¹¹⁷ *Moore*, 67 M.J. at 755.

¹¹⁸ *Id.* (quoting *United States v. Ross*, 34 M.J. 183, 187 (C.M.A. 1992)). In *Ross*, the accused was convicted of altering four test scores during a specific time period, but the court allowed aggravation evidence of approximately twenty to thirty uncharged other altered test scores. *Ross*, 34 M.J. at 187. See also *United States v. Shupe*, 36 M.J. 431, 436 (C.M.A. 1993) (allowing aggravation evidence of multiple distributions of LSD as part of a conspiracy that went beyond the overt acts admitted by the accused during providency because the additional distributions showed “an extensive and continuing scheme to introduce and sell LSD to numerous buyers assigned to the naval base”); *United States v. Mullens*, 29 M.J. 398, 400 (C.M.A. 1990) (allowing aggravation evidence of uncharged indecent liberties contained in a stipulation of fact, when the uncharged misconduct “evidenced a continuous course of conduct involving the same or similar crimes, the same victims, and a similar situs within the military community, i.e., the servicemember’s home”).

¹¹⁹ 64 M.J. 279 (C.A.A.F. 2007).

¹²⁰ *Id.* at 280. The evidence of the drug use was in the form of a drug waiver, and a pledge to not use drugs, in the accused’s enlistment paperwork. *Id.*

¹²¹ *Id.* at 282.

legally make her admissions of prior service drug use ‘directly related’ to the charged offense.”¹²²

Turning back to the specific facts in *Moore*, the court held that the continued use of drugs while in the rehabilitation program was not “directly related” to the charged offenses. “To conclude otherwise would simply result in the conclusion that all drug usage is aggravating to any charged drug usage.”¹²³ Even though Moore’s uncharged drug use was very close in time to his charged offenses, the AFCCA found it simply did not meet the heightened relevance requirement under RCM 1001(b)(4).¹²⁴ The *Moore* case thus serves as a reminder for counsel to look “beyond the rule” when dealing with RCM 1001(b)(4). In dictum, the *Moore* court sensed that Government counsel may become frustrated with an inability to satisfy RCM 1001(b)(4), so it suggested three alternatives: (1) “incorporating the essence of [the] misconduct in opinion testimony as to an accused’s rehabilitation potential”; (2) initially charging the other misconduct, or referring later misconduct to a new court-martial; and (3) admitting the misconduct as evidence found in personnel records under RCM 1001(b)(2).¹²⁵

The last learning point from the *Moore* case is the recurring theme of objecting at trial. Defense counsel did not object to the admission of the drug tests or to the Government’s sentencing argument, so the court applied plain error analysis.¹²⁶ The court found plain error, but more importantly, under the third prong of the plain error analysis the court found material prejudice.¹²⁷ Based on this prejudice, the court reassessed the sentence and reduced the adjudged confinement from five to four months.¹²⁸ The AFFCA’s plain error analysis was the basis for the CAAF’s reversal: “We conclude that in light of the continuing offense doctrine and a lack of material prejudice to Appellee in this case, there was no plain error regarding the admission of two urinalysis tests on sentencing in this military judge alone trial.”¹²⁹ This reversal reinforces the two key learning points in the case. First, applying the continuing offense

doctrine to the use of aggravation evidence is very fact specific and may be a close call, requiring trial counsel to carefully “look beyond the rule.” Second, objecting at trial is defense counsel’s best chance for success. In its reversal of *Moore*, the CAAF said, “we do not decide whether the offered material might properly have been omitted as aggravation evidence under Rule for Courts-Martial 1001(b)(4) had there been a timely objection.”¹³⁰ As discussed previously, counsel should research the full application of RCM 1001(b)(4) for each piece of aggravation evidence they plan to offer. Proper research and advocacy at the trial stage will ensure proper decisions at the trial level and less error on appeal.

*United States v. Rhine*¹³¹—“Beyond the Rule”

Rhine is the second AFCCA case that addresses the use of uncharged misconduct in aggravation. The appellant in *Rhine* was convicted by a judge-alone general court-martial of violating a no-contact order, stalking, and two specifications of willful damage to the non-military property of another.¹³² During sentencing, the Government wanted to introduce, over defense objection, multiple acts of uncharged misconduct by the appellant as aggravation evidence to explain the magnitude of the victim’s fear from the charged stalking offense.¹³³ A detailed summary of the facts will make it easier to properly analyze *Hardison*’s “closely related” test for using uncharged misconduct in aggravation.

The appellant and Airman (Amn) KRS were enlisted members of the Air Force stationed in the United Kingdom (UK).¹³⁴ Airman KRS was married but was engaged in a sexual relationship with the appellant.¹³⁵ When Amn KRS’s husband arrived in the UK, she told the appellant they could no longer be together sexually, but they could be friends.¹³⁶ Apparently, the appellant did not take this news well. In short, the appellant went to Amn KRS’s on-base residence on two separate occasions, in violation of two separate no-contact orders, and vandalized Amn KRS’s cars.¹³⁷ He slashed the tires on two vehicles, and scratched “slut” on the hood of one car and “Chad [the heart symbol] U” on the

¹²² *Id.* at 283.

¹²³ *Moore*, 67 M.J. at 756.

¹²⁴ *Id.*

¹²⁵ *Id.* at 756–57. The court noted that there was “no evidence to suggest that the [uncharged failed urinalysis tests] were included in the appellant’s personnel records.” *Id.* at 755 n.2.

¹²⁶ *Id.* at 757.

¹²⁷ *Id.* (“It is difficult to imagine something more damaging to an appellant’s sentencing case than evidence that the appellant has continued the very conduct for which his court-martial was pending.”). See *supra* notes 62–66 and accompanying text for a discussion of plain error analysis.

¹²⁸ *Moore*, 67 M.J. at 757. The accused was initially sentenced to a bad conduct discharge, reduction to E-1, and confinement for four months. The reassessed sentence did not change the punitive discharge or reduction. *Id.*

¹²⁹ *United States v. Moore*, No. 09-5005/AF (C.A.A.F. Jan. 22, 2010) (noting the “absence of a more developed trial record”).

¹³⁰ *Id.*

¹³¹ 67 M.J. 646 (A.F. Ct. Crim. App. 2009).

¹³² *Id.* at 647.

¹³³ *Id.* at 648. When the defense objected to the trial counsel’s questioning of the victim on this issue, the trial counsel told the military judge he was using the testimony as “[f]acts and circumstances and the effect it had on the victim. We’re not alleging that this misconduct per se is at issue; it’s not. It goes to state of mind of the victim, her fear based on the events that we did allege.” *Id.*

¹³⁴ *Id.* at 647.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

other car.¹³⁸ In further violation of the no-contact order, the appellant then went to Amn KRS's on-base home a third time, banged on her window with his Leatherman, and then sent her text messages apologizing for the vandalism and indicating that he was going to kill himself.¹³⁹

During presentencing, the trial counsel called Amn KRS. Her testimony covered five examples of misconduct by the appellant that were either uncharged or not within the time period alleged in the charged offenses.¹⁴⁰ First, she explained how the appellant would touch her in front of her husband and do sexual things in the presence of her husband, such as exposing his penis to Amn KRS from the backseat of a car while Amn KRS was a passenger and her husband was driving.¹⁴¹ Second, she identified another occasion where the appellant indicated he might kill himself.¹⁴² Airman KRS and her husband went to the appellant's dorm room, but only Amn KRS entered.¹⁴³ The appellant had red, swollen knuckles from apparently punching his walls.¹⁴⁴ He told Amn KRS, "Yeah, I could go and beat [your husband] up or I can kill him."¹⁴⁵ She told him "you couldn't do shit," and the appellant pushed her up against the wall and said "Yes, I can."¹⁴⁶ Third, Amn KRS explained that as she was leaving a movie theater with her husband, she received a text message that said "How's the movie?"¹⁴⁷ She walked outside and saw the appellant waiting for her and her husband. The appellant demanded that she tell her husband about their affair. She refused, and the appellant told her husband, "I fucked your wife."¹⁴⁸ The husband asked the appellant what his problem was, but the appellant got into his car. As the husband was asking Amn KRS about the affair, the appellant sped towards the husband in his car, causing the husband to jump back.¹⁴⁹ Fourth, Amn KRS testified how the appellant used his administrator privileges at work to prevent her from logging into her Government computer.¹⁵⁰ Fifth, the appellant broke into Amn KRS's personal Yahoo! account, changed her password, and also sent a message to Amn KRS's sister's MySpace page, exposing the affair.¹⁵¹

¹³⁸ *Id.*

¹³⁹ *Id.* at 647–48.

¹⁴⁰ *Id.* at 648.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 650.

¹⁵¹ *Id.*

The facts of this case provide a good contrast to the *Moore* case, where the court found the uncharged drug use was not "directly related" to the charged offenses. The *Rhine* court held all five examples of uncharged misconduct were proper aggravation evidence.¹⁵² The court used three different "beyond the rule" concepts to justify its holding: (1) the *Hardison* two-step (directly related and MRE 403 balancing) analysis;¹⁵³ (2) the more than "mere relevance" standard;¹⁵⁴ and (3) the "continuous course of conduct" analysis for uncharged misconduct.¹⁵⁵

After a brief discussion of how military judges "are assumed to be able to appropriately consider only relevant material in assessing sentencing,"¹⁵⁶ the court said it would "broadly construe the first element of the *Hardison* test regarding whether the evidence is directly related."¹⁵⁷ Except for the fact that it was a judge-alone case, the court did not clearly explain why it was "broadly construing" the first *Hardison* element and simply "conclude[d] that all the facts, circumstances, and activities between the victim and the appellant are directly related to the charged offense of stalking, and therefore, are admissible in aggravation"¹⁵⁸ It appears the court gave great weight to the military judge's comment on the record, during a defense objection to the subject testimony, that "he was considering the evidence solely for the issues related to fear and the offense of stalking."¹⁵⁹ The lesson learned in *Rhine* is a good example of a trial counsel understanding the application of RCM 1001(b)(4) to a specific type of aggravation evidence—uncharged misconduct—articulating that reason on the record, and introducing evidence to support his argument.

Conclusion

The eight military appellate cases involving RCM 1001(b)(4) demonstrate that identifying and admitting aggravation evidence at courts-martial continue to be problems for judge advocates. The three recurring

¹⁵² *Id.* at 651.

¹⁵³ *Id.* (finding the uncharged misconduct "to be closely related, if not directly tied, in time with the charged offenses"). See *United States v. Hardison*, 64 M.J. 279, 281 (C.A.A.F. 2007).

¹⁵⁴ *Id.* See *United States v. Rust*, 41 M.J. 472, 478 (C.A.A.F. 1995).

¹⁵⁵ *Id.* ("The evidence demonstrates a continuing course of conduct by the appellant involving similar actions and misconduct with the same victim."). See *United States v. Ross*, 34 M.J. 183, 187 (C.M.A. 1992).

¹⁵⁶ *Rhine*, 67 M.J. at 651.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* Even though the military judge never articulated the MRE 403 balancing test on the record, he did mention the rule at one point, and spoke at length on the record during the questioning of Amn KRS, and during the trial counsel's sentencing argument, about the limited purpose for which he was considering the uncharged misconduct. *Id.* at 648–50, 652.

problems—not objecting to improper evidence, military judges not performing the required MRE 403 balancing test on the record, and counsel misunderstanding the proper scope of the rule—continue to create errors and issues on appeal. These problems are not complex or difficult to solve; they just require a little more preparation before trial and attention to detail at trial. The first thing counsel should do is look beyond the text of RCM 1001(b)(4) for each piece of aggravation evidence expected at trial. The text of the rule is very broad and would appear to allow a wide variety of evidence, but case law makes it very clear that the standard under the rule is more than mere relevance. With

this proper research and preparation prior to trial, both sides will be better prepared to protect the record. Trial counsel will be able to articulate a proper basis for admissibility and also explain why the evidence passes the MRE 403 balancing test, especially if the military judge does not perform the balancing on the record. Defense counsel will know when to object to a liberal reading of the rule that is prohibited by case law, thereby preventing the difficult burden of plain error review on appeal. Researching the law and protecting the record are not new concepts to judge advocates, but in the area of aggravation evidence, they continue to be old problems.

Shocking and Embarrassing Displays On-line: Recent Developments in Military Crimes Involving Indecent Conduct via Webcam

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"The necessity for [Indecent Acts or Liberties with a Child under Article 134] was to throw a cloak of protection around minors and to discourage sexual deviates from performing with, or before them."¹

Introduction

The "webcam" is a relatively simple device. It is a camera attached to a computer with the ability to take still shots, record videos, and transmit live-video feed over the Internet.² Suspicious parents can employ a "Nanny Cam" to keep watch over their in-home child-care provider.³ Concerned homeowners can use a webcam to perform remote home surveillance.⁴ Opportunistic exhibitionists can set up a webcam to record their every move and charge customers to watch.⁵ Unfortunately, child abusers can also use a webcam to interact with their on-line victims.⁶

In the typical scenario, a predator will identify a child (usually a teenager) in an Internet chatroom and initiate a conversation either in the chatroom or using an instant messenger service.⁷ The individual will then steer the conversation to sexual topics and the conversation will become extremely sexually explicit. He will then turn on a webcam and display his penis to the child. In some cases, the predator will then begin to masturbate while still exposed on camera. The military courts have seen a surprising number of cases with facts that follow this general pattern, but in most cases, instead of finding an actual child, the accused has found a law enforcement officer posing as a child.

The military courts have recognized that the sexually explicit conversations in chatrooms or via instant messenger constitute communication of indecent language, an offense listed under Article 134.⁸ Sexual conduct, like masturbation or exposure of the genitals, is more difficult to charge. No offense in the Uniform Code of Military Justice (UCMJ) specifically covers this type of long-distance sexual behavior using the Internet. Prior to the recent amendments to Article

¹ United States v. Brown, 13 C.M.R. 10, 17 (C.M.A. 1953).

² See also United States v. Parker, No. 20080579, slip. op. at 2 n.1 (A. Ct. Crim. App. Aug. 31, 2009) (unpublished) ("A webcam is a camera used to transmit live images over the World Wide Web.").

³ See, e.g., *Nanny Shock: Caught on the Web Cam*, Feb. 22, 2008, http://www.ncwanted.com/ncwanted_home/story/2470371.

⁴ Josh Lowensohn, *DIY Home Surveillance With a Webcam*, CNET.COM, Aug. 3, 2009, http://news.cnet.com/8301-27076_3-10301349-248.html.

⁵ "JenniCam" seems to be the most notorious of the websites in this genre. Viewers could watch Jennifer Ringley "slumped in front of the TV, doting on her countless pets, idly plaiting her hair, pottering around her house or sauntering naked between rooms." *R.I.P. Jennicam*, BBC NEWS, Jan. 1, 2004, http://news.bbc.co.uk/2/hi/uk_news/magazine/3360063.stm. The website, which went off-line in late 2003, boasted 100 million hits per week at one point during its lifespan. *Id.*; *Voyeur Web Site JenniCam to Go Dark*, CNN.COM, Dec. 10, 2003, <http://www.cnn.com/2003/TECH/internet/12/10/jenni.cam.reut/>.

⁶ See, e.g., *Colorado v. Cook*, 197 P.3d 269 (Colo. Ct. App. 2008) (case involving defendant who directed web camera at his own genitals and also used the webcam to broadcast sexually explicit acts by his girlfriend's daughter over the Internet); *California v. Learn*, No. A109084, 2007 WL 4157772 (Cal. Ct. App. Nov. 26, 2007) (unpublished) (case involving a law enforcement officer who posed as a fourteen-year-old boy and viewed the defendant showing his penis and masturbating via webcam); *Minnesota v. Skapyak*, 702 N.W.2d 331 (Minn. Ct. App. 2005) (case involving defendant who masturbated in front of two different teenage girls three to four times via webcam); *Deecheandia v. Commonwealth*, 2004 WL 1243042 (Va. Ct. App. 2004) (unpublished) (defendant exposed his penis via webcam during an instant messenger chat with a law enforcement officer posing as a thirteen-year-old girl); *Brooker v. Commonwealth*, 587 S.E.2d 732 (Va. Ct. App. 2003) (defendant exposed his penis via webcam during an instant messenger chat with a law enforcement officer posing as a twelve-year-old girl).

⁷ Instant messenger services allow individuals to "chat" on-line back and forth in real time without having to send e-mail back and forth. Conversations occur in a "chat window" that remains open on the user's computer. See *How to Use Instant Messenger Programs*, http://www.ehow.com/how_2095611_instant-messenger-programs.html (last visited Nov. 5, 2009). Current examples include Yahoo! Messenger and MSN Messenger. See *Instant Messaging Programs*, <http://www.pctechbytes.com/messenger.htm> (last visited Dec. 6, 2009).

⁸ MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 89 (2005) [hereinafter 2005 MCM] (indecent language); see, e.g., *United States v. Larson*, 66 M.J. 212, 213-14 (C.A.A.F. 2008) (affirming, without directly addressing the issue, one specification of communicating indecent language for sexually explicit discussions in a chatroom with a law enforcement officer posing as a teenager); *United States v. Miller (Miller I)*, 65 M.J. 845, 846 (A.F. Ct. Crim. App. 2007) (affirming conviction for attempting to communicate indecent language to a child for sexually explicit discussions via instant messenger with a law enforcement officer posing as a teenager); *United States v. Parker*, No. 20080579 (A. Ct. Crim. App. Aug. 31, 2009) (unpublished) (affirming, without directly addressing the issue, conviction on two specifications of attempting to communicate indecent language to a child for sexually explicit discussions via instant messenger with a law enforcement officer posing as a teenager); *United States v. Ferguson (Ferguson I)*, No. 37272, 2009 WL 2212070, slip op. (A.F. Ct. Crim. App. July 15, 2009) (unpublished) (affirming, without directly addressing the issue, conviction on one specification of attempting to communicate indecent language to a child for sexually explicit discussions in a chatroom with a law enforcement officer posing as a teenager); *United States v. Garner*, 67 M.J. 734, 735-36 (N-M. Ct. Crim. App. 2009) (affirming, without directly addressing the issue, conviction on one specification of attempting to communicate indecent language to a child for sexually explicit discussions in a chatroom with a law enforcement officer posing as a teenager).

120,⁹ three listed offenses under Article 134 provided the best means for charging this conduct: indecent acts or liberties with a child,¹⁰ indecent acts with another,¹¹ and indecent exposure.¹² Between 2008 and 2009, the military courts decided several cases involving the application of these three offenses to sexual conduct with children (or law enforcement officers posing as children) over the Internet using a webcam. As of 1 October 2007, all three of these offenses are now codified in Article 120, and the elements of all three offenses changed.¹³ With these developments, applying the UCMJ to indecent conduct using an Internet webcam continues to present a challenge for military justice practitioners.

This article will begin with an analysis of *United States v. Miller*,¹⁴ where the Court of Appeals for the Armed Forces (CAAF) held that conduct over the Internet, using a webcam, cannot create the physical presence required for indecent liberties with a child under Article 134—a conclusion with even more force now that the offense is codified in Article 120.¹⁵ The next section will address indecent acts. After *Miller*, indecent acts with another under Article 134 became the fallback position for indecent conduct via the Internet, and it appears that this trend will continue now that the offense of indecent acts is an enumerated offense under Article 120. The third section will address indecent exposure via webcam. This is the offense where military law is in the most flux. Two service courts have reached opposite conclusions in cases involving webcams, and the CAAF granted review on one of the two—presumably to resolve the split. The decision, however, did not resolve the myriad issues surrounding indecent exposure via webcam. Furthermore, after 1 October 2007, this offense also falls under Article 120 and has elements that appear to differ from the Article 134 version. In analyzing these three offenses when applied to indecent conduct via webcam, practitioners will find that, as with child pornography, the law has failed to keep pace with technological advancements. As such, the “cloak of

⁹ See National Defense Authorization Act for Fiscal Year 2006 (NDAA), Pub. L. No. 109-163, § 552, 119 Stat. 3136, 3256–63 [hereinafter 2006 NDAA] (codified at 10 U.S.C. § 920 (2006)) (amending Article 120, UCMJ with an effective date of 1 October 2007) (making substantial revisions to the sexual offense scheme, which became effective 1 October 2007).

¹⁰ 2005 MCM, *supra* note 8, pt. IV, ¶ 87 (indecent acts or liberties with a child).

¹¹ *Id.* ¶ 90 (indecent acts with another).

¹² *Id.* ¶ 88 (indecent exposure).

¹³ See 2006 NDAA, *supra* note 9 (the substantial revisions to the sexual assault scheme included moving indecent acts with another, indecent acts or liberties with a child, and indecent exposure from Article 134 to Article 120; amendments became effective 1 October 2007) (codified at 10 U.S.C. § 920); UCMJ art. 120 (2008); MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 45j (indecent liberty with child), ¶ 45k (indecent act), ¶ 45n (indecent exposure) (2008) [hereinafter 2008 MCM].

¹⁴ 67 M.J. 87 (C.A.A.F. 2008).

¹⁵ 2008 MCM, *supra* note 13, pt. IV, ¶ 45j (indecent liberty with a child).

protection,” described in the introductory quote, seems threadbare in spots. Nonetheless, two crimes—indecent acts and indecent language—still offer viable protection for children from offenders seeking to use the webcam as a tool for sexual exploitation.

Indecent Liberties via Webcam: “Constructive Presence” Is Not “Physical Presence”

Prior to the major revision to Article 120 that became effective in 2007,¹⁶ child sexual abuse that did not involve sexual intercourse was punished using the offenses listed in the *Manual for Court-Martial (MCM)* under Article 134. From the list of applicable offenses under this article, indecent acts or liberties with a child had the highest maximum punishment¹⁷ and did not require physical contact.¹⁸ The purpose for listing this offense in the *MCM* was “to throw a cloak of protection around minors and to discourage sexual deviates from performing with, or before them.”¹⁹ Two cases provided the basic parameters for this offense.

The first case, *United States v. Brown*, involved a servicemember who exposed his penis to two sisters, aged seven and ten, while the girls were riding their bicycles.²⁰ The Government crafted a specification alleging indecent liberties with a child under Article 134 that borrowed some of the language from indecent exposure under Article 134.²¹ The Court of Military Appeals (CMA) concluded that this conduct could be punished as indecent liberties with a child even though the accused did not physically contact his victims.²² An offense that might otherwise constitute

¹⁶ See 2006 NDAA, *supra* note 9.

¹⁷ Compare 2005 MCM, *supra* note 8, pt. IV, ¶ 87e (indecent acts or liberties with a child having a maximum punishment of a dishonorable discharge, forfeiture of all pay and allowances, and confinement for seven years), with *id.* pt. IV, ¶ 88e (indecent exposure; maximum punishment of bad-conduct discharge, forfeiture of all pay and allowances, and confinement for six months) and *id.* pt. IV, ¶ 90e (indecent acts with another; maximum punishment of a dishonorable discharge, forfeiture of all pay and allowances, and confinement for five years).

¹⁸ 2005 MCM, *supra* note 8, pt. IV, ¶ 87b, c.

¹⁹ *United States v. Brown*, 13 C.M.R. 10, 17 (C.M.A. 1953).

²⁰ *Id.* at 10–11.

²¹ *Id.* at 11. The specification read as follows:

In that Private Lester E. Brown, United States Army, Company A, 508th Airborne Infantry, did, at Fort Benning, Georgia, on or about 24 October 1952, take indecent liberties with . . . and . . . , both females under 16 years of age, by willfully and wrongfully exposing in an indecent manner to them in public, his penis with intent to gratify the sexual desires of the said Private Lester E. Brown.

Id.; see also MANUAL FOR COURTS-MARTIAL, UNITED STATES app. 6 (1951) (Form 146 provides the form specification for indecent acts with a child and Form 147 provides the form specification for indecent exposure.).

²² *Brown*, 13 C.M.R. at 17.

indecent exposure can be charged as indecent acts with a child, and thereby subject the accused to a greater maximum punishment, because “[t]he remedy for the evil [of exposing oneself to a child] is to provide substantial punishment for those who perform indecent and immoral acts which cause shame, embarrassment, and humiliation to children, or lead them further down the road to delinquency.”²³ In *Brown*, though, while there was no contact, the accused was actually in the presence of his two victims.²⁴

The second key case, *United States v. Knowles*,²⁵ pushed the CMA to examine the nature of the presence required for an indecent liberties conviction. In two separate incidents, the accused used obscene language when speaking to children over the telephone.²⁶ The court confirmed that indecent liberties with a child requires physical presence with the child, and cited several cases where the courts affirmed convictions because the indecent conduct occurred in the actual physical presence of the child.²⁷ However, the court held that communication over a telephone is not sufficient to sustain a conviction for indecent liberties with a child, reasoning that “the offense . . . requires greater conjunction of the several senses of the victim with those of the accused than that of hearing a voice over a telephone wire.”²⁸ After this decision, the drafters of the *MCM* revised the explanation for indecent acts with a child to require that the “liberties be taken in the physical presence of the child.”²⁹

In these two cases, the CMA established three fundamental principles. First, indecent liberties with a child does not require physical contact. Second, this offense requires physical presence with the child. Third, a telephone cannot create the necessary physical presence. After *Knowles*, the law of physical presence for purposes of indecent liberties remained settled until the advent of the webcam. This technological innovation re-opened the question that the CMA left unanswered in *Knowles*: whether

indecent liberties with a child may be “committed by performance of indecent acts and the use of obscene language over an audio-visual system.”³⁰ Air Force Staff Sergeant (SSgt) Christopher Miller would provide the courts an opportunity to answer that question.

*United States v. Miller: Establishing the Limits of
Indecent Liberties with a Child*

The facts of *United States v. Miller*³¹ fall into the general pattern outlined in the introductory paragraph. In 2005, a civilian police officer was monitoring an Internet chatroom posing as a fourteen-year-old girl.³² Thinking that he had found an actual teenage girl, the accused used an instant messaging program to initiate a conversation with the officer.³³ While chatting on-line, the accused asked if she wanted to see a picture of him.³⁴ When the officer responded that she did, the accused turned on a webcam and initiated a live-video feed over the Internet link.³⁵ After several minutes, he asked the officer if she wanted to see his penis.³⁶ When she responded affirmatively, he directed the webcam toward his penis and began masturbating while engaging in an “extremely graphic” conversation with the officer.³⁷ He continued for about ten minutes while asking the officer about her breast size and describing the sexual acts he would like to perform with her.³⁸ He also stated that he “liked young girls” and “never had one but always wanted to try.”³⁹ While still on camera, he ejaculated, cleaned himself up, and asked her if “she liked what she had seen.”⁴⁰ She confirmed that she did and then asked him how it felt.⁴¹ The accused then responded, “[F]elt good would have felt better if i [sic] had someone else’s hand on it.”⁴² The conversation ended at that point, but the accused

²³ *Id.*

²⁴ *Id.* at 11.

²⁵ *United States v. Knowles*, 35 C.M.R. 376 (C.M.A. 1965).

²⁶ *Id.* at 377–78; *United States v. Miller (Miller II)*, 67 M.J. 87, 89 (C.A.A.F. 2008); U.S. DEP’T OF ARMY, PAM. 27-2, ANALYSIS OF CONTENTS MANUAL FOR COURTS-MARTIAL, UNITED STATES ch. 25, at 25-13 (rev. 1969) (July 1970) [hereinafter DA PAM. 27-2]. One incident involved a male child and another involved a female child. *Id.*

²⁷ See *Knowles*, 35 C.M.R. at 377 (citing *United States v. Riffe*, 25 C.M.R. 650 (A.B.R. 1957)) (involving a “face to face indecent proposal to a child”); *United States v. Childers*, 31 C.M.R. 747 (A.F.B.R. 1962) (accused held his hand close to “a part of his own anatomy” while commenting on personal parts of a seven-year-old girl’s body); *United States v. Daniel*, 26 C.M.R. 894 (A.F.B.R. 1958) (accused “made obscene remark” to a child “while pointing to a personal part of his body”).

²⁸ *Knowles*, 35 C.M.R. at 377–78.

²⁹ MANUAL FOR COURTS-MARTIAL, UNITED STATES ch. XXVIII, ¶ 213f(3) (1969) [hereinafter 1969 MCM] (indecent acts with a child under the age of 16 Years); DA PAM. 27-2, *supra* note 26, ch. 28, para. 213f(3), at 28-19.

³⁰ *Knowles*, 35 C.M.R. at 378.

³¹ *Miller II*, 67 M.J. 87 (C.A.A.F. 2008).

³² *Id.* at 88.

³³ *Id.* Although the case does not definitively establish the gender of the officer, the pronoun “she” is used in this section to refer to the officer posing as the teenage girl.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *United States v. Miller (Miller I)*, 65 M.J. 845, 846 (A.F. Ct. Crim. App. 2007) (the “conversation” occurred via a typewritten exchange in the chatroom).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Miller II*, 67 M.J. at 88.

⁴¹ *United States v. Miller (Miller III)*, No. 36829, 2009 WL 1508494, at *1 (A.F. Ct. Crim. App. 2009) (unpublished).

⁴² *Id.*

engaged in a similar conversation about a month later without the video feed of the masturbation.⁴³

For these acts, the accused faced three specifications under Article 80, UCMJ: two specifications of attempting to communicate indecent language to a child under sixteen and one specification of attempting to take indecent liberties with a child.⁴⁴ Contrary to his pleas, the military judge sitting as a general court-martial convicted the accused of all three specifications. On appeal to the Air Force Court of Criminal Appeals (AFCCA), the accused claimed that the military judge erred in finding him guilty of attempting to take indecent liberties with a child because he was “never physically in the presence of the ‘child.’”⁴⁵ Because the conduct in this case occurred only through the Internet video feed, the Air Force court inferred that the military judge relied on a theory of “constructive presence” in convicting the accused of this specification.⁴⁶ The AFCCA affirmed, framing the issue as one of legal sufficiency and holding that the accused’s “real-time conversations and his live-feed broadcast of himself masturbating were sufficient to satisfy the presence element on indecent liberties, at least for the purposes of an Article 80, UCMJ, prosecution.”⁴⁷ On appeal to the CAAF, the accused renewed his argument that his conviction for attempting to take indecent liberties with a child was not legally sufficient because “he was not physically present with the detective while he masturbated.”⁴⁸ This led the court to confront the question left open in *Knowles*: whether “presence created through the use of an audio-visual system” could satisfy “physical presence” for purposes of indecent liberties with a child.⁴⁹

As described above, indecent liberties with a child requires that the accused commit the indecent act “in the presence” of the child, even when there is no actual physical

contact. Although the act was charged as an attempt, the CAAF first found that the “nature of the presence required by the completed offense is germane” to the charge of attempted indecent liberties and, in fact, “the nature of the presence required for the completed offense . . . is the threshold question.”⁵⁰ The court then turned to the requirement for physical presence with the child. The provision that appeared in the 1969 *MCM* after *Knowles* remains unchanged in the 2005 *MCM*: “[T]he liberties must be taken in the physical presence of the child.”⁵¹ While the *MCM* explanations are not binding on the court, the CAAF described them as “persuasive authority . . . to be evaluated in light of [the court’s] precedent.”⁵² Citing *Brown*, *Knowles*, and a third case, *United States v. Rodriguez-Rivera*,⁵³ the court confirmed that its precedent requires that the act at issue occur in the physical presence of the child.⁵⁴ Furthermore, although *Knowles* left open the question of whether acts performed through an audio-visual system could be “in the presence” of the child, the court noted that the *MCM* explanation was amended after that case to include the physical presence requirement.⁵⁵ Therefore, the court held that “presence means physical presence, rather than presence created through the use of an audio-visual system.”⁵⁶ To conclude its analysis, the court turned to the plain meaning of the words “physical presence.” Applying dictionary definitions for the words “physical” and “presence,” the court concluded, “[P]hysical presence” requires the accused to be in the same physical space as the victim” and “constructive presence will not suffice in context of a penal statute that has been construed to require physical presence.”⁵⁷ Turning to the case at hand, the court found that the accused was not in the same physical space as the officer while he was masturbating, and, as such, he did not commit the act “in the presence” of the victim.⁵⁸ The court did provide a caveat though, noting that the case does not decide “whether future advances in technology or the

⁴³ *Id.*

⁴⁴ *Miller II*, 67 M.J. at 88; UCMJ art. 80 (2008). The offenses were charged in this way based on the concept of factual impossibility. As the victim in this case was an adult posing as a fourteen-year-old girl, it was factually impossible for him to actually communicate indecent language to a child or actually take indecent liberties with a child. Therefore, these acts were properly charged as attempts under Article 80. See 2005 *MCM*, *supra* note 8, pt. IV, ¶ 4c.(3) (describing the concept of factual impossibility); *United States v. Thomas*, 32 C.M.R. 278, 288 (C.M.A. 1962) (recognizing that factual impossibility is not a bar to a conviction for attempt).

⁴⁵ *Miller I*, 65 M.J. 845, 845–46 (A.F. Ct. Crim. App. 2007); 2005 *MCM*, *supra* note 8, pt. IV, ¶ 87b, c.

⁴⁶ *Miller I*, 65 M.J. at 847. The military judge did not specifically state that he relied on a theory of “constructive presence”; however, during his closing argument, the trial counsel mentioned constructive presence and *United States v. Cook*, 61 M.J. 757 (A.F. Ct. Crim. App. 2005), where the AFCCA held that constructive presence was sufficient to support a guilty plea to attempted indecent liberties with a child. *Id.*

⁴⁷ *Id.* The AFCCA left open the issue of whether constructive presence would be sufficient to support a conviction under Article 134. *Id.*

⁴⁸ *Miller II*, 67 M.J. 87, 88 (C.A.A.F. 2008).

⁴⁹ *Id.* at 90; *United States v. Knowles*, 35 C.M. R. 376, 378 (C.M.A. 1965).

⁵⁰ *Miller II*, 67 M.J. at 89.

⁵¹ 2005 *MCM*, *supra* note 8, pt. IV, ¶ 87c; 1969 *MCM*, *supra* note 29, ch. XXVIII, ¶ 213f(3); DA PAM. 27-2, *supra* note 26, para. 213f(3), at 28-19.

⁵² *Miller II*, 67 M.J. at 89 (citing *United States v. Miller*, 47 M.J. 352, 356 (C.A.A.F. 1997) and *United States v. Hemingway*, 36 M.J. 349, 351–52 (C.A.A.F. 1993)).

⁵³ 63 M.J. 372, 285 (C.A.A.F. 2006) (setting aside a conviction for indecent liberties with a child where the victim watched pornographic videos at the accused’s house, even though the accused was not with the victim while she watched the videos).

⁵⁴ *Miller II*, 67 M.J. at 90.

⁵⁵ *Id.*

⁵⁶ *Id.* (internal quotations omitted).

⁵⁷ *Id.* (quoting BLACK’S LAW DICTIONARY 1221 (8th ed. 2004) (defining “presence” as “[t]he state or fact of being in a particular place and time” and [c]lose proximity coupled with awareness) and MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 935 (11th ed. 2003) (defining “physical” as having material existence” and “of or relating to the body”)).

⁵⁸ *Id.*

understanding of physical presence might change the analysis.”⁵⁹

However, this case was charged as an attempt, not the completed offense. For an attempt under Article 80, the accused’s act must “tend[] to effect the commission of the intended offense.”⁶⁰ None of the accused’s actions met this element. Although the detective could watch him while he masturbated, none of his actions “tended to effect the element of being in the detective’s physical presence.”⁶¹ Therefore, the court set aside the conviction for attempted indecent liberties with a child and foreclosed the possibility of charging indecent conduct over a webcam as an indecent liberty with a child under Article 134.⁶²

Beyond Article 134: Miller’s Implications for Future Webcam Cases

The CAAF’s decision in *Miller* is a straightforward application of the plain language in the *MCM*, the court’s precedent on the subject, and the plain meaning of the terms at issue. The CAAF’s resolution of this issue, though, has significant import for both the policymaker and the practitioner. First, this case exposes a gap in the coverage of child-specific sexual abuse offenses. It seems that sexual offenders like SSgt Miller have retreated from the schoolyards and street corners into the expansive and ethereal Internet network where these offenders can reach a broader audience. These offenders can encounter children and teens that they might never meet or see in real life, and exploit their naiveté and curiosity for sexual gratification. The accused in *Miller* thought that he had identified a teenage girl and masturbated to ejaculation in front of her using a webcam. This is a startlingly different scenario than that in *Knowles*, where the children were listening to obscene language spoken over a telephone. If the need for this offense was “to throw a cloak of protection around minors and to discourage sexual deviates from performing with, or before them,” it is incongruous that conduct should penetrate this cloak simply because it occurred over the

Internet.⁶³ Perhaps the CMA was prescient when the *Knowles* opinion left open the possibility that another “audio-visual system” could create the “presence” required for indecent liberties.⁶⁴ Nonetheless, the choice of language in the *MCM* caused the CAAF to reject this reasoning. While the next section will address another offense that can be used to address this conduct, the burden will fall to policymakers to mend the cloak in such a way that the child-specific sexual offenses adequately protect children from indecent conduct over the Internet.

For conduct occurring after 1 October 2007, indecent liberty with a child is now codified under Article 120. As such, some may view *Miller* as a narrow holding applying to an old offense. But *Miller* has importance even for the newer version of this offense. Under Article 120(j), “[a]ny person . . . who engages in indecent liberty in the physical presence of a child [with the requisite specific intent] is guilty of indecent liberty with a child and shall be punished as a court-martial may direct.”⁶⁵ For offenses occurring after 1 October 2007, the physical presence requirement is now an element rather than a persuasive explanation of the offense in the *MCM*.⁶⁶ There is nothing in the statutory language, the *MCM* provisions, or the Joint Service Committee report on sexual offenses⁶⁷ to suggest a departure from prior interpretations of this term under Article 134. No language

⁵⁹ *Id.*

⁶⁰ 2005 MCM, *supra* note 8, pt. IV, ¶ 4b. The four elements of an attempt under Article 80, UCMJ, are as follows:

- (1) That the accused did a certain overt act;
- (2) That the act was done with the specific intent to commit a certain offense under the code;
- (3) That the act amounted to more than mere preparation; and
- (4) That the act apparently tended to effect the commission of the intended offense.

Id.

⁶¹ *Miller II*, 67 M.J. at 91.

⁶² *Id.*

⁶³ *United States v. Brown*, 13 C.M.R. 10, 17 (C.M.A. 1953).

⁶⁴ *United States v. Knowles*, 35 C.M.R. 376, 378 (C.M.A. 1965).

⁶⁵ UCMJ art. 120(j) (2008).

⁶⁶ 2008 MCM, *supra* note 13, pt. IV, ¶ 45b(10). The elements of indecent liberty with a child under Article 120, UCMJ, are as follows:

- (1) That the accused committed a certain act or communication;
- (2) That the act or communication was indecent;
- (3) That the accused committed the act or communication in the physical presence of a certain child;
- (4) That the child was under 16 years of age; and
- (5) That the accused committed the act or communication with the intent to:
 - (i) Arouse, appeal to, or gratify the sexual desires of any person; or
 - (ii) Abuse, humiliate, or degrade any person.

Id.

⁶⁷ See SEX CRIMES AND THE UCMJ: A REPORT FOR THE JOINT SERVICE COMMITTEE ON MILITARY JUSTICE 240 (Feb. 2005), available at http://www.defenselink.mil/dodgc/php/docs/subcommittee_reportMarkHarvey1-13-05.doc [hereinafter SEX CRIMES AND THE UCMJ]. The report provides a number of ways in which this offense differs from the Article 134 version, but no mention is made of the physical presence issue. *Id.* Furthermore, the report describes how the proposed definition of “indecent liberty” in Article 120(t)(12) “statutorily overrule[s]” *United States v. Baker*, 57 M.J. 330 (C.A.A.F. 2002), which held that the “factual consent of the child is relevant to whether the conduct was indecent.” There is no mention of *Knowles* or *Rodriguez-Rivera*, suggesting that the drafters acquiesced to those interpretations of the requirement for physical presence. *Id.* at 255.

suggests the adoption of a doctrine of constructive presence or suggests that physical presence could occur through an audio-visual mechanism like a closed-circuit television system or an Internet link with a webcam. Rather, by requiring that the offense occur “in the physical presence of a child,” Article 120(j) simply adopts the language that the *MCM* drafters added after *Knowles* and that has been included in every *MCM* since 1969. Should a constructive presence case make its way to an appellate court under the Article 120 version of indecent liberties with a child, there appears to be no basis for a court to depart from the CAAF’s reasoning in *Miller*. As this offense is no longer a viable option for conduct like that in *Miller*, practitioners must consider whether it constitutes an “indecent act” under either Article 134 or Article 120.

Indecent Acts: Indecency and “Affirmative Interaction” via Webcam

In *Miller*, the court set aside the accused’s convictions for attempted indecent liberties with a child. However, the court did not say that this conduct was not subject to criminal sanction under the UCMJ. This section will explain how the courts have analyzed indecent acts with another under Article 134 when the conduct involves the use of a webcam and will also consider whether the analysis changes now that this offense is codified under Article 120. While indecent liberties with a child is not a viable charge when the conduct occurs via webcam, both indecent acts with another under Article 134 and indecent act under Article 120 provide avenues to address indecent conduct via webcam when it involves children.

Affirming Indecent Acts with Another via Webcam: A Service Court Survey

Prior to the 2006 National Defense Authorization Act (NDAA), the *MCM* listed indecent acts with another as a lesser included offense for indecent acts or liberties with a child.⁶⁸ In *Miller*, the Government asked the CAAF to affirm attempted indecent acts with another as a lesser included offense to attempted indecent liberties with a child.⁶⁹ Indecent acts with another only requires that the act be committed “with a certain person,” and contains “neither a ‘physical presence’ nor a ‘presence’ requirement.”⁷⁰

⁶⁸ See 2005 MCM, *supra* note 8, pt. IV, ¶ 87(d)(1).

⁶⁹ “If the accused is charged with an attempt under Article 80, and the offense attempted has a lesser included offense, then the offense of attempting to commit the lesser included offense would ordinarily be a lesser included offense to the charge of attempt.” *Id.* pt. IV, ¶ 4d; *Miller II*, 67 M.J. 87, 91 (C.A.A.F. 2008).

⁷⁰ *Id.* at 91; see also 2005 MCM, *supra* note 8, pt. IV, ¶ 90b. The elements of indecent acts with another under Article 134, UCMJ, are as follows:

Although the CAAF did not affirm this lesser included offense because the AFCCA did not assess its legal and factual sufficiency, the CAAF provided the lower courts with the necessary groundwork. Under indecent acts with another, the act must “be done in conjunction or participating with another person,”⁷¹ but the other person “must be more than an inadvertent or passive observer.”⁷² The offense requires “some affirmative interaction between the accused and the victim” and they need not be in the “same physical space.”⁷³ The CAAF remanded the case to the AFCCA to consider whether the lesser included offense of attempted indecent acts with another would be factually and legally sufficient under these facts. The efforts to outline the elements of the offense, and the holdings of relevant case law, offer a strong indicator that the CAAF considers indecent acts with another as an available lesser included offense where an indecent liberties conviction fails due to a lack of physical presence.

Before the AFCCA could accept the CAAF’s invitation, the Army Court of Criminal Appeals (ACCA) became the first to apply *Miller* to a case involving indecent conduct via webcam. The facts in *United States v. Lorenz*⁷⁴ are remarkably similar to those in *Miller*. While in his barracks room at Fort Hood, Texas, the accused initiated a conversation in an Internet chatroom with someone he believed to be a thirteen-year-old girl.⁷⁵ Not surprisingly, the thirteen year-old girl was actually an undercover civilian police detective.⁷⁶ After some sexually explicit chat conversation, the accused used his webcam to establish a live-video feed.⁷⁷ He then displayed his penis, masturbated, and ejaculated.⁷⁸ While performing these acts in front of the webcam, he continued the sexually explicit conversation in the chatroom with the detective posing as the teenage girl.⁷⁹

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- (1) That the accused committed a certain wrongful act with a certain person;
 - (2) That the act was indecent; and
 - (3) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

Id.

⁷¹ *Miller II*, 67 M.J. at 91 (quoting *United States v. Thomas*, 25 M.J. 75, 76 (C.M.A. 1987)).

⁷² *Id.* (quoting *United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996)).

⁷³ *Id.* (quoting *United States v. McDaniel*, 39 M.J. 173, 175 (C.M.A. 1994)).

⁷⁴ No. 20061071 (A. Ct. Crim. App. Apr. 20, 2009) (unpublished).

⁷⁵ *United States v. Lorenz*, No. 20061071, slip op. at 2 (A. Ct. Crim. App. Apr. 20, 2009) (unpublished).

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

The accused pled guilty to attempted indecent liberties with a child under Article 80.⁸⁰ On appeal, the ACCA affirmed in an unpublished opinion, applying the doctrine of constructive presence that had developed under the service court caselaw prior to *Miller*.⁸¹ After the CAAF rejected the doctrine of constructive presence in *Miller*, the ACCA reconsidered its decision.⁸² Finding the facts in *Lorenz* to be “substantially similar” to those in *Miller*, the court set aside the conviction for attempted indecent liberties with a child and affirmed the lesser included offense of attempted indecent acts with another.⁸³ The court reasoned that the facts established the “necessary affirmative interaction” between the two individuals at issue and supported a conviction for attempted indecent acts.⁸⁴ Specifically, the court noted the following: the “two-way online conversation” lasted for more than three hours; the accused asked his intended victim several sexually explicit questions that she answered; her answers then prompted him to ask more questions; and the two made plans to meet for a sexual encounter.⁸⁵ The court found that the detective in the case was “by no means a passive or inadvertent observer” and held that the facts supported attempted indecent acts with another: his acts were indecent, wrongful, and service discrediting.”⁸⁶

Shortly after *Lorenz*, the AFCCA issued its opinion on remand in *Miller*, accepting the CAAF’s suggestion and affirming a conviction for the lesser included offense of attempted indecent acts with another.⁸⁷ Applying the evidence in the record, the court found that all of the elements of attempted indecent acts with another were proven beyond a reasonable doubt.⁸⁸ The accused established a live-video feed and “affirmatively obtained the victim’s assurance” that he could show her his penis.⁸⁹ He then began masturbating while continuing a sexually explicit conversation with her using an instant messaging program.⁹⁰ After ejaculating, he asked her “if she liked what she had seen” and she responded affirmatively.⁹¹ Based on these facts, the AFCCA concluded, “These affirmative

interactions, though done at long distance over the Internet, are sufficient to meet the elements of the lesser included offense of attempted indecent acts with another.”⁹²

In the summer of 2009, the ACCA had yet another chance to consider a case involving masturbation via webcam. This time the case involved the unfortunate and unusual fact that the recipient of the accused’s amorous advances and lascivious exhibitions was an actual teenage girl. The accused in *United States v. Parker*⁹³ was stationed in Yongsan, Korea. Using a webcam and an instant messaging program, the accused conversed with a fourteen-year-old girl who was located in Montana.⁹⁴ On four separate occasions, they used an instant message program to engage in sexually explicit chats about “what they would do together sexually” and, using the webcam, he exposed his penis and masturbated while she watched via the live-video feed.⁹⁵ The court observed that she “actively participated in the chats” and, upon his request, even sent him a picture of her pubic area.⁹⁶ For these acts, the accused pled guilty to four specifications of indecent liberties with a child under Article 134.⁹⁷ Applying *Miller*, the ACCA set aside the convictions for indecent liberties and affirmed the lesser included offense of indecent acts with another.⁹⁸ The court concluded that these facts supported the necessary affirmative interaction between the accused and the teenager and demonstrated that the girl in this case was an “active participant,” rather than “an inadvertent or passive observer.”⁹⁹ Based on the accused’s admissions during the guilty plea inquiry and in the stipulation of fact, the ACCA was “convinced beyond a reasonable doubt [his] acts were wrongful, indecent, prejudicial to good order and discipline, and service discrediting.”¹⁰⁰

Indecent Act(s): The Catchall for Webcam Indecency?

Although all three cases discussed in this section are unpublished, they are instructive. First, the facts in all three cases are remarkably similar. In all three cases, there is a two-way conversation using some sort of real-time Internet conversation tool, like a chat room or an instant message

⁸⁰ *United States v. Lorenz*, No. 20061071, slip op. at 1 (A. Ct. Crim. App. Nov. 18, 2008) (unpublished) (withdrawn upon reconsideration).

⁸¹ *Id.* at 4.

⁸² *Id.* at 1–2.

⁸³ *Id.* at 3.

⁸⁴ *Id.* at 4 (quoting *Miller II*, 67 M.J. 87, 91 (C.A.A.F. 2008)) (internal quotations omitted).

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Miller III*, No. 36829, 2009 WL 1508494 (A.F. Ct. Crim. App. Apr. 30, 2009) (unpublished).

⁸⁸ *Id.* at *2.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ No. 20080579, slip op. (A. Ct. Crim. App. Aug. 31, 2009) (unpublished).

⁹⁴ *Id.* at *2.

⁹⁵ *Id.*

⁹⁶ *Id.* The opinion does not state whether the video was one-way or two-way.

⁹⁷ Unlike all of the cases discussed thus far, this case involved an actual victim and there was therefore no need to resort to the inchoate offense of attempt.

⁹⁸ *Parker*, No. 20080579, at *2.

⁹⁹ *Id.* at *4 (quoting *United States v. Eberle*, 644 M.J. 374, 375 (C.A.A.F. 1996) and *Miller II*, 67 M.J. 87, 91 (C.A.A.F. 2008)).

¹⁰⁰ *Id.*

program. Also, in all three cases, the accused used the “chat” capability to engage in sexually explicit conversations with the victim (or the law enforcement officer posing as the victim). Each accused asked questions of the child that were of a graphic sexual nature and described the sexual acts that each wished to perform with their particular victim. Also, in all of the cases, the child (or the law enforcement officer posing as the child) participated in the conversation by answering the accused’s questions. In *Miller*, the victim even asked some questions of her own.¹⁰¹ Next, in all of the cases, the accused established a live-video feed, exposed his penis, and masturbated. This video was then transmitted in real-time to the victim who ostensibly watched it. According to these three service court panels, these victims were more than inadvertent or passive observers and these common facts establish the requisite “affirmative interaction” for indecent acts (or an attempt where the accused was a law enforcement agent).¹⁰²

As another observation, all of these cases involve an accused who thought he was engaging an actual teenager. This is a fundamental part of the indecency analysis. In *Parker*, the accused was actually performing in front of a real teenager and the court affirmed a conviction for indecent acts with another.¹⁰³ In both *Miller* and *Lorenz*, these two servicemembers were engaging law enforcement agents posing as children, and the courts affirmed attempted indecent acts with another rather than the actual completed offense.¹⁰⁴ This is a key distinction. The conduct in these cases—masturbation in front of one other person via webcam—is indecent because it involves a child. It appears then, that without more, such conduct between consenting adults in private would not be punishable as an indecent act.¹⁰⁵

As a final note on indecent acts, the three cases addressed conduct that occurred before the new Article 120 took effect. For offenses occurring after 1 October 2007, indecent act is now codified in Article 120(k).¹⁰⁶ No court

has yet explained how Article 134 caselaw will apply to the offense as it is codified under Article 120. The most significant difference is that the Article 120 version no longer requires that the acts be prejudicial to good order and discipline or service discrediting.¹⁰⁷ None of the courts, however, seemed to struggle much in finding that masturbation in front of a webcam that is broadcast over the Internet to a person purporting to be a minor was either service discrediting or prejudicial to good order and discipline in the Armed Forces.¹⁰⁸ As such, it does not appear that this change will adjust the difficulty in proving this offense. Additionally, the definition of indecent conduct under Article 120 is substantially similar to the definition under the Article 134 version of the offense.¹⁰⁹ Accordingly, the Army Trial Judiciary has imported the Article 134 indecent acts jurisprudence governing “open and notorious” sexual conduct into Article 120.¹¹⁰ But there is a final key difference between the Article 120 version and the Article 134 version: an indecent act under Article 120 does not require that the acts be done “with another.”¹¹¹ In *Miller*, when suggesting that indecent acts with another may be a viable lesser included offense, the court focused on the element requiring that the act be committed “with a certain person.”¹¹² The court identified three cases which provided key principles for determining whether an act was “done in

¹⁰¹ See *Miller III*, No. 36829, 2009 WL 1508494, at *1 (A.F. Ct. Crim. App. Apr. 30, 2009) (unpublished). After the accused ejaculated, he asked “if she liked what she saw,” and the officer asked “how it felt.” *Id.*

¹⁰² *Miller II*, 67 M.J. 87, 91 (C.A.A.F. 2008).

¹⁰³ *Parker*, No. 20080579, at *3.

¹⁰⁴ *United States v. Lorenz*, No. 20061071, slip op. at 3 (A. Ct. Crim. App. Apr. 20, 2009) (unpublished); *Miller III*, No. 36829, 2009 WL 1508494, at *1 (A.F. Ct. Crim. App. Apr. 30, 2009) (unpublished).

¹⁰⁵ See also U.S. DEP’T OF ARMY, PAM. 27-9, MILITARY JUDGES’ BENCHBOOK instr. 3-45-9 n.2 (1 Jan 2010) [hereinafter BENCHBOOK] (“If the evidence raises the issue of private consensual conduct between adults . . . the following instruction should be given. . . . Article 120, UCMJ, is not intended to regulate the wholly private consensual sexual activities of individuals”); see also *United States v. McCracken*, 67 M.J. 467, 468 n.2. (C.A.A.F. 2009) (Baker, J., concurring) (noting that absent other aggravating circumstances, private consensual sexual contact between unmarried adult persons “has never been punishable in the military as an indecent act.”) (citations omitted).

¹⁰⁶ UCMJ art. 120(k) (2008).

¹⁰⁷ Compare 2005 MCM, *supra* note 8, pt. IV, ¶ 90b, with 2008 MCM, *supra* note 13, pt. IV, ¶ 45b(11). Under the new Article 120, the elements of indecent act are as follows:

- (1) That the accused engaged in certain conduct; and
- (2) That the conduct was indecent.

2008 MCM, *supra* note 13, pt. IV, ¶ 45b(11). See also SEX CRIMES AND THE UCMJ, *supra* note 67, at 240–41.

¹⁰⁸ *Miller II*, 67 M.J. 87, 91 (C.A.A.F. 2008) (affirming attempted indecent acts with another without addressing the prejudice to good order and discipline or the act’s tendency to discredit the service); *United States v. Parker*, No. 20080579, slip op. at 4 (A. Ct. Crim. App. Aug. 31, 2009) (unpublished) (finding the conduct to be service discrediting without explicitly analyzing the element); *United States v. Lorenz*, No. 20061071, slip op. at 4 (A. Ct. Crim. App. Apr. 20, 2009) (unpublished) (finding the conduct to be service discrediting without explicitly analyzing the element).

¹⁰⁹ Under Article 120, “indecent conduct” is defined as “that form of immorality relating to sexual impurity that is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire or deprave morals with respect to sexual relations.” 2008 MCM, *supra* note 13, pt. IV, ¶ 45a(11). Under Article 134, “indecent signifies that form of immorality relating to sexual impurity which is not only grossly vulgar, obscene, and repugnant to common propriety, but tends to lust and deprave the morals with respect to sexual relations.” 2005 MCM, *supra* note 8, pt. IV, ¶ 90b. Interestingly, in the explanation, the 2008 MCM includes a definition of “indecent” that is slightly different from the statutory definition of indecent conduct, but almost identical to the definition of “indecent” under Indecent Acts with Another under Article 134. See 2008 MCM, *supra* note 13, pt. IV, ¶ 45c(3).

¹¹⁰ BENCHBOOK, *supra* note 105, Instr. 3-45-9, n.2.

¹¹¹ 2008 MCM, *supra* note 13, pt. IV, ¶ 45b(11).

¹¹² *Miller II*, 67 M.J. 87, 91 n.5 (C.A.A.F. 2008).

conjunction or participating with another person.”¹¹³ This analysis does not seem necessary under the Article 120 version. While this conduct will almost always *involve* another person, the statutory language appears to eliminate the requirement that the person *participate* in the conduct. Notwithstanding this change, practitioners and courts should thoroughly explore the nature of the surrounding circumstances to ensure that the conduct at issue is truly “indecent.”

In sum, should there be a need to charge beyond the communication of indecent language, indecent act appears to be the failsafe for indecent conduct with a child via webcam. In cases where the “child” is actually an adult posing as a child, the courts have consistently affirmed attempted indecent acts under Article 80. By eliminating the requirement that the acts occur “with another,” it appears that these cases may be even easier to prove under the Article 120 version. There is, however, one other offense that the Government has charged in some webcam cases: indecent exposure.

Indecent Exposure via Webcam: The Final Frontier

Despite the availability of indecent acts as a crime to cover webcam cases, there are some cases where the Government has charged indecent exposure under Article 134 where the accused used a webcam to expose himself over the Internet to a person he thought was a child. There is currently an open question regarding the extent to which exposure of the genitals via webcam is factually and legally sufficient for indecent exposure under Article 134.¹¹⁴ Two service courts have split in their application of indecent exposure to cases involving the display of genitalia via webcam, and the CAAF recently reviewed one of these two cases. This section will explore how courts have addressed indecent exposure via webcam and consider how the

analysis may change now that indecent exposure is codified under Article 120.¹¹⁵

Indecent Exposure in the Military: Willful, Indecent, and in the Public View

Indecent exposure is the least serious indecency offense under the UCMJ.¹¹⁶ Under the common law, this offense “prohibited the public exhibition of a person’s private parts which instinctive modesty, human decency, or self-respect requires [to] be customarily kept covered in the presence of others.”¹¹⁷ The CAAF has further explained that the “purpose of criminalizing public indecency is to protect the public from shocking and embarrassing displays of sexual activities.”¹¹⁸ In *United States v. Graham*, the CAAF summarized the key requirements for indecent exposure under Article 134: the exposure must be “willful, indecent, and in public view.”¹¹⁹ First, the exposure must be willful. Negligence or heedlessness is insufficient.¹²⁰ The explanation in the *MCM* explains that “willful” means “an intentional exposure to public view.”¹²¹ In general, the Government can demonstrate willfulness in one of two ways: (1) the exposure occurs in a place “so public that it must be presumed it was intended to be seen by others,” or (2) the exposure is “accompanied by some action by which [the accused] draws attention to his exposed condition.”¹²²

¹¹⁵ See UCMJ art. 120(n) (2008) (indecent exposure); 2008 MCM, *supra* note 13, pt. IV, ¶ 45a(n) (indecent exposure).

¹¹⁶ 2005 MCM, *supra* note 8, pt. IV, ¶ 88e (stating that the maximum punishment for indecent exposure is a dishonorable discharge, forfeiture of all pay and allowances, and confinement for six months); 2008 MCM, *supra* note 13, pt. IV, ¶ 45f(7) (setting the maximum punishment for indecent exposure under the new Article 120 as a dishonorable discharge, forfeiture of all pay and allowances, and confinement for one year).

¹¹⁷ DAVID A. SCHLUETER ET AL., *MILITARY CRIMES AND DEFENSES* § 7.31[2] (1st ed. 2007) (citing W. WINTHROP, *MILITARY LAW AND PRECEDENTS* 1004 (2d ed. reprint 1920)).

¹¹⁸ *United States v. Graham*, 56 M.J. 266, 269 (C.A.A.F. 2002) (internal quotations and emphasis omitted).

¹¹⁹ *Id.* at 267 (internal quotations omitted).

¹²⁰ See *United States v. Stackhouse*, 37 C.M.R. 99, 101 (C.M.A. 1967) (accused had habit of walking around his first floor apartment in the nude and was visible to neighbors, but made no effort to attract their attention); *United States v. Manos*, 25 C.M.R. 238, 239 (C.M.A. 1958) (court held exposure “negligent” where military policeman observed accused drying himself after a shower in front of the upstairs rear bedroom of his home); see also 2005 MCM, *supra* note 8, pt. IV, ¶ 88c (“Negligent indecent exposure is not punishable as a violation of the code.”); SCHLUETER ET AL., *supra* note 117, at § 7.31[3] (“In the military, there is no such thing as negligent indecent exposure.”) (citing *Stackhouse*, 37 C.M.R. at 99 and *Manos*, 25 C.M.R. at 238).

¹²¹ 2005 MCM, *supra* note 8, pt. IV, ¶ 88c (“Negligent indecent exposure is not punishable as a violation of the code.”); see also SCHLUETER ET AL., *supra* note 117, § 7.31[3] (“In the military, there is no such thing as negligent indecent exposure.”) (citing *Stackhouse*, 37 C.M.R. at 101; *Manos*, 25 C.M.R. at 239).

¹²² See *Graham*, 56 M.J. at 268 (internal citations omitted). “Drawing attention” can include “motions, signals sounds or other actions . . . designed to attract attention to his exposed condition.” *Id.*

¹¹³ *Id.* at 91 (citing *United States v. Thomas*, 25 M.J. 75, 76 (C.M.A. 1987) (“The offense of committing indecent acts with another requires that the acts be done in *conjunction or participating with another person.*”); *United States v. McDaniel*, 39 M.J. 173, 175 (C.M.A. 1994) (describing the appellant’s actions as “affirmative interaction” with his victims); *United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996) (“Appellant admitted substantially more than merely acting in the presence of the two women.”)).

¹¹⁴ 2005 MCM, *supra* note 8, pt. IV, ¶ 88 (Indecent exposure). The elements of indecent exposure under Article 134 are as follows:

- (1) That the accused exposed a certain part of the accused’s body to public view in an indecent manner;
- (2) That the exposure was willful and wrongful; and
- (3) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

Id. pt. IV, ¶ 88b.

The next requirement is that the conduct be indecent, that is, it must demonstrate “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.”¹²³ The courts concede that indecency is an elusive concept, but in general, this offense requires more than just nudity.¹²⁴ Most of the indecent exposure cases involve exposure of genitals to women and children, or exposure to the public at large.¹²⁵

The third requirement is that the conduct occur in “public view.”¹²⁶ In *Graham*, the CAAF synthesized its prior decisions¹²⁷ and clarified that conduct can be “in public view” in one of two ways. First, it can occur in a public place. This obviously includes public lands or public buildings, but also includes those “places so public and open . . . that they are certain to be observed by the general population.”¹²⁸ The courts also recognize that indecent exposure can also occur in private locations, such as inside a privately-owned home; however, the conduct must be “in the view of the public.”¹²⁹ Following the state court decisions on the matter, which comprise the majority view, the CMA stated that “the focus of the offense is on the victim, not the location of the crime.”¹³⁰

After establishing this framework, the court then turned to the actual facts in *Graham*. While wearing only a towel, the accused invited his fifteen-year-old babysitter into his bedroom.¹³¹ Once there, he allowed the towel to drop,

exposing his penis to the babysitter.¹³² Contrary to his pleas, the accused was convicted of indecent exposure under Article 134.¹³³ On appeal to the CAAF, the court found that the conduct was willful—there was no evidence to suggest that the dropping of the towel was inadvertent or otherwise negligent.¹³⁴ The court also found that the conduct was indecent, reasoning that the babysitter was “not a spouse or girlfriend, or . . . a family member or other person involved with him in such a way that a given exposure might not be indecent.”¹³⁵ Rather, she was “completely unrelated to and uninvolved with” him, and she “neither invited nor consented to his conduct.”¹³⁶

After resolving these two issues easily, the court turned to the real issue in the case: whether this exposure was “in public view.” The incident did not occur in a traditionally public place, like a park or a building. It also did not occur in a place readily observable by members of the general public, like an open garage.¹³⁷ As the exposure occurred in a private bedroom, the court had to determine whether it was “in public view.” The CAAF began its analysis by articulating the purpose of criminalizing indecent exposure: “to protect the public from shocking and embarrassing displays of sexual activities.”¹³⁸ Furthermore, “[a] person need not be in a public place to be a member of the public.”¹³⁹ The court then provided its formulation of what it means to be “in public view”: “[P]ublic view’ means ‘in the view of the public,’ and in that context, ‘public’ is a noun referring to any member of the public who views the indecent exposure.”¹⁴⁰ This circular definition begs the question: Who is “a member of the public?” The court did not define the term any further, but concluded that the babysitter was a “member of the public,” finding that the accused “made certain that an unsuspecting and uninterested member of the general population had no choice but to see him naked.”¹⁴¹ The court affirmed the conviction for indecent exposure.¹⁴²

In writing for the majority, it appears that Judge Crawford tried to provide a roadmap for analyzing indecent exposure cases. But determining whether a particular

¹²³ 2005 MCM, *supra* note 8, pt. IV, ¶ 90c; SCHLUETER ET AL., *supra* note 117, § 7.31[3].

¹²⁴ *United States v. Caune*, 46 C.M.R. 200, 201 (C.M.A. 1973) (holding that a disrobing in front of male law enforcement officers was contemptuous and disrespectful, rather than indecent). The court in *Caune* opined, “Although we have difficulty in defining what indecency is, we believe we know what it is not.” *Id.* (citing *Jacobellis v. Ohio*, 378 U.S. 194, 197 (1964) (Stewart, J., concurring)).

¹²⁵ *See id.* But *see United States v. Choate*, 32 M.J. 423 (C.M.A. 1991) (holding that, although not charged as indecent exposure, conduct involving exposure of the buttocks to a female neighbor (“mooning”) was indecent and prejudicial to good order and discipline).

¹²⁶ *See* 2005 MCM, *supra* note 8, pt. IV, ¶ 88b; *Graham*, 56 M.J. at 267.

¹²⁷ *See United States v. Shaffer*, 46 M.J. 94, 96–97 (C.A.A.F. 1997) (affirming an indecent exposure conviction where neighbors observed the accused standing naked in his open garage); *United States v. Ardell*, 40 C.M.R. 160, 161 (C.M.A. 1969) (setting aside a conviction for indecent exposure where neighborhood children observed the accused naked in his residence, but no evidence showed that he was aware of their presence); *United States v. Stackhouse*, 37 C.M.R. 99, 100–01 (C.M.A. 1967) (setting aside three convictions for indecent exposure where neighbors viewed the accused naked inside his apartment, but no evidence showing that the exposure was intentional).

¹²⁸ *See United States v. Graham*, 56 M.J. 266, 268 (C.A.A.F. 2002) (emphasis omitted).

¹²⁹ *Id.* at 267.

¹³⁰ *Id.* at 268.

¹³¹ *Id.* at 267.

¹³² *Id.*

¹³³ *Id.* at 266.

¹³⁴ *Id.* at 267.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *See United States v. Shaffer*, 46 M.J. 94, 97 (C.A.A.F. 1997) (where neighbors passing his house observed the accused standing naked in his open garage).

¹³⁸ *Graham*, 56 M.J. at 269.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 268.

¹⁴² *Id.* at 270.

exposure is willful, indecent, or in public view can be difficult and will depend heavily on the facts of the case. Thus, in an indecent exposure case, the answers to two questions provide the key facts for the analysis of whether a particular case is factually and legally sufficient: (1) Where did the exposure occur? and (2) Who actually viewed the exposure? The easiest case is where the conduct occurred in a truly public place, like public land or a public building, and where the conduct was viewed by someone that did not know the accused at all. The *Graham* case provides an example of a more difficult case where the conduct occurred in a private location, only the accused and the victim were present, and the victim knew the accused. The most difficult set of facts involves an exposure via webcam in a private location to a law enforcement posing as a teenager who acquiesces to the exposure. This is where the service courts have struggled in using *Graham's* roadmap.

Exposure to Police via Webcam: Indecent Exposure?

The fickle nature of the indecency definition and the circular nature of the definition of “in public view” have proved difficult for the military courts when considering an exposure via webcam to a law enforcement officer posing as a child. The Navy-Marine Corps Court of Criminal Appeals (NMCCA) had the first opportunity to consider the issue in *United States v. Hockemeyer*.¹⁴³ In that case, the accused engaged in several online conversations with an individual whom he believed to be a girl between the ages of thirteen and fifteen.¹⁴⁴ In fact, “Raven” was an undercover Naval Criminal Investigative Service (NCIS) officer.¹⁴⁵ Each of their instant messenger conversations became more sexual in nature and, in their last conversation, the accused used a webcam to transmit a live video of his erect penis.¹⁴⁶ He pled guilty, in relevant part, to one specification of indecent exposure and was convicted.¹⁴⁷ On appeal to the NMCCA, he conceded that his conduct was willful, but argued that his plea was improvident because the conduct was neither indecent nor in the public view because it occurred between “consenting adults.”¹⁴⁸ In an unpublished opinion, the NMCCA found the plea improvident and set the conviction aside.¹⁴⁹

¹⁴³ No. 200800077, 2008 WL 4531999 (N-M. Ct. Crim. App. Sept. 30, 2008) (unpublished).

¹⁴⁴ *Id.* at *1.

¹⁴⁵ The screen name the NCIS agent used was “lilraven0103” and the court used “Raven” as shorthand when referring to the agent. *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at *2.

¹⁴⁹ *Id.* at *1.

First, the court assumed from the record that no one besides Raven viewed the transmission.¹⁵⁰ This assumption makes the case factually analogous to *Graham*: although it occurred via the Internet, the exposure occurred in private, between only the accused and the victim. Next, following the military precedent, which in turn follows the state majority view, the NMCCA stated that “the focus of indecent exposure is on the victim and not the location of the crime.”¹⁵¹ Therefore, the crime can occur in a private setting.¹⁵² The court then narrowed its focus to the victim, finding that she was “a member of the public who viewed the appellant’s exposure.”¹⁵³ At this point, the court compared the victim to the babysitter in *Graham*, finding that the law enforcement officer posing as Raven was “neither unsuspecting nor uninterested.”¹⁵⁴ Instead, the target of the exposure “was an NCIS agent attempting to snare online predators.”¹⁵⁵ Also, the exposure was preceded by a number of online chats that became “progressively sexual in nature.”¹⁵⁶ Finally, the conversation that immediately preceded the exposure gave a strong indication that the accused was about to display his penis.¹⁵⁷ Although given the opportunity, the agent did not object and even complimented the accused’s display.¹⁵⁸ Based on these facts, the NMCCA found the record factually insufficient to sustain the conviction for indecent exposure, concluding that

¹⁵⁰ *Id.* at *2.

¹⁵¹ *Id.* (quoting *United States v. Graham*, 56 M.J. 266, 268 (C.A.A.F. 2002)).

¹⁵² *Id.*

¹⁵³ *Id.* at *3.

¹⁵⁴ *Id.* (internal quotations omitted).

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* The court recounted the conversation as it appears in the record of trial as follows:

ACC: and maybe I could show u a few things of me
Raven: pleeeeee

....

ACC: u alone?
Raven: yeah why
ACC: want to make sure cuz I may show u more then
just my face
Raven: oh yeah . . . just me
ACC: so u won't mind if I show u more of me?
Raven: its up to you
ACC: u ready to see this?
Raven: yeah

Id. at *1.

¹⁵⁸ *Id.* The court recounted the conversation as it appears in the record of trial as follows:

ACC: u like?
ACC: u like my * * * *?
Raven: wow that is big
Raven: never seen one before

Id.

the victim was “neither unsuspecting nor uninterested.”¹⁵⁹ As the court specifically found that the exposure was to a member of the public and the accused conceded that his conduct was willful, the court’s resolution had to have been grounded in the conclusion that, under the circumstances of this case, the exposure to the law enforcement officer was not indecent.

After *Hockemeyer*, the AFCCA had the next opportunity to review a conviction for indecent exposure to a law enforcement official using a webcam. The facts of *United States v. Ferguson*¹⁶⁰ are very similar to those in *Hockemeyer*. The accused entered an Internet chat room and made contact with an individual whom he believed to be a fourteen-year-old boy.¹⁶¹ “Bradnh14” was actually an undercover civilian law enforcement officer.¹⁶² On a number of different occasions over about a month, the accused engaged in several sexually graphic conversations with the officer, and in the course of one of the online chats, used his webcam to send a live video of himself masturbating and ejaculating.¹⁶³ The accused pled guilty to indecent exposure as well as several other charges.¹⁶⁴

On appeal to the AFCCA, the accused advanced the same arguments that were successful in *Hockemeyer*: that his conduct was not “in the public view” because he “exposed himself in a nonpublic way . . . to an undercover police officer who was neither unsuspecting nor uninterested.”¹⁶⁵ In yet another unpublished opinion, the AFCCA, with one dissenting judge, rejected the *Hockemeyer* reasoning and affirmed the accused’s conviction for indecent exposure.¹⁶⁶ The court concluded that the officer remained a member of the public and found that neither the elements of the offense nor the *Graham* holding required a “complete lack of interest and suspicion as a precondition to a finding of ‘public view.’”¹⁶⁷ Providing a hypothetical where an accused exposed himself to a “consenting” child, the court reasoned that “even ‘invited’ exposure might, under certain circumstances, still be considered indecent, and to a member

of the public.”¹⁶⁸ Instead, the court articulated a “totality of the circumstances” approach where the nature of the relationship between the parties, as well as the role of consent, are important considerations in determining whether a particular exposure is “indecent” or in “public view.”¹⁶⁹ The court then applied the *Graham* framework to the facts of the case, considering the totality of the circumstances. The accused did not dispute that his conduct was willful.¹⁷⁰ Next, the court found that the officer remained a “member of the public.”¹⁷¹ Using the *Graham* court’s description of the babysitter, the court reasoned that the officer and the accused did not have a “pre-existing relationship . . . such as that of a family member or paramour,” and, therefore, the exposure occurred “in public view.”¹⁷² Additionally, the court found that conduct was indecent because of the very nature of the conduct itself; the fact the exposure occurred as part of an ongoing sexual dialogue; and, most significantly, the fact that the accused believed he was exposing himself to a fourteen-year-old boy.¹⁷³ Therefore, although the record shows that the officer “invited or at least acquiesced in the online exposure,” the court found the conduct legally and factually sufficient for indecent exposure under Article 134.¹⁷⁴

The CAAF granted review of *Ferguson*, presumably due to the service court split on the issue of webcam exposure to law enforcement personnel. Rather than tackling the myriad issues involved in assessing the criminal nature of this conduct, the three-judge majority resolved the case on very narrow grounds. Airman First Class (A1C) Ferguson pled guilty to indecent exposure and did not even raise the issue of the providence of his plea to the AFCCA.¹⁷⁵ In an opinion that will surely be cited for its pronouncements on the appellate review of guilty pleas, the court simply held that there was not a substantial basis in law or fact to question A1C Ferguson’s guilty plea.¹⁷⁶

Writing for the majority, Judge Stucky noted several key admissions by the accused. Essentially, the accused admitted that he “transmitted live images of himself over the Internet, intentionally exposing his naked body and erect penis while ejaculating to a person he thought was a

¹⁵⁹ *Id.* at *3.

¹⁶⁰ *Ferguson I*, No. 37272, 2009 WL 2212070 slip op. (A.F. Ct. Crim. App. July 15, 2009) (unpublished).

¹⁶¹ *Id.* at *1.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.* The other charges include attempting to send obscene materials to a minor via the Internet, communicating indecent language to a person believed to be a minor, and possession of child pornography. *Id.*

¹⁶⁵ *Id.* at *2.

¹⁶⁶ *Id.* at *2–5; see also *id.* at *5–7 (Heimann, J., dissenting). Judge Heimann would have reversed the case applying the same reasoning as the NMCCA in *Hockemeyer*. *Id.* It appears that the entire panel viewed the *Hockemeyer* reasoning as grounded in a finding that the exposure was not “in public view.” See *id.* at *3, *6.

¹⁶⁷ *Id.* at *3.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at *2.

¹⁷¹ *Id.* at *2, *4.

¹⁷² *Id.* at *4.

¹⁷³ *Id.*

¹⁷⁴ *Id.* at *4–5.

¹⁷⁵ *United States v. Ferguson (Ferguson II)*, No. 10-0020, slip op. at 3 (C.A.A.F. Mar. 22, 2010). The accused raised no issues on appeal, but the AFCCA specified the issue concerning the providence of his plea to indecent exposure. *Id.*; *Ferguson I*, 2009 WL 2212070, at *1.

¹⁷⁶ *Ferguson II*, No. 10-0020, at 2.

fourteen-year-old boy.”¹⁷⁷ Although the accused asked whether “bradnh14” was alone, he admitted to the military judge the “he couldn’t have known who was in the room.”¹⁷⁸ Additionally, the accused stipulated that “the Internet transmission could have been intercepted by a third party, was ‘public,’ and ‘indecent.’” The accused admitted that “he performed the acts intentionally, purposefully, and in public view.”¹⁷⁹ As such, the court found that there was no matter inconsistent with his plea.¹⁸⁰

The accused did, however, raise an issue that the majority found necessary to discuss. The accused argued that *Graham* requires the victim to be unsuspecting and uninterested when the conduct occurs in a private setting.¹⁸¹ This principle was central to the NMCCA’s analysis in *Hockemeyer* and was found to be persuasive by the lone dissenting judge in the AFCCA opinion.¹⁸² According to the majority’s reading of *Graham*, the fact that the victim was “unsuspecting and uninterested” is necessary to establish willfulness when the conduct occurs in a private location.¹⁸³ Should the conduct occur in a public location, that fact alone will be sufficient to establish the willful nature of the conduct.¹⁸⁴ However, because the conduct in *Graham* occurred in private, “the willfulness was established by the fact that Graham exposed himself to a member of the public . . . who was unsuspecting and uninterested, and had no choice but to see him naked.”¹⁸⁵ According to the majority, the accused’s admissions during the plea colloquy established willfulness in the case at hand.¹⁸⁶

In a dissenting opinion, which Judge Ryan joined, Judge Erdmann opined that the plea in this case was not provident.¹⁸⁷ The key point of departure from the majority was the reading of *Graham*. Judge Erdmann noted that the *Graham* opinion discussed the babysitter’s status in the discussion of both the willfulness element and the indecency

element.¹⁸⁸ As such, Judge Erdmann reasoned that the status of the victim and consent to the conduct at issue are relevant to both willfulness and indecency.¹⁸⁹ He also noted that status and consent would also be important in determining whether the conduct was wrongful.¹⁹⁰ Based on this reasoning, Judge Erdmann concluded that “consideration of the victim’s status must be included in any analysis of an indecent exposure offense in a nonpublic location.”¹⁹¹ In this case, the accused asked whether “bradnh14” was alone, and the individual stated that he was. Additionally, there is no evidence in the record that anyone other than “bradnh14” viewed the exposure, and the law enforcement officer specifically requested that the accused transmit the image. Judge Erdmann found that the law enforcement officer “specifically invited and consented to the exposure” and concluded that the facts in this case “do not meet the legal requirements of indecent exposure as defined in the *MCM* and [the CAAF].”¹⁹² With a narrow majority opinion and the points Judge Erdmann raised in his dissent, *Ferguson* leaves a number of unresolved issues concerning indecent exposure in webcam cases.

Indecent Exposure Under Article 134: Forging the Road Ahead

As Judge Erdmann noted, two service courts applied *Graham* to almost identical facts and reached opposite conclusions.¹⁹³ There are, however, a couple of points that appear undisputed. First, the Government could have charged the conduct in both *Hockemeyer* and *Ferguson* as an attempted indecent act under Article 134 and subjected the accused to a significantly higher maximum punishment. In both cases, the accused engaged in sexually explicit dialogue with a person he believed to be a minor. Then, the accused used a webcam to transmit live video of masturbation and ejaculation to the “teen,” who then commented approvingly on the video. Second, it appears that the courts accept the principle that an indecent exposure can occur via Internet webcam. No court thus far has read a requirement that the exposure must occur in the physical presence of the victim to constitute indecent exposure. Setting aside issues involving invitation, law enforcement officers posing as children, and pre-recorded pictures and video, it seems beyond cavil that an accused could use his webcam to

¹⁷⁷ *Id.* at 4.

¹⁷⁸ *Id.* at 5.

¹⁷⁹ *Id.* at 11.

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 8.

¹⁸² *United States v. Hockemeyer*, No. 200800077, 2008 WL 4531999, slip op. at *3 (N-M. Ct. Crim. App. Sept. 30, 2008) (unpublished); *Ferguson I*, No. 37272, 2009 WL 2212070, slip op. at *5–7 (A.F. Ct. Crim. App. July 15, 2009) (unpublished) (Heimann, J., dissenting).

¹⁸³ *Ferguson II*, No. 10-0020, slip op. at 10.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* (“[W]hether appellant’s acts were willful . . . was resolved during the plea inquiry. Appellant confirmed to the military judge that the decision to expose himself ‘was the result of a freely made decision on his part.’”).

¹⁸⁷ *Ferguson II*, No. 10-0020, slip op. at 1 (Erdmann, J., dissenting).

¹⁸⁸ *Id.* at 5.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* Indecent exposure must be both “willful” and “wrongful.” See *id.* at 3; 2005 MCM, *supra* note 8, pt. IV, ¶ 88; BENCHBOOK, *supra* note 105, instr. 3-88-1.

¹⁹¹ *Ferguson II*, No. 10-0020, slip op. at 5 (Erdmann, J., dissenting).

¹⁹² *Id.* at 7.

¹⁹³ *Id.* at 1.

willfully expose a certain part of his body to public view in an indecent manner via live-video feed.¹⁹⁴

It appears likely that the CAAF certified *Ferguson* based on the incongruous results from the service courts. However, questions remain in the factual scenario where a law enforcement officer poses as a child and acquiesces in the exposure. There appear to be two salient questions. First, when does an individual cease to be a “member of the public?” Second, what is the role of invitation and consent in the crime of indecent exposure? Two principles in the *Graham* opinion provide important waypoints for a final resolution of this issue. The first is the policy behind criminalizing indecent exposure: “to protect the public from shocking and embarrassing displays of sexual activities.”¹⁹⁵ The second is the CAAF’s description of the accused’s actions in *Graham*: “[H]e made certain that *an unsuspecting and uninterested member of the general population had no choice but to see him naked.*”¹⁹⁶ These two salient questions and these two waypoints offer some assistance to courts and practitioners handling future Article 134 indecent exposure cases.

In both *Ferguson* and *Hockemeyer*, the courts agreed that the law enforcement officer at issue was a member of the public. However, a deeper analysis of the *Graham* opinion might yield a different result. There appears to be a recognition that some individuals are not “members of the public” for purposes of indecent exposure, like spouses, family members, or other members of the household.¹⁹⁷ It is logical that at some point, an individual ceases to be a “member of the public” for indecent exposure purposes and is no longer in need of protection from “shocking and embarrassing” displays of sexuality. In both *Ferguson* and *Hockemeyer*, the accused engaged in extensive online chatting with these two victims and the chatting involved sexually explicit topics. Furthermore, prior to the exposure, the servicemembers sought some form of permission from their targets. Both victims are easily distinguishable from the babysitter who had no idea what awaited her when she

entered Graham’s bedroom.¹⁹⁸ Instead, these two victims were interested in seeing the genitals of the accused and expected that the accused would, at some point, show his genitals. One who engages in explicit sexual conversations with an individual who then seeks permission to display his genitals no longer needs the protection from the “shocking and embarrassing displays” that an indecent exposure offense endeavors to provide members of the public.

Additionally, the courts acknowledge that the victims in both *Ferguson* and *Hockemeyer* invited or consented to the exposure. This factor must play a role in whether the conduct is indecent. Under *Graham*, the court describes the victim as one “who had no choice but to see [the accused] naked.”¹⁹⁹ The law enforcement officers in both *Ferguson* and *Hockemeyer* had sufficient warning that the two accused were going to expose themselves and had ample opportunity to avoid seeing the genitals of these two servicemembers. Nonetheless, they acquiesced in the display in order to perfect a criminal case against the accused. Should a particular exposure be willful and in the public view, the only logical place for consent or invitation is in assessing the indecent nature of the offense. One who invites an individual to display certain parts of his body, or consents to such a display, has a choice in the matter and no longer needs the protection that the indecent exposure offense provides. The obvious exception to this principle is the case involving an actual child. However, without resorting to a conclusion that children cannot consent to indecent conduct, indecent acts or indecent liberties with a child account for this circumstance—with a higher maximum punishment.²⁰⁰

Narrowing the definition of “member of the public” and broadening the role of invitation or consent has applications in a more conventional context as well. Consider a hypothetical scenario where a female neighbor comes to a male servicemember’s house to return a borrowed copy of the latest *Harry Potter* book.²⁰¹ The servicemember invites the neighbor into the house and steers the conversation away from Voldemort and Hogwarts toward topics of a more sexual nature. Instead of leaving the servicemember’s house immediately, the neighbor participates in sexually-oriented

¹⁹⁴ For example, a servicemember could send a link to an “unsuspecting or uninterested” person on the Internet who, on clicking on the link, is transported to a live-video feed where the accused exposes himself. Consider another example where two individuals are chatting via webcam and one displays his genitals to the other in an unexpected manner.

¹⁹⁵ *United States v. Graham*, 56 M.J. 266, 269 (C.A.A.F. 2002) (emphasis added).

¹⁹⁶ *Id.* at 268 (emphasis added).

¹⁹⁷ While understandable considering the common law development of the offense, it is interesting that indecent exposure is limited to members of the public. Children remain protected under other offenses and it would be nonsensical to protect spouses. It seems, however, that the law should protect other members of the household from exposures that are indecent. The definition of “indecent” would naturally operate to exempt from prosecution those rare, incidental exposures that occur as a result of everyday life in a common household.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ See 2005 MCM, *supra* note 8, pt. IV, ¶ 87e (indecent acts or liberties with a child with a maximum punishment of a dishonorable discharge, forfeiture of all pay and allowances, and confinement for seven years); *id.* pt. IV, ¶ 88e (indecent exposure with a maximum punishment of bad-conduct discharge, forfeiture of all pay and allowances, and confinement for six months); *id.* pt. IV, ¶ 90e (indecent acts with another with a maximum punishment of a dishonorable discharge, forfeiture of all pay and allowances, and confinement for five years); *Ferguson I*, No. 37272, 2009 WL 2212070, slip op. at *6 (A.F. Ct. Crim. App. July 15, 2009) (Heimann, J., dissenting) (noting that indecent act with a child would apply to the facts at hand, with a far greater maximum punishment). Of course, after *Miller*, indecent liberties with a child does not apply to conduct over the Internet.

²⁰¹ *E.g.*, J.K. ROWLING, HARRY POTTER AND THE DEATHLY HALLOWS (2007).

banter. This encourages the servicemember to take the conversation in an even more sordid direction. As the conversation continues, the servicemember asks whether the neighbor wants to see his penis and the neighbor's reply, rather than "No!" or leaving immediately, is "Sure!" This neighbor is easily distinguishable from a perfect stranger or a neighbor walking down the street, and it seems absurd that this conduct could be considered to be indecent and in the public view. The law should not provide the same protection to this neighbor that it offers to the rest of the general population.

Beyond the role of consent and the status of the victim, three more issues warrant consideration when discussing indecent exposure in the webcam context. The first is the significance of others who might view the webcam feed. In *Ferguson*, the accused asked "bradnh14" if he was alone and "bradnh14" confirmed that he was. However, in the stipulation of fact, the accused agreed that the "Internet transmission could have been intercepted by a third party."²⁰² Additionally, during the providence inquiry, the accused admitted that "he couldn't have known who was in the room" with "bradnh14."²⁰³ This raises interesting issues regarding the ability of others to view private Internet transmissions, the likelihood of another viewing a private Internet transmission, and the accused's knowledge of that likelihood. The military jurisprudence proves very helpful here. In *Stackhouse*, the accused admitted to walking nude in his apartment and even admitted that it was possible that his neighbors might see him.²⁰⁴ However, the court found such evidence "clearly insufficient to establish a willful indecent exposure."²⁰⁵ Contrast this with *Shaffer*, where the accused was seen standing naked in the back of his garage, with the garage door open, "facing the street."²⁰⁶ The court noted that "school buses and automobiles, drove by on a regular basis, . . . children routinely passed by on foot and on their bicycles[, and o]ther families' homes were located directly alongside of and across the street . . ."²⁰⁷ Based on these facts, the court held that the exposure was "willful and wrongful."²⁰⁸ As the *Benchbook* instructs, "'Willful' means an intentional exposure to public view. The exposure must be done with the intent to be observed by one or more members of the public."²⁰⁹ Assuming that the exposure is in a private location and the primary target of the exposure is not a member of the public, the accused must know that

someone else is witnessing the exposure and intend that they observe it. Heedlessness or negligence is not enough.²¹⁰ In rejecting the providence of A1C Ferguson's plea, Judge Erdmann noted that in previous cases, the CAAF has recognized that "members of the public are not generally able to view e-mails and instant messenger conversations."²¹¹ This is an important footnote because CAAF has thus far rejected the idea that all electronic transmissions are open to the view of the general public.²¹² The situation where there is a private transmission, with the mere possibility that the transmission is viewed by an employee of the service provider or a hacker that intercepted the transmission, seems more analogous to *Stackhouse* than *Shaffer*. Thus, the facts are critical to determining whether an Internet exposure is willful.

The second issue involves attempts under Article 80.²¹³ In a situation where the accused believes he is exposing himself to a child, rather than an adult law enforcement agent, attempted indecent exposure should be both a valid charge, as well as a valid appellate remedy under Article 59.²¹⁴ Indeed, Judge Erdmann noted this in his dissenting opinion in *Ferguson*.²¹⁵

As a third and final issue, as of 1 October 2007, indecent exposure is now codified under Article 120(n), UCMJ, and the elements have changed. The elements are now as follows:

- (1) That the accused exposed his or her genitalia, anus, buttocks, or female areola, or nipple;
- (2) That the accused's exposure was in an indecent manner;
- (3) That the exposure occurred in a place where the conduct involved could reasonably be expected to be viewed by

²⁰² *Ferguson II*, No. 10-0020, slip op. at 5 (C.A.A.F. Mar. 22, 2010).

²⁰³ *Id.*

²⁰⁴ *United States v. Stackhouse*, 37 C.M.R. 99, 100-01 (C.M.A. 1967).

²⁰⁵ *Id.* at 101; *see also* *United States v. Manos*, 25 C.M.R. 238, 239 (C.M.A. 1958).

²⁰⁶ *United States v. Shaffer*, 46 M.J. 94, 97 (C.A.A.F. 1997).

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ BENCHBOOK, *supra* note 105, instr. 3-88-1.

²¹⁰ 2005 MCM, *supra* note 8, pt. IV, ¶ 88c ("Negligent indecent exposure is not punishable as a violation of the code."); SCHLUETER ET AL., *supra* note 117, § 7.31[3] ("In the military, there is no such thing as negligent indecent exposure.") (citations omitted).

²¹¹ *Ferguson II*, No. 10-0020, slip op. at 6 n.3 (C.A.A.F. Mar. 22, 2010) (Erdmann, J., dissenting).

²¹² In *Hockemeyer*, the NMCCA found the record "devoid of any facts demonstrating that th[e] transmission was either observed by a third party, or capable of being observed by a third party. *United States v. Hockemeyer*, No. 200800077, 2008 WL 4531999, slip op. at *2 (N-M. Ct. Crim. App. Sept. 30, 2008) (unpublished). Furthermore, the court did not find "any indication . . . that a purported private online video transmission could be viewed by other computers through which the images travel." *Id.* at 2 n.5.

²¹³ UCMJ art. 80 (2008).

²¹⁴ *Id.* art. 59b ("Any reviewing authority . . . may approve or affirm, instead, so much of the finding as includes a lesser included offense.").

²¹⁵ *Ferguson II*, No. 10-0020, slip op. at 7 (Erdmann, J., dissenting) ("The facts as presented here may have constituted the offense of attempted indecent exposure . . .").

people other than the accused's family or household; and
(4) That the exposure was intentional.²¹⁶

Although the elements differ from the Article 134 version, the exposure must still be intentional and indecent.²¹⁷ There are, however, several key changes. First, the statute applies to both male and female servicemembers and the statute clearly identifies the body parts at issue. Under the Article 134 version, it was an open question whether the offense covered exposure of the buttocks or the female breast.²¹⁸ Second, the statute replaces the term "public view" with a more specific phrase. The conduct must occur "in a place where the conduct involved could reasonably be expected to be viewed by people other than the accused's family or household."²¹⁹ In proposing this language, the drafters of the Joint Service Committee report on sexual assault intended that Congress codify the holding in *Graham*.²²⁰ The drafters viewed the Article 134 definition as "narrow" and borrowed the current language from the Georgia indecent exposure statute in an effort to broaden the places where this offense can occur.²²¹ The question raised above concerning private Internet transmissions is now phrased a new way: can it be *reasonably expected* that a third party will view the transmission? Third, Article 120 now governs the applicability of certain defenses. Marriage is an affirmative defense to indecent exposure, unless the accused's intent is "to abuse, humiliate, or degrade any person."²²² Additionally, consent and mistake of fact as to consent are not affirmative defenses to indecent exposure.²²³ Thus, for cases arising under Article 120, the key question appears to be whether the exposure at issue is indecent, and *Graham* will remain instructive. In performing the indecency analysis, the court described the babysitter as "completely unrelated to and uninvolved with him, and . . . neither invited nor consented to his conduct."²²⁴ While consent or invitation may not be affirmative defenses, facts

indicating either should still have bearing on whether the conduct at issue is indecent.

Considering *Graham*, *Hockemeyer*, *Ferguson*, and the new Article 120, indecent exposure remains an enigma when applied to conduct occurring over the Internet. The learning point for practitioners is that the conduct in both *Hockemeyer* and *Ferguson* would have been punishable as an indecent act, whether under the Article 134 version or under the Article 120 version. While the court in *Ferguson* affirmed the accused's guilty plea based on the his admissions and stipulations, the narrow disposition and Judge Erdmann's dissent sound ominous tones of caution for trial counsel considering an indecent exposure charge for a case involving webcam exposure to a law enforcement officer posing as a child.

Conclusion

In just two years, there have been six appellate opinions that dealt with an accused who used an Internet webcam to display his genitals to someone he thought was a child. In four of the five instances at issue, the accused found a law enforcement officer rather than a child, but the prevalence of this crime is worthy of note to practitioners at all levels. Also worthy of note is the difficulty that the courts have in applying law designed for conduct that occurs in the actual physical presence of the victim to conduct that occurs over the Internet and using webcams. The policy behind these laws—either protecting children from sexual predators or protecting the public from shocking and embarrassing displays of a sexual nature—has continuing validity and mandates that military law accommodate this new avenue for predatory and deviant sexual activity. Indecent liberties with a child fails because it requires actual physical presence and indecent exposure is littered with open issues when applied to exposure via webcam to a law enforcement officer posing as a child. Indecent language has always been available for the words spoken or typed, and the charge of indecent acts has become the catch-all for the sexual acts performed.

Over the past several years, child pornography cases have occupied a significant portion of the military justice docket. The cases discussed in this article are a significant development because they show another way that the UCMJ has failed to keep pace with the age of the computer and the Internet. With more cases involving the use of the Internet to commit crimes of a sexual nature, perhaps the time has come for the military justice system to account for the Internet age in the statutory language of the UCMJ and in the explanations and analysis of the *MCM*. Until that is done, practitioners will continue to rely on the courts' "tech-savvy" in analogizing misconduct over the Internet to misconduct occurring in a more conventional, face-to-face manner. As these cases show, the cloak of protection is a growing a bit threadbare.

²¹⁶ 2008 MCM, *supra* note 13, pt. IV, ¶ 45b(14) (internal quotations omitted).

²¹⁷ The drafters proposed the phrase "willfully exposes" to reflect the language in the Article 134 version, and then defined "willful" as "intentional exposure in a public place." SEX CRIMES AND THE UCMJ, *supra* note 67, at 273, 275. Congress ultimately adopted the more simple phrase "intentionally exposes." See UCMJ art. 120(n) (2008).

²¹⁸ SCHLUETER ET AL., *supra* note 117, § 7.31[3]; see *United States v. Choate*, 32 M.J. 423, 426 (C.M.A. 1991) (finding exposure of the buttocks indecent and prejudicial to good order and discipline under the circumstances).

²¹⁹ 2008 MCM, *supra* note 13, pt. IV, ¶ 45b(14)(c) (emphasis added).

²²⁰ SEX CRIMES AND THE UCMJ, *supra* note 67, at 241.

²²¹ *Id.* (quoting GA. STAT. ANN. § 16-6-3(15) (2004)).

²²² UCMJ art. 120(q) (2008).

²²³ *Id.* art. 120(r).

²²⁴ *United States v. Graham*, 56 M.J. 266, 267 (C.A.A.F. 2002) (emphasis added).

**Everybody Cut Footloose¹:
Recent Developments in the Law of Court-Martial Personnel, Guilty Pleas, and Pretrial Agreements**

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*You're playing so cool
Obeying every rule
Dig way down in your heart
You're burning, yearning for some . . .
Somebody to tell you
That life ain't passing you by
. . . .
Lose your blues
Everybody cut footloose²*

I. Introduction

In the movie *Footloose*,³ big-city kid Ren moves to the small town of Bomont in the Midwest. He finds out the conservative town has banned dancing; as the town preacher explains to Ren: “Besides liquor and drugs, which seem to accompany such an event, the thing that distresses me even more, Ren is the spiritual corruption that can be involved. These dances and this kind of music can be destructive.”⁴ Ren realizes all the town needs is a dance and, with backing tracks from Kenny Loggins, he eventually convinces the town to let the high school kids have a dance just outside the town’s limits.⁵ It can be said without hyperbole that *Footloose* is the *Citizen Kane* of 1980s dance films, the magic of *Rebel Without a Cause* combined with the emotional gravitas of Frankie and Annette’s *Beach Party*.⁶ The movie is so profound, it has influenced appellate judges this term to cut loose (footloose) in a series of cases, finding that convening authorities will rarely be disqualified from referring cases, uncovering broad waivers in guilty plea cases, enforcing terms in pretrial agreements that favor the Government while also limiting the Government’s ability to withdraw from pretrial agreements, and reviewing records in guilty pleas with a view towards upholding the plea.

¹ FOOTLOOSE (Paramount 1984).

² *Id.* (lyrics by Kenny Loggins).

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.* But see Roger Ebert, Review, *Footloose*, Jan. 1, 1984, available at <http://rogerebert.suntimes.com/apps/pbcs.dll/article?AID=/19840101/REVIEW/401010339/1023#> (last visited Nov. 13, 2009) (writing that “‘Footloose’ is a seriously confused movie that tries to do three things, and does all of them badly”; specifically, the film “wants to tell the story of a conflict in a town, it wants to introduce some flashy teenage characters, and part of the time it wants to be a music video”).

II. “Jump Back!”: Convening Authority Disqualification

After Ren starts school at Bomont, he talks to another student who reveals the town has criminalized dancing:

Willard: You won’t get any of that here.
Ren: What’s that?
Willard: Dancing. There’s no dancing.
Ren: Why?
Willard: It’s illegal.
Ren: Jump back!⁷

Ren is so shocked that he coins his own catchphrase. This term, the CAAF considered whether a convening authority was disqualified from referring a case to trial based on his involvement in a related investigation. The opinion should remind practitioners that some rarely-invoked legal principles can have significant ramifications that might cause them to “jump back.”

The concept of accuser disqualification has been a bedrock principle of military justice for the last 180 years.⁸ In 1952, the Court of Military Appeals (COMA) defined disqualification as the “concept that the accuser should not appoint the court.”⁹ The COMA noted the accused’s right to have a case referred by an impartial convening authority “must be jealously guarded or abuses will creep in.”¹⁰ In even stronger language, the court declared that accuser disqualification “has been one of the pillars of military justice and that to weaken it would tend to destroy the system.”¹¹ The current rules for accuser disqualification are

⁷ FOOTLOOSE, *supra* note 1.

⁸ See *United States v. Gordon*, 2 C.M.R. 161, 163–66 (C.M.A. 1952) (providing an excellent history of accuser disqualification). The *Gordon* opinion traced accuser disqualification to a congressional act in 1830 and showed its development through various scholarly writings, Judge Advocate General directives, service court opinions, and even a ruling from the U.S. Attorney General. *Id.* The COMA concluded, “We have purposefully developed the origin and history of the rule to emphasize the fact that it has been one of the pillars of military justice and that to weaken it would tend to destroy the system.” *Id.* at 166–67. See also *United States v. Jeter*, 442 M.J. 442, 448 (C.M.A. 1992) (Gierke, J., concurring in the result) (tracing the history of the accuser disqualification from an amendment to Article of War 65 in 1830 through the statutory definition adopted in Article 1(11) of the UCMJ in 1950, which was renumbered Article 1(9) in 1956).

⁹ *Id.* at 163–64.

¹⁰ *Id.* at 164.

¹¹ *Id.* at 166–67. See also *United States v. Corcoran*, 17 M.J. 137, 138 (C.M.A. 1984) (“It has been a cardinal principle from the early Articles of War to the present that an accuser may not appoint the court that tries an

scattered throughout the *Manual for Courts-Martial*. Under Article 1(9), UCMJ, an accuser is one: (1) “who signs and swears to charges” (type one accuser); (2) “who directs that charges nominally be signed and sworn to by another” (type two accuser); or (3) “who has an interest other than an official interest in the prosecution of the accused” (type three accuser).¹² Articles 22(b) and 23(b) prohibit an accuser from convening general and special courts-martial, respectively.¹³ The President has repeated this prohibition in Rules for Courts-Martial 504(c)(1) and 601(c), which bar all types of accusers from referring a case to a special or general court-martial.¹⁴ “Type one” and “type two” accusers are also known as “statutory accusers,” as the disqualification is limited in scope and based on the preferral of charges; by contrast, “type three” accusers are “personally disqualified” because their disqualification is based on an other-than-official interest in the case.¹⁵ Because status as a “type one” accuser is easily determined (any convening authority who prefers charges), litigation in this field has focused on whether challenged convening authorities are “type two” or “type three” accusers.

In *United States v. Ashby*,¹⁶ the CAAF rejected claims that a convening authority was disqualified from referring a

accused.”) (citing *United States v. Crossley*, 10 M.J. 376 (C.M.A. 1981); *United States v. Gordon*, 2 C.M.R. 161 (C.M.A. 1952)).

¹² UCMJ art. 1(9) (2008). See generally *United States v. Ashby*, 68 M.J. 108, 129 (C.A.A.F. 2009) (separating three enumerated types of accusers under Article 1(9), UCMJ).

¹³ See UCMJ art. 22(b) (“If any such commanding officer is an accuser, the court shall be convened by superior competent authority, and may in any case be convened by such authority if considered desirable by him.”); *id.* art. 23(b) (“If any such officer is an accuser, the court shall be convened by superior competent authority, and may in any case be convened by such authority if considered advisable by him.”).

¹⁴ See MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 504(c)(1) (2008) [hereinafter MCM] (“An accuser may not convene a general or special court-martial for the trial of the person accused.”); *id.* R.C.M. 601(c) (“An accuser may not refer charges to a general or special court-martial.”). See also *id.* R.C.M. 303 discussion (“A person who is an accuser (see Article 1(9)) is disqualified from convening a general or special court-martial in that case.”) (citing RCM 504(c)(1)).

¹⁵ See *McKinney v. Jarvis*, 46 M.J. 870, 875 n.5 (A. Ct. Crim. App. 1997) (differentiating between “statutory disqualification” and “personal disqualification” of an accuser), *review denied*, 48 M.J. 15 (C.A.A.F. 1997). See also Major Bradley J. Huestis, *New Developments in Pretrial Procedures: Evolution or Revolution?*, ARMY LAW., Apr. 2002, at 22 (“A convening authority-accuser may be disqualified in either a ‘statutory’ sense (for example, having sworn to the charges) or in a ‘personal’ sense by virtue of having an ‘other than official’ interest in the case.”). A statutorily-disqualified accuser cannot refer a case to a special or general court-martial, but may offer non-judicial punishment, refer the case to a summary court-martial, appoint an Article 32 investigating officer, and forward the charges with recommendation to a higher convening authority noting the statutory disqualification. *McKinney*, 46 M.J. at 874–75. See also MCM, *supra* note 14, R.C.M. 401(c)(2)(A) (“If the forwarding commander is disqualified from acting as convening authority in the case, the basis for the disqualification shall be noted.”). By contrast, a personally-disqualified (or “type three”) accuser cannot refer a case to a special or general court-martial, appoint an Article 32 investigating officer or make a recommendation to a higher convening authority for disposition.

¹⁶ 68 M.J. 108 (C.A.A.F. 2009).

court-martial as a “type two” or “type three” accuser. The accused was a Marine pilot who flew an EA-6B Prowler aircraft through a gondola cable in the Italian Alps, killing twenty passengers.¹⁷ The accused was court-martialed twice.¹⁸ In the first trial he was acquitted of all charges relating to the deaths.¹⁹ During the first case, the Government preferred additional charges for conduct unbecoming an officer. The accused objected to the additional charges being joined, so the military judge ordered them severed from the original charges and the Government tried the accused for these offenses at a second court-martial.²⁰ During the second trial, the defense alleged unlawful command influence (UCI), based in part on the intense media interest in the case.²¹ The UCI motion extended to a defense challenge of the convening authority as both a statutorily- and personally-disqualified accuser.²² Regarding the disqualification issue, then-Lieutenant General Pace (the eventual general court-martial convening authority), in his capacity as Commander, United States Marine Corps Forces Atlantic, and Commander, United States Marine Corps Forces Europe, convened a command investigation board (CIB) into the gondola incident and appointed his deputy commanding general to investigate.²³

The defense first argued the convening authority was a “type two” accuser because he “essentially” triggered preferral by influencing the CIB and identifying charges by virtue of endorsing the CIB report.²⁴ The defense further argued the convening authority was a “type three” accuser because of his personal involvement in the CIB and a general predisposition to the accused’s guilt.²⁵ The court first noted, “The test for determining whether a convening authority is an accuser is ‘whether he was so closely connected to the offense that a reasonable person would conclude that he had a personal interest in the matter.’”²⁶ In

¹⁷ *Id.* at 112.

¹⁸ *Id.* at 112–13.

¹⁹ *Id.* at 112. The charges included dereliction of duty, damaging military and nonmilitary property, involuntary manslaughter, and negligent homicide. *Id.*

²⁰ *Id.* at 112, 114.

²¹ *Id.* at 127.

²² *Id.* at 127–28.

²³ *Id.* at 125–26, 129.

²⁴ *Id.* at 129.

²⁵ *Id.*

²⁶ *Id.* at 130 (quoting *United States v. Voorhees*, 50 M.J. 494, 499 (C.A.A.F. 1999) (internal quotations omitted)). The CAAF summarized the following standards for a “type three” accuser:

“Personal interests relate to matters affecting the convening authority’s ego, family, and personal property” and “[a] convening authority’s dramatic expression of anger towards an accused might also disqualify the commander if it demonstrates personal animosity.” *Id.* [*Voorhees*, 50 M.J. at 499]. We have found a personal interest where, for example, the

addressing the first argument, the CAAF found the convening authority did not act as a nominal accuser; specifically, he did not direct another to sign and swear the charges in the case.²⁷ The court rejected the defense claim that forwarding the CIB was tantamount to directing another to prefer charges.²⁸

In rejecting the second defense challenge, the CAAF noted that official action generally will not make the convening authority an “accuser.”²⁹ The CAAF found the convening authority’s interest was “wholly official,” as commanders have a responsibility to investigate accidents and Lieutenant General (Lt. Gen.) Pace’s frequent contact with the CIB did not show a “personal rather than a professional interest.”³⁰ Further, there was no evidence that the convening authority directed anyone (either expressly or impliedly) to prefer charges in this case.³¹

The opinion offers three practice points. First, the CAAF noted the presumption of regularity that applies to convening authority actions in military justice matters: “We presume that the legal officers properly performed their professional duties which included independent review of the evidence and preparation of only those charges for which they determined probable cause existed.”³² Second, a

convening authority will normally not be disqualified as an accuser for performing official duties, even when those duties overlap with the impartial review of court-martial charges; as the CAAF unmistakably held, “Interest in an incident and the investigation thereof is not personal—it is in fact the responsibility of a commander.”³³ Other cases have similarly held that convening authorities will not normally be disqualified by performing duties attendant to their command position, even when an accused is charged with disobeying the convening authority’s order.³⁴ Third, and perhaps most significant, defense counsel should be vigilant in raising this issue, particularly when a tenable unlawful command influence challenge is raised.³⁵ If a defense counsel fails to raise accuser disqualification, the issue is waived except for plain error.³⁶

III. Pleas and Providence Inquiries

During *Footloose*, the locals are nervous that Ren is stirring up trouble, trying to bring the evils of music and dancing into their town. One worried citizen says to the

Id.

³³ *Id.* at 131.

³⁴ See *United States v. Dominguez*, No. 200601385, 2009 WL 1863383 (N.M. Ct. Crim. App. June 30, 2009) (unpublished) (convening authority not disqualified for ordering accused to have no contact with accused’s wife, the victim of alleged battery). See also *United States v. Tittel*, 53 M.J. 313 (C.A.A.F. 2000) (convening authority not disqualified as an accuser when the accused was charged with disobeying the convening authority’s order “not to enter any Navy Exchange facility”).

³⁵ If the defense asserts the convening authority is personally disqualified as an accuser, there is likely a tenable claim of unlawful command influence. See *Ashby*, 68 M.J. at 128–29 (noting and rejecting defense argument that unlawful command influence affected the command investigation board of the accused conduct, which was also the subject of an accuser disqualification challenge).

³⁶ *United States v. Gudmundson*, 57 M.J. 493, 495 (C.A.A.F. 2002) (“If an appellant fails to make a timely motion or objection raising the disqualification issue, the issue may be waived.”) (citing *United States v. Shiner*, 40 M.J. 155, 157 (C.M.A. 1994); *United States v. Jeter*, 35 M.J. 442, 447 (C.M.A. 1992)). See Major Bradley J. Huestis, *You Say You Want a Revolution: New Developments in Pretrial Procedures*, ARMY LAW., Apr./May 2003, at 22–23 (“Defense practitioners should take heed: failure to raise convening authority disqualification at trial may result in waiver.”) (discussing *Tittel*, 53 M.J. 313 and citing *United States v. Voorhees*, 50 M.J. 494 (C.A.A.F. 1999)). But cf. *Tittel*, 53 M.J. at 315 (Effron and Sullivan, JJ., concurring in part) (arguing majority opinion rests solely on the conclusion that the convening authority was not an accuser, and the opinion does not mean the accuser issue can be “passively waived, as opposed to being the subject of a knowing and intelligent waiver”). See also *Jeter*, 35 M.J. at 447 (“We are inclined to believe that generally a violation of Article 22(b) is waived if an accused and his counsel are well aware thereof and make no objection or protest at trial.”); *United States v. Mack*, 56 M.J. 786, 794 (A. Ct. Crim. App. 2002) (“The appellant’s failure to raise the ‘accuser’ issue at trial waives appellate review of the issue, absent plain error.”). Last term, the CAAF made clear that convening authority disqualification is not a jurisdictional defect. *United States v. Schweitzer*, 68 M.J. 133, 136 (C.A.A.F. 2009) (“[T]he disqualification of the convening authority . . . for being an accuser under Article 1(9), UCMJ, does not deprive the court-martial of jurisdiction”) (citing *United States v. Ridley*, 22 M.J. 43, 47–48 (C.M.A. 1986)).

convening authority is the victim in the case, *United States v. Gordon*, 2 C.M.R. 161 (C.M.A. 1952); where the accused attempted to blackmail the convening authority, *United States v. Jeter*, 35 M.J. 442 (C.M.A. 1992); and where the accused had potentially inappropriate personal contacts with the convening authority’s fiancée, *United States v. Nix*, 40 M.J. 6 (C.M.A. 1994).

Id. See also *United States v. Dinges*, 55 M.J. 308, 312 (C.A.A.F. 2001) (Baker, J., concurring) (“Personal interests relate to matters affecting the convening authority’s ego, family, and personal property. A convening authority’s dramatic expression of anger towards an accused might also disqualify the commander if it demonstrates personal animosity.”) (citing *Voorhees*, 50 M.J. at 498).

²⁷ *Ashby*, 68 M.J. at 130.

²⁸ *Id.* This argument was undercut because the charges at issue in the second court-martial were not investigated by the CIB or otherwise incorporated into the convening authority’s endorsement of the report. *Id.*

²⁹ *Id.*

³⁰ *Id.* at 130–31.

³¹ *Id.* at 131.

³² *Id.* at 130. The CAAF provided the following to support the presumption of regularity:

See Article 34, UCMJ, 10 U.S.C. § 834 (2000) (imposing a duty on the staff judge advocate to prepare advice to the convening authority before a charge is referred to a general court-martial); *United States v. Masusock*, 1 C.M.R. 32, 35 (C.M.A. 1951) (citing the presumption that a public officer charged with a particular duty has performed it properly); *United States v. Roland*, 31 M.J. 747, 750 (A.C.M.R. 1990) (“We will presume, in the absence of evidence to the contrary, that the staff judge advocate properly discharged his duties.”).

town's minister: "Eleanor and I are absolutely certain that this boy is organizing a dance. . . . We let some punk push us around it won't be long before every community standard is violated."³⁷ In similar fashion this term, military appellate courts have tried to strongly enforce certain standards while allowing other standards to wane. On the one hand, courts have enforced standards by upholding military judges' decisions to reject guilty pleas as irregular or improvident, expanding the scope of waiver when an accused enters a guilty plea, and providing a framework for military judges advising accuseds in guilty pleas for non-traditional offenses. On the other hand, courts have eroded standards by affirming guilty pleas that are based on limited factual inquiry or, worse, that include unresolved defenses presented during the guilty plea.

A. Irregular Pleas

The law for entering pleas seems well-established. The *Manual for Courts-Martial* recognizes five pleas: (1) guilty; (2) not guilty; (3) guilty to a lesser included offense; (4) guilty by exceptions; and (5) guilty by exceptions and substitutions.³⁸ Under RCM 910(b), if an accused makes an "irregular plea," the military judge must enter a plea of not guilty for the accused.³⁹ The discussion to the rule notes that an irregular plea includes a plea "such as guilty without criminality."⁴⁰ The law for irregular pleas can be less clear when an accused attempts to modify the language in a specification during the course of a guilty plea.

In *United States v. Diaz*,⁴¹ the accused served as a judge advocate at Guantanamo Bay, Cuba. While serving there, he concluded the Government was improperly withholding names of unrepresented detainees, so he downloaded classified "identifying information" in his office, printed a hardcopy of this information, cut it into smaller pieces, and sent it to the Center for Constitutional Rights in a Valentine's Day card.⁴² At trial, the accused attempted to plead guilty to conduct unbecoming under Article 133, UCMJ, by amending certain language in the specification.⁴³ The military judge rejected the plea as irregular under RCM

910(b), and the Navy-Marine Court of Criminal Appeals (NMCCA) affirmed in a unanimous unpublished opinion.⁴⁴

The *Diaz* court noted the discussion to RCM 910(b) defines an irregular plea to include "pleas such as guilty without criminality."⁴⁵ In reviewing a military judge's decision to reject a plea as "irregular," appellate courts apply an abuse of discretion standard.⁴⁶ The specification in *Diaz* originally read that the accused "did wrongfully and dishonorably transmit classified documents to an unauthorized individual."⁴⁷ The accused pled by excepting "classified documents" and substituting therefor "government information not for release."⁴⁸ The accused made a proffer of the facts that would be provided during the inquiry and argued the amended specification coupled with these facts would satisfy a plea for conduct unbecoming; the military judge ruled the amended specification did not state an offense and entered a plea of not guilty on the accused's behalf.⁴⁹ The NMCCA noted that disseminating "government information not for release" could amount to an offense punishable under Article 133 in the right circumstances.⁵⁰ However, the defense proffer and representations made by counsel indicated the accused would only admit to giving unclassified names of detainees (and no other identifying information).⁵¹ As a result, the Navy-Marine Corps court found the military judge did not abuse his discretion by rejecting the plea as irregular. On 2 September 2009, the CAAF granted review on three issues, including, "Whether the military judge abused his discretion in rejecting as irregular appellant's proffered guilty plea to a violation of Article 133."⁵²

There are three interesting issues in analyzing the form of pleas. First, military courts have recognized that an accused may enter a guilty plea, in part, to limit the information that would be admitted during a contested case.⁵³ Put another way, the defense may enter pleas to

³⁷ FOOTLOOSE, *supra* note 1.

³⁸ MCM, *supra* note 14, R.C.M. 910(a)(1) ("An accused may plead as follows: guilty; not guilty to an offense as charged, but guilty of a named lesser included offense; guilty with exceptions, with or without substitutions, not guilty of the exceptions, but guilty of the substitutions, if any; or, not guilty.").

³⁹ *Id.* R.C.M. 910(b).

⁴⁰ *Id.* R.C.M. 910(b) discussion. The discussion further reads, "When a plea is ambiguous, the military judge should have it clarified before proceeding further." *Id.*

⁴¹ No. 200700970, 2009 WL 690614 (N-M. Ct. Crim. App. Feb. 19, 2009) (unpublished), *review granted*, 68 M.J. 200 (C.A.A.F. 2009).

⁴² *Id.* at *1.

⁴³ *Id.* at *2.

⁴⁴ *Id.* at *2, *6.

⁴⁵ MCM, *supra* note 14, R.C.M. 910(b) discussion, *quoted in Diaz*, 2009 WL 690614, at *2.

⁴⁶ *Diaz*, 2009 WL 690614, at *2 (citing *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008)).

⁴⁷ *Id.* at *5 n.4.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at *7 (noting, for example, that an officer could violate Article 133 by providing a base phone directory to a terrorist group).

⁵¹ *Id.* at *8-9.

⁵² *United States v. Diaz*, 68 M.J. 200 (C.A.A.F. 2009).

⁵³ *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008) ("[A]n accused might make a conscious choice to plead guilty in order to 'limit the nature of the information that would otherwise be disclosed in an adversarial contest.'" (quoting *United States v. Jordan*, 57 M.J. 236, 238-39 (C.A.A.F. 2002)). *See also* 2 FRANCIS A. GILLIGAN & FREDERIC I. LEDERER, COURT-MARTIAL PROCEDURE 19-3 (3d ed. 2006) ("In determining the advisability of such action [the accused testifying during a

reduce the maximum sentence for an offense or to eliminate aggravating circumstances listed in the specification. For example, certain offenses include sentence escalators if the accused is charged and found guilty under aggravating circumstances.⁵⁴ The defense may also attempt to except out language to merely minimize the nature of the conduct, even if the maximum punishment is unaffected.⁵⁵ The second notable issue in this area is the broad discretion appellate courts afford a military judge in rejecting a guilty plea.⁵⁶ The third notable point is that a military judge may commit mere harmless error in accepting certain irregular pleas; if the defense pleads guilty to a charge without pleading guilty to the underlying specification, courts will generally find the error to be harmless.⁵⁷ Considering these three issues, appellate courts have properly proscribed broad latitude to military judges in deciding whether to reject a plea as irregular.⁵⁸

When the accused enters a plea, a military judge has great latitude to reject the form of a plea that appears to eliminate an element or modify the specification so that it fails to state an offense. Military judges would be wise to

merits trial], counsel must consider the possibility of impeachment of the accused with prior silence, illegally-obtained evidence, prior instances of bad acts, or prior convictions, among others.”).

⁵⁴ See generally UCMJ art. 112a (2008) (increasing the maximum confinement for marijuana possession from two years to five years if the accused possessed more than thirty grams); *id.* art. 121 (increasing the maximum confinement for larceny if the property stolen is “military property” or valued at more than \$500).

⁵⁵ See generally *United States v. Denier*, 47 M.J. 253, 254 n.1 (C.A.A.F. 1997) (noting accused pled guilty to conduct unbecoming an officer under Article 133 based on inappropriate relationship with an enlisted airman’s wife, by excepting “inviting her to have alcoholic drinks” and pleading to merely “talking to her about having alcoholic drinks”).

⁵⁶ *Inabinette*, 66 M.J. at 322 (citing *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991)). But see *United States v. Johnson*, 12 M.J. 673, 674 (A.C.M.R. 1981) (noting military judge may not act “arbitrarily” in rejecting a guilty plea and finding error when military judge refused to accept plea because accused refused to name his drug supplier).

⁵⁷ See MCM, *supra* note 14, R.C.M. 910(b) discussion (“An irregular plea includes . . . guilty to a charge but not guilty to all specifications thereunder.”); *United States v. Greene*, 64 M.J. 625, 629 (C.G. Ct. Crim. App. 2007) (finding no “possible prejudice” in guilty plea case when defense counsel pled guilty to charge with no plea to specification of that charge, and military judge entered findings of guilt to both the charge and specification; court “urge[d] military judges to insist on complete pleas in all cases”); *United States v. Williams*, 47 M.J. 593, 595 (N-M. Ct. Crim. App. 1997) (refusing to grant relief for erroneous plea to charge with no plea to underlying specification and holding, “We do not find any possible prejudice, and refuse to grant the appellant a windfall on the basis of a technical oversight by his trial defense counsel which the military judge failed to correct.”).

⁵⁸ The military judge in *Diaz* may have been upheld on appeal had he accepted the accused’s plea, assuming an adequate factual predicate was provided on the record. *United States v. Diaz*, No. 200700970, 2009 WL 690614, at *6 (N-M. Ct. Crim. App. Feb. 19, 2009) (unpublished) (“We agree with the appellant that the wrongful release of ‘government information not for release’ could, under the right circumstances, constitute an act reflecting sufficient dishonor and lack of integrity to constitute an offense under Article 133, UCMJ.”).

follow the lead of their colleague in *Diaz* and reject pleas that appear to eliminate the criminality of a specification. Simply stated, military judges have a duty to reject purported guilty pleas that do not admit guilt. In close cases, military judges should reject such pleas as irregular. Appellate judges would be wise to continue to defer to military judges who reject these pleas, as this rule serves to safeguard the integrity of the guilty plea process.

B. Guilty Pleas and Waiver

*Almost paradise!
We’re knocking on Heaven’s door.
Almost paradise!
How could we ask for more?
I swear that I can see forever in your eyes.*⁵⁹

A guilty plea can seem like paradise to an appellate court reviewing a case. The accused’s unconditional guilty plea waives any objection or motion, regardless of whether or not it has been raised, “insofar as the objection relates to the factual issue of guilt.”⁶⁰ As one treatise explained, “[A] provident guilty plea waives all nonjurisdictional defects, whether raised at trial or not, that do not violate the accused’s right to due process.”⁶¹ The Supreme Court has long favored this approach in reviewing guilty pleas: “The point . . . is that a counseled plea of guilty is an admission of factual guilt so reliable that, where voluntary and intelligent, it *quite validly* removes the issue of factual guilt from the case.”⁶² This path to paradise can be sidetracked when issues raised in a guilty plea are characterized as “jurisdictional” and are, therefore, non-waivable.

However, courts are generally reluctant to characterize issues as jurisdictional and have applied the waiver doctrine to some of the most fundamental protections afforded a

⁵⁹ FOOTLOOSE, *supra* note 1 (lyrics by Ann Wilson & Mike Reno).

⁶⁰ MCM, *supra* note 14, R.C.M. 910(j). This subparagraph exempts conditional pleas from the general rule of waiver. *Id.* The accused may enter into a conditional plea with the consent of the Government and the military judge to preserve an otherwise-waived issue. *Id.* R.C.M. 910(a)(2) (“With the approval of the military judge and the consent of the Government, an accused may enter a conditional plea of guilty, reserving the right, on further review or appeal, to review of the adverse determination of any specified pretrial motion.”). But see U.S. DEP’T OF ARMY, REG. 27-10, MILITARY JUSTICE para. 5-26b (16 Nov. 2005) (“Because conditional guilty pleas subject the government to substantial risks of appellate reversal and the expense of retrial, SJAs should consult with the Chief, Criminal Law Division . . . Office of The Judge Advocate General, HQDA, prior to the government’s consent regarding an accused entering a conditional guilty plea at court-martial.”). For a brief discussion of the procedural requirements for entering a conditional guilty plea, see *United States v. Bradley*, 68 M.J. 279, 281–82 (C.A.A.F. 2010).

⁶¹ 2 GILLIGAN & LEDERER, *supra* note 52, at 19-7.

⁶² *Menna v. New York*, 423 U.S. 61, 62 n. 2 (1975), *quoted in* *United States v. Schweitzer*, 68 M.J. 133, 136 (C.A.A.F. 2009) (emphasis in original).

military accused.⁶³ In *United States v. Schweitzer*,⁶⁴ the accused moved to dismiss charges, arguing the convening authority was disqualified from referring the case as an “accuser” under Article 1(9), UCMJ.⁶⁵ The military judge denied the motion, and the accused later pled guilty pursuant to an approved pretrial agreement.⁶⁶ In a unanimous decision, the CAAF held the accused’s unconditional guilty plea waived the convening authority disqualification issue.⁶⁷ The *Schweitzer* court noted that Rule for Courts-Martial (RCM) 910(j) provides a “bright-line rule” that presumes waiver after an accused enters an unconditional guilty plea.⁶⁸ The CAAF added, “Objections that do not relate to factual issues of guilt are not covered by this bright-line rule, but the general principle still applies: An unconditional guilty plea generally ‘waives all defects which are neither jurisdictional nor a deprivation of due process of law.’”⁶⁹ Applying these principles, the CAAF held accuser disqualification under Article 1(9) does not deprive the court-martial of jurisdiction, so the issue was waived by the accused’s unconditional guilty plea.⁷⁰ As a practice point for military judges, the CAAF noted with approval that the military judge properly advised the accused that his plea of guilty waived the litigated accuser disqualification challenge, further bolstering the conclusion that the issue was waived by the guilty plea.⁷¹

⁶³ See *United States v. Mezzanatto*, 513 U.S. 196, 201 (1995) (“A criminal defendant may knowingly and voluntarily waive many of the most fundamental protections afforded by the Constitution.”), *quoted in* *United States v. Gladue*, 67 M.J. 311, 314 (C.A.A.F. 2009) (finding an accused can waive double jeopardy by pleading guilty).

⁶⁴ 68 M.J. 133 (C.A.A.F. 2009).

⁶⁵ As discussed in Part I of this article, an accuser is one: (1) “who signs and swears to charges”; (2) “who directs that charges nominally be signed and sworn to by another [type two accuser]”; or (3) “who has an interest other than an official interest in the prosecution of the accused [type three accuser].” UCMJ art. 1(9) (2008). See *United States v. Ashby*, 68 M.J. 108 (C.A.A.F. 2009), discussed *supra* notes 16-33 and accompanying text.

⁶⁶ *Schweitzer*, 68 M.J. at 136–37.

⁶⁷ *Id.* at 134.

⁶⁸ *Id.* at 136.

⁶⁹ *Id.* (quoting *United States v. Rehorn*, 26 C.M.R. 267, 268–69 (C.M.A. 1958)). The CAAF noted that so long as the convening authority is authorized to convene the court under Articles 22(a) and 23(a), disqualification under Article 1(9) does not deprive the court-martial of jurisdiction. *Id.* By entering an unconditional guilty plea, the accused waived this nonjurisdictional issue for appeal. *Id.*

⁷⁰ *Id.* The CAAF noted that so long as the convening authority is authorized to convene the court under Articles 22(a) and 23(a), disqualification is not a jurisdictional defect. By entering an unconditional guilty plea, the accused waived this issue for appeal.

⁷¹ *Id.* at 137. The military judge advised the accused regarding the issues waived by his guilty plea:

[B]y your pleas of guilty, you also give up your right to appeal the decisions, not only that I made, but the decisions that were made by [the military judge] during the joint motion session of this trial. By your plea of guilty, you waive all motions with the exception of motions regarding multiplicity; motions involving jurisdictional issues; and, as far as the

An unconditional guilty plea similarly waives most issues relating to multiplicity and unreasonable multiplication of charges. In *United States v. Rhine*,⁷² the accused pled guilty, among other things, to damaging non-government property and stalking a female airman. For the damaging property offense, the accused admitted to slashing the tires of two cars, carving “slut” on the hood of a car, and writing “Chad ‘heart’ U” on another car.⁷³ For the stalking offense, the accused admitted to the same conduct as the damaging property charge, and added that he sent repeated text messages to the victim.⁷⁴ The Air Force Court of Criminal Appeals (AFCCA) reasoned, “Ordinarily, an unconditional guilty plea waives a multiplicity issue, unless it rises to the level of plain error. The appellant bears the burden of showing that such an error occurred.”⁷⁵ Based on the accused’s providence inquiry, the AFCCA found it “clear” that the two offenses were factually distinguishable.⁷⁶ Stalking and damaging personal property require different elements of proof and the providence inquiry revealed “clear differences in the focus of the military judge,” who specifically focused on the “fear” element of stalking and then on the “specifics of the damage” for the other offense.⁷⁷ Hence, the offenses were not facially duplicative,⁷⁸ and the defense did not carry its burden.

The Air Force court noted that the parties at trial apparently did not believe the charges ran afoul of multiplicity principles.⁷⁹ The military judge mentioned the issue while summarizing an RCM 802 conference by saying “the court raised the issue of whether there was any

guilty plea is concerned, unlawful command influence, selective prosecution, or ineffectiveness of counsel. All other motions are waived.

Id. (alteration in original).

⁷² 67 M.J. 646 (A.F. Ct. Crim. App. 2009), *review denied*, 68 M.J. 184 (C.A.A.F. 2009).

⁷³ *Id.* at 647.

⁷⁴ *Id.* at 653.

⁷⁵ *Id.* at 652–53 (citing *United States v. Powell*, 49 M.J. 460, 464–65 (C.A.A.F. 1998)). See also *United States v. Purdy*, 67 M.J. 780, 781 (N-M. Ct. Crim. App. 2009) (holding receipt and possession of child pornography were separate offenses based on the accused’s providence inquiry and “[a] guilty plea waives a multiplicity issue absent plain error”) (citing *United States v. Heryford*, 52 M.J. 265, 266 (C.A.A.F. 2000)).

⁷⁶ *Rhine*, 67 M.J. at 654 (“We find it clear that the appellant’s offenses of stalking and of damaging Amn KRS’ vehicles are factually distinguishable.”).

⁷⁷ *Id.* at 653–54.

⁷⁸ An unconditional guilty plea waives challenges for unreasonable multiplication of charge or multiplicity, except for charges that are “facially duplicative.” *United States v. Lloyd*, 46 M.J. 19 (C.A.A.F. 1997); *United States v. McMillian*, 33 M.J. 257 (C.M.A. 1991).

⁷⁹ *Rhine*, 67 M.J. at 652–53.

multiplicity” regarding these two offenses.⁸⁰ The defense counsel did not object, and there is no other mention of the issue in the record.⁸¹ While not case dispositive, the AFCCA suggested that the failure to object showed the parties agreed the charges were not facially duplicative; this conclusion was bolstered by the military judge’s separate inquiry (and separate focus) when questioning the accused about the two offenses.⁸² The AFCCA correctly concluded that the defense waived these issues by pleading guilty and then reviewed for plain error before ultimately denying appellant’s challenge.⁸³

There is a simple message this term regarding pleas and the waiver doctrine: the already-strong doctrine continues to expand and will likely be dispositive in even more appellate cases. Courts examining guilty plea cases on appeal will still review alleged jurisdictional defects and due process violations, but those two avenues for review are becoming increasingly narrow. By way of example, the CAAF decided this term that accuser disqualification, a recognized pillar of the military justice system, is not a jurisdictional defect and, therefore, is waived by an unconditional plea. Simply stated, the growing list of issues waived by an unconditional plea, coupled with the limited legal issues that are considered jurisdictional or related to due process, may effectively preclude appellate review of guilty pleas except for matters relating to the providence inquiry.

C. Advising the Accused of the Offenses and Elements in a Guilty Plea

While Ren is planning his dance in *Footloose*, the town is also worried about books like *Slaughterhouse-Five* getting into the hands of children. Accordingly, concerned townfolk organize a book burning outside the library. The pastor thinks the town is overreacting, which leads to this terse exchange with a concerned parent:

Roger: Doesn’t take much time for corruption to take root.

Reverend Moore: How long is that, Roger? About as long as it takes compassion to die?⁸⁴

⁸⁰ *Id.* at 652 n.9. See generally MCM, *supra* note 14, R.C.M. 802(a) (“After referral, the military judge may, upon request of any party or *sua sponte*, order one or more conferences with the parties to consider such matters as will promote a fair and expeditious trial.”).

⁸¹ *Rhine*, 67 M.J. at 652 n.9 (“With the exception of that reference to multiplicity, there is nothing else contained in the record of trial which indicates what was discussed and there is no ruling by the military judge on the record. The trial defense counsel did not raise the issue.”).

⁸² *Id.* at 653.

⁸³ *Id.* at 654. An accused can affirmatively waive challenges to “facially duplicative” charges as part of a pretrial agreement. See *United States v. Gladue*, 67 M.J. 311 (C.A.A.F. 2009) discussed *infra* notes 233–44 and accompanying text.

⁸⁴ FOOTLOOSE, *supra* note 1.

Military law recognizes that an incomplete providence inquiry can corrupt a guilty plea, so it places a great burden on military judges to explain the elements of an offense to an accused before a guilty plea may be accepted, in stark contrast to the lower standard in civilian courts.⁸⁵ Under RCM 910(c), “Before accepting a plea of guilty, the military judge shall address the accused personally and inform the accused of, and determine that the accused understands . . . [t]he nature of the offense to which the plea is offered”⁸⁶ The Discussion section further notes the military judge should explain the elements of the offenses to which the accused has pled guilty.⁸⁷ As the Supreme Court has explained, “[B]ecause a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts.”⁸⁸ On appeal, military courts do not require textbook recitations of the elements of an offense; rather, courts will examine the entire record to decide whether the accused understood the elements.⁸⁹ Military judges also have latitude in providing legal definitions to an accused when a specific term is not defined by the *Manual* or by statute. Unfortunately, this fluid standard has led to litigation about the accuracy of the military judge’s advice to the accused, particularly in cases with technical legal theories or nuanced elements.

In *United States v. Craig*,⁹⁰ the accused pled guilty to distributing child pornography in violation of 18 U.S.C. § 2252A(a)(2), charged under clause 3 of Article 134, UCMJ. The military judge correctly advised the accused of the statutory elements of the offense as well as several applicable definitions provided under 18 U.S.C. § 2256.⁹¹

⁸⁵ See *United States v. Aleman*, 62 M.J. 281, 284 n.1 (C.A.A.F. 2006) (citing *Bradshaw v. Stumpf*, 545 U.S. 175, 183 (2005) for the federal standard that “constitutional prerequisites of a guilty plea are satisfied if counsel has explained the elements to the defendant” as opposed to the military standard in *United States v. Care*, 40 C.M.R. 247, 253 (C.M.A. 1969), which held, “under military law, counsel’s explanation will not relieve the military judge of the responsibility to explain the elements on the record”).

⁸⁶ MCM, *supra* note 14, R.C.M. 910(c).

⁸⁷ *Id.* R.C.M. 910(c)(1) discussion.

⁸⁸ *McCarthy v. United States*, 394 U.S. 459, 466 (1969).

⁸⁹ *United States v. Redlinski*, 58 M.J. 117, 119 (C.A.A.F. 2003) (“Rather than focusing on a technical listing of the elements of an offense, this Court looks at the context of the entire record to determine whether an accused is aware of the elements, either explicitly or inferentially.”) (citations omitted). The military judge may also be required to advise the accused of theories of vicarious liability. See *United States v. Craney*, 1 M.J. 142, 143 (C.M.A. 1975) (noting that when an accused is pleading guilty as an aider and abettor, the military judge has a duty to inquire “into the accused’s understanding of the difference between a principal and his position as an aider and abettor and to determine that the actual extent of accused’s involvement made him responsible for the offenses charged”).

⁹⁰ 67 M.J. 742 (N-M. Ct. Crim. App. 2009), *aff’d*, 68 M.J. 399 (C.A.A.F. 2009).

⁹¹ *Id.* at 744. These included “definitions of child pornography, minor, sexually explicit conduct, and visual depiction, which, he said, includes data stored on a computer.” *Id.*

The term “distribute” is not defined under 18 U.S.C. §§ 2252A or 2256, so the military judge defined the term during the providence inquiry using the definition under Article 112a, UCMJ.⁹² On appeal before the Navy-Marine Court of Criminal Appeals (NMCCA), the defense argued the accused’s plea was improvident because the military judge did not provide an accurate explanation of “distribute.”⁹³

The *Craig* opinion provides an excellent summary of the law governing guilty pleas. In reviewing a guilty plea, a military appellate court must apply the “substantial basis” test, which states, “A guilty plea will be rejected on appeal only where the record of trial shows a substantial basis in law or fact for questioning the plea.”⁹⁴ In applying this test, the court may consider all matters contained in the record, including the stipulation of fact, providence inquiry, and inferences that can be drawn from them.⁹⁵ The NMCCA noted that the accused must give a factual basis for the guilty plea, and whether this component was satisfied is a mixed question of law and fact.⁹⁶ Despite the legal component to this review, courts apply an abuse of discretion standard in considering the military judge’s decision to accept a guilty plea.⁹⁷ Of import to this case, an accused must understand the elements of the offense, which leads to the “military judge’s duty to accurately inform the [accused] of the nature of his offense, and then to elicit from him a factual basis to support his plea.”⁹⁸

Applying these rules, the *Craig* court determined the military judge properly advised the accused of the elements, including the legal term “distribute.”⁹⁹ Relying on *United States v. Kuemmerle*,¹⁰⁰ the NMCCA noted three sources to find the meaning of terms not defined in statute: “(1) the plain meaning of the term; (2) the manner in which Article III courts have construed the term; and (3) the guidance

gleaned from any parallel UCMJ provisions.”¹⁰¹ In *Kuemmerle*, the CAAF affirmed a military judge’s explanation of “distribute” as derived from *Black’s Law Dictionary* and *Webster’s Third New International Dictionary Unabridged*.¹⁰² In *Craig*, the military judge provided this definition from Article 112a: “‘Distribute’ means to deliver to the possession of another.”¹⁰³ The court determined this definition was consistent with federal courts’ explanation of “distribution” in child pornography cases, as well as the federal model jury instructions.¹⁰⁴ The court then upheld the military judge’s explanation of the elements during the providence inquiry, finding the instruction was “consistent with the model federal instruction, the common meaning as articulated by the CAAF, and the usage in Article III courts.”¹⁰⁵

In addition to its excellent summary of the law, there is a simple lesson for practitioners in *Craig*. The Government should only assimilate federal or state statutes when the *Manual for Courts-Martial* does not address the accused’s misconduct and the assimilated offenses are the gravamen of the case. *Craig* illustrates the challenges inherent in such a guilty plea, particularly in advising the accused of elements and applicable definitions that are not part of military case law or authority. When an accused pleads guilty to an assimilated offense, the military judge and counsel may have to find applicable explanations from federal and state statutes, federal sentencing guidelines, model jury instructions, and even dictionaries.¹⁰⁶ As the amount of legal research increases to craft a proper guilty plea advisement, the risk for error expands exponentially. Because of these additional hazards, trial counsel should only assimilate law when the underlying misconduct would independently warrant a court-martial.

⁹² *Id.* See MCM, *supra* note 14, ¶ 37c(3) (under Article 112a, “‘Distribute’ means to deliver to the possession of another.”).

⁹³ *Craig*, 67 M.J. at 743–44. The court ultimately reversed because the accused did not actually distribute child pornography. *Id.* at 746.

⁹⁴ *Id.* at 744 (citing *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008)).

⁹⁵ *Id.* (citing *United States v. Carr*, 65 M.J. 39, 41 (C.A.A.F. 2007)).

⁹⁶ *Id.* (citing UCMJ art. 45 (2008); MCM, *supra* note 14, R.C.M. 910(e); *United States v. Phillippe*, 63 M.J. 307 (C.A.A.F. 2006); *United States v. Holmes*, 65 M.J. 684, 687 (N-M. Ct. Crim. App. 2007)).

⁹⁷ *Id.* (citing *United States v. Shaw*, 64 M.J. 460, 462 (C.A.A.F. 2007)).

⁹⁸ *Id.* (citing *United States v. Care*, 40 C.M.R. 241 (C.M.A. 1969)). See also *United States v. Caudill*, 65 M.J. 756, 758 (N-M. Ct. Crim. App. 2007) (“Before accepting a guilty plea, the military judge must explain the elements of the offense and ensure that a factual basis for the plea exists.”) (citing *United States v. Faircloth*, 45 M.J. 172, 174 (C.A.A.F. 1996)), *review denied*, 66 M.J. 189 (C.A.A.F. 2008).

⁹⁹ *Craig*, 67 M.J. at 745.

¹⁰⁰ 67 M.J. 141 (C.A.A.F. 2009).

¹⁰¹ *Craig*, 67 M.J. at 744 (citing *United States v. Kuemmerle*, 67 M.J. 141, 143 (C.A.A.F. 2009)). Though not mentioned in *Craig*, the *Kuemmerle* court also considered the definition of “distribute” under Article 112a, UCMJ. See *Kuemmerle*, 67 M.J. at 144 (citing *MANUAL FOR COURTS-MARTIAL, UNITED STATES*, ¶ 37c(3) (2000)).

¹⁰² *Craig*, 67 M.J. at 744.

¹⁰³ *Id.* (citing to the record of trial).

¹⁰⁴ In a footnote, the NMCCA noted the federal sentencing guidelines provide a broader definition of distribute that could encompass actual, constructive or attempted delivery: “‘Distribution’ means any act, including possession with intent to distribute, production, advertisement, and transportation, related to the transfer of material involving the sexual exploitation of a minor.” *Id.* at 745 n.1 (quoting U.S. SENTENCING GUIDELINES MANUAL 2G2.2, at cmt. n.1 (2008)). However, the court rejected this broader definition, reasoning that neither Congress nor the federal judiciary have applied the term so expansively.

¹⁰⁵ *Craig*, 67 M.J. at 745. The case was ultimately reversed because the accused merely made child pornography available for download on an Internet file sharing site; there was no evidence that anyone “actually *did* so such that the charged distribution resulted in a completed transfer of possession of the contraband.” *Id.* at 746 (emphasis in original).

¹⁰⁶ See *supra* notes 90-105 and accompanying text.

D. Factual Predicate in Providence Inquiry

In *Footloose*, Ren talks to another high school student about music, and there seems to be a huge gap in their knowledge of popular culture:

Ren: Don't you ever listen to the radio?

Willard: No. We got one radio at home, but it's never on.

Ren: You like Men at Work?

Willard: Which men?

Ren: Men at Work.

Willard: Where do they work?

Ren: They're a music group.

Willard: What do they call themselves?

Ren: Oh, no. What about the Police?

Willard: What about 'em?

Ren: Have you heard them?

Willard: No, but I seen 'em.

Ren: In concert?

Willard: No, behind you.¹⁰⁷

A providence inquiry can have the same awkward back-and-forth between the military judge and the accused, particularly when the military judge asks the accused to explain his criminal conduct. Under RCM 910(e), "The military judge shall not accept a plea of guilty without making such inquiry of the accused as shall satisfy the military judge that there is a factual basis for the plea."¹⁰⁸

In the last term, the CAAF indicated that the factual basis is not always a high hurdle to clear. In *United States v. Nance*,¹⁰⁹ the accused pled guilty, among other things, to wrongful use of Coricidin HBP Cough and Cold Medicine (CCC) on divers occasions, as conduct prejudicial to good order and discipline under Article 134.¹¹⁰ On appeal, the defense argued the providence inquiry did not provide a sufficient factual basis to show the accused's conduct was prejudicial to good order and discipline.¹¹¹ In a unanimous decision written by Judge Ryan, the CAAF upheld the accused's guilty plea. In examining a providence inquiry, courts look to the totality of the circumstances.¹¹² In this case, the relevant circumstances included the "stipulation of fact, as well as the relationship between the accused's responses to leading questions and the full range of the accused's responses during the plea inquiry."¹¹³ The CAAF recognized that while leading questions are generally

disfavored, they may be used by a military judge to clarify points in a providence inquiry: "Although this Court has stressed that the use of leading questions that do no more than elicit 'yes' and 'no' responses during the providence inquiry is disfavored, it has never been the law that a military judge's use of leading questions automatically results in an improvident plea."¹¹⁴

Accordingly, the CAAF ruled it was permissible to use leading questions to "amplify" the inquiry.¹¹⁵ The CAAF noted with approval that the military judge only used leading questions to expound on three points that were already on the record: (1) "objective facts" from the stipulation of fact; (2) "objective facts" already elicited from the accused earlier in the plea inquiry; and (3) the accused's "explicit agreement" that his conduct was prejudicial to good order and discipline.¹¹⁶ The court also noted that whether factual circumstances amount to "conduct prejudicial to good order and discipline" is a "legal conclusion that remains within the discretion of the military judge in guilty plea cases."¹¹⁷

Focusing on the totality of the circumstances, the CAAF held the factual circumstances provided by the accused supported the plea.¹¹⁸ In his stipulation of fact, the accused admitted that each time he took CCC, "he consumed more than the maximum recommended daily dosage and did so with the intent to alter his mood or function"¹¹⁹ and that he would become unconscious or enter a disoriented state.¹²⁰ The stipulation noted the accused wrongfully used CCC in this manner five times with other junior enlisted airmen, including one who was junior in rank to the accused.¹²¹ The CAAF noted that an accepted stipulation of fact "is binding on the court-martial and may not be contradicted by the parties thereto."¹²² Despite the stipulation's detail in explaining the effects of cough and cold medicine, the stipulation only offered a conclusory statement about the element disputed on appeal.¹²³ During the providence inquiry, the accused did not explain how his conduct was

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* (citing *United States v. Jordan*, 57 M.J. 236, 239 (C.A.A.F. 2002)).

¹¹⁸ *Id.* at 365.

¹¹⁹ *Id.* at 363.

¹²⁰ *Id.* The stipulation read: "On one or more occasions, [Appellant] passed out or went into a dream-like state, from which he emerged disoriented. The after-effects of CCC use experienced by [Appellant] were headache, dry throat, inflammation of the thyroids, and sometimes nausea." *Id.* at 363-64.

¹²¹ *Id.* at 363.

¹²² *Id.* at 366 (quoting *MCM*, *supra* note 14, R.C.M. 811(e)).

¹²³ *Id.* at 364 (noting the stipulation merely stated, "[Appellant's] use of CCC was, under the circumstances, to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces.>").

¹⁰⁷ *FOOTLOOSE*, *supra* note 1.

¹⁰⁸ *MCM*, *supra* note 14, R.C.M. 910(e).

¹⁰⁹ 67 M.J. 362 (C.A.A.F. 2009).

¹¹⁰ *Id.* at 363. The accused was also pled guilty to wrongful use of ecstasy on divers occasions. *Id.*

¹¹¹ *Id.*

¹¹² *Id.* at 366 (citing *United States v. Sweet*, 42 M.J. 183, 185-86 (C.A.A.F. 1995)).

¹¹³ *Id.*

prejudicial to good order and discipline; rather, in response to a question about this element, the accused explained that he believed his conduct was service discrediting:

Well, Your Honor, as a member of the United States Air Force, it's not in the best interests and it puts a bad image on the United States Air Force when airman [sic] or other members sit around and, you know, break the law by doing, you know, partaking of [CCC] or any other type of drugs that are illegal; that brings a bad image upon yourself and, you know, who we work for.¹²⁴

The military judge asked nine follow-up questions of the accused, which all elicited cursory responses.¹²⁵ The military judge then recessed and spoke to counsel at an RCM 802 conference to determine if this element had been satisfied.¹²⁶ After the conference, the military judge said on the record that he agreed the accused's conduct would have a direct effect on good order and discipline.¹²⁷ However, the accused had not made such a statement during the providence inquiry.¹²⁸

It is possible the CAAF was setting up a "straw man,"¹²⁹ characterizing the defense arguments in an easily refutable way to discourage future challenges in this area. The military judge did not gloss over this element or disregard potential inconsistencies from the accused. To the contrary, the military judge received a stipulation of fact that stated the accused met with four fellow airmen (including one of lower rank) and intentionally used CCC to become intoxicated.¹³⁰ During the providence inquiry, the accused said, "I knew it was inappropriate for me to over medicate like that and *I knew it was against good order and discipline.*"¹³¹ Against this backdrop, the CAAF came to the sound conclusion that there was no substantial basis in fact or law for setting aside the plea. The accused admitted

during his providence inquiry and through his stipulation of fact that he used more than the recommended amount of cough syrup with other servicemembers so he could become intoxicated. Based on these undisputed facts, it was not necessary for the accused to explain the legal conclusion that this conduct was prejudicial to good order and discipline.

Nance is significant for three reasons. First, the CAAF held that an accused is not required to make legal conclusions about misconduct.¹³² Rather, it is sufficient that the accused provide facts that support such a conclusion, through the providence inquiry and stipulation of fact. Second, the court emphasized the importance of a stipulation of fact for gauging the providence of an accused's plea.¹³³ Because a stipulation may be used to uphold a guilty plea, it must do more than recite unsupported legal conclusions.¹³⁴ Finally, *Nance* is significant because it suggests a change in the court. The opinion curiously reads, "In this case, Appellant argues that the military judge failed to illicit, *from Appellant*, a sufficient factual basis to establish that Appellant's conduct was to the prejudice of good order and discipline in the armed forces."¹³⁵ This comment seems odd, as appellate defense counsel frequently make this argument in challenging the providence of the accused's plea.¹³⁶ The

¹²⁴ *Id.* (alterations in original).

¹²⁵ *Id.* (noting the accused replied either "Yes, Your Honor" or "Not entirely, Your Honor" to all nine questions).

¹²⁶ *Id.*

¹²⁷ *Id.* The military judge said: "He did talk about the fact that there were other members present when he was using and how the affects [sic], you know, of airmen getting together and abusing this would have a direct and palpable effect on good order and discipline, and certainly readiness as well." *Id.*

¹²⁸ *Id.* at 365.

¹²⁹ See JUSTICE ANTONIN SCALIA & BRYAN A. GARNER, MAKING YOUR CASE: THE ART OF PERSUADING JUDGES 84 (2008) (noting appellate courts may "set up a straw man" to turn a seemingly-contentious issue into a clear-cut one) (quoting RICHARD A. POSNER, LAW AND LITERATURE: A MISUNDERSTOOD RELATION 305 (1988)).

¹³⁰ *Nance*, 67 M.J. at 365.

¹³¹ *Id.* (emphasis added).

¹³² *Cf.* United States v. Outhier, 45 M.J. 326, 331 ("Mere conclusions of law recited by an accused are insufficient to provide a factual basis for a guilty plea.") (citing United States v. Terry, 45 C.M.R. 216 (C.M.A. 1972)).

¹³³ See United States v. Harding, 61 M.J. 526, 528 (A. Ct. Crim. App. 2005) ("The boundary of those facts which may be considered in establishing the providence of a guilty plea has been expanded to include those facts agreed to by the accused in a stipulation of fact which is admitted at trial.") (citing United States v. Sweet, 42 M.J. 183, 185-86 (C.A.A.F. 1995)). See also Major Alexander N. Pickands, *Writing with Conviction: Drafting Effective Stipulations of Fact*, ARMY LAW., Oct. 2009, at 1-13 (discussing the law governing stipulations of fact and recommending a nine-step process for drafting comprehensive stipulations of fact).

¹³⁴ *Nance*, 67 M.J. at 365. See United States v. Zapp, No. 200700844, 2008 WL 4756023 (N-M. Ct. Crim. App. Oct. 30, 2008) (unpublished). The accused pled guilty to making provoking speech towards security personnel, charged as: "Bring it on, F* * * all you all bitches . . . I'm from the hood and I'm white. I will knock that mother f* * * * out." *Id.* at *6. On appeal, defense argued the military judge failed to elicit sufficient facts to show the words were "provoking or reproachful." *Id.* The NMCCA agreed, noting that provoking speech inquiries are necessarily "fact intensive," and the context surrounding the making of the statement is critical. *Id.* at *8. In this case, the accused could not remember the specific exchange, and relied on his defense counsel's advice after he interviewed two witnesses. *Id.* at *9. The court found the accused's "blanket and non-specific admission" was insufficient. *Id.* As a practice point, the NMCCA reviewed the stipulation of fact in an effort to find a factual predicate for the plea. Unfortunately, "this stipulation did no more than rearticulate the words used by the appellant and otherwise reflect, without supporting facts, the legal conclusions that the words were 'provoking and reproachful . . . [and] wrongful' and were intended to 'provoke and/or reproach a breach of peace between himself and security personnel'" *Id.* at *9-10 (quoting the stipulation of fact). The case may have had a different result if the stipulation of fact had been fully developed.

¹³⁵ *Nance*, 67 M.J. at 365 (emphasis supplied by the court).

¹³⁶ See generally Major Deidra J. Fleming, *Out, Damned Error Out, I Say! The Year in Court-Martial Personnel, Voir Dire and Challenges, and Pleas and Pretrial Agreements*, ARMY LAW., May 2005, at 60 (noting in the 2004 judicial term appellate courts had "reversed numerous findings because a

opinion arguably suggests defense counsel have a duty to resolve disputes in this area; the CAAF noted with approval that the military judge conducted an RCM 802 session with counsel—outside the presence of the accused—during the providence inquiry to clarify the “prejudicial to good order and discipline” element and that the military judge asked defense counsel two separate times whether further inquiry was necessary.¹³⁷ While *Nance* illustrates the CAAF’s deference to a trial court accepting a guilty plea, another recent case suggests the same deference applies to a military judge’s decision to reject a plea as improvident.

In *United States v. England*,¹³⁸ one of the Abu Ghraib detainee abuse cases, the accused pled guilty to several offenses and successfully completed her providence inquiry.¹³⁹ During sentencing, the defense called a co-accused, Private Charles Graner, who testified that he had placed a “tether” (which resembles a leash) around a detainee’s shoulder to extract him from a cell at the Abu Ghraib prison.¹⁴⁰ Private Graner said he gave the “tether” to the accused and took her picture.¹⁴¹ This explanation was significant because the accused had pled guilty to conspiracy to maltreat a subordinate based on this incident with the leashed detainee and Private Graner implied his actions were lawful.¹⁴² Because of Private Graner’s somewhat ambiguous responses to defense counsel’s questions,¹⁴³ the military

review of the entire record failed to establish a factual predicate for the accused’s plea or left unresolved an inconsistent matter or defense raised during the court-martial”) (citations omitted).

¹³⁷ *Nance*, 67 M.J. at 364. See *United States v. Carmer*, No. 20070173, 2008 CCA LEXIS 592 (A. Ct. Crim. App. Sept. 12, 2008) (per curiam) (unpublished). The accused pled guilty, *inter alia*, to communicating a threat. On appeal, the court ruled that the military judge “failed to elicit sufficient facts from [the accused] pertaining to whether the alleged unlawful communication of a threat was prejudicial to good order and discipline or service discrediting.” The court did not print the actual inquiry, but found the military judge failed to ask the accused whether the conduct met this element; this omission was not remedied by the stipulation of fact, which only parroted the language of the element without explaining how the accused’s conduct satisfied it. Curiously, to support its conclusion, the court quoted the following language from a dissenting opinion: “The mere recitation of the elements of a crime . . . and an accused’s rote response is simply not sufficient to meet the requirements of Article 45 [and *Care*].” (quoting *United States v. Barton*, 60 M.J. 62, 67 (C.A.A.F. 2004) (Erdmann, J., dissenting) (omission and alteration in original)). The court set aside the finding of guilty for that offense, affirmed the remaining offenses, and reassessed the sentence.

¹³⁸ No. 20051170, 2009 CCA LEXIS 349 (A. Ct. Crim. App. Sept. 10, 2009) (unpublished). The author served as trial counsel in this court-martial.

¹³⁹ *Id.* at *3–4.

¹⁴⁰ *Id.* at *5.

¹⁴¹ *Id.*

¹⁴² *Id.* at *7.

¹⁴³ The civilian defense counsel had this exchange with PVT Graner:

CDC: When you handed the tether to Private England, did you tell her why you were handing it to her?

WIT: No, sir, I just asked her to hold it.

judge asked the witness if this “cell extraction” was a legitimate use of force.¹⁴⁴ Private Graner responded, “Yes, sir, it was to me the safest way to get this prisoner out of his cell.”¹⁴⁵ The military judge rejected the accused’s plea to that offense, reasoning the charged co-conspirator testified there was no intent to maltreat.¹⁴⁶ The military judge further determined there was no longer a valid stipulation of fact and that the accused was not in compliance with her pretrial agreement.¹⁴⁷ Once the military judge made this ruling, the accused pled not guilty at a second court-martial and received a greater sentence than the one that would have been provided by the pretrial agreement.¹⁴⁸ On appeal, the defense argued the accused was provident and the military judge did not have the authority to reject the plea.¹⁴⁹

The Army Court of Criminal Appeals (ACCA) affirmed in an unpublished opinion, reasoning that the military judge did not abuse his discretion in rejecting the guilty plea.¹⁵⁰ The court noted a military judge’s decision to accept or reject a guilty plea is reviewed for an abuse of discretion, while questions of law arising from guilty are reviewed *de novo*.¹⁵¹ If an accused “sets up a matter inconsistent with the plea, the military judge must either resolve the inconsistency or reject the plea.”¹⁵² In this case, appellate defense counsel argued Private Graner’s personal belief about the incident was not relevant to the accused’s belief that she had conspired with him to commit maltreatment.¹⁵³ The ACCA rejected this argument, noting the testimony created a “direct contradiction” to the providence inquiry.¹⁵⁴ During the providence inquiry, the accused testified this incident was

CDC: Were you asking her as the NCO [noncommissioned officer] in charge of that tier, or were you asking her as a friend or as a fellow soldier?

WIT: I was asking her as *the senior person of that extraction team*, I guess you would say, as the NCO.

Id. at *5 (emphasis added).

¹⁴⁴ *Id.* at *7.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at *7–8.

¹⁴⁸ *Id.* at *3 (pretrial agreement capped confinement at thirty months); *Id.* at *1 (adjudged sentence at contested court-martial included confinement for thirty-six months).

¹⁴⁹ *Id.* at *9.

¹⁵⁰ *Id.* at *11.

¹⁵¹ *Id.* at *8 (citing *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008); *United States v. Shaw*, 64 M.J. 460, 462 (C.A.A.F. 2007)).

¹⁵² *Id.* at *10 (citing UCMJ art. 45(a) (2008)).

¹⁵³ *Id.* at *9. The court summarized the defense arguments: “PVT Graner’s ‘understanding, belief, or interpretation’ of the incident was irrelevant to appellant’s belief that she conspired with PVT Graner to commit maltreatment. Appellant further asserts that PVT Graner’s testimony was simply his attempt to rationalize his behavior.” *Id.*

¹⁵⁴ *Id.* at *10.

“degrading and humiliating” for the detainee and that Private Graner took photographs “for his personal use and amusement.”¹⁵⁵ By contrast, Private Graner described a lawful use of force that he legitimately documented by taking photographs, which he said he was required to do pursuant to standing rules of engagement.¹⁵⁶ Once there was conflicting testimony about the intent of the alleged conspirators, the military judge was within his discretion to reject the plea.¹⁵⁷

England illustrates the need to maintain the abuse of discretion standard for accepting guilty pleas. If the military judge had re-opened the providence inquiry and ultimately accepted the guilty plea, appellate defense counsel would have undoubtedly argued the military judge abused his discretion in allowing the plea to go forward. Put another way, military judges should receive great deference in deciding whether the accused’s guilty plea is supported by the record, even if that deference limits appellate relief.¹⁵⁸ Without such deference, the judgments made at the trial level to accept or reject a plea would routinely lead to reversal. Put another way, reasonable military judges may arrive at different conclusions after observing an accused’s providence inquiry. Courts should only reverse these decisions when a reasonable factfinder could not have arrived at the conclusion made by the military judge.

E. Defenses Raised During Guilty Pleas

During *Footloose*, the town’s pastor feels his daughter is slipping away from him. She sneaks out of town to listen to music, drinks with her friends, and has even started seeing Ren. One night, he confronts his daughter, Ariel, about where she has been:

Reverend Moore: I don’t understand why you feel it necessary to lie to me.

Ariel: I don’t know why you find it necessary to check up on me.

Reverend Moore: I’m concerned about your well-being, that’s all.¹⁵⁹

Military judges walk a similar fine line during guilty pleas, working to ensure an accused is actually guilty of the charged offenses before accepting a plea while also considering whether potential defenses affect the providence of the plea. On the one hand, Article 45(a) mandates, “If an accused . . . after a plea of guilty sets up a matter inconsistent with the plea . . . a plea of not guilty *shall* be entered.”¹⁶⁰ The Discussion to RCM 910(e) similarly directs, “If any potential defense is raised by the accused’s account of the offense or by other matter presented to the military judge, the military judge should explain such a defense to the accused and should not accept the plea unless the accused admits facts which negate the defense.”¹⁶¹ This obligation to resolve possible defenses continues throughout the trial, even after findings are announced.¹⁶²

On the other hand, military courts have properly acknowledged that an accused may elect to rein in the evidence presented at a guilty plea for strategic reasons: “We are similarly mindful that a decision to plead guilty may include a conscious choice by an accused to limit the nature of the information that would otherwise be disclosed in an adversarial contest. Thus, this Court has declined to adopt too literal an application of Article 45 and R.C.M. 910(e).”¹⁶³ Recognizing this potential tension, appellate courts have attempted to differentiate between defenses actually raised during a guilty plea and the “mere possibility” of a defense.

The courts have created a fine line between a “mere possibility” of a defense (which does not require the military judge instruct the accused of the defense) and a possible defense (which triggers an obligation for the military judge to instruct the accused to ensure the plea is provident). The blurry line that separates these two legal conclusions was further obfuscated in *United States v. Riddle*.¹⁶⁴ There, the accused pled guilty to wrongful use of marijuana and a

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at *10–11. The ACCA provided this summary of Private Graner’s testimony: “He testified that his purpose in taking the photograph was to document a valid, lawful ‘planned use of force.’ He testified further that he was required under the 800th Military Police Rules of Engagement to document this ‘planned use of force’ and he did so by taking the photograph.” *Id.*

¹⁵⁷ *Id.* at *11. Though not mentioned in the opinion, the *Manual* contemplates that a matter inconsistent with the accused’s plea may be raised by someone other than the accused. See MCM, *supra* note 14, R.C.M. 910(e) discussion (“If any potential defense is raised by the accused’s account of the offense *or by other matter presented* to the military judge, the military judge should explain such a defense to the accused and should not accept the plea unless the accused admits facts which negate the offense.”) (emphasis added).

¹⁵⁸ See Lieutenant Colonel Patricia A. Ham, *Making the Appellate Record: Trial Defense Attorney’s Guide to Preserving Objections—the Why and How*, ARMY LAW., Mar. 2003, at 16 (“Because of the degree of deference appellate courts traditionally grant to trial judges’ rulings through their standards of review, it is almost always difficult to obtain any relief on appeal, even with a properly preserved issue.”).

¹⁵⁹ FOOTLOOSE, *supra* note 1.

¹⁶⁰ UCMJ art. 45(a) (2008) (emphasis added).

¹⁶¹ MCM, *supra* note 14, R.C.M. 910(e) discussion.

¹⁶² *Id.* R.C.M. 910(h)(2) (“If after findings but before the sentence is announced the accused makes a statement to the court-martial, in testimony or otherwise, or presents evidence which is inconsistent with a plea of guilty on which a finding is based, the military judge shall inquire into the providence of the plea.”).

¹⁶³ *United States v. Jordan*, 57 M.J. 236, 238–39 (C.A.A.F. 2002), *quoted in United States v. Hollmann*, NMCCA 200900226, 2009 WL 2599350 (N-M. Ct. Crim. App. Aug. 25, 2009) (unpublished).

¹⁶⁴ 67 M.J. 335 (C.A.A.F. 2009).

forty-seven-day AWOL.¹⁶⁵ During the guilty plea, there was substantial evidence that the accused had serious mental health problems.¹⁶⁶ Notably, the stipulation of fact read the accused suffered from chronic alcohol and marijuana dependence, bipolar disorder, and borderline personality disorder (all conditions that predated her enlistment).¹⁶⁷ The accused was also pending an administrative discharge for her mental health condition before going AWOL.¹⁶⁸ Perhaps most telling, the accused was committed to a mental health facility *at the time of trial* and was scheduled to return there when the trial was complete.¹⁶⁹ During the providence inquiry, the accused stated she was being treated for “[b]ipolar and borderline personality disorder with severe depression.”¹⁷⁰ She said she was taking “Zoloft, 100 milligrams, with Topamax three times a day; Ibuprofen, 800 milligrams three times a day; Zyrtec; Atarox [sic], Serequel; and—.”¹⁷¹ The military judge interrupted to ask the accused what those medications were treating, and she responded, “Sleep aids, mood suppressants, and a couple of anti-depressants.”¹⁷² Of import to the CAAF, a psychiatrist prepared a report before charges were preferred concluding the accused had the “mental capacity” to understand and participate in the proceedings, and that she was “mentally responsible,” though the report was not part of a sanity board.¹⁷³ The military judge asked a series of questions about the accused’s mental health problems, which primarily elicited “yes” or “no” responses.¹⁷⁴ The military judge did

not instruct the accused about mental responsibility as a defense, despite the substantial evidence that such a defense might apply. In a surprising split opinion, the CAAF affirmed.

In a 3-2 decision authored by Judge Stucky, the CAAF found there was not a substantial basis in law or fact that would warrant setting aside the guilty plea.¹⁷⁵ Citing oft-quoted language from *United States v. Shaw*,¹⁷⁶ the majority noted the “mere possibility” of a defense or inconsistency is not sufficient for setting aside an otherwise provident plea.¹⁷⁷ Unlike other potential defenses, mental responsibility is an affirmative defense that requires “clear and convincing evidence.”¹⁷⁸ Because of the heightened quantum of proof required for such a defense, “[a] military judge can presume, in the absence of contrary circumstances, that the accused is sane and, furthermore, that counsel is competent.”¹⁷⁹

The CAAF discussed a series of recent cases addressing mental responsibility issues raised during a providence inquiry. In *United States v. Shaw*,¹⁸⁰ the accused testified during his unsworn statement that he had a history of bipolar disorder; the CAAF held in that case that the mention of bipolar disorder only raised the “mere possibility” of a defense and not a substantial basis in law or fact to question the plea.¹⁸¹ Curiously, the majority then considered *United States v. Harris*¹⁸² in which an accused was diagnosed with a mental disease or defect *after* trial, so the military judge was

¹⁶⁵ *Id.* at 336 (noting the accused left her unit on 1 March 2007 and voluntarily returned on 16 April 2007).

¹⁶⁶ *Id.* at 336–37.

¹⁶⁷ *Id.* at 336. These facts were part of the stipulation of fact and were “binding on the court-martial.” See MCM, *supra* note 14, R.C.M. 811(e) (“[A] stipulation of fact that has been accepted is binding on the court-martial and may not be contradicted by the parties thereto.”).

¹⁶⁸ *Riddle*, 67 M.J. at 336.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 337 (internal quotations omitted).

¹⁷² *Id.*

¹⁷³ *Id.* According to the CAAF, the record was unclear about why this report was generated. The form was completed nine days before charges were preferred and discusses the company commander’s decision to pursue “the most rapid separation possible.” *Id.*

¹⁷⁴ The CAAF summarized this exchange during the providence inquiry regarding the accused’s mental illness:

MJ: Okay. I understand that at the conclusion of this trial today you are going to return to the Bradley Center for continued treatment?

ACC: Yes, sir.

MJ: All right. . . . The question is whether or not you are—you believe that you are competent to stand trial. Do you think you are?

ACC: Yes, sir.

MJ: Do you believe that you fully understand not only the ramifications of this court-martial but what is going to happen today?

ACC: Yes, sir.

Id. at 336–37 (quoting from the record of trial).

¹⁷⁵ *Id.* at 338. An appellate court will only set aside a guilty plea if something in the record raises a substantial bias in law or fact to question the providence of the plea. *Id.* (citing *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008)).

¹⁷⁶ 64 M.J. 460, 462 (C.A.A.F. 2007).

¹⁷⁷ *Riddle*, 67 M.J. at 338 (citing *Shaw*, 64 M.J. at 462).

¹⁷⁸ *Id.* (citing UCMJ art. 50a(a) (2008); MCM, *supra* note 14, R.C.M. 916(b)(2)).

¹⁷⁹ *Id.* (citing *Shaw*, 64 M.J. at 463).

¹⁸⁰ 64 M.J. 460 (C.A.A.F. 2007).

¹⁸¹ In *Shaw*, the accused pled guilty to several offenses, including wrongful use of cocaine, adultery, breaking restriction, and disobeying a no-contact order. In his unsworn statement, the accused said that he was severely beaten at some time before he committed the offense and suffered numerous injuries, including “two skull fractures, bruising and bleeding of the brain.” *Id.* at 461. He was diagnosed with “bi-polar syndrome because of the incident.” *Id.* On appeal, the defense argued that the military judge should have re-opened the providence inquiry to explore the alleged mental disorder. The CAAF rejected this argument because the “reference to his diagnosis of bipolar disorder, without more, at most raised only the mere possibility of a conflict with the plea.” *Id.* at 464.

¹⁸² 61 M.J. 391 (C.A.A.F. 2005).

unable to conduct the necessary providence inquiry. The CAAF concluded this case was similar to *Shaw*, as “the record does not reflect that her bipolar disorder affected the providence of her plea.”¹⁸³ The CAAF favorably noted in the opinion that the accused’s “counsel agreed that she [the accused] was competent and responsible at that time.”¹⁸⁴ Despite the court’s reliance on the defense counsel’s opinion, other courts have reasoned such lay evaluations should be given little weight.¹⁸⁵

The *Riddle* majority opinion reads like an appellate brief, making razor thin distinctions that ultimately amount to no difference. For example, the majority concluded, “There was no evidence of record that Appellant lacked mental responsibility at the time the offenses were committed.”¹⁸⁶ However, it was undisputed the accused ended her unlawful absence when she voluntarily surrendered to the mental health section at the installation’s hospital.¹⁸⁷ Put another way, the majority determined there was “no evidence” the accused lacked mental responsibility when she committed the offenses, even though she was admitted to an in-patient mental health facility on the last day of a charged AWOL. The majority similarly discounted the long list of prescription medications taken by the accused to treat verified mental health conditions. Again, the only issue before the court was whether there was enough evidence of a mental responsibility defense to require the military judge advise the accused of the defense. The majority’s conclusion that there was not sufficient evidence is not reasonable based on the facts presented during the plea.

The dissenting opinion, authored by Chief Judge Effron and joined by Judge Erdmann,¹⁸⁸ provides an excellent and legally astute summary of the errors in the majority opinion. The dissent begins by summarizing the requirements of a *Care* inquiry, focusing on the military judge’s duty to personally advise the accused of the elements of each offense and inquire into the accused’s conduct to ensure the servicemember is in fact guilty.¹⁸⁹ Once a “possible” defense is raised, the military judge must inquire further

with the accused to determine if the defense applies.¹⁹⁰ If the accused’s explanation demonstrates that the defense does not apply, the military judge is not required to explain the defense to the accused and may accept the plea.¹⁹¹ “If, however, the military judge’s inquiries do not bring forth evidence demonstrating that the defense is inapplicable, the military judge must explain the defense to the accused.”¹⁹² The dissent noted that this inquiry hinges on the military judge’s discussion with the accused, independent of counsel: “The providence inquiry centers on the special relationship between the accused and the military judge, not between the accused and counsel.”¹⁹³

The dissent correctly summarized the substantial evidence of a mental responsibility defense: (1) the accused was diagnosed with bipolar disorder and borderline personality disorder; (2) the accused was “confined” in an inpatient mental health facility for the three weeks before her court-martial; (3) the accused was “taking at least six types of medication, including mood suppressants and anti-depressants”; (4) a mental health report showed the accused had attempted suicide twice; and (5) the military judge apparently tailored a punishment of “time served” to allow for continued mental health treatment.¹⁹⁴

It is difficult to assess the actual impact of *Riddle*. First, military judges would be wise not to read *Riddle* as a license to take shortcuts during a providence inquiry.¹⁹⁵ The “totality of the circumstances” standard is, by definition, very fact-dependent, so minor factual differences during plea inquiries may result in different results on appeal. Military judges should still liberally advise an accused of potential defenses to avoid issues on appeal, even after *Riddle*. Second, servicemembers are under remarkable stress from

¹⁸³ *Riddle*, 67 M.J. at 339 (citing *Shaw*, 64 M.J. at 462).

¹⁸⁴ *Id.* at 340–41.

¹⁸⁵ See *United States v. Johnson*, 65 M.J. 919 (C.G. Ct. Crim. App. 2008) (“Defense counsel’s naked concessions are not a substitute for the requirement to conduct a meaningful inquiry into any affirmative defense raised by the record, and to ascertain from the accused himself whether his pleas are fully informed and voluntary.”).

¹⁸⁶ *Riddle*, 67 M.J. at 339 (emphasis added).

¹⁸⁷ *Id.* at 342 (Effron, C.J., & Erdmann, J., dissenting).

¹⁸⁸ Of note, Chief Judge Effron and Judge Erdmann also dissented from the majority in *Shaw*. See *United States v. Shaw*, 64 M.J. 460, 464–67 (C.A.A.F. 2007) (Effron, C.J., & Erdmann, J., dissenting).

¹⁸⁹ *Riddle*, 67 M.J. at 340 (Effron, C.J., & Erdmann, J., dissenting) (citing *United States v. Care*, 40 C.M.R. 247, 253–54 (C.M.A. 1969)).

¹⁹⁰ *Id.* (Effron, C.J., & Erdmann, J., dissenting) (citing *United States v. Phillippe*, 63 M.J. 307, 310–11 (C.A.A.F. 2006)).

¹⁹¹ *Id.* (Effron, C.J., & Erdmann, J., dissenting) (citing *Phillippe*, 63 M.J. at 310–11; *United States v. Inabinette*, 66 M.J. 320, 322–23 (C.A.A.F. 2008)).

¹⁹² *Id.* (Effron, C.J., & Erdmann, J., dissenting) (citing *United States v. Harris*, 61 M.J. 391, 398 n.13 (C.A.A.F. 2005)). *Harris* reads:

At this juncture the military judge had two options. He could have inquired whether Appellant still wished to plead guilty, now aware of a possible affirmative defense based on mental illness. Alternatively, the military judge could have advised the convening authority that a substantial basis in law and fact now existed to question whether Appellant’s pleas were provident.

Harris, 61 M.J. at 398 n.13.

¹⁹³ *Riddle*, 67 M.J. at 343 (Effron, C.J., & Erdmann, J., dissenting) (citing *United States v. Care*, 40 C.M.R. 247, 253 (C.M.A. 1969)).

¹⁹⁴ *Id.* at 341–42 (Effron, C.J., & Erdmann, J., dissenting).

¹⁹⁵ See Huestis, *supra* note 36, at 32 (“Military judges must be meticulous and, if necessary, take extra time on the record to clarify potential issues—or even reject improvident pleas at trial—rather than invite further litigation on appeal.”).

routine deployments in Iraq and Afghanistan.¹⁹⁶ Guilty plea inquiries will continue to raise mental health issues as these deployments continue. Third, *Riddle* is consistent with the trend among appellate courts, which are generally reluctant to set aside otherwise complete providence inquiries based on mental health issues raised during the inquiry.¹⁹⁷ This aversion is heightened when the alleged mental health problems are raised after trial.¹⁹⁸

Finally, the opinion is a valiant but ultimately failed attempt to reconcile this case with prior case law. The accused was in an in-patient psychiatric facility at the time of trial. As set forth in the dissenting opinion, there was a great deal of evidence of a possible mental responsibility defense (as opposed to a “mere possibility” of a defense). The military judge did not explain the potential defense to the accused; rather, he relied on statements from the accused, who was being treated in an in-patient psychiatric facility, defense counsel’s lay opinion, the military judge’s observations at the guilty plea, and a mysterious letter from a psychiatrist, who was not part of a sanity board. The court considered and ultimately rejected another defense raised in a guilty plea this term.

In a more reasoned opinion, the CAAF found the “mere possibility” of a self-defense claim did not make an accused’s plea of guilty improvident. In *United States v. Yanger*,¹⁹⁹ the accused pled guilty to involuntary

manslaughter for killing his wife during an argument about his cocaine use. According to the accused’s providence inquiry, his wife had a broken stem from a stemware glass in her hand; he tried to take a cell phone she was holding and accidentally cut his hand on the stemware.²⁰⁰ The accused said his wife approached him aggressively, with her shoulders hunched, and the accused shoved her.²⁰¹ She stumbled and stabbed herself in the neck with the glass stem, which caused her to bleed to death.²⁰² The Coast Guard Court of Criminal Appeals (CGCCA) reversed the case based on this statement from the accused: “In—in the situation I was in, sir, I just wanted—I just wanted her out of my face with the glass.”²⁰³ In a per curiam opinion, the CAAF reversed and upheld the accused’s guilty plea.²⁰⁴

The *Yanger* opinion noted that in *United States v. Prater*,²⁰⁵ “this court rejected the ‘mere possibility of conflict’ standard for the more realistic ‘substantial basis’ test.” Once the “possibility” of a defense was raised, the military judge properly questioned the accused to decide if a defense was raised.²⁰⁶ Specifically, the military judge clarified that the accused was not scared, was not concerned his wife would use the stemware against another person, and did not believe he was acting in self-defense.²⁰⁷ Based on the accused’s responses, the military judge was not required to explain the elements of self-defense to the accused.

¹⁹⁶ See generally Lieutenant Colonel Edye U. Moran, *A View from the Bench: The Guilty Plea—Traps for New Counsel*, ARMY LAW., Nov. 2008, at 65 (“[P]roblems may arise after the accused has successfully entered pleas of guilty, and then raises a mental responsibility or diminished capacity issue during the sentencing portion of the trial. Mental health issues bear special status in the military, especially today where many soldiers facing courts-martial have served multiple tours in Iraq and Afghanistan.”); Captain Evan R. Seamone, *Attorneys as First-Responders: Recognizing the Destructive Nature of Posttraumatic Stress Disorder on the Combat Veteran’s Legal Decision-Making Process*, 202 MIL. L. REV. 144 (2009) (advocating that defense attorneys consider alternative techniques for counseling clients with PTSD).

¹⁹⁷ See *United States v. Sajdak*, No. S31433, 2009 WL 440198 (A.F. Ct. Crim. App. Feb. 24, 2009) (unpublished) (“A military judge may properly presume, in the absence of any indication to the contrary, that counsel has conducted a reasonable investigation into the existence of the sanity defense. A military judge is not required to inquire further when the appellant makes reference to a mental condition but does not raise it as a defense.”) (citing *United States v. Shaw*, 64 M.J. 460, 463 (C.A.A.F. 2007)) (emphasis added).

¹⁹⁸ Cf. *United States v. Curtis*, No. 37072, 2009 WL 136871 (A.F. Ct. Crim. App. Jan. 6, 2009) (unpublished). Before trial, a sanity board evaluated the accused pursuant to RCM 706 and concluded he was not suffering from a severe mental disease or defect at the time of trial or at the time of the charged offenses. The board also noted it had specifically ruled out a diagnosis of Post Traumatic Stress Disorder. The accused then pled guilty to several assaults of his wife. In post-trial confinement, a social worker diagnosed the accused with PTSD. On appeal, the accused argued he would not have pled guilty had he known he had PTSD. Relying on *Harris*, *Shaw*, and *Inabinette* (all discussed above), the AFCCA concluded the post-trial evidence of PTSD showed an inconsequential severity so it was “nothing more than a mere possibility of a defense.”

¹⁹⁹ 67 M.J. 56 (C.A.A.F. 2008) (per curiam).

²⁰⁰ *Id.* at 57.

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.* According to the CAAF: “Focusing on these words, a majority of the Court of Criminal Appeals concluded that *Yanger*’s colloquy raised the defense of self-defense and that the military judge failed to conduct an appropriate inquiry. The court set aside the involuntary manslaughter conviction because of this ‘unresolved self-defense issue.’” *Id.* (citing *United States v. Yanger*, 66 M.J. 534, 537–38 (C.G. Ct. Crim. App. 2008)).

²⁰⁴ *Id.* at 58. The Coast Guard Judge Advocate General certified this issue for appeal: “Whether the Coast Guard Court of Criminal Appeals erred by finding that the accused raised sufficient facts during the plea inquiry requiring the military judge to explain self-defense.” *Id.* at 56.

²⁰⁵ 32 M.J. 433 (C.M.A. 1991).

²⁰⁶ *Yanger*, 67 M.J. at 57.

²⁰⁷ *Id.* The CAAF favorably noted this exchange during the providence inquiry:

MJ: Did you think at that point that – that she was threatening you in any way?

ACC: No, sir.

MJ: Were you scared?

ACC: No, sir.

MJ: Did you think that she might use the stemware against [others]?

ACC: No, sir.

Id. (alteration in original).

The CGCCA opinion reflects the same factual findings regarding self-defense as the CAAF decision. The CGCCA wrote the case was “replete with statements, details, and questions that address the *possibility* of self-defense” and it was clear that the parties and the military judge “viewed the issue of self-defense as *lingering at the fringes* of the case.”²⁰⁸ Assuming the CGCCA’s conclusions were correct, this would be a mere possibility of a defense. This case is similar to others this term in giving a special status to affirmative defenses including self-defense²⁰⁹ and voluntary intoxication²¹⁰ in a guilty plea, essentially requiring the defense counsel raise the issue.

These cases suggest two trends, one obvious and one hidden between the lines. In the obvious trend, appellate courts are going to great lengths to uphold the providence of guilty pleas. In *Riddle*, a narrow majority opinion ignored stipulated facts and statements by the accused that raised an unresolved defense of lack of mental responsibility. In *Nance*, the CAAF searched through a stipulation of fact to find the factual predicate for the accused’s plea when the accused’s statements to the court fell short. In a less obvious

²⁰⁸ *Yanger*, 66 M.J. at 537 (emphasis added).

²⁰⁹ See *United States v. Brady*, No. 20070888, 2008 CCA LEXIS 577, at *3 (A. Ct. Crim. App. Nov. 26, 2008) (per curiam) (unpublished), *review denied*, 68 M.J. 146 (C.A.A.F. 2009). Similar to *Yanger*, defense argued on appeal that a guilty plea to battery was not provident because the military judge did not advise the accused of self-defense. The military judge asked a series of “yes” or “no” questions that effectively showed the defense was not raised. *Id.*

²¹⁰ See *United States v. Hollmann*, No. 200900226, 2009 WL 2599350 (N.M. Ct. Crim. App. Aug. 25, 2009) (unpublished). The accused pled guilty to several offenses, including housebreaking. Per the plea inquiry, the accused was drunk after having several glasses of wine at a Marine Corps Ball; when he left the ball, he pulled into a gas station to fill up his truck. The gas station was closed so the accused, “still wearing his Marine Corps dress blue uniform,” threw a rock through a glass door and entered the gas station. *Id.* at *1. On appeal, the defense argued the plea was improvident because the accused was intoxicated and, therefore, unable to form the intent to commit a criminal offense (the specification stated the accused intended to commit “larceny and willful spoiling of nonmilitary real property”). During the inquiry, the accused gave some conflicting reasons for entering the building. Defense counsel noted that “because he was intoxicated, he might not have as clear a recollection at this time as to what he actually intended to do and what intent he formed and when it was formed.” *Id.* at *2. Citing *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008) for the substantial basis test, the NMCCA found no substantial basis in law or fact for questioning the plea. According to the stipulation of fact, the accused entered the gas station intending to “commit larceny and/or to damage property, such as the glass door.” *Id.* at *1. By contrast, during the providence inquiry, the accused said his intent was “[d]estruction of his [the owner’s] property, the ATM, lottery, cash register, and wirings [sic].” *Id.* (alterations supplied by the court). The military judge later asked, “So, the reason that you think you are guilty of this offense [housebreaking] then was simply because you had the intent to do damage to the store before you went in there?” *Id.* The accused responded, “Yes, ma’am.” *Id.* On appeal, the court considered the entire record of trial and concluded the stipulation of fact and the statements during the providence inquiry were sufficient to show no substantial basis in law or fact to reverse. The court ruled it was not significant that the accused said during the inquiry that he might have entered to turn on the gas pumps; once the accused made that claim, the military judge properly resolved the potential inconsistency.

trend, the courts seem to be moving the burden of establishing the accused’s providence from the military judge to the defense counsel. As discussed in *Nance*, the CAAF criticized the accused, using italics, for arguing on appeal that there was not enough information elicited “*from Appellant*” to sustain the plea.²¹¹ The *Riddle* opinion also split the burden for resolving a potential defense, noting that when mental responsibility is at issue, “the military judge and other officers of the court each has the independent responsibility to inquire into the accused’s mental condition.”²¹² Echoing this trend, the ACCA went so far as to argue in dicta that the accused has an obligation to raise applicable defenses at a guilty plea: “Though we do not find this case to present a close call for the military judge, we take this opportunity to remind parties that *the accused, at trial, bears the burden to raise defenses where applicable*, and not rely on appellate review to seek them out.”²¹³ This second trend is significant. If the defense counsel bears some of the burden to raise and resolve defenses, appellate courts can more easily affirm cases in which the military judge may have failed to adequately advise the accused of a defense. This trend undercuts Article 45(a) and *United States v. Care*, which direct the military judge to advise the accused and ultimately safeguard the guilty plea.²¹⁴

IV. Pretrial Agreements

Near the end of *Footloose*, the town pastor addresses his congregation during Sunday morning service. After listening to Ren recite scripture about dancing to the city council and after stopping a local book burning, Reverend Moore realizes he has to give the kids a chance to learn and grow and even make mistakes:

I’m standing up here before you today with a very troubled heart. You see, my friends, I’ve always insisted on taking responsibility for your lives. But, I’m really like a first-time parent who makes mistakes and tries to learn from them. And like that parent, I find myself at that moment when I have to decide. Do I hold on or do I trust you to yourselves? . . . If we don’t start trusting our children, how will they ever become trustworthy?²¹⁵

²¹¹ *United States v. Nance*, 67 M.J. 362, 365 (C.A.A.F. 2009) (emphasis supplied by the court).

²¹² *United States v. Riddle*, 67 M.J. 335, 338 (C.A.A.F. 2009) (citing MCM, *supra* note 14, R.C.M. 706(a)).

²¹³ *Brady*, 2008 CCA LEXIS 557, at *3.

²¹⁴ See *Riddle*, 67 M.J. at 343 (Effron, C.J. & Erdmann, J., dissenting) (“The providence inquiry centers on the special relationship between the accused and the military judge, not between the accused and counsel.”).

²¹⁵ FOOTLOOSE, *supra* note 1.

After choking back his emotions, Reverend Moore convinces his parish to let the high school kids have a dance in a warehouse outside of town.²¹⁶ Military judges and appellate courts have the same struggle in reviewing pretrial agreements. When an accused agrees to a term, when should the military judge intervene to protect the defense? When can the Government withdraw from the agreement? This term, military courts gave practitioners some latitude to make—and hopefully learn from—their mistakes.

A. Overview

A pretrial agreement is a “constitutional contract” between the convening authority and the accused.²¹⁷ In a typical agreement, the accused agrees to forego constitutional rights in exchange for a benefit, normally a reduction in sentence.²¹⁸ As a result, when interpreting pretrial agreements, contract principles outweigh protections afforded to the accused under the Due Process Clause.²¹⁹ Under RCM 910(f)(4), “The military judge shall inquire to ensure: (A) That the accused understands the agreement; and (B) That the parties agree to the terms of the agreement.”²²⁰ The military judge must also ensure that the agreement conforms to RCM 705 and that the accused has freely and voluntarily entered into the agreement and waived constitutional rights.²²¹

To ensure the accused understands the pretrial agreement, the military judge must discuss the terms with the accused as well as the consequences of those terms. In *United States v. Coker*,²²² the accused’s pretrial agreement included the following term: “I further agree to enroll in and

successfully complete the sex offender treatment program available to me, wherever confined, to the extent I am sentenced to confinement sufficient for enrollment in, and completion of, the sex offender treatment program.”²²³ The military judge explained this term to the accused as follows: “If you are, in fact, confined to a length of time that would be sufficient for you to complete the sex offender treatment program, then you’re agreeing to enroll in it.”²²⁴ The military judge did not mention the “successfully complete” language.²²⁵

The CGCCA held, “In a case involving a pretrial agreement, the military judge must conduct an inquiry, *including an explanation of each material provision*, to ensure that the accused understands the agreement and agrees to it, and that any ambiguities are clarified so that the parties share a common understanding of the agreement.”²²⁶ The court ruled the military judge did not satisfy the RCM 910(f) requirement as he did not inform the accused of the significant requirements of sex offender treatment.²²⁷

In guarded language, the Coast Guard court explained, “One might posit that the terms of such a program agreement are present, though submerged, in the pretrial agreement. If so, arguably they must be part of the inquiry required under R.C.M. 910(f).”²²⁸ The court continued later in the opinion, “However, to the extent that obligations associated with enrollment in the treatment program went wholly unmentioned during the trial, it could not be said that there was an adequate inquiry into the sex offender treatment provision of the pretrial agreement.”²²⁹ However, the court found the error to be harmless, as the Government conceded on appeal the convening authority could not withdraw from the agreement if the accused failed to “successfully complete” a sex offender treatment program.²³⁰

²¹⁶ *Id.*

²¹⁷ *United States v. Smead*, 68 M.J. 44, 59 (C.A.A.F. 2009) (citing *United States v. Lundy*, 63 M.J. 299, 301 (C.A.A.F. 2006)).

²¹⁸ *Id.* (quoting *Lundy*, 63 M.J. at 301).

²¹⁹ *Id.* (quoting *Lundy*, 63 M.J. at 301). *See also* *United States v. Grisham*, 66 M.J. 501, 505 (A. Ct. Crim. App. 2008) (“Generally, pretrial agreements will be strictly enforced based upon the express wording of the agreements; however, ‘[w]hen interpreting pretrial agreements contract principles are outweighed by the Constitution’s Due Process Clause protections for an accused.’”) (quoting *United States v. Acevedo*, 50 M.J. 169, 172 (C.A.A.F. 1999)).

²²⁰ MCM, *supra* note 14, R.C.M. 910(f)(4). *See also id.* R.C.M. 910(f)(4) discussion (“If the plea agreement contains any unclear or ambiguous terms, the military judge should obtain clarification from the parties. If there is doubt about the accused’s understanding of any terms in the agreement, the military judge should explain those terms to the accused.”).

²²¹ *Smead*, 68 M.J. at 59 (citing UCMJ art. 45(a) (2008); MCM, *supra* note 14, R.C.M. 705; R.C.M. 910(f), (h)(2), (h)(3); *United States v. Perron*, 58 M.J. 78, 82 (C.A.A.F. 2003)). *See* MCM, *supra* note 14, R.C.M. 705(c)(1)(B) (“A term or condition in a pretrial agreement shall not be enforced if it deprives the accused of: the right to counsel; the right to due process; the right to challenge the jurisdiction of the court-martial; the right to a speedy trial; the right to complete sentencing proceedings; the complete and effective exercise of post-trial and appellate rights.”).

²²² 67 M.J. 571 (C.G. Ct. Crim. App. 2008).

²²³ *Id.* at 575.

²²⁴ *Id.*

²²⁵ *Id.* at 575 n.7.

²²⁶ *Id.* at 575 (citing MCM, *supra* note 14, R.C.M. 910(f); *United States v. Green*, 1 M.J. 453 (C.M.A. 1976); *United States v. Felder*, 59 M.J. 444 (C.A.A.F. 2004)) (emphasis added).

²²⁷ *Id.* at 576. According to a prosecution exhibit, the sex offender treatment program would require the accused admit responsibility for his offenses, discuss the details of his misconduct, and follow other program guidelines. *Id.* On appeal, the defense submitted a separate affidavit from the U.S. Disciplinary Barracks, where the accused was confined post-trial and during the appeal. *Id.* According to the affidavit, there are “three treatment series” requiring a “total of at least fifty-five sessions.” *Id.* n.8.

²²⁸ *Id.* at 576.

²²⁹ *Id.*

²³⁰ *Id.* at 577. The pretrial agreement required the accused enroll in sex offender treatment and, if he later failed to do so, the convening authority could vacate suspension of punishment. *Id.* To the extent the accused later “encounters an obstacle to his enrollment in sex offender treatment,” the remedy would be to petition the court for relief at that time. *Id.*

As a practice point, the *Coker* court noted the military judge could have conducted a complete inquiry under RCM 910(f) by discussing “summarized information” about the treatment program, like the contents of the prosecution exhibit, with the accused.²³¹ The court expressly rejected a defense argument that the military judge was required to discuss all the program terms with the accused, which included significant additional requirements for treatment.²³²

B. Pretrial Agreement Terms

Three recent cases addressed novel issues in interpreting pretrial agreement terms. The three cases considered the scope of a “waive all waivable motions” provision, read a possible *sub rosa* term into a pretrial agreement, and decided whether charges dismissed under a pretrial agreement continue to be dismissed if the guilty plea is set aside on appeal.

In the first case, the CAAF endorsed the “waive all waivable motions” provision in pretrial agreements and broadly interpreted its scope. In *United States v. Gladue*,²³³ the accused pled guilty and agreed to “waive any waiveable [sic] motions” pursuant to a pretrial agreement. At trial, the military judge asked the defense what motions were waived by this provision; defense counsel stated the only contemplated motions were for a continuance, suppression of evidence, change of venue, and entrapment, and did not mention multiplicity or unreasonable multiplication of charges.²³⁴ On appeal, the defense argued for the first time that certain charges should be dismissed for multiplicity or, alternatively, an unreasonable multiplication of charges.²³⁵ In an opinion authored by Judge Stucky, a three-judge majority found the accused waived those issues for appellate review by virtue of a “waive all waivable motions” provision.²³⁶

By way of providing a legal framework, the opinion asserted, “The granted issue arises out of the failure of military courts to consistently distinguish between the terms ‘waiver’ and ‘forfeiture.’”²³⁷ The CAAF quoted the

following from the Supreme Court: “Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right.”²³⁸ When an issue is merely forfeited, an appellate court will review for plain error; if an accused waives a right at trial, it is “extinguished” and will not be reviewed on appeal.²³⁹ The Supreme Court has held that a defendant may waive many fundamental constitutional protections.²⁴⁰ Similarly, a military accused may waive challenges based on double jeopardy, the basis for a multiplicity objection.²⁴¹ By contrast, unreasonable multiplication of charges is not grounded in the Constitution, but rather a “presidential policy.”²⁴² Hence, an accused can waive both multiplicity and unreasonable multiplication of charges in a pretrial agreement. In this case, the accused knowingly waived all waivable motions, which included multiplicity and unreasonable multiplication of charges.²⁴³ According to the majority, it was not relevant that the defense did not contemplate these potential motions at trial.²⁴⁴

Judge Baker wrote a separate opinion, joined by Chief Judge Effron, concurring in the result, arguing that an accused must waive certain rights expressly and on the record, as opposed to the majority’s broad presumption of waiver derived from a blanket “waive all waivable motion” term.²⁴⁵ The concurring opinion correctly noted, “Generally, waivers of fundamental constitutional rights, including protection from double jeopardy, must be ‘knowing, intelligent, and voluntary.’”²⁴⁶ In this case, the concurring opinion noted there was no express waiver of the “double jeopardy claims.”²⁴⁷ To the contrary, the accused waived all

²³¹ *Id.* at 576.

²³² The CGCCA discussed an affidavit admitted on appeal that added significant requirements on the accused to compete sex offender treatment:

According to the affidavit, there are three treatment series that are prerequisite to sex offender treatment, comprising a total of at least fifty-five sessions. The frequency of these sessions is not stated. Hence it is unclear whether Appellant has likely reached the enrollment point; he almost surely had not reached it by the time his brief was filed.

Id. n.8.

²³³ 67 M.J. 311 (C.A.A.F. 2009).

²³⁴ *Id.* at 313.

²³⁵ *Id.* at 312.

²³⁶ *Id.*

²³⁷ *Id.* at 313 (citing *United States v. Harcrow*, 66 M.J. 154, 156 n.1 (C.A.A.F. 2008)).

²³⁸ *United States v. Olano*, 507 U.S. 725, 733 (1993), quoted in *Gladue*, 67 M.J. at 313 (internal quotations omitted).

²³⁹ *Gladue*, 67 M.J. at 313.

²⁴⁰ See *United States v. Mezzanatto*, 513 U.S. 196, 201 (1995) (“A criminal defendant may knowingly and voluntarily waive many of the most fundamental protections afforded by the Constitution.”), quoted in *Gladue*, 67 M.J. at 314.

²⁴¹ *Gladue*, 67 M.J. at 314.

²⁴² *Id.* (citing *United States v. Weymouth*, 43 M.J. 329, 335 (C.A.A.F. 1995)).

²⁴³ *Id.*

²⁴⁴ *Id.* (“Admittedly, motions relating to multiplicity and unreasonable multiplication of charges were not among those subsequently discussed by the military judge and the civilian defense counsel. However, this does not affect the validity of the waiver.”).

²⁴⁵ See *id.* at 314–17 (Baker, J. & Effron, C.J., concurring in the result). The concurring opinion ultimately agreed with the result, as the charges were not facially duplicative or an unreasonable multiplication of charges. *Id.* at 316 (Baker, J. & Effron, C.J., concurring in the result).

²⁴⁶ *Id.* at 314–15 (Baker, J. & Effron, C.J., concurring in the result) (quoting *Ricketts v. Adamson*, 483 U.S. 1, 23 (1987)).

²⁴⁷ *Id.* at 315 (Baker, J. & Effron, C.J., concurring in the result) (noting the record did not show the accused “knowingly, voluntarily, and intelligently waived his double jeopardy claims”). The concurring opinion seemed to initially consider both multiplicity and unreasonable multiplication of

waivable motions but the military judge inquired about the term and “delimited that waiver by cataloguing the specific motions and issues waived.”²⁴⁸ The military judge noted four motions that defense counsel was waiving and then said to the accused, “Knowing what your defense counsel and I have told you, do you want to give up making those motions in order to get the benefit of your pretrial agreement?”²⁴⁹ In the context of this limited waiver of specific motions, the concurring opinion further noted, “an accused cannot silently waive appellate review of plain error.”²⁵⁰

The concurring opinion suggested that an accused should clearly waive motions to avoid confusion: “Waiver of waivable motions should be done on the record and expressly. Otherwise, the military judge and appellate courts will not be in a position to assess whether the waiver is knowing and voluntary.”²⁵¹ While the concurring opinion does not expand on this idea, its analysis implies the two judges believe an accused should be advised that waiving all waivable motions extends to issues that are normally reviewed on appeal even if not raised at trial (to include plain error). The concurring opinion would likely advocate for an extensive advisement from the military judge that resolves any ambiguity about issues that are preserved for appeal; without such an advisement, the accused should be allowed to litigate motions that otherwise survive a guilty plea. If the accused believed the military judge’s

charges as double jeopardy assertions. *See id.* (Baker, J. & Effron, C.J., concurring in the result). However, later in the opinion, the concurrence noted only multiplicity is grounded in on the constitutional principle of double jeopardy, while unreasonable multiplication is designed to guard against prosecutorial overreaching. *Id.* at 316 (Baker, J. & Effron, C.J., concurring in the result) (quoting *United States v. Roderick*, 62 M.J. 425, 433 (C.A.A.F. 2006)).

²⁴⁸ *Id.* at 315 (Baker, J. & Effron, C.J., concurring in the result).

²⁴⁹ *Id.* (Baker, J. & Effron, C.J., concurring in the result) (quoting from the record of trial).

²⁵⁰ *Id.* at 316 (Baker, J. & Effron, C.J., concurring in the result) (citing *United States v. Branham*, 97 F.3d 835, 842 (6th Cir. 1996); *United States v. Lloyd*, 46 M.J. 19, 22 (C.A.A.F. 1997)). *Cf.* *United States v. McClary*, 68 M.J. 606, 611 (C.G. Ct. Crim. App. 2010) (“Plain error analysis is not required where an appellant intentionally waives a known right at trial.”) (citing *Gladue*, 67 M.J. 311).

²⁵¹ *Gladue*, 67 M.J. at 316. (Baker, J. & Effron, C.J., concurring in the result). *See also* *United States v. Brehm*, No. 20070688, 2009 CCA LEXIS 183 (A. Ct. Crim. App. May 13, 2009) (unpublished). The accused pled guilty to indecent liberties with a child for an offense committed in 1999; charges were not forwarded until October 2006. *Id.* at *2. At that time, the CAAF had not decided whether or a newly-adopted child abuse exception to the five-year statute of limitations applied retroactively. *Id.* *Cf.* *United States v. Lopez de Victoria*, 66 M.J. 67 (C.A.A.F. 2008) (holding the 2003 amendment to Article 43, UCMJ, which excepted child abuse offenses from the five-year statute of limitations, does not apply retroactively). At the *Brehm* guilty plea, the military judge asked the accused if he intended to waive a possible statute of limitations challenge from “any hypothetical ruling” by the CAAF. *Brehm*, 2009 CCA LEXIS 183, at *3. The ACCA ruled that the military judge exceeded his authority by adding an additional term to the pretrial agreement (specifically, waiver of a potential statute of limitation defense). *Id.* The court noted it would have had “less concern” if the pretrial agreement expressly discussed a “bargained-for waiver of a hypothetical future defense.” *Id.*

advisement in this case, the only motions waived involved a continuance, suppression of evidence, change of venue, and entrapment. The concurring opinion is correct that such an advisement did not accurately explain the pretrial agreement.

Gladue has an expansive scope.²⁵² Appellate courts will now interpret a pretrial agreement term that the accused will “waive all waivable motions” to affirmatively waive virtually all issues on appeal.²⁵³ The change moves closer to federal practice, in which prosecutors routinely require a defendant waive all motions (as well as appellate review) in pretrial agreements.²⁵⁴ Similarly, the second Report of the Commission on Military Justice, chaired by CAAF Senior Judge Walter T. Cox III, made a tempered recommendation that the President consider amending RCM 705(c)(1)(B) to allow an accused to waive appellate review in a pretrial agreement, a waiver that is currently prohibited under the rule.²⁵⁵ Nonetheless, practitioners should be wary of adding boilerplate language that purports to waive motions when no motions are actually contemplated.²⁵⁶

In the second recent case addressing pretrial agreement provisions, *United States v. Molina*,²⁵⁷ the CGCCA held the Government had agreed to an unwritten promise in a pretrial agreement that the accused would not be required to register as a sex offender. During pretrial negotiations, trial and defense counsel researched federal and state law as well as

²⁵² *See generally* *United States v. Martinez*, ACM 37176, 2009 WL 1508451 (A.F. Ct. Crim. App. Apr. 7, 2009) (unpublished) (holding “waive all waivable motions” provision waives appellate challenge for vindictive prosecution).

²⁵³ Based on the CAAF’s conclusion that an accused can affirmatively waive constitutional rights, arguably the only issues that survive this provision are jurisdiction and failure to state an offense. It is an open issue whether a “waive all waivable motions” provision would extend to the statute of limitations. *See United States v. Province*, 42 M.J. 821 (N-M. Ct. Crim. App. 1996) (no waiver of statute of limitation defense “unless an accused, on the record, voluntarily and expressly waives the statute of limitations as bar to trial”).

²⁵⁴ *See generally* *United States v. Hahn*, 359 F.3d 1315, 1325 (10th Cir. 2004) (en banc) (per curiam) (providing framework for enforcing waiver of appellate rights).

²⁵⁵ REPORT OF THE COMMISSION ON MILITARY JUSTICE 8 (Oct. 2009) (“R.C.M. 705(c)(1)(B) could be amended, or superseded by an amendment to the UCMJ, to permit the waiver of appellate review to become part of a pretrial agreement. The change would also move the military justice system toward the elimination of ‘no-issue’ appeals, which do little to promote justice but consume scarce resources . . .”). The *Report* cautioned that appellate review was created “to guarantee appellate review to persons convicted by a military, rather than a civilian, court.” *Id.* The Commission argued any such change should be cautiously considered: “We think it likely that the military justice system has matured to the point that such a guarantee is no longer required, but we recommend that the President amend the rule only after careful consideration of the overall military appellate structure.” *Id.* at 9.

²⁵⁶ *See Moran*, *supra* note 196, at 63 (“Pretrial agreements should be tailored to the case and omit unnecessary language. For example, if defense counsel knows there are no motions in the case, they should omit the provision that requires the accused to ‘waive all waivable motions.’”).

²⁵⁷ 68 M.J. 532 (C.G. Ct. Crim. App. 2009).

Secretary of the Navy Instruction 5800.14A to determine if the accused would have to register as a sex offender if he pled guilty.²⁵⁸ Based on that research, counsel believed only one offense, indecent assault, would trigger sex offender registration; the Government agreed that the accused could plead guilty to assault consummated by battery (vice indecent assault), which the parties believed would avoid sex offender registration.²⁵⁹ After trial, counsel learned that California, the state in which the accused planned to reside, had a bifurcated reporting regime and by pleading guilty to indecent exposure as required by the pretrial agreement, the accused would register as a sex offender on a non-public list.²⁶⁰ The CGCCA decided the parties had agreed that the accused would not have to register as a sex offender and this provision was a material term in the pretrial agreement; the remedy was to dismiss the charge that triggered registration as a sex offender.²⁶¹ Of note, this decision relied largely on concessions of the appellate Government counsel, so the opinion likely has limited precedential value.²⁶²

The opinion hinges on an erroneously expansive interpretation of pretrial agreements, founded on a set of well-accepted principles. First, interpreting the terms of a pretrial agreement is a question of law that is reviewed de novo on appeal.²⁶³ Second, the meaning of a pretrial agreement is based on the plain letter of its terms as well as the accused's "understanding" of those terms as shown in the record.²⁶⁴ Applying this legal framework, the Coast Guard court uncovered the "understanding" based on a post-trial affidavit from the accused claiming he would have pled not guilty had he known he would have to register as a sex offender.²⁶⁵ In a separate affidavit, trial counsel only conceded that sex offender registration "was a subject of the pre-trial negotiations" but not that it was a term of the

agreement.²⁶⁶ Based on these post-trial affidavits and Government concessions on appeal,²⁶⁷ the CGCCA concluded sex offender registration was "the [accused's] primary concern" in agreeing to plead guilty, that he would not have pled guilty but for his misunderstanding of this issue, and that the matter was a "material term" of the agreement.²⁶⁸

For this legal conclusion, the Coast Guard court cites no authority. For the accused to prevail, the court was required to find the unwritten sex offender provision was a material term and the parties' mistaken belief that the accused would not have to register as a sex offender evinced a mutual misunderstanding of that term.²⁶⁹ Regarding the court's conclusion that an unwritten material term existed, the facts do not support this determination. As set forth above, the Government only conceded that the parties discussed whether the accused would have to register as a sex offender as a collateral consequence of his plea.²⁷⁰ Even more important, it is unclear in the opinion if the Government conceded that the convening authority, or anyone acting as his representative, actually promised the accused that the plea would not trigger sex offender registration.

²⁶⁶ *Id.* The Government's answer brief read, "The Appellant made it clear during the pre-trial negotiations that he was concerned about pleading guilty to any offense constituting a sex offense." *Id.* (emphasis in original). The Government's answer later (and similarly) noted, "As a result, sex offender registration was a subject of the pre-trial negotiations." *Id.*

²⁶⁷ The CGCCA also claimed the "record as a whole" supports these conclusions, though that does not seem to be the case. *See id.* at 534. The military judge did not discuss sex offender registration during the guilty plea and no one claimed at trial that the pretrial agreement was drafted to ensure the accused would not have to register as a sex offender. *Id.* at 535 ("[T]he issue of sex offender registration never came up during the providence inquiry.").

²⁶⁸ *Id.*

²⁶⁹ *Id.* (citing *United States v. Perron*, 58 M.J. 78, 82 (C.A.A.F. 2003)).

²⁷⁰ Courts are loathe to reverse cases based on collateral consequences of a guilty plea or punishments adjudged at trial. *See United States v. Carson*, No. 200600994, 2008 CCA LEXIS 393 (N-M. Ct. Crim. App. Nov. 6, 2008) (unpublished), *review denied*, 2009 CAAF LEXIS 616 (C.A.A.F. June 11, 2009). The accused pled guilty to offenses relating to indecent acts and language with two of his daughters. *Id.* at *1. His pretrial agreement included this term: "Further, that after sentence is announced in this case, there should no longer be a need for the military protective order, and that I will be allowed contact with my entire family, if they so desire." *Id.* at *4. After trial, the accused was transferred to a confinement facility that does not allow minors to visit convicted sex offenders. *Id.* On appeal, the NMCCA found this agreement to be unambiguous. *Id.* at *5. However, the court found the accused's limited access to his children was a collateral consequence of his conviction and confinement. *Id.* at *6-7. Applying the three part-test from *United States v. Bedania*, 12 M.J. 373 (C.M.A. 1982), the NMCCA concluded it was not reasonable to believe the language of the agreement would foreseeably cause the accused to misunderstand consequences of confinement. *Carson*, 2008 CCA LEXIS, at *7. The NMCCA affirmed. *Id.* at *15. *See Bedania*, 12 M.J. at 376 (holding an appellate court will only set aside a guilty plea based on collateral consequences if "collateral consequences are major and the appellant's misunderstanding of the consequences (a) results foreseeably and almost inexorably from the language of a pretrial agreement; (b) is induced by the trial judge's comments during the providence inquiry; or (c) is made readily apparent to the judge, who nonetheless fails to correct the misunderstanding.").

²⁵⁸ *Id.* at 533.

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ *Id.* at 535.

²⁶² *Id.* at 533 ("Appellant asserts, that his decision to plead guilty to the charges . . . was based on assurances that he would not have to register as a sex offender. The Government agrees . . .").

²⁶³ *Id.* (citing *United States v. Acevedo*, 50 M.J. 169, 172 (C.A.A.F. 1999)). *See also United States v. Smead*, 68 M.J. 44, 59 (C.A.A.F. 2009) ("[I]nterpretation of the agreement is a question of law, subject to review under a de novo standard.") (citing *United States v. Lundy*, 63 M.J. 299, 301 (C.A.A.F. 2006)).

²⁶⁴ *Molina*, 68 M.J. at 534 ("Nonetheless, 'In the context of pretrial agreements involving the constitutional rights of a military accused, we look not only to the terms of the agreement, or contract, but to the accused's understanding of the terms of an agreement as reflected in the record as a whole.'") (quoting *United States v. Lundy*, 63 M.J. 299, 301 (C.A.A.F. 2006)). To emphasize the point, the court inserts the same quotation from *Lundy* on the next page of the opinion. *See id.* at 535 n.4 (quoting *Lundy*, 63 M.J. at 301).

²⁶⁵ *Id.* at 534.

To make its factual leap, the court relied on the pleas themselves: “This agreement on the modified plea to Charge V, in our view, represents the efforts of the parties to meet Appellant’s concern to avoid any requirement to register as a sex offender, underscoring, for this Court, the fundamental validity of the assertions in the post-trial affidavits.”²⁷¹ The court gives no authority for this circular conclusion; the decision found that the Government allowed the accused to plead in such a way to address his “concern” about sex offender registration, which bolstered a legal conclusion that the parties added a material, unwritten term that the accused would not have to register as a sex offender. There is also no authority given for concluding that a trial counsel’s opinion on the state of the law for sex offender registration equates to a promise in a pretrial agreement. The court also failed to analyze this unwritten promise as a *sub rosa* agreement, which is prohibited by the *Rules for Courts-Martial* and highly disfavored on appeal.²⁷² Put another way, appellate courts are justifiably suspicious of defense claims that unwritten terms are part of a written pretrial agreement, and logic suggests that counsel would normally reduce material terms to writing (particularly if the accused would have pled not guilty in the absence of such a promise).

For a number of reasons, the import of *Molina* is questionable. Government counsel can correctly argue the case is limited to its unique facts. To support that claim, practitioners should point to the court’s reliance on Government concessions, particularly regarding the nature of the pretrial negotiations; the Coast Guard’s reliance on these concessions was so pronounced the court added this footnote: “The Court commends the Government for making the concessions in this case.”²⁷³ Defense counsel should note that pretrial negotiations frequently include discussions of collateral consequences and may argue that trial counsel opinions on potential consequences are part of a pretrial agreement. To avoid this potential challenge, practitioners would be wise to give guarded legal conclusions when discussing consequences of a plea with opposing counsel. A literal reading of *Molina* gives some authority to extend such legal conclusions into binding

²⁷¹ *Molina*, 68 M.J. at 534.

²⁷² See MCM, *supra* note 14, R.C.M. 805(d)(2) (discussing pretrial agreements and mandating, “All terms, conditions, and promises between the parties shall be written.”). The CAAF has explained the sound rationale for prohibiting such *sub rosa* agreements:

The terms of the agreement should be understood by all parties to the agreement to permit full disclosure at trial and to allow a full inquiry by a judge. The substance of these agreements must be in writing. Thus, the primary goal of RCM 705 is to preclude misunderstandings about the terms of an agreement and to prohibit *sub rosa* agreements.

United States v. Jones, 52 M.J. 60, 66 (C.A.A.F. 1999) (citing MANUAL FOR COURTS-MARTIAL, UNITED STATES, Drafters’ Analysis, at A21-39 (1995)).

²⁷³ *Molina*, 68 M.J. at 534 n.2.

pretrial agreement terms. Government appellate counsel should be cautioned against making such generous concessions, as they can lead to unfavorable precedent. Finally, trial counsel and convening authorities should not accept pretrial agreement provisions that promise the accused will not register as a sex offender; no one has the power to limit state and federal registration schemes and the law in this area is routinely changing.²⁷⁴

In the third recent development in this area, military courts have considered whether charges dismissed pursuant to a pretrial agreement may be resurrected after appellate review sets aside the guilty plea. In *United States v. Smead*,²⁷⁵ the accused pled guilty at two courts-martial. At his first trial, the accused pled guilty to possession of child pornography and indecent acts with a child.²⁷⁶ Pursuant to an approved pretrial agreement, the accused pled not guilty to three other child pornography specifications and a single rape specification, and the Government agreed to “withdraw” those offenses.²⁷⁷ Later in the agreement, the parties agreed that once the sentence was announced, “the withdrawn language and/or charge(s) and specification(s) will be dismissed with prejudice by the convening authority.”²⁷⁸ The agreement further provided that the convening authority would suspend the accused’s rank reduction for six months and direct the accused to serve his confinement at Miramar Base Brig; the Government failed to comply with these two terms and, after two service court decisions, the accused was allowed to withdraw from the agreement.²⁷⁹ At the second court-martial, the Government

²⁷⁴ This opinion might have been better decided based on ineffective assistance of counsel. See *United States v. Rose*, 67 M.J. 630 (A.F. Ct. Crim. App. 2009) (reversing guilty plea to indecent assault offenses because defense counsel was ineffective by implying the accused would not have to register as a sex offender; note, defense counsel did not make that statement expressly, but suggested it by downplaying the seriousness of the offenses and saying he “didn’t see why” such conviction would trigger sex offender registration). For a summary of how varying UCMJ offenses trigger state sex offender registration, see Major Andrew D. Flor, *Sex Offender Registration Laws and Uniform Code of Military Justice*, ARMY LAW., Aug. 2009, at 20–23 (listing registration requirements for all fifty states based on court-martial conviction).

²⁷⁵ 68 M.J. 44 (C.A.A.F. 2009).

²⁷⁶ *Id.* at 47.

²⁷⁷ *Id.*

²⁷⁸ *Id.*

²⁷⁹ *Id.* at 47, 51. In *Smead I*, the NMCCA found the convening authority did not comply with the pretrial agreement and remanded the case. The court split the two terms. Regarding the provision about confinement at Miramar, the NMCCA remanded with three options for the convening authority. The NMCCA wrote:

The CA may (1) set aside the findings and sentence and if appropriate authorize a rehearing; or (2) grant specific performance by securing the appellant’s transfer to the MCAS Miramar Brig, so that the appellant can participate in the 2-year sexual offender rehabilitation course; or (3) provide alternative relief that is satisfactory with the appellant.

re-referred all charges and specifications, including those that were dismissed with prejudice at the first guilty plea.²⁸⁰ The accused moved to dismiss the offenses that were withdrawn at the first trial; the military judge denied the motion and the accused eventually pled guilty.²⁸¹ The CAAF issued an opinion joined by three judges concluding the Government improperly re-referred the dismissed charges, though the error was ultimately harmless based on the unique facts of this case.²⁸² A separate opinion, authored by Judge Ryan and joined by Judge Erdmann, concurred in the judgment but argued the Government had the authority to re-refer all charges.²⁸³

The lengthy opinion ultimately rests on two simple points. First, in the initial pretrial agreement, parties agreed certain charges would be dismissed with prejudice once the sentence was announced; the record of trial is “replete” with evidence that the parties agreed the charges would be withdrawn with prejudice, which is significant as charges may be withdrawn without prejudice under RCM 604.²⁸⁴ Hence, the parties agreed to dismiss charges with prejudice, which had the prevented further prosecution for those offenses.²⁸⁵ Second, the new pretrial agreement was more favorable than the one in the initial case, including thirty-six months less confinement and one less guilty plea to a child pornography specification, so the error was harmless.²⁸⁶ Put another way, while the military judge erred by allowing the Government to re-refer the withdrawn charges, the error was harmless because the accused was found not guilty of those offenses and received a more favorable sentence limitation.

The concurring opinion argued that the Government was actually within its rights to re-refer the withdrawn

charges. The analysis was straightforward. First, the concurring opinion reasoned that dismissing the charges with prejudice was a material term in “a legally binding and enforceable contract.”²⁸⁷ Second, when there is a misunderstanding to a material term in an agreement (as in this case), specific performance is not available, and the parties cannot agree on alternate relief, the pretrial agreement is nullified and the parties should be returned the status quo ante.²⁸⁸ Once this pretrial agreement was nullified, the term requiring the Government to dismiss was no longer binding and all charges could be re-referred.

Smead is useful for settling the law on the limited issue of re-referral of charges after a guilty plea is reversed on appeal. This case also teaches trial counsel to be wary of terms the convening authority may be unable to enforce. In this case, the convening authority had no authority to direct the accused serve his sentence to confinement at Miramar; non-compliance with this (arguably) minor term allowed the accused to withdraw his guilty plea and triggered significant appellate litigation.

C. Government Withdrawal from Pretrial Agreements

In a significant opinion, the CAAF ruled that once the accused begins performance of *any* promise in an approved pretrial agreement, the Government may only withdraw in very limited circumstances. In *United States v. Dean*,²⁸⁹ on the eve of trial, the Government withdrew from a pretrial agreement because the accused refused to modify the stipulation of fact to include new, post-pretrial misconduct. In a 4-1 decision relying on RCM 705(d)(4), the CAAF held the convening authority was not allowed to withdraw.²⁹⁰ Under RCM 705(d)(4)(B), the Government may only withdraw from a pretrial agreement in limited circumstances: (1) before an accused begins performance of promises under the pretrial agreement; (2) upon accused’s failure to fulfill any “material promise” in the pretrial agreement; or (3) when inquiry by the military judge discloses a disagreement as to a “material term” in the agreement.²⁹¹ While not applicable to this case, the rule also

Smead I, 60 M.J. 755, 758 (N-M. Ct. Crim. App. 2004). Regarding the rank reduction, the court did not find the term affected the providence of the accused’s plea, but ordered the convening authority to take corrective action. In *Smead II*, the NMCCA wrote a brief decision that the convening authority had not complied with the initial order regarding the accused’s rank reduction; the court set aside findings and sentence and returned the case. *Smead II*, No. 200201020 (N-M. Ct. Crim. App. June 22, 2005) (unpublished). In the current case, the Government re-referred all charges from the original court-martial. *Smead*, 68 M.J. at 47.

²⁸⁰ *Smead*, 68 M.J. at 51.

²⁸¹ *Id.* at 51–52.

²⁸² *Id.* at 52.

²⁸³ *Id.* at 66–67 (Ryan & Erdmann, JJ., concurring in the judgment).

²⁸⁴ *Id.* at 61 (noting “the convening authority agreed to withdraw and dismiss specified charges with prejudice upon announcement of the sentence”); 63 (concluding “the record of trial is replete with references to withdrawal with prejudice”). See MCM, *supra* note 14, R.C.M. 604(b) (noting that withdrawn charges may be referred anew to another court-martial).

²⁸⁵ *Smead*, 68 M.J. at 65 (noting on “the unique circumstances of this case,” the agreement required dismissal with prejudice and there was no authority for treating this provision as “a mere temporary disposition of the affected charges subject to revival at a rehearing”).

²⁸⁶ *Id.* at 66.

²⁸⁷ *Id.* at 67 (Ryan & Erdmann, JJ., concurring in the judgment).

²⁸⁸ *Id.* at 68 (Ryan & Erdmann, JJ., concurring in the judgment) (citing *United States v. Perron*, 58 M.J. 78, 87 (C.A.A.F. 2003)). “Status quo ante” is defined as “[t]he situation that existed before something else (being discussed) occurred.” BLACK’S LAW DICTIONARY 1448 (8th ed. 2004). The service court opinion provided this definition: “‘Status quo ante’ literally means ‘the state of things before.’” *United States v. Smead*, No. 200201020, 2008 WL 142112, at *5 (N-M. Ct. Crim. App. Jan. 10, 2008) (quoting BLACK’S LAW DICTIONARY 1410 (6th ed. 1990)).

²⁸⁹ 67 M.J. 224 (C.A.A.F. 2009).

²⁹⁰ *Id.* at 225–26. Judge Baker filed a dissenting opinion. *Id.* at 231–32 (Baker, J., dissenting).

²⁹¹ MCM, *supra* note 14, R.C.M. 705(d)(4)(B). On its face, the rule delineates between “material” and other terms and promises in an agreement. The Government may withdraw if the accused fails to perform, but only when the failure involves a “material” promise or condition. The

allows for withdrawal if findings are set aside on appeal because the plea was improvident.²⁹²

The *Dean* court found the accused began performance by (1) signing the stipulation of fact, (2) electing trial by military judge alone, and (3) filing an amended witness list that conformed to a condition in the pretrial agreement.²⁹³ Of note, the accused signed the stipulation of fact and elected trial by military judge alone *before* the convening authority approved the pretrial agreement.²⁹⁴ Hence, once the convening authority approved the offer to plead guilty, the Government could only withdraw under RCM 705(d)(4)(B) if the accused failed to perform or there was a disagreement to a material term. On appeal, the Government first argued the parties had a disagreement regarding a material term, specifically the “before I begin performance” provision in the agreement.²⁹⁵ The CAAF quickly dismissed this argument, noting the Government did not rely on that basis for withdrawal at trial and noted the phrase was essentially a term of art defined in the context of interpreting RCM 705.²⁹⁶ The Government next made the novel argument that the agreement carried “an implied obligation of good faith.”²⁹⁷ The CAAF quickly dismissed this argument as well, reasoning that RCM 705(c)(2)(D) expressly allows for a pretrial agreement term that requires the accused not commit other misconduct, so a provision allowing such a term to be added necessarily means that “good conduct” is not an implicit term in pretrial agreement.²⁹⁸ Finally, and perhaps most compellingly, the Government argued the pretrial agreement allowed for

cancellation if there was “any modification of the stipulation without my [the accused’s] consent.”²⁹⁹ The CAAF dismissed this argument—perhaps too quickly—noting that this term was “not a model of clarity” and a separate provision in the agreement only required the accused agree to a stipulation of fact regarding the offenses to which he was pleading guilty.³⁰⁰ Hence, the Government could not withdraw from the pretrial agreement when the accused refused to modify the stipulation of fact to include uncharged misconduct.³⁰¹

Judge Baker dissented from *Dean*, making two valid critiques.³⁰² First, regarding the CAAF’s conclusion that the accused had begun performance by signing the stipulation of fact and electing trial by military judge alone before the agreement was submitted to the Government, the dissent argued, “[I]t is not clear how Appellant could, as a matter of law, begin performing on a contract that had not yet been signed by the convening authority.”³⁰³ The dissent argued more persuasively that the pretrial agreement allowed for modification of the stipulation of fact, a term that could have allowed for the Government to withdraw.³⁰⁴ Specifically, the agreement noted “this agreement may be cancelled” if the accused did not agree with trial counsel to the contents of a stipulation of fact or if there was “any modification of the stipulation without my consent.”³⁰⁵ Judge Baker read these terms together to mean “any modification to the stipulation on which the parties could not agree would cancel the agreement.”³⁰⁶ Hence, when the Government sought to add new misconduct to the stipulation (as a modification) and the accused did not agree, the agreement was cancelled.

Government may also withdraw if there is a disagreement about a term, but only if the term is “material.” By contrast, the Government may not withdraw after the accused begins performance of promises in the agreement; this portion of the rule does not require the promises be “material.”

²⁹² *Id.*

²⁹³ *Dean*, 67 M.J. at 228. Per the pretrial agreement, accused agreed to waive the personal appearance of three named military witnesses and to request production of no more than two non-local defense witnesses. *Id.* at 226. On 8 July 2005, the accused elected trial by military judge alone. *Id.* at 228. On 29 August 2009, he submitted the offer to plead guilty with a signed stipulation of fact. *Id.* at 225, 228. On 14 September 2005, the convening authority approved the offer to plead guilty. *Id.* at 226.

²⁹⁴ *Id.* at 227.

²⁹⁵ *Id.* at 228.

²⁹⁶ *Id.* at 228, 229. The court noted that RCM 705(d)(4)(B) uses the phrase “before the accused begins performance of promises contained in the agreement.” *Id.* at 229. To the extent this issue was raised at trial, the military judge only applied it in the context of interpreting RCM 705(d)(4)(B), and trial counsel did not assert the parties disagreed to its meaning. *Id.* In harsh language, the court determined, “[T]he only reason the Government withdrew was because *Dean* refused to modify the stipulation of fact to include additional misconduct.” *Id.*

²⁹⁷ *Id.* at 229.

²⁹⁸ *Id.* at 230. See also *United States v. Cox*, 46 C.M.R. 69, 70 (C.M.A. 1972) (“We are unable to adjudge that the pretrial agreement carries with it an implied condition that the Government will be bound only if the appellee behaves well.”), quoted in *Dean*, 67 M.J. at 230.

For practitioners, *Dean* limits the Government’s options for withdrawing from a pretrial agreement. First, the court liberally interpreted the “the accused begins performance” provision of RCM 705(d)(4)(B) to include performance that predates approval of the pretrial agreement. Second, the court narrowly construed the “disagreement to a material term” basis that can allow for Government withdrawal. The opinion also gives a helpful reminder about trial practice that applies to all motions. Appellate courts disfavor legal arguments that were not made at the trial level. For example, when the law allows for the Government to withdraw from an agreement in a series of different circumstances, counsel would be wise to argue as many of

²⁹⁹ *Dean*, 67 M.J. at 230.

³⁰⁰ *Id.*

³⁰¹ *Id.* The court added, “As such, the modification proposed by the Government to include recent acts of alleged misconduct in the stipulation is outside the scope of the parties’ agreement.” *Id.*

³⁰² *Id.* at 231–32 (Baker, J., dissenting).

³⁰³ *Id.* at 231 (Baker, J., dissenting).

³⁰⁴ *Id.* (Baker, J., dissenting).

³⁰⁵ *Id.* (Baker, J., dissenting).

³⁰⁶ *Id.* (Baker, J., dissenting).

those bases as possible in front of the military judge. An appellate court will skeptically view arguments that were available at trial but raised for the first time on appeal. Finally, trial counsel should consider requiring misconduct provisions in pretrial agreements. In this case, the Government would have been allowed to withdraw if a term like the following had been in the agreement: “If I commit any misconduct (to include any act that violates the UCMJ) after the signing of this pretrial agreement but before the date of trial, such misconduct may be the basis for the convening authority to unilaterally withdraw from the pretrial agreement.”

VIII. Conclusion

At the end of *Footloose*, Ren and his friends host a dance for the high school in a warehouse outside of town. In a way, the kids are bending the rules; knowing dancing is outlawed in town, they go just a few miles away with the approval of their parents. All the kids move like trained, choreographed, professional dancers. Once the rules are pushed aside, the kids can cut loose and do the “moonwalk,” glide in sync, and have impromptu dance-offs.³⁰⁷ Unfortunately, when appellate courts cut loose, the results can be inconsistent and occasionally unsightly.

There was much to admire from the last term’s cases. The NMCCA affirmed a military judge’s decision to reject an accused’s irregular guilty plea,³⁰⁸ while the ACCA affirmed a military judge’s decision to reject a guilty plea in one of the high-profile Abu Ghraib cases based on inconsistent matters raised by the defense during sentencing.³⁰⁹ These decisions will hopefully encourage military judges to reject questionable (or “close call”) guilty pleas in which an accused has ambiguously asserted his guilt. The NMCCA highlighted a military judge’s duty to properly advise an accused of the elements of the offenses to which the accused is pleading guilty, as well as the challenging legal concepts that must be defined during the providence inquiry to ensure the accused truly understands the plea.³¹⁰ Finally, the CAAF issued a well-reasoned opinion limiting the Government’s ability to withdraw from a pretrial agreement once the accused begins performance of any portion of the agreement.³¹¹ These four decisions represent the strong tradition in military justice of protecting an accused, first, by ensuring a plea of guilty is only

accepted if the accused is truly guilty and understands the full meaning and effect of the plea, and second, by scrutinizing Government actions in guilty pleas to prevent overreaching.

Other cases were more of a mixed bag. The CAAF’s two decisions regarding convening authority disqualification ultimately reached the correct result but downplayed the importance of this legal principle.³¹² In another opinion, the CAAF determined an accused may add a promise to “waive all waivable motions” in a pretrial agreement; while this term may allow an accused to negotiate a more favorable sentence limitation, the CAAF has interpreted the term so broadly that it approaches a waiver of appellate review.³¹³ The CAAF’s decision on waiving all waivable motions even expanded the waiver to cover motions that were not contemplated at trial.³¹⁴ As a counterbalance, the CGCCA has recently noted that service courts can review waived issues under the broad authority of Article 66(c), UCMJ.³¹⁵

Unfortunately, two cases warrant some criticism. *United States v. Nance*, a case in which leading questions were used to get the accused to admit that his abuse of cough and cold medicine was prejudicial to good order and discipline, will likely be cited for years to come for its general derision of the military guilty plea process.³¹⁶ The CAAF’s implied frustration that the “Appellant argues that the military judge failed to illicit, *from Appellant*, a sufficient factual basis to establish that Appellant’s conduct was to the prejudice of good order and discipline in the armed forces”³¹⁷ may resonate with other frustrated members of the judiciary who review a litany of guilty plea cases. However, this criticism runs contrary to congressional statutes governing guilty pleas, as well as rules promulgated by the President.³¹⁸

Even more troubling, *United States v. Riddle* relied on questionable legal and factual conclusions to uphold a guilty plea of a mentally ill Soldier who was not advised of the

³⁰⁷ FOOTLOOSE, *supra* note 1.

³⁰⁸ *United States v. Diaz*, No. 200700970, 2009 WL 690614 (N-M. Ct. Crim. App. Feb. 19, 2009) (unpublished), *review granted*, 68 M.J. 200 (C.A.A.F. 2009).

³⁰⁹ *United States v. England*, No. 20051170, 2009 CCA LEXIS 349 (A. Ct. Crim. App. Sept 10, 2009) (unpublished).

³¹⁰ *United States v. Craig*, 67 M.J. 742 (N-M. Ct. Crim. App. 2009), *aff’d*, 68 M.J. 399 (C.A.A.F. 2009).

³¹¹ *United States v. Dean*, 67 M.J. 224 (C.A.A.F. 2009).

³¹² *United States v. Schweitzer*, 68 M.J. 133 (C.A.A.F. 2009); *United States v. Ashby*, 68 M.J. 108 (C.A.A.F. 2009).

³¹³ *United States v. Gladue*, 67 M.J. 311 (C.A.A.F. 2009); *see also supra* notes 252–56 and accompanying text.

³¹⁴ *See supra* notes 234, 243–44 and accompanying text.

³¹⁵ *See United States v. McClary*, 68 M.J. 606, 611 n.7 (C.G. Ct. Crim. App. 2010) (“At a federal Court of Appeals, plain error analysis of an intentionally waived issue is not available at all, because a valid waiver leaves no error for us to correct on appeal. However, under Article 66(c), UCMJ, this Court may entertain an issue despite waiver.”) (internal quotations and citations omitted). *See also* UCMJ art. 66(c) (2008) (“[The Court of Criminal Appeals] may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved.”).

³¹⁶ *United States v. Nance*, 67 M.J. 362 (C.A.A.F. 2009).

³¹⁷ *Id.* at 365 (emphasis supplied by the court).

³¹⁸ *See* UCMJ art. 45 (2008); MCM, *supra* note 14, R.C.M. 910(c)–(e).

applicable defense of lack of mental responsibility.³¹⁹ The CAAF concluded that the accused's multiple mental health conditions, which resulted in her living in an in-patient psychiatric facility at time of trial, only amounted to the mere possibility of a defense. While this conclusion is certainly problematic, the opinion may be more significant for ever-so-slightly shifting the burden of the providence inquiry from the military judge to defense counsel.³²⁰ Consistent with the court's growing waiver doctrine, future cases may allege that the defense waives challenges to the providence of a guilty plea by not raising those issues at trial. Such a shift would imprudently undercut the "special relationship between the accused and the military judge"³²¹ during the providence inquiry that has long served to ensure a military guilty plea is aligned with the truth.

Military judges are in the best position to safeguard the providence of an accused's plea. Despite the recent appellate cases upholding slipshod plea inquiries, military judges should continue to fully advise military accused and ensure factual discrepancies and possible defenses are

addressed at the trial level. To the extent inconsistencies between the accused's plea of guilt and the providence inquiry cannot be resolved, military judges have a duty to not accept the plea and instead enter a plea of not guilty for the accused.

Last summer, Paramount Studios announced that it was re-making *Footloose* for a "new generation." While it is hard to imagine the film could be improved, filmmakers seem to believe the great aspects of the original can be captured again. In the same way *Footloose* is being re-made, practitioners and military judges should endeavor to modify and expand caselaw to strengthen the review of accuser disqualification issues and guilty pleas.

³¹⁹ *United States v. Riddle*, 67 M.J. 335 (C.A.A.F. 2009).

³²⁰ See *supra* notes 184, 212 and accompanying text.

³²¹ *Riddle*, 67 M.J. at 343 (Effron, C.J., & Erdmann, J., dissenting) (citing *United States v. Care*, 40 C.M.R. 247, 253 (C.M.A. 1969)).

**“Physician Heal Thyself”¹:
How Judge Advocates Can Commit Unlawful Command Influence**

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Unlawful command influence (UCI) occurs whenever there is even the appearance that the authority of rank has constrained, coerced, or otherwise improperly influenced the independent discretion of any of the key players in the military justice system.² Unlawful command influence deprives Soldiers of due process³ and erodes the credibility of the military justice system in the eyes of the public.⁴ The Uniform Code of Military Justice (UCMJ) was enacted, and the Judge Advocate General’s Corps formed, largely to combat UCI.⁵ As such, it is essential that judge advocates be part of the solution rather than part of the problem when it comes to UCI.

This article will address some of the ways in which judge advocates may intentionally or unintentionally commit UCI. It will begin by describing the role of the military justice system and demonstrating how the objectives of the system are corrupted by UCI. It will then examine some of the more common areas of UCI involving judge advocates, beginning with instances where rank disparity between judge advocates results in UCI. It will then look at UCI impacting the independence of the trial judiciary, both through the judicial chain of command and through improper interference by judge advocates outside the judiciary structure. Finally, it will look at some of the other less obvious ways in which judge advocates can commit, or contribute to, UCI. The article will conclude by briefly discussing the proper role for judge advocates in identifying and eliminating UCI and preserving the integrity of the military justice system.

The military justice system is a commander’s system; it exists to allow commanders to enforce good order and discipline among their troops.⁶ To enable commanders to

effectively accomplish that task, they have been invested with significant authority within the military justice system.⁷ Yet, a commander must exercise his military justice authority in a manner that is distinct from his exercise of traditional command authority. With regard to the mission and most of the day-to-day functions of a unit, the commander is the final arbiter.⁸ If the commander sees something he does not like, he orders it changed. If he perceives a need for his command, his orders ensure the need is met.⁹ His decisions are final and, by and large, they may be as arbitrary as his judgment and the mission require.

However, a commander cannot exercise his military justice function in the same authoritarian manner in which he commands his troops.¹⁰ To the contrary, a commander must be fair and impartial when he takes adverse action; moreover, he must actively protect the system from even the perception that his command authority dictates the course of military justice. Even though it is his good order and discipline that has been effectively victimized by misconduct, a commander is expected to step aside from his traditional authoritarian role and assume the neutral and detached affect of a judicial officer.¹¹ A commander may not simply order justice done. Instead, he must set aside his personal feelings to fully and fairly evaluate each case and take only that action which is appropriate under all of the facts and circumstances.¹²

In addition to maintaining his own neutrality, a commander must work to ensure the neutrality of any of his subordinates who play parts in the military justice system. Although the members of a military organization typically exercise some level of independence in carrying out the mission of the unit, that independence is always shaped by

¹ *Luke 4:23.*

² See UCMJ art. 37 (2008); *United States v. Lewis*, 63 M.J. 405, 415 (C.A.A.F. 2006) (quoting *United States v. Rosser*, 6 M.J. 267, 271 (C.M.A. 1979)) (Congress is equally concerned with eliminating both actual and apparent command influence.).

³ *United States v. Cruz*, 20 M.J. 873, 879–80 (A.C.M.R. 1985) (unlawful command influence poses a special threat to military due process).

⁴ *United States v. Harvey*, 64 M.J. 13, 17–18 (C.A.A.F. 2006) (noting the invidious impact of unlawful command influence on the public perception of military justice and the court’s role in curing it).

⁵ *Id.* at 30 (Baker, J., dissenting). See also Colonel Robert Burrell, *Recent Developments in Unlawful Command Influence*, ARMY LAW., May 2001, at 2.

⁶ MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. 1, pmb., ¶ 3 (2008) [hereinafter MCM].

⁷ *Id.* R.C.M. 306(c) (describing the options available to commanders faced with the report of an offense in their unit).

⁸ U.S. DEP’T OF ARMY, REG. 600-20, ARMY COMMAND POLICY para. 2-1 (18 Mar. 2008) (a commander is responsible for everything his unit does or fails to do).

⁹ *Id.* paras. 1-5, 3-2, and 4-3.

¹⁰ *Id.* para. 4-7 (“Discretion, fairness, and sound judgment are essential ingredients of military justice.”).

¹¹ MCM, *supra* note 5, R.C.M. 504(c)(1) (an accuser may not convene a court-martial). An accuser is one who has either preferred the charges or one who has other than an official interest in the case. UCMJ art. 1(9) (2008).

¹² MCM, *supra* note 5, R.C.M. 306(b) discussion.

the commander's intent.¹³ Commanders must be ever mindful of this deference to their intent and exercise caution so that the members of their commands who fulfill justice functions, such as witnesses, panel members, and subordinate commanders, do not allow their perceptions of command intent to constrain their independent discretion. Likewise, commanders must be aware that anyone subject to the code can commit UCI.¹⁴ They must ensure that their subordinate leaders and staff officers do not intentionally or unintentionally use the authority derived from their relation to the commander to influence the course of military justice.

In most instances, commanders understand their role in the military justice system and perform it properly. Unfortunately, there continue to be instances where commanders and those vested with the mantle of command authority, intentionally or unintentionally, use their authority to influence the administration of military justice towards a desired result.¹⁵ This is UCI.¹⁶ The most common targets of UCI are subordinate commanders, witnesses, and panel members.¹⁷ The typical offenders are commanders. However, it is important to recognize that not all command influence is committed by commanders. Subordinate leaders, non-commissioned officers, and staff officers all carry the mantle of command authority and therefore have the potential to either commit or contribute to the commission of UCI.¹⁸ Judge advocates are staff officers who play a central role in the enforcement of good order and discipline within a command. Because of their prominent role in the administration of military justice, judge advocates must be mindful of their potential to commit UCI.

The courts have repeatedly noted that the military judge (MJ) is the last sentinel in identifying and curing UCI.¹⁹ If that is true, then judge advocates are both the forward

observers and the rapid reaction force against the dangers of UCI. Judge advocates are charged with providing fair and accurate military justice advice to their commanders.²⁰ Their presence in the military justice system ensures that commanders apply their military justice authority correctly. Judge advocates, as trial counsel (TC), chiefs of justice, brigade judge advocates (BJAs), and SJAs, are responsible for training commanders and their staffs on the dangers of UCI.²¹ As TC, defense counsel, and MJs, judge advocates are responsible for identifying UCI as soon as possible and taking appropriate action to cure it. Given these important roles in protecting the system against UCI, it is particularly damaging when judge advocates themselves become involved in UCI.

One way in which judge advocates can commit UCI is through their relationship with subordinate judge advocates. The authority that comes with superior rank is at the heart of UCI.²² Obviously, some judge advocates outrank others and therefore have the capacity to intentionally or unintentionally exert influence through their superior rank or position. This is particularly true where that influence impacts the independent discretion of subordinate judge advocates acting as legal advisors to convening authorities. The case of *United States v. Chessani*²³ provides an example of this type of UCI.

Lieutenant Colonel Jeffery Chessani was the most senior Marine facing charges related to an incident in Haditha, Iraq, in which a group of Marines allegedly killed approximately twenty-four Iraqi civilians.²⁴ The incident occurred in 2005 while appellant was the commander of Kilo Company, Third Battalion, 1st Marine Division, a subordinate command of 1st Marine Expeditionary Force (I MEF).²⁵ As the investigation into the incident was taking shape, the Commandant of the Marine Corps designated the commander of U.S. Marine Corps Central Command (MARCENT) as the Consolidated Disposition Authority (CDA) for all disciplinary action related to the Haditha incident.²⁶ Lieutenant General (LtGen) James T. Mattis, as the MARCENT Commander, therefore had disposition authority for appellant's case. Lieutenant General Mattis

¹³ AR 600-20, *supra* note 7, para. 2-1.

¹⁴ UCMJ art. 37. *See also* *United States v. Stombaugh*, 40 M.J. 208, 211 (C.M.A. 1994) and *United States v. Kitts*, 23 M.J. 105 (C.M.A. 1986) (staff judge advocate carries the mantle of command authority).

¹⁵ *See, e.g.*, *United States v. Wiechmann*, 67 M.J. 456 (C.A.A.F. 2009); *United States v. Reed*, 65 M.J. 487 (C.A.A.F. 2008); *United States v. Harvey*, 64 M.J. 13 (C.A.A.F. 2006); *United States v. Gore*, 60 M.J. 178 (C.A.A.F. 2004).

¹⁶ *United States v. Simpson*, 58 M.J. 368, 373-75 (C.A.A.F. 2003) (as corrected 9 July 2003 and 14 July 2003).

¹⁷ DAVID A. SCHLUETER, *MILITARY CRIMINAL JUSTICE PRACTICE AND PROCEDURE* §§ 6-3 to 6-8 (2008) (detailing Article 37's protection of these key groups); Lieutenant Colonel Mark L. Johnson, *Unlawful Command Influence—Still with Us; Perspectives of the Chair in the Continuing Struggle Against the "Mortal Enemy" of Military Justice*, ARMY LAW., June 2008, at 110.

¹⁸ UCMJ art. 37 ("no person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial . . ."). *See also id.* art. 98 (making it an offense for any person subject to the code to unnecessarily delay or knowingly or intentionally fail to comply with the manual provisions regulating the proceedings of a court-martial).

¹⁹ *United States v. Rivers*, 49 M.J. 434, 443 (1998).

²⁰ *See generally* UCMJ art. 6; MCM, *supra* note 5, R.C.M. 406; *United States v. Argo*, 46 M.J. 454 (C.A.A.F. 1997) (SJA is usually in a position to give neutral advice); *United States v. Engle*, 1 M.J. 387, 389 (C.M.A. 1976) (UCMJ art. 6 (SJA disqualification provisions intended to assure the accused a fair and impartial review of his case); Major General John L. Fugh, *Address to the JAG Regimental Workshop*, ARMY LAW., June 1991, at 3.

²¹ U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE para. 19-5 (16 Nov. 2005).

²² UCMJ art. 37.

²³ NMCCA 200800299, CCA LEXIS 84 (N-M. Ct. Crim. App. 2009).

²⁴ *Id.* at *2.

²⁵ *Id.* at *3.

²⁶ *Id.*

was a dual-hatted commander, also serving as the Commander, I MEF. Lieutenant General Mattis's two commands, MARCENT and I MEF, each had their own staff judge advocate (SJA).²⁷ The SJA for MARCENT, and therefore the CDA, was Lieutenant Colonel (LtCol) Bill Riggs.²⁸ The SJA for I MEF was Colonel (Col) John Ewers, a well-known and respected judge advocate who had served with LtGen Mattis during prior tours.²⁹

Based upon his experience and prior relationship with LtGen Mattis, Col Ewers was appointed to assist in the investigation of the Haditha incident on behalf of I MEF.³⁰ In the course of the investigation, Col Ewers interviewed appellant and advised and assisted in drafting the final official report of investigation into the incident.³¹ After the investigation was complete, MARCENT, as the CDA, had authority to take punitive action on any cases arising out of the incident. Charges were preferred against appellant for failing to properly report and investigate the incident.³² The case belonged to MARCENT, as the CDA; therefore, Col Ewers was not responsible for advising LtGen Mattis on the case. That responsibility fell to LtCol Riggs as the MARCENT SJA.³³ Nonetheless, Col Ewers attended several meetings where LtGen Mattis and the MARCENT SJA, LtCol Riggs, discussed disposition of appellant's case.

At trial, defense counsel alleged that Col Ewers had improperly participated in advising LtGen Mattis on disposition of appellant's case. Accordingly, the defense filed a motion asking the MJ to dismiss all charges based upon UCI.³⁴ In response to the defense motion, the Government called both LtGen Mattis and Col Ewers as witnesses.³⁵ The Government did not call LtCol Riggs. The testimony and other evidence demonstrated that Col Ewers was present at meetings where LtGen Mattis and LtCol Riggs discussed disposition of the Haditha cases, including appellant's. Both LtGen Mattis and Col Ewers agreed that although Col Ewers was present, he did not offer any advice to LtGen Mattis on disposition of appellant's case.³⁶

Nonetheless, after hearing all of the evidence offered, the MJ granted the defense motion to dismiss all charges, without prejudice, as a result of UCI.³⁷ The MJ also

disqualified LtGen Mattis and Col Ewers from any further participation in the case.³⁸ Specifically, the MJ found that the Government failed to meet its burden of proving beyond a reasonable doubt that Col Ewer's presence "did not chill subordinate legal advisors from exercising independence and providing potentially contrary advice."³⁹ The MJ further found that the Government failed to prove that "the legal advice and recommendations of the SJA and deputy SJA of MARCENT were not improperly influenced" by Col Ewer's presence.⁴⁰ Finally, the MJ ruled that he was convinced beyond a reasonable doubt that Col Ewer's presence at the meetings in questions created the perception of UCI.⁴¹

The Government appealed the ruling of the MJ pursuant to Article 62, UCMJ, and Rule for Courts-Martial (RCM) 908.⁴² On appeal, the Navy-Marine Court of Criminal Appeals (NMCCA) reiterated the legal test for UCI and stressed the Government's burden to prove beyond a reasonable doubt that either the predicate facts alleging UCI untrue; or that even if the facts were true, the facts did not constitute UCI; or even if UCI did occur, that the UCI did not affect the proceedings.⁴³ After establishing the standard to be applied, the court noted that the case contained allegations of both actual and apparent UCI.⁴⁴ The court began its analysis by examining the appearance of UCI.⁴⁵

The court noted that the appearance of UCI "exists where an objective, disinterested observer fully informed of all of the facts and circumstances would harbor significant doubt about the fairness of the proceeding."⁴⁶ The court observed that the Government's response on appeal focused on the absence of influence flowing upwards from Col Ewers to LtGen Mattis, the convening authority.⁴⁷ However, the court was more concerned with potential influence flowing downward from Col Ewers to LtCol Riggs, who was the official legal adviser in appellant's case.⁴⁸ The court chastised the Government for failing to present any testimonial or documentary evidence from LtCol Riggs or

²⁷ *Id.* at *3-4.

²⁸ *Id.*

²⁹ *Id.* at *4-5.

³⁰ *Id.*

³¹ *Id.* at *5-6.

³² *Id.*

³³ *Id.* at *6-8.

³⁴ *Id.* at *9.

³⁵ *Id.*

³⁶ *Id.* at *10.

³⁷ *Id.* at *10-12.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at *12.

⁴³ *Id.* at *13-15.

⁴⁴ *Id.* (citing *United States v. Lewis*, 63 M.J. 405, 415 (C.A.A.F. 2006)) (quoting *United States v. Rosser*, 6 M.J. 276, 271 (C.M.A. 1979) ("Congress and this court are concerned not only with eliminating actual unlawful command influence, but also with 'eliminating even the appearance of unlawful command influence at courts-martial.'").

⁴⁵ *Id.* at *14-15.

⁴⁶ *Id.* at *15-16 (citing *United States v. Lewis*, 63 M.J. 405, 415 (C.A.A.F. 2006)).

⁴⁷ *Id.* at 17-18.

⁴⁸ *Id.*

his staff “to ameliorate . . . the appearance that the MARCENT SJA’s legal advice may have been impermissibly influenced” by the presence of Col Ewers at MARCENT legal meetings.⁴⁹ Without such evidence, the Government was unable to meet its burden of disproving that Col Ewer’s presence created the impermissible appearance of UCI.⁵⁰

Having affirmed the MJ’s finding of apparent UCI, the court declined to address the allegations of actual command influence. Instead, the court went on to analyze the propriety of the MJ’s remedy: dismissal without prejudice. The court recognized that the MJ is the “last sentinel”⁵¹ in protecting the court-martial process from UCI.⁵² The court reasoned that the MJ’s remedy was directed at eradicating the taint of UCI on the proceedings and ensuring that any future proceedings would not be similarly tainted.⁵³ Accordingly, dismissing the charges and ensuring that they could only be resurrected by an untainted command was well within his purview. As such, the court held that the MJ did not abuse his discretion by dismissing the case without prejudice, disqualifying the MARCENT and I MEF commanders as well as Col Ewers and LtCol Riggs from further participation in the case.⁵⁴

In reaching its decision, the Navy-Marine court ignored a more obvious approach to focus on UCI. Article 6, UCMJ, states that no person who has acted as an investigating officer in any case may later act as SJA or legal officer to any reviewing officer in the same case.⁵⁵ The parties clearly recognized that Col Ewers had acted as an investigating officer in the case and was therefore disqualified from acting as an SJA in the *Chessani* case.⁵⁶ Accordingly, the court could have simply analyzed the issue under Article 6 and focused on the improper appearance created by Col Ewers involvement in a case from which he was disqualified.⁵⁷ This approach would have allowed the court to resolve the issue without reference to UCI.

⁴⁹ *Id.* at 18.

⁵⁰ *Id.* at *20–21.

⁵¹ *Id.* at *22 (citing *United States v. Biagase*, 50 M.J. 143, 152 (C.A.A.F. 1999)).

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at *24.

⁵⁵ UCMJ art. 6(c) (2008). Article 6 specifically states “no person who has acted as member, military judge, trial counsel, assistant trial counsel, defense counsel, assistant defense counsel, or investigating officer in any case may later act as staff judge advocate or legal officer to any reviewing authority upon the same case.”

⁵⁶ *United States v. Chessani*, NMCCA 200800299, CCA LEXIS 84, at *6–7 (N-M. Ct. Crim. App. 2009). The record indicates that LtCol Riggs recognized that Col Ewers was disqualified because of his role as an investigator in the case..

⁵⁷ UCMJ art. 6(c).

Instead, the court elected to address the issue in terms of the potential UCI flowing from the senior ranking SJA to the junior SJA. This focus demonstrates the importance our system accords to the neutral and detached advice of an SJA.⁵⁸ This reminder is important because there are many circumstances where judge advocates are expected to exercise independent discretion when providing legal advice.⁵⁹ Under *Chessani*’s UCI analysis, if the actions of a senior ranking judge advocate directly influence, or even create the appearance that they have influenced, the independent discretion of a junior judge advocate, then there is a potential UCI issue. As such, the case signals a caution for some aspects of the practice of military justice.

In particular, the *Chessani* court’s reasoning could impact the interactions between Army division or installation SJAs and judge advocates assigned directly to brigades within the same general court-martial convening (GCMCA) authority jurisdiction. Until recently, Army TC typically provided direct advice to brigade commanders on matters related to military justice.⁶⁰ However, the TC were assigned to the Office of Staff Judge Advocate (OSJA) and they represented the SJA when they advised commanders. For purposes of Article 6, the SJA was still ultimately responsible for providing legal advice to convening authorities at all levels and simply used the TC as a conduit for that advice. Under those circumstances, it was both common and appropriate for a senior ranking SJA to shape, influence, or even direct the content of advice his subordinate TC provided to brigade and battalion commanders.

A recent paradigm shift in the Army Judge Advocate General’s Corps has altered the long standing relationship between division or installation SJAs and junior ranking judge advocates serving within the same command.⁶¹ In the new paradigm, brigade combat teams and other modular brigades have a BJA assigned directly to the brigade as staff officers. The BJAs are in the technical and rating chain of

⁵⁸ *See, e.g.*, *United States v. Dresen*, 47 M.J. 122 (C.A.A.F. 1997) (Officers providing important statutory advice, such as post-trial recommendations, must be and appear to be fair and objective.). *See also* UCMJ arts. 6 and 34 and MCM, *supra* note 6, R.C.M. 1106.

⁵⁹ *See, e.g.*, MCM, *supra* note 6, R.C.M. 406(b) discussion (“[T]he staff judge advocate is personally responsible for the pretrial advice and must make an independent and informed appraisal of the charges and evidence in order to render the advice.”).

⁶⁰ U.S. DEP’T OF ARMY, FIELD MANUAL, 1-04 (27-100), LEGAL SUPPORT TO THE OPERATIONAL ARMY para. 4-4 (Apr. 2009).

⁶¹ To support the Army’s implementation of the modular brigade program, The Judge Advocate General provided guidance on the assignment of judge advocates directly to the staff of Brigade Combat Teams. Policy Memorandum 06-7, The Judge Advocate General, subject: Location, Supervision, Evaluation, and Assignment of Judge Advocates in Modular Force Brigade Combat Teams (10 Jan. 2006). *See also* TJAG SENDS, *Brigade Judge Advocates—The Cutting Edge of Military Legal Practice*, vol. 3, Mar. 2005.

the installation or division SJA;⁶² however, they are not assigned to the OSJA, nor do the work directly for the SJA.⁶³ Therefore, it could be argued that the BJA is the brigade's SJA for Article 6 purposes, while the division or installation SJA advises only the commanding general as the GCMCA.⁶⁴ The BJA would be expected to carry out the Article 6 function and provide neutral and detached legal advice to his convening authority on matters related to military justice. Consistent with the court's reasoning in *Chessani*, a senior ranking SJA, or even a senior deputy staff judge advocate or chief of justice, could commit UCI, or create the appearance of UCI, by interfering with or otherwise seeking to shape the advice a BJA provides to his commander on military justice matters.

It is important to note that *Chessani* is an unpublished opinion from one service court; as such it holds no real precedential value. Moreover, the court seems to suggest that its analysis would have been different had the Government presented some evidence explaining any potential impact Col Ewers's presence might have had on LtCol Riggs's advice.⁶⁵ Finally, because the *Chessani* case arose out of an extremely high-profile international incident, both the trial and appellate courts may have exercised extraordinary caution to ensure that the attention the incident received did not unfairly taint the process. Accordingly, practitioners should not read too much into the opinion.

Nonetheless, it is important that SJAs and other senior ranking judge advocates keep UCI in mind when they interact with subordinates. Some level of communication between superior and subordinate SJAs is both permissible and expected. Rule for Courts-Martial 105(b) entitles SJAs to communicate directly with either superior or subordinate SJAs or even with The Judge Advocate General.⁶⁶

⁶² Policy Memorandum 08-1, The Judge Advocate General, subject: Location, Evaluation, Supervision, and Assignment of Judge Advocates in Modular Force Brigade Combat Teams (17 Apr. 2008).

⁶³ *Id.* The established rating and technical chain relations between a division SJA and a BJA provide a crucial distinction from the relationship between the two SJA in the *Chessani* case. This distinction should be noted by counsel who find themselves responding to UCI allegations involving SJAs and junior ranking BJAs.

⁶⁴ FM 1-04 (27-100), *supra* note 59, paras. 4-36 to -39 (implying that brigade judge advocates are part of the SJA's technical chain of command for purposes of Article 6). However, the issue has not been tested before a court. Additionally, paragraph 4-9 states that the brigade judge advocate is the brigade commanders primary legal advisor. Other portions of the doctrine identify the brigade legal staff as having responsibility for providing brigade commanders with advice and support on military justice, administrative separations, and the general enforcement of good order and discipline.

⁶⁵ *United States v. Chessani*, NMCCA 200800299, CCA LEXIS 84, at *18-21 (N-M. Ct. Crim. App. 2009).

⁶⁶ MCM, *supra* note 5, R.C.M. 105(b). It is interesting to note that this rule would have allowed the two SJAs in *Chessani* to communicate directly with each other. As such, any of the influence the court was concerned might have occurred in the convening authority's office could have just as easily occurred under circumstances sanctioned by the *Manual*.

Likewise, general guidance and mentoring from a superior regarding military justice typically does not constitute UCI.⁶⁷ However, in the case of BCTs, SJAs who go too far and direct, or create the appearance that they are directing, the advice of subordinate BJAs may well face allegations of UCI.⁶⁸ The key to avoiding UCI when advising and mentoring subordinate BJAs is ensuring that the subordinate clearly understands that she has the independent discretion to provide her commander with whatever legal advice she believes is appropriate in a particular case.

This focus on independent discretion is not limited to relations between SJAs and BJAs. There are many situations in the military justice process where judge advocates are expected to exercise independent discretion and therefore could be subject to influence by senior ranking judge advocates. Company grade judge advocates are frequently assigned as military magistrates to review pre-trial confinement and to authorize searches and seizures.⁶⁹ As magistrates, they are expected to make only those rulings that they, in their independent discretion, believe are legally correct based on the information presented.⁷⁰ It would be improper for a senior ranking judge advocate to unduly influence the decisions of a military magistrate.⁷¹ At times, judge advocates also serve as Article 32 investigating officers who are expected to independently review a case to determine if there are reasonable grounds to believe the accused committed the offense charged.⁷² Again, it would be improper for a senior ranking judge advocate to interfere with the investigating officer's deliberative process.⁷³

Independent discretion is perhaps most important to judge advocates when they are serving as MJJs. For obvious reasons, MJJs must maintain their independence in executing their immense responsibility within the military justice

⁶⁷ Larry A. Gaydos, *What Commanders Need to Know About Unlawful Command Control*, ARMY LAW., Oct. 1986, at 15 n.43 (citing *United States v. Rogers*, CM 442663 (A.C.M.R. 29 Mar. 1983)).

⁶⁸ In the relationship between SJAs and BJAs, this is particularly true in situations where the brigade commander has independent discretion to act. For example, the decision to either administer non-judicial punishment or forward a case with a recommendation for court-martial rests within the independent discretion of the brigade commander. He should make that decision in consultation with his legal advisor, the BJA. It would be improper influence for the SJA to direct the BJA's advice towards a certain outcome, just as it would be improper influence for the convening authority to direct the brigade commander to the same outcome. If the SJA disagrees with the recommendations being made by the BJA, she should recommend that the convening authority withdraw the case to his own level for disposition.

⁶⁹ *Id.*

⁷⁰ AR 27-10, *supra* note 20, ch. 9.

⁷¹ *United States v. Rice*, 16 M.J. 770 (A.C.M.R. 1983) (addressing military judge's contact with magistrate at behest of the deputy staff judge advocate).

⁷² MCM, *supra* note 5, R.C.M. 405(j).

⁷³ *United States v. Argo*, 50 M.J. 504 (A.F. Ct. Crim. App. 2000).

system. To that end, the UCMJ requires MJs at the GCM level to be designated by, and directly responsible to, The Judge Advocate General or his designee.⁷⁴ The UCMJ also prohibits any convening authority or his staff from preparing or reviewing fitness reports related to the performance of MJs.⁷⁵ Moreover, each service has its own regulations for managing their trial judiciaries.⁷⁶ These regulations serve to further insulate the MJ from command influence. Unfortunately, there are still instances where MJs have been subject to undue influence both from within their own chain of command and from other judge advocates outside that chain of command.

*United States v. Mabe*⁷⁷ is the seminal case on UCI from within the judicial chain of command. In *Mabe*, the Chief Trial Judge for the Navy received several complaints about lenient sentences coming out of one particular circuit.⁷⁸ The complaints related specifically to sentences in unauthorized absence cases.⁷⁹ In response, the chief trial judge sent a letter to the chief judge of the circuit in question. The letter indicated that the circuit had become the “forum of choice for an accused” largely due to lenient sentences.⁸⁰ While advising the circuit judge that he had complete “discretion and control” to address the matter as he saw fit, the chief trial judge stressed that there were “grumblings” and “dissatisfaction [and] criticism” directed towards the circuit.⁸¹ He further reminded the circuit judge that “when we tilt to [sic] far in any direction, someone inevitably complains.”⁸²

Fortunately, the chief circuit judge recognized that the letter posed an UCI issue. The circuit judge notified the Navy Judge Advocate General of the letter from his supervisor, disclosed it to counsel practicing in the circuit, and provided copies to other MJs in the circuit.⁸³ Further, he allowed counsel to voir dire him on the letter and ensured them that it would not impact his decisions or independence. For his part, the Navy Judge Advocate General wrote the circuit judge and told him to disregard the letter and indicated that the chief judge would be removed from his rating chain.⁸⁴

Despite these efforts, *Mabe* challenged his conviction and sentence for unauthorized absence and missing movement based upon UCI exerted on his trial judge. Procedurally, the case was complicated and required a remand by the Court of Military Appeals (CMA) to the service court.⁸⁵ In the end, both the former Navy Court of Military Review⁸⁶ and the CMA found that the actions of the chief judge constituted UCI.⁸⁷ However, the CMA agreed with the service court that any UCI was cured by the actions of The Judge Advocate General and the circuit judge.⁸⁸ As such, there was no evidence that appellant suffered any prejudice as a result of the letter.⁸⁹

A similar issue presented itself in the case of *United States v. Campos*.⁹⁰ In *Campos*, the MJ, Colonel (COL) Mitchell, indicated on the record that he was being replaced as senior trial judge at Fort Hood, Texas, by a COL Green. Colonel Mitchell further expressed that the move might create the appearance that he was being relieved due to the perception that he was too lenient on sentencing.⁹¹ He noted that COL Green had a reputation for harsher sentences.⁹² However, COL Mitchell also explained on the record that he had spoken with his chief circuit judge and the Chief Trial Judge for the Army. Both offered benign reasons for his replacement.⁹³ Both COL Green and COL Eggers, the former Chief of the Army Trial Judiciary, were later called as witnesses and described for the record the reasons they had replaced COL Mitchell.⁹⁴ Those reasons were unrelated to COL Mitchell’s sentencing philosophy. In denying the defense motion to recuse himself, COL Mitchell stressed that he had no reason to believe that he was being replaced due to his sentencing philosophy, and he indicated that he could perform his duties in a fair and just manner.⁹⁵

At a post-trial session, trial defense counsel requested the opportunity to present new evidence demonstrating that the decision to replace COL Mitchell was based to some extent on his sentencing philosophy.⁹⁶ The new evidence indicated that two SJAs at Fort Hood had relayed their concerns about COL Mitchell’s lenient sentences to the

⁷⁴ UCMJ art. 26 (2008).

⁷⁵ *Id.*

⁷⁶ See, e.g., AR 27-10, *supra* note 201, ch. 8. U.S. DEPT. OF THE NAVY, JUDGE ADVOCATE GENERAL INSTR. 5813.4G, NAVY-MARINE CORPS TRIAL JUDICIARY (Feb. 10, 2006).

⁷⁷ 33 M.J. 200 (C.M.A. 1991).

⁷⁸ *United States v. Mabe*, 30 M.J. 1254, 1258 (N.M.C.M.R. 1990).

⁷⁹ *Mabe*, 33 M.J. at 201–02.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Mabe*, 30 M.J. at 1258.

⁸⁴ *Id.* at 1259.

⁸⁵ *Id.* at 1256 (citing *United States v. Mabe*, 28 M.J. 326 (C.M.A. 1989)).

⁸⁶ *Id.* at 1267.

⁸⁷ *Mabe*, 33 M.J. at 206.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ 42 M.J. 253 (C.A.A.F. 1995).

⁹¹ *Id.* at 258.

⁹² *Id.* at 260.

⁹³ *Id.* at 258.

⁹⁴ *Id.* at 259.

⁹⁵ *Id.*

⁹⁶ *Id.* at 259–60.

Corps SJA, who was then COL Gray.⁹⁷ Colonel Gray was later selected for promotion to general officer and went on to become the Commander of the U.S. Army Legal Services Agency.⁹⁸ The Commander of the U.S. Army Legal Services Agency also served as the Chief of the Trial Judiciary.⁹⁹

There was some evidence that Brigadier General (BG) Gray passed along concerns about COL Mitchell to the Chief Trial Judge of the Army whom he supervised as Chief of the Trial Judiciary.¹⁰⁰ Likewise, there was evidence that the new Corps SJA had independently relayed similar concerns to the Chief Trial Judge.¹⁰¹ However, there was no evidence that either the Chief Trial Judge or BG Grey took any action based upon the complaints of the various SJAs.¹⁰² To the contrary, the evidence indicated that COL Green's assignment as the senior judge at Fort Hood was based on other legitimate considerations.¹⁰³ After considering the new post-trial evidence, the MJ stood by his initial ruling and again stressed that he was confident that he was fair and impartial in appellant's case.¹⁰⁴ Accordingly, he declined to grant any further relief.

On appeal, the CMA condemned the "calculated carping to the judge's judicial superiors about his sentencing philosophy."¹⁰⁵ However, the court noted that the trial judge heard all of the evidence and found that the complaints about his sentencing philosophy played no role in the decision to replace him with COL Green. The court was willing to accept the findings of the MJ. Moreover, the court agreed that any appearance of UCI was cured by full litigation of the issue during and after the trial and by COL Mitchell's repeated assurances that the perception of his lenient sentencing philosophy would not impact his deliberations.¹⁰⁶ As such, the court affirmed the findings and sentence.

The *Mabe* and *Campos* cases demonstrate the potential for senior judges to exert UCI. The *Campos* case also demonstrates the potential for UCI that might arise from the interactions between SJAs and MJs serving in their jurisdictions. Dissatisfaction by SJAs with the performance of a particular MJ is as old as the trial judiciary. Problems arise when the SJA communicates his dissatisfaction in a

manner that is either intended to or has the appearance of influencing the future actions of the MJ.

The most recent example of this type of judicial interference is the case of *United States v. Lewis*.¹⁰⁷ In *Lewis*, a civilian defense counsel (CDC), who was a former judge advocate, represented the appellant at his court-martial for a variety of drug-related offenses.¹⁰⁸ The CDC did not enter her appearance at the first session before the trial judge. At that time, neither side expressed any grounds for challenge against the MJ. However, when the CDC did appear at the next session, the TC then elected to voir dire the MJ on her impartiality.¹⁰⁹ The grounds offered by the TC were that (1) the MJ presided over two companion cases; (2) the MJ had a prior professional relationship with the CDC while the CDC was on active duty; (3) the appearance created by the number of cases presided over by the MJ where the same CDC represented the accused; (4) the extent of social interactions between the MJ and the CDC; and (5) the MJ had expressed displeasure with the Government at being subject to voir dire on the same subjects in prior cases.¹¹⁰

In the course of responding to the voir dire, the MJ indicated that she had only limited social interaction with the CDC at a stable where they both boarded horses.¹¹¹ Nonetheless, the TC challenged the MJ and asked that she recuse herself.¹¹² When the MJ denied the motion, the TC then requested the MJ reconsider her denial of the motion.¹¹³ The TC also presented a previously prepared written pleading on the challenge. The written motion contained proffered evidence that the MJ had, in fact, been observed attending a play with the CDC in a nearby city.¹¹⁴ The Government obviously knew about that alleged incident at the time of the original voir dire but elected not to raise the matter at that time and thereby allow the MJ to respond on the record.¹¹⁵

After reviewing the motion, the MJ admitted on the record that she had forgotten about the play.¹¹⁶ Nonetheless, the MJ denied that Government's motion. Finally, the TC requested a continuance to file a Government appeal.¹¹⁷

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.* at 260.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 261.

¹⁰⁷ 63 M.J. 405 (C.A.A.F. 2006).

¹⁰⁸ *Id.* at 406.

¹⁰⁹ *Id.* at 407.

¹¹⁰ *Id.* at 407-09.

¹¹¹ *Id.* at 408.

¹¹² *Id.* 409.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

That request was denied as was the Government's request for a three-hour continuance to seek a stay.¹¹⁸

At the next session, the defense filed a motion seeking dismissal of all charges based upon prosecutorial misconduct.¹¹⁹ The SJA was called as a witness and gave contentious testimony on the motion.¹²⁰ The SJA's testimony indicated that he had played a behind the scenes role in the voir dire of the MJ.¹²¹ He testified that he had passed along information to the TC and provided general advice on conducting the voir dire.¹²² Part of the information passed on by the SJA was what he described as "some evidence out there that, in fact, the defense lawyer had been on a date with the military judge" while appellant's case was pending.¹²³ The SJA also testified that he had discussed that case with the Chief of the Navy-Marine Corps Appellate Government Division.¹²⁴

At the conclusion of one further Article 39a session, the MJ again concluded that she could continue to sit on the case. However, the very next day, after considering the matter overnight, the MJ again reconsidered her decision to remain on the case and instead elected to recuse herself.¹²⁵ A second MJ was detailed, but after reviewing the record, he recused himself because he was so offended by the conduct of the Government that he did not feel he could be unbiased.¹²⁶ A third judge was brought in temporarily before a fourth judge was detailed to finally hear appellant's case. To cure any possible taint from UCI, the final trial judge disqualified the SJA from any further participation in the case and directed that the post-trial action on the case be handled by a new convening authority.¹²⁷ The appellant agreed to trial by MJ alone and pled guilty. Nonetheless, following his conviction, the accused filed an appeal based upon UCI.

The Navy-Marine Court of Criminal Appeals reviewed the case and concluded that the SJA had, in fact, committed UCI. However, that Navy-Marine court found that the actions taken by the MJ were sufficient to cure the taint of UCI. Accordingly, no relief was granted.¹²⁸

Appellant then appealed to the Court of Appeals for the Armed Forces (CAAF). The CAAF held that the decision of the court below, which concluded that there was UCI, was the law of the case.¹²⁹ Accordingly, the only issue before the Court was whether the Government had met its burden of proving beyond a reasonable doubt that the actions of the trial judge had cured any actual command influence as well as the perception of UCI. On this count, the court did not agree with the service court.¹³⁰

The court began by analyzing the process by which MJs are selected and detailed to cases. The court demonstrated how the UCMJ and service regulations dictate that a MJ be detailed by a standing service trial judiciary.¹³¹ The court observed that while the rules allow either party to question and challenge an MJ, neither the Government nor the defense has the authority to remove or otherwise unseat a properly certified and detailed MJ.¹³²

In appellant's case, the court found that the SJA exceeded the bounds of a good faith challenge to an MJ and instead committed actual UCI.¹³³ The court was not convinced beyond a reasonable doubt that the actions of the MJ had cured the actual UCI.¹³⁴ The court expressed particular concern for the fact that the TC, who is the SJA's instrument in the courtroom, remained on the case.¹³⁵ The court also found that the actions of the SJA and Government counsel created the appearance of UCI.¹³⁶ Again, the court was not convinced that the remedial actions of the trial judge were sufficient to cure the apparent UCI.¹³⁷ Finally, the court concluded that the only sufficient remedy for the UCI in the case was dismissal of all charges with prejudice.¹³⁸

Obviously, the circumstances in *Lewis* were unique; however, the desire of an SJA to influence a detailed MJ is not uncommon. *United States v. Ledbetter*¹³⁹ involved an Air Force non-commissioned officer convicted of larceny and conspiracy to commit larceny.¹⁴⁰ He was sentenced to a

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.* at 409–10.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.* at 410–11.

¹²⁶ *Id.* at 411.

¹²⁷ *Id.*

¹²⁸ 61 M.J. 512, 521 (N-M. Ct. Crim. App. 2005).

¹²⁹ *Lewis*, 63 M.J. at 412.

¹³⁰ *Id.* at 416.

¹³¹ *Id.* at 414 (citing U.S. DEPT. OF THE NAVY, JUDGE ADVOCATE GENERAL, INSTR. 5800.7D, MANUAL OF THE JUDGE ADVOCATE GENERAL (JAGMAN) para. 1030a(1) (Mar. 15, 2004); U.S. DEPT. OF THE NAVY, JUDGE ADVOCATE GENERAL, INSTR. 5813.4G, NAVY-MARINE CORPS TRIAL JUDICIARY para. 6 (Feb. 10, 2006)).

¹³² *Id.*

¹³³ *Id.* at 414–15.

¹³⁴ *Id.* at 416.

¹³⁵ *Id.* at 414.

¹³⁶ *Id.* at 415.

¹³⁷ *Id.* at 416.

¹³⁸ *Id.* at 416–17.

¹³⁹ *United States v. Ledbetter*, 2 M.J. 37 (C.M.A. 1976).

¹⁴⁰ *Id.* at 39.

one grade reduction, forfeiture of \$300 per month for one year, and confinement for one year.¹⁴¹ The MJ also recommended that the convening authority suspend the automatic reduction provision found in Article 58a.¹⁴² At some point after the trial, the MJ submitted a memorandum detailing calls he received from judge advocates at the Air Force Office of The Judge Advocate General.¹⁴³ The callers, who were junior in rank to the MJ, indicated that there had been complaints about lenient sentences in at least three of the cases presided over by the MJ.¹⁴⁴ The callers asked the MJ to explain his rationale for the sentences so that their superiors, presumably The Judge Advocate General, could respond to the inquiries.¹⁴⁵ In a further memorandum, the MJ described being questioned by the installation SJA about the appellant's case. The SJA asked the MJ why he did not sentence Ledbetter to a discharge, and he told the MJ that the commander was not pleased with the sentence.¹⁴⁶

The MJ also described a phone call from Major General Harold R. Vague, Assistant Judge Advocate General for the Air Force. Major General Vague inquired about another case in which the MJ found the accused guilty but sentenced him to no punishment.¹⁴⁷ Major General Vague asked the MJ why he did not at least sentence the accused to a small forfeiture for the sake of appearances.¹⁴⁸

The Court of Military Appeals stressed the impropriety of such contacts as well as the need to ensure that MJ's are insulated from UCI. The court rejected the Government's argument that the inquiries by the Office of The Judge Advocate General were consistent with his supervisory role over MJs.¹⁴⁹ In the absence of specific action by Congress establishing a process for reviewing the actions of the MJ, the court specifically barred all official inquiries which "question or seek justification for a judge's decision."¹⁵⁰ However, because all of the contact with the MJ took place after appellant's trial had concluded, the court ruled that there was no evidence of prejudice.¹⁵¹

These cases point out the dangers of intentionally or unintentionally invading the independent discretion of the MJ. An independent judiciary is essential to the integrity of

our military justice system. Judge advocates within and outside of the trial judiciary must avoid actions that impact, or create the appearance of impacting, the independent discretion of individual MJs. Staff judge advocates and other judge advocates should bear in mind that sentencing philosophies will differ among judges. Moreover, a court-martial is an adversarial process in which both sides present evidence. Military judges have the benefit of considering all of the evidence, whereas SJAs are often only aware of the Government's case.

Accordingly, even though the MJ may make a convenient foil, judge advocates should avoid criticizing MJs to other judge advocates and, especially, to commanders. Such criticism is unfair and it undermines the integrity of the court-martial system. In the overwhelming majority of cases, MJs make a good faith effort to make the correct rulings and adjudge fair sentences. If an SJA feels compelled to complain about the performance of an MJ, such complaints should be directed to the service's Chief Trial Judge. Such complaints should normally be limited to matters serious enough to call into question the fitness of the MJ under the applicable standards. Dissatisfaction with sentences or judicial philosophies are typically not legitimate reasons to contact the chief judge or otherwise disparage a sitting trial judge.

To this point, we have seen how judge advocates can potentially commit UCI through inappropriate interactions with subordinate judge advocates and MJs. However, because of the prominent and encompassing role of judge advocates in the administration of military justice, judge advocates have the potential to commit UCI in a variety of other forums. Much of this potential arises from the fact that judge advocates are often perceived as speaking for the commander on matters related to military justice. This perception is most dangerous when it is tied to a particular case. The following cases demonstrate how a judge advocate's commentary in the courtroom or in the post newspaper can be misinterpreted as reflecting the will of the commander and thereby lead to allegations of UCI.

When trying a case before members, judge advocates must take care to ensure that their arguments do not lead the panel to inappropriately bring the convening authority into their deliberations. In *United States v. Dugan*,¹⁵² the CAAF observed that "command presence . . . in the deliberation room chills the members' independent judgment and deprives an accused of his or her constitutional right to a fair and impartial trial."¹⁵³ Therefore, it is impermissible UCI for a commander to hold meetings or staff calls with the intent or effect of influencing the deliberative process of panel members in attendance.¹⁵⁴ Likewise, it is UCI for a

¹⁴¹ *Id.*

¹⁴² *Id.* at 44.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 44-45.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 45-46.

¹⁴⁷ *Id.* at 46.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 42.

¹⁵⁰ *Id.* at 43.

¹⁵¹ *Id.*

¹⁵² 58 M.J. 253 (C.A.A.F. 2003).

¹⁵³ *Id.* at 259.

¹⁵⁴ *Id.* at 258.

panel member to remind the other panel members of the commander's stance on a particular case or category of crimes.¹⁵⁵ That being the case, it is certainly inappropriate for a judge advocate to introduce the authority of the commander via argument. Rule for Courts-Martial 1001(b) specifically states that "trial counsel may not in argument purport to speak for the convening authority or any higher authority, or refer to the views of such authorities or any policy directive relevant to punishment or to any punishment or quantum of punishment greater than that court-martial may adjudge."¹⁵⁶ Despite this clear charge, there are numerous instances where counsel have crossed the line in argument by effectively bringing the commander into the deliberation room.

In *United States v. Grady*,¹⁵⁷ the TC referenced specific command policies on drug abuse during his sentencing argument. Specifically, TC argued, "You all, though, in this court, at this base, are members of the Strategic Air Command (SAC). You know what the SAC policies are, and I think you are somewhat bound to adhere to those policies in deciding on a sentence."¹⁵⁸ Counsel then discussed the specifics of those policies, including the fact that according to the applicable policies, those caught dealing or using drugs were not eligible for rehabilitation. There was no objection and the MJ did not offer any specific limiting instruction. He did remind the panel that regardless of any policies that may have been discussed, they had to decide what sentence was appropriate.¹⁵⁹ On appeal, the CMA found that the repeated references to the command policy were prejudicial error.¹⁶⁰ The court noted that it had long condemned reference to such policies before the panel because their introduction permeates the trial process with the "spectre of command influence" and creates "the appearance of improperly influencing the court-martial proceedings."¹⁶¹ Accordingly, the court set aside the adjudged sentence and returned the case to the Air Force Judge Advocate General to order a rehearing.¹⁶²

In *United States v. Pope*,¹⁶³ the appellant, a recruiter, faced charges related to sexual misconduct with recruits. During the sentencing phase of the court-martial, TC introduced a letter which the accused's commander had

previously distributed throughout the recruiting command.¹⁶⁴ The letter cautioned recruiters against inappropriate conduct with potential recruits and indicated that "harsh adverse action" could follow.¹⁶⁵ The accused was convicted and sentenced to confinement for fifteen months and a bad conduct discharge. The Air Force Court of Criminal Appeals affirmed the findings and sentence; however, the CAAF held that introducing the letter created the appearance of UCI because it conveyed the commander's view that misconduct, such as the accused's, should be punished harshly.¹⁶⁶ Based on the potential for UCI, the CAAF set aside the sentence and ordered the case returned to The Judge Advocate General of the Air Force for further action.¹⁶⁷

In a somewhat related line of cases, TCs have also contributed to the appearance of UCI through articles they have authored for post newspapers. While it is common for judge advocates to use the media to discuss a wide range of legal issues, extra caution must be observed when the articles deal with military justice, especially when they specially reference cases that may still be pending either trial or post-trial action.

*United States v. Taylor*¹⁶⁸ addressed the appeal of a noncommissioned officer who was convicted of violating a lawful general order and willful dereliction of his duties.¹⁶⁹ The panel sentenced him to a reduction to E-1 and a bad conduct discharge.¹⁷⁰ During the sentencing portion of the case, the Government attempted to admit several negative counseling statements administered to the accused; however, the MJ refused to admit the documents because of clerical errors in their preparation.¹⁷¹ Approximately eight days after the trial, the TC authored an article in the command newspaper wherein she warned of the dangers of failing to properly prepare adverse information. She stressed that such failures could have "devastating effects in [sic] the proper administration of justice."¹⁷² She then gave the example of a recent case in which improperly completed records were, not admitted, resulting in the information being excluded and the trier of fact receiving an incomplete picture of the accused who was not, in her view, a "good candidate for

¹⁵⁵ *United States v. Grady*, 15 M.J. 275 (C.M.A. 1983) (improper to reference drug policy during argument).

¹⁵⁶ MCM, *supra* note 5, R.C.M. 1001(b).

¹⁵⁷ 15 M.J. 275 (C.M.A. 1983).

¹⁵⁸ *Id.* at 276.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 277.

¹⁶¹ *Id.* at 276 (internal quotation omitted).

¹⁶² *Id.* at 277.

¹⁶³ 63 M.J. 68 (2006).

¹⁶⁴ *Id.* at 75.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 69. See also *United States v. Mallet*, 61 M.J. 761 (A.F. Ct. Crim. App. 2005) (counsel committed prejudicial error by referencing commanders eleven times in argument to panel).

¹⁶⁷ *United States v. Pope*, 63 M.J. 68, 76 (C.A.A.F. 2006) (stating that a rehearing on sentence was authorized by the court).

¹⁶⁸ 60 M.J. 190 (C.A.A.F. 2004).

¹⁶⁹ *Id.* at 191.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 191-12.

¹⁷² *Id.* at 192.

rehabilitation.”¹⁷³ Although she did not name the accused, someone familiar with the case could have easily determined his identity.¹⁷⁴ She concluded by opining that justice had not been served.¹⁷⁵

At the time the article was released, the appellant’s case was still pending post-trial action by the convening authority. Defense counsel drafted two memoranda to the convening authority complaining that the article showed a lack of impartiality on the part of the TC and the SJA.¹⁷⁶ In her second memorandum, defense counsel argued that the entire SJA office should be disqualified from providing post-trial advice on appellant’s case.¹⁷⁷ Defense counsel also observed that the convening authority’s name was listed among the editorial staff of the paper. Defense counsel argued that if the letter could in any way be imputed to the convening authority, then he would be disqualified as well.¹⁷⁸

The SJA submitted an addendum to the post-trial action in which he admitted that the article could be imputed to him; however, he advised that convening authority that the article did not demonstrate any improper bias on behalf of the SJA.¹⁷⁹ The SJA also concluded that there were no grounds for the convening authority to disqualify himself from taking post-trial action.¹⁸⁰ For his part, the convening authority submitted an affidavit with the record of trial that indicated he was unaware of the article until it was brought to his attention by defense counsel, and that, in any event, it did not influence his action on the case.¹⁸¹

On review by the CAAF, the court looked at whether either the convening authority or the SJA were disqualified.¹⁸² The court accepted the convening authority’s affidavit stating that he had not been involved in or aware of the contents of the article. Accordingly, the court concluded that the convening authority was not disqualified. However, the court did take exception to the actions of the SJA. The court noted that in the addendum, the SJA admitted that the article could be imputed to him. Since the article expressly stated that justice was not served and that the unnamed subject was not a good candidate for clemency, imputing the article to the SJA created the

impression he had prejudged the case.¹⁸³ According to the court, this disqualified the SJA from providing post-trial advice to the convening authority, and the court returned the case for a new post-trial action.¹⁸⁴

*United States v. Wansley*¹⁸⁵ is a similar case with a somewhat different result. Captain Wansley was convicted of carnal knowledge and indecent acts with his fifteen year old step-daughter.¹⁸⁶ Following his conviction, but prior to action on his case, the chief of military justice authored a short article for the post newspaper about the case. The article stated that appellant had “exhibited an extreme abuse of integrity and honor” and that appellant’s conviction “sends a strong message of deterrence to people who prey upon children.”¹⁸⁷ In his post-trial submissions, appellant’s defense counsel contended that the article reflected “prejudgment” by the command and, therefore, appellant would not receive a fair post-trial review.¹⁸⁸ In the addendum, the SJA stated that neither the SJA nor the convening authority made the comments.¹⁸⁹ He further stressed that the chief of military justice was not speaking on behalf of the convening authority and had no input on the clemency decision.¹⁹⁰

The convening authority took action and the case was subsequently affirmed by the Court of Criminal Appeals.¹⁹¹ On appeal to the CAAF, appellant contended that the legal center’s participation in preparing the article disqualified the SJA from preparing the post-trial recommendation. However, the court held that the defense failed to rebut the SJA’s statements that neither the SJA nor the commander approved or relied upon the article written by the chief of justice. Likewise, the defense failed to rebut the SJA’s contention that the chief of justice was not involved in preparing the SJA’s recommendation.¹⁹² Accordingly, the court found the issue to be without merit and affirmed the lower court.

The distinction between *Taylor* and *Wansley* rests on the response of the SJA. In *Taylor*, the SJA admitted in his post-trial recommendation that the article could be imputed to him. Whether or not his assessment was legally accurate was not an issue. Based upon his admission, the court was

¹⁷³ *Id.* at 194.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 192.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 192–93.

¹⁸² *Id.* at 193.

¹⁸³ *Id.* at 194.

¹⁸⁴ *Id.* at 195–56.

¹⁸⁵ 46 M.J. 335 (C.A.A.F. 1997).

¹⁸⁶ *Id.* at 335.

¹⁸⁷ *Id.* at 336.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.* at 337.

willing to find the SJA had been disqualified. In *Wansley*, the SJA denied that the article could be imputed to him. Again, without discussing the merits of that argument, the court was willing to accept it and hold that the SJA was not disqualified.

These cases do present a lingering issue of concern for practitioners. The court has yet to address when the comments of a subordinate judge advocate in a local paper can be attributable to the SJA as a matter of law. For the time being, the court appears willing to accept the opinion of the SJA on that issue. However, in *Wansley*, the court suggested that the defense could have rebutted the SJA's contention but failed to do so.¹⁹³ As such, in a given case, a defense counsel might demonstrate that an article by subordinate counsel could be attributed to the SJA. Accordingly, counsel should exercise caution in publishing articles about specific cases prior to final action. Such articles should focus on the evidence admitted, findings, and sentence, while avoiding opinion on the propriety of the former or on the actions of the accused. Doing so will protect the command from allegations of UCI.

The role of the judge advocate is essential to the fair administration of military justice. This is particularly true in regards to UCI, "the mortal enemy of military justice." Judge advocates are responsible for understanding UCI, training their commands on avoiding it,¹⁹⁴ identifying it when it occurs, and taking all possible measures to alleviate its impact when it does occur.¹⁹⁵ Judge advocates must endeavor to ensure the system is fair and that they always give advice that is legally correct and untainted by the influence of command authority.¹⁹⁶ Accordingly, judge advocates must avoid becoming part of the problem by committing UCI themselves. Neither rank nor supervisory authority can be allowed to impede the independent discretion of other judge advocates, whether they are magistrates, investigating officers, trial and defense counsel, or MJs. Familiarity with the concepts and cases discussed above should alert judge advocates to the UCI minefields that pervade our practice.

¹⁹³ *Id.*

¹⁹⁴ Johnson, *supra* note 16, at 108.

¹⁹⁵ See generally *United States v. Rivers*, 49 M.J. 434 (1998), *United States v. Biagase*, 50 M.J. 143 (1999); *United States v. Francis*, 54 M.J. 636 (A. Ct. Crim. App. 2000); and *United States v. Clemons*, 35 M.J. 770 (A.C.M.R. 1992).

¹⁹⁶ *United States v. Lewis*, 63 M.J. 405, 407 (C.A.A.F. 2006) (citing *United States v. Rivers*, 49 M.J. 434, 443 (C.A.A.F. 1998), and *United States v. Sullivan*, 26 M.J. 442, 444 (C.M.A. 1988)).

Special Victim Units—Not a Prosecution Program but a Justice Program

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Introduction

*In the criminal justice system sexually based offenses are considered especially heinous. In New York City the dedicated detectives who investigate these vicious felonies are members of an elite squad known as the Special Victims Unit.*¹

Many large cities such as Chicago,² New York City,³ Seattle,⁴ and Atlanta,⁵ to name just a few, have a special division or unit set up to handle the investigations and prosecutions of sexual assault crimes. In March 2009, the Department of the Army followed the path of these civilian agencies when it authorized additional assets to the Office of The Judge Advocate General (OTJAG) and the U.S. Army Criminal Investigation Command (CID) “to support the investigation and prosecution of sexual assault cases and expand their efforts regarding sexual assault prevention.”⁶

¹ *Law and Order—Special Victim's Unit* (NBC 2009).

² About the Cook County State's Attorney's Office, http://www.statesattorney.org/index2/about_the_office.html (last visited Oct. 28, 2009). The Cook County State's Attorney's Office is the second largest prosecutor's office in the nation, with the prosecutor's office in Los Angeles being the largest. *Id.* Chicago, Illinois is within Cook County. The Cook County's State's Attorney's Office is divided into seven bureaus; within the Criminal Prosecutions Bureau is a division solely for sexual crimes. *Id.*

³ New York County District Attorney's Office, <http://manhattanda.org/organization/trial/> (last visited on Oct. 28, 2009). The New York Sex Crimes Prosecution Unit was established in 1974. *Id.* “It was the first unit in the country dedicated to the investigation and prosecution of sexual assault.” *Id.* Forty senior Assistant District Attorney's who staff the unit were selected for their experience, as well as their sensitivity to the issues unique to survivors of these crimes. *Id.* Other cities around the country have used the New York Sex Crimes Unit as a model. *Id.*

⁴ King County Prosecuting Attorney's Office, Criminal Division Overview, <http://www.kingcounty.gov/prosecutor/criminaloverview.aspx/predator> (last visited Oct. 28, 2009). The King County Prosecutor's Office has a specialized unit to deal exclusively with cases involving sexual offenses against children and adults. *Id.* The prosecutors are specially trained to deal with the “complex and sensitive nature of these cases.” *Id.* The King County Prosecutor's Office Special Assault Unit works with law enforcement, Child Protective Services, and local advocacy groups. *Id.*

⁵ Fulton County District Attorney's Office, Trial / Special Prosecution Units, <http://www.atlantada.org/officeoverview/trial/index.htm> (last visited Oct. 28, 2009). In 1997, to overcome the firmly entrenched belief that the Fulton County District Attorney was unwilling or uninterested in prosecuting sexual assault and child abuse crimes, the District Attorney created the “Crimes Against Women & Children Unit.” *Id.* This unit took a new approach to the prosecution of sexual assaults and child abuse. *Id.*

⁶ Message, ALARACT 075/2009, 191404Z Mar 09, DA Washington DC/DAPE-HRPD, subject: Sexual Harassment/Assault Response and Prevention (SHARP) Initiatives [hereinafter SHARP Initiatives Message].

The additional resources for OTJAG include seven highly qualified experts (HQEs) and fifteen additional authorizations for judge advocates who will focus primarily on sexual assault litigation and training during a three-year tour.⁷ The Department of the Army authorized CID seven HQEs, thirty additional special civilian investigators, and more than thirty additional laboratory examiners.⁸ The special civilian investigators and laboratory examiners will be selected based upon their extensive backgrounds and experience in the investigation of sexual assaults and domestic violence.⁹

This article begins by examining the circumstances which led to the authorization of the hiring of the HQEs and other experts involved in the investigation and prosecution of sexual assaults. Specifically this section addresses the circumstances behind the creation of the Sexual Assault Prevention and Response (SAPR) program. It also discusses the unique difficulties in investigating and prosecuting a sexual assault case. Next, this article examines the implementation and incorporation of the HQEs and special victim prosecutors (SVPs). This section identifies the role of the HQE and the SVP, as well as, the training and experience these individuals will bring to other judge advocates. The Army CID has also received additional resources and personnel to assist in sexual assault investigations. This section provides an overview of the new training their investigators receive in addition to identifying the resources that will also assist judge advocates in the litigation of sexual assault cases. Finally, this article discusses how judge advocates should best utilize these assets both as trial counsel and as defense counsel.

Background

From 16 through 18 November 2003, the *Denver Post* published a series that focused on women who had been sexually assaulted in the military.¹⁰ This report, based on a

⁷ *Id.*

⁸ *Id.* “The investigators will be located at those installations with higher reports of sexual assault, while the examiners will increase the capabilities and turn-around time of evidence examinations at the laboratory.” *Id.*

⁹ Colby Hauser, *Special Sexual Assault Investigators Deploy Army Wide*, United States Army Criminal Investigation Command, Sept. 28, 2009, available at [http://www.cid.army.mil/documents/Sexual%20Assault%20Investigators%20Deploy%20Army%20Wide%20\(2\).pdf](http://www.cid.army.mil/documents/Sexual%20Assault%20Investigators%20Deploy%20Army%20Wide%20(2).pdf)

¹⁰ Amy Herdy & Miles Mofeit, *Betrayal in the Ranks*, DENV. POST, Nov. 16–18, 2003, available at http://extras.denverpost.com/justice/tdp_betray

nine-month investigation, argued that the military was failing in its care for victims of sexual assault.¹¹ Additionally, in early 2003 the U.S. Air Force Academy made headlines over a sexual assault scandal that resulted in the removal of the Academy's four top senior officers.¹² These combined incidents caught the attention of the public and of Congress. In January 2004 the Secretary of Defense, Donald Rumsfeld ordered the Department of Defense (DoD) to review how the armed services handle the "treatment of and care for victims of sexual assault, with particular attention to any special issues that may arise from the circumstances of a combat theater."¹³ Shortly after the initiation of the DoD review, the Army formed a task force to review its own policies on reporting and how it addresses allegations of sexual assault.¹⁴ Both the DoD and the Army task force made several recommendations concerning policy, training, prevention, and response to sexual assaults in the military.¹⁵ Dr. David Chu, then the Under Secretary of Defense for Personnel & Readiness, issued eleven directive memoranda to the Services based on the findings and recommendations of the DoD Care for Victims of Sexual Assault Task Force. These directives have been incorporated into DoD Directive 6495.01, *Sexual Assault Prevention and Response Program*¹⁶ and DoD Instruction 6495.02, *Sexual Assault Prevention and Response Program*.¹⁷

In October 2005, the DoD issued a directive formally implementing the SAPR.¹⁸ The Army soon followed with its own SAPR program, which incorporated the

requirements set forth in the DoD SAPR program.¹⁹ During the initial implementation of the SAPR program, the DoD's emphasis was on the response element—putting into place measures that focused on the victim's needs. Such measures included creating a civilian Sexual Assault Response Coordinator position at each installation and requiring battalion-size units to appoint victim advocates.²⁰ Significantly, the new DoD SAPR program provided servicemember victims the opportunity to make a confidential (restricted) report of sexual assault.²¹ A restricted report of sexual assault does not trigger an investigation or notification of the victim's command but does enable the victim to receive medical and counseling care.²² Servicemember victims also have the option of making an unrestricted report which will trigger a criminal investigation and notification to his or her command.²³ The SAPR program seeks to give victims confidence in the military system to encourage them to report if they are victims of a sexual assault. The overall goal of the response portion of the SAPR program is to ensure victims receive the assistance they need to include medical and mental health care.²⁴

On 9 September 2008, the Secretary of the Army (SecArmy) launched a campaign plan to eliminate sexual harassment and sexual assault from the Army and to make the program a model for the nation.²⁵ The Army leadership felt that new measures put in place to respond to sexual assaults were working but that they could do more by placing additional emphasis on the prevention piece of SAPR. The campaign plan has four phases: Phase One requires the Army leadership to commit to taking steps to eliminate sexual assault in the Army. Phase One provides top-down guidance and training on the best practices and ideas designed to allow leaders at all levels to develop their own command prevention action plan.²⁶ Phase Two expands on Phase One and requires an Army-wide conviction to eliminate sexual assault. Phase Two targets all Soldiers and provides them with the education and training to ensure "they understand their moral responsibility to intervene to stop sexual assault and sexual harassment, and to protect

al.pdf.

¹¹ *Id.*

¹² Diana Jean Schemo & Michael Moss, *Criminal Charges Possible in Air Force Rape Scandal*, N.Y. TIMES, Mar. 27, 2003, at A17, available at <http://www.nytimes.com/2003/03/27/us/criminal-charges-possible-in-air-force-rape-scandal.html?pagewanted=1>.

¹³ Memorandum from the Sec'y of Def., to the Under Sec'y of Def. (Personnel and Readiness), subject: Department of Defense Care for Victims of Sexual Assaults (5 Feb. 2004) [hereinafter DoD Care for Victims of Sexual Assaults Memo]. One such report was a news series in the *Denver Post*.

¹⁴ U.S. DEP'T OF ARMY, THE ACTING SECRETARY OF THE ARMY'S TASK FORCE REPORT ON SEXUAL ASSAULT POLICIES (27 May 2004).

¹⁵ See U.S. DEP'T OF DEF. CARE FOR VICTIMS OF SEXUAL ASSAULTS TASK FORCE, REPORT ON CARE FOR VICTIMS OF SEXUAL ASSAULT (Apr. 2004) and U.S. DEP'T OF ARMY, THE ACTING SECRETARY OF THE ARMY'S TASK FORCE REPORT ON SEXUAL ASSAULT POLICIES (May 27, 2004).

¹⁶ U.S. DEP'T OF DEF., DIR. 6495.01, SEXUAL ASSAULT PREVENTION AND RESPONSE PROGRAM (7 Nov. 2008) [hereinafter DoDD 6495.01].

¹⁷ U.S. DEP'T OF DEF., INSTR. 6495.02, SEXUAL ASSAULT PREVENTION AND RESPONSE PROGRAM (13 Nov. 2008) [hereinafter DoDI 6495.02].

¹⁸ DoDD 6495.01, *supra* note 16, and DoDI 6495.02, *supra* note 17.

¹⁹ See U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY ch. 8 (11 Feb. 2009) [hereinafter AR 600-20] (SAPR Program).

²⁰ *Id.* para. 8-5o(10), 8-5p.

²¹ *Id.* app. H and para. 8-5o.

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 8-1.

²⁵ U.S. DEP'T OF THE ARMY, ARMY SEXUAL ASSAULT PREVENTION AND RESPONSE PROGRAM ANNUAL REPORT—FISCAL YEAR 2008, at 8-9 (1 Dec. 2009) [hereinafter ARMY SAPR ANNUAL REPORT FY 2008].

²⁶ *Id.*

their fellow Soldiers.”²⁷ Phase Two also emphasizes holding those who commit sexual assaults accountable for their actions.²⁸ Phase Three is the culmination of Phase One and Phase Two. In Phase Three, the Army achieves a cultural change which creates an environment that drives sexual assault and harassment from the Army altogether.²⁹ The final phase, Phase Four consists of sustainment, refinement, and sharing and will incorporate measures to ensure that, once sexual assault and harassment are eliminated from the Army, they stay eliminated.³⁰ The Army has achieved Phase One of the campaign and has moved into Phase Two. To meet one of the Phase Two objectives, holding those who commit sexual assaults accountable, it is critical that criminal investigators have the training and resources to successfully investigate reports of sexual assault and that the Army judge advocates have the training and resources to litigate the founded cases. The Army JAG Corps continuously strives to ensure a balance of justice.³¹ Above all, the JAG Corps must ensure due process and a strict adherence to the rule of law under the Uniform Code of Military Justice (UCMJ).³² To fulfill this mission, trial counsel and defense counsel must be properly trained.

In 2008, The Judge Advocate General of the Army (TJAG) recommended, and the SecArmy approved, more resources and training of judge advocates in the litigation of sexual assault cases.³³ The SecArmy similarly approved more resources for and training of military investigators. The Fiscal Year 2008 SAPR report assisted in providing support for the request and approval of the additional resources.³⁴ For example, in Fiscal Year 2008, the length of time to complete a sexual assault criminal investigation averaged eighty-nine days.³⁵ Moreover, the numbers seemed to suggest that only a small percentage of reported sexual assaults resulted in court-martial convictions.³⁶ The report does not take into consideration why a case may take several weeks to investigate or why it may not make it to

court-martial. The reasons are varied and are case-specific. For example, a case may not make it to court-martial because of a lack of evidence, inability to identify a suspect, or even lack of victim cooperation.

The report states that of 1086 servicemembers investigated for sexual assault, administrative or disciplinary action was taken against 280 of them.³⁷ Of those 280, 56 were court-martialed, 102 received non-judicial punishment, 19 were discharged in-lieu of court-martial, 21 were discharged in lieu of disciplinary action,³⁸ and 82 received administrative or other actions.³⁹ The report also stated that action against 463 of the 1086 subjects was not taken due to unfounded allegations or insufficient evidence.⁴⁰ The raw numbers may be deceiving and may suggest that the Army’s prosecution rate is too low, but “at worst, the Army prosecutes at a comparable rate to civilian jurisdictions.”⁴¹ However, that does not mean that the Army should not strive to do better. The hiring of HQEs and the addition of judge advocates, investigators, and laboratory examiners demonstrate the Army’s intent “to exemplify the best practices and effort associated with the investigation and prosecution of the more challenging class of cases.”⁴² A thoroughly investigated case helps ensure that cases that should go forward to a court-martial do go forward.⁴³

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ Telephone Interview with Colonel (Retired) Lawrence J. Morris, Chief of Advocacy, Office of The Judge Advocate General, U.S. Army in Wash., D.C. (Oct. 28, 2009) [hereinafter Morris Interview].

³² See E-mail from Lieutenant Colonel Eric S. Krauss, Chief, Pol’y Branch, Office of The Judge Advocate General, U.S. Army (Jan. 22, 2010, 1439 EST) [hereinafter Krauss e-mail] (on file with author).

³³ *Id.*

³⁴ ARMY SAPR ANNUAL REPORT FY 2008, *supra* note 25, at 23, 24.

³⁵ *Id.* at 20.

³⁶ This is true not just for the military but across the nation as a whole. Krauss e-mail, *supra* note 32.

³⁷ ARMY SAPR ANNUAL REPORT FY 2008, *supra* note 25, at 21. In Fiscal Year 2008, 999 investigations were completed, and 1086 subjects were investigated. Of the 1086 subjects, 1011 were Soldiers. Of those 1011 cases, 548 were substantiated by CID for some type of sexual offense. At the time of the report, of the 548 cases, 268 were pending commander action; commanders disposed of the remaining 280 through some type of administrative adverse action. *Id.* See also Krauss e-mail, *supra* note 32.

³⁸ An enlisted Soldier, who has had charges preferred against him or her for an offense for which the punishment under the UCMJ and the 2008 *Manual for Courts-Martial* includes a bad conduct or dishonorable discharge, may request from the general court-martial convening authority an administrative discharge in lieu of trial by court-martial. U.S. DEP’T OF ARMY, REG. 635-200, ACTIVE DUTY ENLISTED ADMINISTRATIVE SEPARATIONS para. 10-1 (17 Dec. 2009).

³⁹ ARMY SAPR ANNUAL REPORT FY 2008, *supra* note 25, at 21.

⁴⁰ *Id.*

⁴¹ Krauss e-mail, *supra* note 32.

⁴² *Id.*

⁴³ “Sexual assault carries with it the misperception that a high number of cases are falsely reported.” Anne Munch, Address at the Army Sexual Assault Prevention and Risk Reduction Training Summit: Naming the Unnamed Conspirator: Examining Myth and Incorporating Truth into the Investigative and Prosecutorial Process 7 (Sept. 9, 2008), [hereinafter Munch Speech] (unpublished article) (on file with author). Three different independent studies show that only eight percent of sexual assaults are false allegations. *Id.* Unfortunately, both investigators and prosecutors arbitrarily believe that false allegations outnumber honest reports and fail to conduct a full investigation. *Id.* “No case should be characterized as false without a full evidence based investigation of the offender and the crime.” *Id.*

These statistics demonstrate the difficulty of prosecuting sexual assault crimes. Many unique factors, such as societal attitudes and victim responses, make such cases especially challenging. Accordingly, just results will be difficult to achieve unless investigators and judge advocates have the necessary training to understand how sexual assault cases differ from other criminal cases.⁴⁴ Specific training is necessary to understand and address society's perception of victims, victims' counterintuitive responses, and the methods used by sexual assault predators.

Society, including those members who sit on panels and juries, are often influenced by societal biases.⁴⁵ As a result of societal biases about sex, some panel members in sexual assault cases focus on the victim instead of the "criminal behavior of the offender."⁴⁶ One study showed that in acquaintance rape cases where there was one perpetrator and one victim who knew each other, and where the assault did not involve any weapons or physical injury, the jurors would define rape in terms of "assumption of risk."⁴⁷ The more risk the victim assumed, the less likely they were to convict. A victim's assumption of risk increased if she engaged in risky behavior. Risky behavior included actions such as going to a bar, drinking alcohol, or going willingly to the accused's apartment.⁴⁸ In such cases, the jurors focused on the actions of the victim rather than those of the accused. The study found that this is significantly less true of other offenses.⁴⁹ A panel usually does not take the behavior of victims into account for other crimes, such as robbery or even murder, when determining whether the accused is guilty. Even more damning for a victim is if she consented to some level of sexual contact before the assault.⁵⁰ In these

⁴⁴ Morris Interview, *supra* note 31. Justice does not mean that the prosecution wins all its cases. It means that an allegation is fully and properly investigated and, if the evidence warrants, that the allegation proceeds to further disposition, such as a court-martial at which both the Government and defense present all relevant evidence to an impartial party for a resolution. *Id.*

⁴⁵ Munch Speech, *supra* note 43.

⁴⁶ *Id.* at 2.

⁴⁷ *Id.* Ms. Munch's article discussed several studies. The first of these studies was conducted by Harry Kalven and Hans Zeisil in the mid-1960s. *Id.* Mr. Kalven and Mr. Zeisil contacted 3500 judges; 550 subsequently participated in the study. *Id.* One interesting finding was that of forty-two cases of acquaintance rape, only three resulted in convictions. *Id.* Almost thirty years later, another study, conducted by Gary LaFree, made similar findings. Gary LaFree, a Sociology professor from the University of New Mexico conducted the survey in 1989 in Indianapolis, Indiana. *Id.* His researchers conducted face-to-face ninety-minute interviews with 331 jurors who sat on rape cases. *Id.* His study found that jurors were more concerned about making a moral judgment about the victims. *Id.* "Jurors were less likely to hold offenders accountable when the victim drank or used drugs, was acquainted with the defendant or engaged in sex outside the marriage." *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at 3.

cases, the victim is often viewed as having "asked for it" or having consented because "she should have known what was going to happen."⁵¹

Investigators and prosecutors need to be aware of how societal influences affect panel members as well as witnesses.⁵² Not only does society tend to scrutinize a victim of sexual assault more closely, but many sexual assault victims react to the assault in a counterintuitive manner.⁵³ People unfamiliar with the psychology of sexual assault, including panel members, often do not understand these counterintuitive reactions. For example, most people can understand why a victim may shower immediately after an assault or may wash important pieces of evidence, such as bed sheets or clothes, that may contain forensic evidence. A panel understands because the victim's actions make sense: The victim wishes to wash the attack away. In contrast, what about a victim who delays reporting an assault for a week, a month, or a year; or a victim who gives inconsistent statements to friends and investigators; or a victim who interacts with her attacker after the assault; or a victim who has sexual relations with others shortly after the attack? These examples of counterintuitive reactions are by no means exhaustive but are a sampling of the more common ones. Without training, investigators and judge advocates could easily misunderstand these behaviors and discount a victim's credibility because of them.

Societal attitudes and biases also affect the victim and often shape her response to an assault.⁵⁴ In the case of acquaintance rape, "[m]any victims may not understand initially that what they experienced was a sexual assault, but with the passage of time, the reality may settle in."⁵⁵ Victims, who are a product of society, may initially believe that because they engaged in "risky behavior," such as kissing the accused or going with the accused to his room, those actions gave the accused consent.⁵⁶ Couple these feeling of self-blame with the feelings of shame, embarrassment, and a fear that no one will believe them, along with the shock and trauma of the assault itself, victims can react in ways that do not make sense to untrained

⁵¹ *Id.* Ms. Munch provides several examples in the article demonstrating the double standard society applies victims of sexual assault. *Id.* at 2-3. Especially notable is the double standard applied to crime victims who drink alcohol. *Id.* at 3. If a victim of sexual assault is under the influence of alcohol, the victim is often criticized or condemned. *Id.* Victims of other crimes who are under the influence of alcohol are not held to this standard. *Id.* Furthermore, the sex offenders who drink are often excused in whole or in part because they had been drinking. *Id.*

⁵² *Id.*

⁵³ *Id.* at 9.

⁵⁴ *Id.* at 5.

⁵⁵ *Id.*

⁵⁶ *Id.*

observers.⁵⁷ A proper sexual assault investigation and prosecution must take all of these factors into account and find ways to explain them to the panel.

Another factor that plays into the difficulty of sexual assault prosecutions is the lack of understanding of the perpetrator. Research has established that many of the more serious sexual crimes are committed by men who are serial offenders.⁵⁸ Fortunately, “these serial offenders comprise a very small proportion of any community.”⁵⁹ Dr. David Lisak, Ph.D. has spent decades researching the causes and consequences of interpersonal violence.⁶⁰ Specifically, he has studied the motives and characteristics of “undetected” rapists, men who commit rape but have never been caught. His research and the research of others found that sexual assaults committed by serial offenders often share some common characteristics and is one tool that investigators can use in the investigation of sexual assaults.⁶¹ First an offender is rarely a stranger to the victim.⁶² In fact, an offender often selects a potential victim because he knows enough about her to identify her as vulnerable in some way.⁶³ The offender then grooms the victim by encouraging friendship, by gaining her trust, or by persuading her to accompany him to a place that ultimately places her in jeopardy.⁶⁴ The offender then increases the victim’s vulnerability by playing on her insecurities, giving her alcohol, or slipping drugs into her drink.⁶⁵ Next the offender

will isolate the victim from friends or others to whom she might otherwise reach out for assistance.⁶⁶ Another element common to acquaintance rapes is the offender’s use of only enough force to compel submission.⁶⁷ The offender will rarely use a weapon, such as a knife or gun, but will instead use intimidation, threats, or physical force.⁶⁸ As a result, victims often manifest minimal physical or visible injuries.⁶⁹

One cannot identify a serial rapist by appearance or through conversation. They are often personable, well-liked, successful, charming, popular and skilled at manipulating those around them.⁷⁰ All of these traits are assets that allow offenders to identify and exploit vulnerable victims in a manner that rarely leads to any official report.

These unique factors are what motivated the DoD to adopt measures to ensure judge advocates and investigators receive the training needed to tackle these difficult, challenging cases. The DoD SAPR program requires law enforcement personnel and judge advocates to receive specific training in various areas of sexual assault investigations and prosecutions.⁷¹ Specifically, investigators must receive training in victim care, crime scene management, and victimology.⁷² Judge advocates must receive training in victimology, sex offenders, recantations, and false information, among other topics.⁷³ The Army has supplemented this training by providing experts and resources to both the Army CID and Army JAG Corps.

⁵⁷ *Id.*

⁵⁸ Dr. David Lisak, Address at the Army Sexual Assault Prevention and Risk Reduction Training Summit: Confronting Sexual Violence, Moral Obligation, and Moral Leadership (Sept. 9, 2008) [hereinafter Lisak Speech].

⁵⁹ *Id.*

⁶⁰ *Id.* Dr. Lisak’s biography was provided to the summit attendees and is on file with the author. Dr. Lisak’s research has been published in leading journals in psychology, trauma, and violence. He is the founding editor of the journal *Psychology of Men and Masculinity*. Dr. Lisak consults frequently with law enforcement and prosecutors on sexual violence and has provided consultation and training to the U.S. military.

⁶¹ *Id.*

⁶² *Id.*; Munch Speech, *supra* note 43.

⁶³ Lisak Speech, *supra* note 58. During his lecture, Dr. Lisak, as an example, described a vulnerable individual as being someone new to the unit, who allows the predator to begin rumors about her and to question her reputation for chastity or for truthfulness. A vulnerable person could also be an individual that already has a negative reputation. *Id.*

⁶⁴ *Id.* Dr. Lisak provided an example of a predator inviting the “target” to a party that he has billed as one where only a select few have been invited. A predator may also invite a “target” to his room for a quick drink; may pretend he needs to retrieve keys, money, or identification from his room; or may encourage a “target” to get into his car by using an excuse such as “parking will be hard, let’s go in my car.” *Id.*

⁶⁵ *Id.* A predator may provide the “target” with drinks with are stronger than normal, may add drugs to a drink, or may pressure an individual into drinking or engaging in an act with which she is not comfortable. *Id.*

Implementation of the HQEs and SVPs

The additional experts and resources funded by the Department of the Army demonstrate the Army’s commitment to preventing sexual assault.⁷⁴ Recognizing the

⁶⁶ *Id.* In addition, offenders who commit repeated sexual assaults may often distort the facts to justify their actions to themselves. *Id.* In one interview conducted by Dr. Lisak, the predator explained the victim was “pissing him off, or she has done this 1,000 times before or she was plastered, maybe that’s why she agreed.” *Id.* The predator made these statements after initially describing the victim as someone who was young, inexperienced, and naive. *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* Dr. Lisak stated that for many predators, a weapon is a concept: It compels submission and it equals power. *Id.*

⁶⁹ *Id.* Dr. Lisak explained that sexual predators often do not cause physical injury because it lessens the chance of a victim reporting the crime. *Id.*

⁷⁰ Munch Speech, *supra* note 43, at 5.

⁷¹ DoDI 6495.02, *supra* note 17, at E6.3.4, E6.3.6.

⁷² *Id.* at E6.3.4

⁷³ *Id.* at E6.3.6

⁷⁴ *Preventing Sexual Assault in the Military: Before the H. Armed Services Comm.*, 111th Cong. (2009), available at <http://armedservices.house.gov/>

need for specialized training, both the Army JAG Corps and CID has taken full advantage of the additional personnel allotted for HQEs and SVPs.⁷⁵ The Army JAG Corps has hired seven HQEs and has added fifteen special prosecutors to “focus exclusively on litigation and training” of sexual assault cases during three-year tours.⁷⁶

This is the first time the Army has designated “prosecutors for a specific crime.”⁷⁷ Until now, an Army judge advocate has been a “generalist, not specialist.”⁷⁸ The Army JAG Corps trains its attorneys to a baseline level for prosecution, which include sexual assault cases.⁷⁹ The creation of an SVP will bring a higher level of training and experience to the Army’s arsenal in eliminating sexual assault from the Army.

An SVP is an experienced judge advocate with a strong background in criminal law.⁸⁰ In addition to a strong criminal law background, SVPs undergo extensive training specific to sexual assault prosecutions. To gain practical experience, SVPs often receive two to three weeks of on-the-job training with a large city sex crimes unit.⁸¹ During this training, the SVPs shadow sex crimes unit prosecutors throughout their trial preparation.⁸² The SVPs attend trial planning strategy meetings, participate in victim and witness interviews, and meet with investigators and experts involved in the various cases.⁸³ In addition to on-the-job training, the SVPs also attend the National District Attorney’s Career Prosecutors Course and receive the Department of Justice Sexual Assault Response Training, as well as the Department of Justice Sexual Assault Nurses Training.⁸⁴

pdfs/MP030609/Collins_Testimony030609.pdf (written statement of Carolyn R. Collins, Sexual Harassment/Assault Response & Prevention Program Manager, Office of the Deputy Chief of Staff, G1, U.S. Army) [hereinafter Collins SHARP House Statement].

⁷⁵ SHARP Initiatives Message, *supra* note 6.

⁷⁶ *Id.*

⁷⁷ Jeff Schogol, *Army Names Special Prosecutors for Assault Cases*, STARS & STRIPES (Jan. 28, 2009), available at <http://www.stripes.com/article.asp?section=104&article=60280> (citing Lieutenant General Scott C. Black, U.S. Army Judge Advocate General).

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ Policy Memorandum 10-8, Office of The Judge Advocate General, subject: Special Victim Prosecutors (29 Jan. 2010) [hereinafter TJAG Policy Memo 10-8].

⁸¹ Telephone Interview with Major Robert C. Stelle, Special Victim Prosecutor, XVIII Airborne Corps and Fort Bragg in Fort Bragg, N.C. (Oct. 23, 2009) [hereinafter Stelle Interview].

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

Once their training is complete the SVPs head to the field. The Army JAG Corps selected nine experienced judge advocates for specialized training in sexual assault and domestic violence prosecution and has already sent them to the field.⁸⁵ The remaining six have been identified and are currently undergoing training.⁸⁶

The SVPs have been assigned geographic areas of responsibility.⁸⁷ The SVPs are physically located at installations that traditionally have a high number of sexual assault cases.⁸⁸ They are also responsible for traveling to all the installations within their area of responsibility as often as they are needed.⁸⁹ All installations fall within one of the SVP’s areas of responsibility.⁹⁰ The chart in the Appendix lists the physical location of SVPs and their areas of responsibility.

The Judge Advocate General provided guidance for the program in policy memorandum 10-8 and, specifically directed that “the SVP’s primary mission is to develop and litigate special victim cases within their geographic areas of responsibility.”⁹¹ Special victim cases are those cases involving an allegation of sexual assault or family violence.⁹² The staff judge advocate (SJA) within an SVP’s area of responsibility is responsible for providing the SVP’s logistical support.⁹³ The Judge Advocate General expects SVPs to try cases and to train and develop junior trial counsel.⁹⁴ However, SVPs do not have to prosecute every special victim case, but they should make themselves available to support these cases to the extent professionally practicable.⁹⁵ The SVPs should also work closely with chiefs of military justice because part of the SVP’s role is to mentor and guide the trial counsel through the prosecution of

⁸⁵ Colonel Norman F. Allen, III, Chief, Government Appellate Division & Lieutenant Colonel Jan E. Aldykiewicz, Chief Trial Counsel Assistance Program, Special Victim Prosecutor Implementation Focus Group, World Wide Continuing Legal Education Course 2009 (Oct. 8, 2009) [hereinafter Allen & Aldykiewicz SVP Focus Group].

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* The SVP’s secondary mission is to “develop a sexual assault and family violence training program for the investigators and trial counsel in their area of responsibility using local, state, and federal resources in conjunction with information provided by TCAP, the CLD, and TJAGLCS.” *Id.*

⁹² *Id.*

⁹³ *Id.* Logistical support includes but is not limited to paralegal, trial counsel, office space, and equipment, to include remote connectivity. *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

sexual assault cases, not to usurp the chiefs of military justice authority.⁹⁶ Both SVPs and chiefs of military justice have the same goal: to ensure trial counsel receive the necessary training, mentoring, and trial experience to ensure the justice system works fairly.⁹⁷ The experience trial counsel receive working with SVPs should assist them in the litigation of non-sexual assault or domestic violence offenses, as well as provide critical experience for future assignments in jobs including defense counsel and chiefs of military justice.⁹⁸ To further emphasize that the role of the SVP is to assist and mentor trial counsel, the SVP does not ordinarily interact with commanders.⁹⁹ Furthermore, as a general rule, the SVP will act as the second chair at trial, giving the junior trial counsel the opportunity to learn by doing.¹⁰⁰

Since the “SVPs are part of an Army-wide effort to provide even greater expertise to the investigation and proper disposition of allegations of sexual assault and family violence” they are assigned to the U.S. Army Legal Services Agency (USALSA).¹⁰¹ To maintain the correct balance between the needs of the local OSJA and the needs of the Army, the SVP’s rating chain contains both an installation supervisor and an OTJAG-level supervisor.¹⁰²

To further provide the necessary experience, guidance, and expertise to both trial and defense counsel, the Army has hired seven HQEs to assist judge advocates. The HQEs have expertise in the fields of special victim and sexual assault prosecution and were hired to augment OTJAG’s training.¹⁰³ The OTJAG training base is not limited to just the prosecution. The goal of military justice is to ensure that the system operates fairly to achieve a just result.¹⁰⁴ Even though HQEs and SVPs have a strong prosecutorial focus,

justice will not prevail unless both trial counsel and defense counsel receive the training and resources necessary to fully investigate and prepare their cases.¹⁰⁵

The Army has invested considerable resources into better preparation, investigation, and disposition of sexual misconduct, and has also focused on attitudinal changes among the ranks. Defense counsel must zealously defend all clients, and in doing so they help to ensure not only that their client receives a fair trial, but that the system, even one that seems to have awakened to place special emphasis on a certain type of crime and special solicitude toward certain victims, dispenses justice according to the procedures and rights guaranteed by the Constitution and the UCMJ. Defense training, then, will focus on areas that ensure due process and fairness for their clients, including the accuracy of forensic testing; the formation, reliability and suggestibility of memory; how to cross-examine alleged victims, and other sensitive witnesses; navigating the rules of evidence, especially MRE’s 412 and 413; how to evaluate, respond to, and offer expert testimony, and sentencing advocacy, among other areas. The government’s commitment to justice must include a guarantee that the accused Soldier receives the best possible defense—ensuring not only good order and discipline in the ranks, but continued high trust in the military justice system by the rank and file.¹⁰⁶

To keep balance in the system, three HQEs are assigned to the Trial Counsel Assistance Program (TCAP); two are assigned to the Defense Counsel Assistance Program (DCAP) (one of which has not yet been filled); one is assigned to OTJAG; and the remaining position is assigned to The Judge Advocate General’s Legal Center and School.¹⁰⁷ The HQE position is a five-year position.¹⁰⁸ The JAG Corps does not anticipate needing the services of HQEs after five years because the JAG Corps’s long established

⁹⁶ Morris Interview, *supra* note 31; Stelle Interview, *supra* note 81.

⁹⁷ Morris Interview, *supra* note 31.

⁹⁸ *Id.*; Stelle Interview, *supra* note 81.

⁹⁹ TJAG Policy Memo 10-8, *supra* note 80.

¹⁰⁰ Allen & Aldykiewicz SVP Focus Group, *supra* note 85; Stelle Interview, *supra* note 81. “Appropriate cases are opportunities to Train/Coach/Mentor/Professionally Develop other Judge Advocates.” Allen & Aldykiewicz SVP Focus Group, *supra* note 85.

¹⁰¹ TJAG Policy Memo 10-8, *supra* note 80; Allen & Aldykiewicz SVP Focus Group, *supra* note 85.

¹⁰² TJAG Policy Memo 10-8, *supra* note 80. For SVPs that are captains and majors, the rater is the Chief, Trial Counsel Assistance Program, and the senior rater is the SJA of the office serving as their primary place of duty. *Id.* For SVPs that are lieutenant colonels, the rater is the SJA of the office serving as their primary place of duty and the senior rater is the Assistant Judge Advocate General for Military Law and Operations (AJAG(MLO)) or the Deputy Judge Advocate General. *Id.*

¹⁰³ SHARP Initiatives Message, *supra* note 6.

¹⁰⁴ Morris Interview, *supra* note 31.

¹⁰⁵ *Id.*

¹⁰⁶ E-mail from Colonel (Retired) Lawrence J. Morris, Chief of Advocacy, Office of The Judge Advocate General, U.S. Army, to author (Jan. 19, 2010, 11:10 EST) [hereinafter Morris e-mail] (on file with author).

¹⁰⁷ Morris Interview, *supra* note 31. The three HQEs assigned to TCAP may be contacted at (703) 588-5277; the two HQEs assigned to DCAP may be contacted at (703) 588-2571. The Chief of Advocacy who oversees the HQE program can be reached at (703) 588-6409. *Id.*

¹⁰⁸ Morris Interview, *supra* note 31.

training institutions will then have the experience necessary to carry on the training mission after that time.¹⁰⁹ These institutions include senior trial counsel, chiefs of military justice, and senior defense counsel (SDC), as well as TCAP and DCAP. With the focused assistance of the HQEs, these institutions will have the experience, expertise, and resources to continue training after the departure of the HQEs.¹¹⁰

All judge advocates should benefit from the SVP and HQE program even though they are not currently assigned as trial counsel. First, the program has already provided training not only to trial counsel but also to defense counsel.¹¹¹ Defense counsel have had opportunities to receive some of the same training as the SVPs, in addition to training provided through the U.S. Army Trial Defense Services (TDS).¹¹² Second, trial counsel typically move to other positions, including defense counsel, and can apply the skills, experience, and knowledge they gained litigating sexual assault cases to future assignments. The SVPs who train them will also move to other leadership positions where they can apply the experience and expertise they gained as SVPs. Having experts in place to train and guide counsel is just one element of ensuring justice.

Another key element to ensuring justice involves working with other agencies to respond to sexual assault or domestic violence crimes.¹¹³ The SVPs are responsible for coordinating with their local CID office to establish an SVU at the installations in their areas of responsibility.¹¹⁴ These SVUs are designed to meet the physical, medical, spiritual, and emotional needs of sexual assault victims.¹¹⁵ The SVUs are comprised of judge advocates, investigators, and “[a]ppropriate personnel to provide victims with medical, emotional, and spiritual services.”¹¹⁶ As seen, another critical piece to effectively address crimes of sexual assault is to properly train investigators.

The Army CID has hired seven HQEs of regional and often national renown credentials in sexual assault investigations and prosecutions.¹¹⁷ These experts mentor

and train CID agents on investigative techniques, including forensics and victim and witness interviews, and assist with complex sexual assault cases.¹¹⁸ In addition, CID recently graduated twenty-two new sexual assault investigators from the SVU Course at the U.S. Army Military Police School at Fort Leonard Wood, Missouri.¹¹⁹

The SVU Course at Fort Leonard Wood, Missouri is a new course instituted by the USACIC.¹²⁰ The intensive two-week course is conducted by the staff of the USACIC, U.S. Army Military Police School, and the seven HQEs in the fields of sexual assault, forensics, medical, and sex crimes prosecution.¹²¹ The HQEs spent their careers focusing on sexual assault and sexual predator crimes and it is with this expertise that they train Army criminal investigators.¹²² The graduates of the course are assigned to Army installations throughout the United States, Germany, and Korea.¹²³ Once at their installations, these specially trained investigators are responsible for taking the lead in forming their installation’s special victims investigative unit.¹²⁴ These investigators come with prior civilian or military experience in investigations and who are respected by their peers, and motivated and dedicated to undertake the difficult cases of sexual assaults.¹²⁵ They are also responsible for leading sexual assault investigations teams “to better address the conduct of sexual assault investigations.”¹²⁶

As part of the Army effort to address sexual assault, CID also increased its crime lab personnel. The U.S. Army Criminal Investigation Laboratory (USACIL) is the DoD’s major crime lab.¹²⁷ To support the effort to fully investigate allegations of sexual assault, USACIL hired thirty-two additional forensic examiners and specialists to handle the projected increased workload and instituted additional “robotics and automation enhancements for DNA forensic work, and a new laboratory information management system (LIMS), which increases the capabilities of the examiners yielding quicker response times to evidence processing.”¹²⁸

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ TJAG Policy Memo, 10-8 *supra* note 80; Morris Interview, *supra* note 31; Stelle Interview, *supra* note 81.

¹¹⁴ TJAG Policy Memo, 10-8, *supra* note 80.

¹¹⁵ Allen & Aldykiewicz SVP Focus Group, *supra* note 85.

¹¹⁶ TJAG Policy Memo, 10-8, *supra* note 80.

¹¹⁷ E-mail from Special Agent Guy Surian, Deputy for Investigations and Intelligence, U.S. Army Criminal Investigations Command, to author (Oct. 27, 2009, 13:36 EST) [hereinafter Surian e-mail] (on file with author).

¹¹⁸ *Id.*

¹¹⁹ Hauser, *supra* note 9.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ Surian e-mail, *supra* note 117.

¹²⁶ Collins SHARP House Statement, *supra* note 74.

¹²⁷ U.S. ARMY CRIMINAL INVESTIGATION COMMAND, U.S. ARMY CRIMINAL INVESTIGATION LABORATORY HISTORY, <http://www.cid.army.mil/usacil2.html>

¹²⁸ *Id.*

The CID is highly selective about whom it selects to receive sexual assault investigator training. Qualified individuals must demonstrate motivation, leadership, and perseverance, and must have experience investigating a broad range of criminal offenses or have specialized expertise in sexual assault or child abuse cases.¹²⁹ For installations that do not yet have their own SVU, CID has created centers of excellence at various installations which can provide resources to help agents improve their skills at investigating sexual assaults.¹³⁰

The field has responded positively to these additional assets.¹³¹ Installation military justice offices and CID offices appreciate the experience and expertise these specially trained prosecutors and investigators bring to these difficult cases.¹³² Now that the resources are in place, young judge advocates are eager and willing to undergo new training to better themselves as judge advocates.¹³³

Advice to Judge Advocates from the SVPs and HQEs

Teamwork is the key element in sexual assault investigations and prosecutions.¹³⁴ Judge advocates must build solid relationships with the investigators, forensic scientists, and other experts, such as experts on victim behavior, ideally before their first case.¹³⁵ This is true for any type of case but especially so for sexual assault and domestic violence cases due to the unique issues. Judge advocates should reach out early to the CID agent investigating the case, as well as other professionals—including medical and forensics personnel—involved.¹³⁶ Early involvement allows judge advocates to identify issues in the case long before they prefer charges. Early involvement also allows judge advocates to identify potential witnesses and establish early contact with the alleged victim. In addition, many investigators and experts are open to input from the judge advocates, especially those who have built relationships with them, and judge advocate

guidance can be useful in uncovering evidence early on in the investigative process.¹³⁷

The SVPs and HQEs can assist trial counsel in preparing for victim and witness interviews. They can demonstrate effective interview techniques and questions appropriate for the crucial victim interview.¹³⁸ The SVPs and HQEs mentor judge advocates during case preparation. They train them to identify which experts they should consult, when they should involve an expert, and, most importantly, why they should consult a particular expert.¹³⁹ The JAG Corps has provided a variety of resources for training, mentoring, and consulting judge advocates. It is up to the judge advocate to take advantage of the resources, especially the SVPs and HQEs.¹⁴⁰

Since the HQE are only funded for five years, chiefs of military justice and SDCs should plan for the continued training and development of their counsel.¹⁴¹ By taking advantage of the training that is available now, new experts in sexual assault and domestic violence can be “home grown” and help ensure that justice prevails in future cases.¹⁴²

Conclusion

Sexual assaults and domestic violence are crimes that often involve unique psychological and evidentiary issues. With the help of SVPs and HQEs, judge advocates can develop the expertise necessary to ensure that these cases are properly investigated and competently litigated. The skills they develop should aid them not just in dealing with these crimes but in all aspects of their careers. The additional resources will aid victims of these crimes and enable justice to prevail.

¹²⁹ Surian e-mail, *supra* note 117.

¹³⁰ Hauser, *supra* note 9.

¹³¹ See Morris Interview, *supra* note 31; Stelle Interview, *supra* note 81; and Surian e-mail, *supra* note 117.

¹³² See Stelle Interview, *supra* note 81; Surian e-mail, *supra* note 117.

¹³³ Morris Interview, *supra* note 31.

¹³⁴ See Morris Interview, *supra* note 31; Stelle Interview, *supra* note 81; Surian e-mail, *supra* note 117.

¹³⁵ See Morris Interview, *supra* note 31; Stelle Interview, *supra* note 81; Surian e-mail, *supra* note 117.

¹³⁶ See Morris Interview, *supra* note 31; Stelle Interview, *supra* note 81; Surian e-mail, *supra* note 117.

¹³⁷ Stelle Interview, *supra* note 81.

¹³⁸ Morris Interview, *supra* note 31; Stelle Interview, *supra* note 81.

¹³⁹ Stelle Interview, *supra* note 81.

¹⁴⁰ Morris Interview, *supra* note 31.

¹⁴¹ *Id.*

¹⁴² *Id.*

Appendix¹⁴⁴

SVP Physical Location	SVP Area of Additional Responsibility
Fort Lewis, WA	Presidio & Fort Irwin, CA
	Forts Wainwright, Greeley, Richardson, AK
Fort Bliss, TX	Fort Huachuca, AZ
	White Sands Missile Base, NM
Fort Carson, CO	Fort Sill, OK
Fort Hood, TX	Fort Sam Houston
Fort Riley, KS	Fort Leavenworth, KS
Fort Campbell, KY	Fort Leonard Wood, MO
Fort Benning, GA	Fort Polk, LA
	Fort Rucker, Fort McClellan & Redstone Arsenal, AL
	Fort McPherson, GA
Fort Stewart, GA	Fort Gordon, GA
	Fort Jackson, SC
Fort Bragg, NC	Fort Knox, KY
Military District of Washington	Fort Lee, Fort Belvoir, & Fort Eustis, VA
	Fort Detrick, Fort Meade, & Aberdeen Proving Ground, MD
Fort Drum, NY	Fort Dix & Fort Monmouth, NJ
	USMC / Westpoint, NY
Fort Shafter, HI	All installations in Hawaii
Campbell Barracks, Heidelberg GE	All installations in Europe
Korea (TBD)	All installations in Korea and Japan

¹⁴⁴ Allen & Aldykiewicz SVP Focus Group, *supra* note 85. The area of responsibility has not yet been formally decided for the fifteenth SVP. *Id.*

Change—A Little Bit at a Time
A Review of that Change in the Area of Professional Responsibility

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Introduction

*Because things are the way they are, things will not stay the way they are.*²

In the law, change is inevitable. Sometimes it takes the form of a tsunami—sudden and unexpected, transforming the entire landscape—while other times it is a gentle lap of the waves against the shore that results in barely perceptible movement in the grains of sand on the beach. Looking back over the past year in professional responsibility, while there was a metamorphosis of the legal landscape, it is not visible to the casual observer. So what lessons can the discerning eye glean from such a gentle shift? Where are things no longer the way they were? Perhaps even more importantly, where are they about to change from the way they are to the way they will be? Developments in the rules governing professional responsibility for criminal law practitioners, both prosecutors and defense counsel (DC), are both a blessing and a curse. As a blessing, they guide the criminal lawyer in his or her practice of the law, but may be a curse when the guidance is not followed and leads to rules broken. An examination of some of the cases throughout the last year will help remind those who advocate on behalf of the Government, as well as those who represent the individual, what guidance exists and how not to run afoul of it.

Mitigation Experts in a Death Penalty Case

*If you play with fire, you're gonna get burned.*³

Some risks are worth taking and others are better left alone. *United States v. Loving* provides a word of warning to counsel trying death penalty cases on the use of mitigation experts.⁴ The appellate court in *Loving* intimated that while *Loving's* defense team was not ineffective for failing to use a mitigation specialist because one of its members assiduously performed that function, the Government has a high burden to overcome in denying funds for such an expert, as does the defense in not availing itself of the opportunity to use one if provided.⁵ The Court of Appeals

for the Armed Forces (CAAF) stated, "Despite a gradually emerging practice of hiring a social worker or other mitigation specialist, the prevailing norm at the time of Appellant's trial was for the defense team to conduct a reasonable, independent investigation into the accused's family and background in an effort to discover mitigating evidence."⁶

Understanding the history of the *Loving* case can help sharpen the lessons it provides.⁷ The case itself has a great deal of history, due in no small part to the five-stage military death penalty process, an extremely protracted process that keeps death penalty cases alive for a very long time.⁸ *Loving* was convicted in 1989 of premeditated murder, felony murder, attempted murder, and several specifications of robbery.⁹ A court-martial sentenced *Loving* to a dishonorable discharge, forfeiture of all pay and allowances, and death.¹⁰ Before CAAF, *Loving* faulted DC counsel for failing to obtain the assistance of a mitigation specialist or social worker.¹¹ He also alleged deficiencies in the number of, approach to, and conduct of the background interviews that DC conducted with his family members and others, as well as deficiencies in the amount of social history records collected.¹² *Loving* also argued that during sentencing, DC only presented "skeletal information concerning *Loving's* background and environment that was wholly inadequate to present to the jury a true picture of his tortured life and the impact upon him."¹³ According to *Loving*, if "this true

⁶ *Id.* at 19.

⁷ *Id.* at 7.

⁸ *Id.* at 3.

⁹ *Id.* at 2.

¹⁰ *Id.*

¹¹ *Id.* at 6. The U.S. Supreme Court issued its decision affirming *Loving's* death sentence on 3 June 1996, completing stage four of the five stage process under the UCMJ. *Loving v. United States*, 517 U.S. 748, 774 (1996). In the time since the Supreme Court's decision, the case has remained pending within the military justice system, awaiting presidential action. *Loving's* case remains in a posture where his military remedies have not been exhausted, a critical component of any effort to obtain review in the Article III courts. See *Loving v. United States*, 62 M.J. 235, 248-51 (C.A.A.F. 2005). As a result, review in the Article III courts is not reasonably available to *Loving* so long as his case remains pending in the military justice system. A more detailed appellate history is documented in prior opinions. See *Loving v. United States*, 64 M.J. 132, 134-36 (C.A.A.F. 2006); *Loving*, 62 M.J. at 238-39; *Loving v. Hart*, 47 M.J. 438, 440 (C.A.A.F. 1998).

¹² *Loving*, 68 M.J. at 3.

¹³ *Id.*

² Bertolt Brecht, *quoted in Bertolt Brecht Quotes*, <http://www.brainyquote.com/quotes/quotes/b/bertoltbre131165.html> (last visited Nov. 16, 2009).

³ Proverb, *quoted in THE YALE BOOK OF QUOTATIONS* 618 (Fred R. Shapiro ed. 2006).

⁴ 68 M.J. 1 (C.A.A.F. 2009).

⁵ *Id.* at 5-7.

picture had been presented there is a reasonable probability that at least one juror would have struck a different balance in the sentencing determination.”¹⁴

Prior to Loving’s trial, one of his counsel traveled to Loving’s hometown of Rochester, New York, and interviewed family members, a childhood teacher, a boxing coach, and even a police detective for area familiarization, all of whom provided testimony at trial.¹⁵ The defense also examined and presented school records, as well as a childhood friend’s arrest record.¹⁶ According to the CAAF, “Defense counsel spent a fair portion of his closing argument calling the members’ attention to Loving’s troubled background.”¹⁷ The court went on to state, “In this case, the crux of our prejudice inquiry under *Strickland* is whether there is a reasonable probability that the mitigating evidence introduced at the *DuBay* hearing would have produced a different result had it been introduced at trial.”¹⁸ The material presented at the *DuBay* hearing centered around a social worker, who gave her biopsychosocial assessment of Loving, and records from social services documenting visits to the home from 1967 to 1985, as well as childhood medical records.¹⁹ Also addressed in greater specificity at the hearing was neighborhood gang violence.²⁰ The court found, however, that “trial defense counsel . . . presented a mitigation case to the members that devoted a significant degree of attention to Loving’s troubled childhood.”²¹ Citing *Buckner v. Polk*, another murder case that ended in a death sentence, the *Loving* Court reiterated there is no prejudice under *Strickland* even when new evidence merely “round[s] out the details” of a personal history already presented to the jury.²² The court found the *DuBay* hearing “did not ultimately change the sentencing profile presented by DC at trial.”²³ The court concluded that Loving failed to demonstrate that there was a reasonable probability that, but for counsel’s deficient performance, the result of the proceeding would have been different with at least one member deciding differently.²⁴

Because the court concluded the use of such experts is the “emerging practice,”²⁵ it stands to reason that while counsel in *Loving* were able to provide effective representation in 1987 without a professional mitigation specialist,²⁶ to attempt to replicate that feat in 2010 is a good way to “get burned.” Similarly, the CAAF in *United States v. Kreutzer*,²⁷ another death penalty case from 2005, observed,

In light of recent Supreme Court decisions in this area, when a defendant subject to the death sentence requests a mitigation specialist, trial courts should give such requests careful consideration in view of relevant capital litigation precedent and any denial of such a request should be supported with written findings of fact and conclusions of law.²⁸

The Supreme Court decision, alluded to in the previous paragraph, is *Wiggins v. Smith*.²⁹ In *Wiggins*, the Court emphasized the importance of the background investigation. In November 2009, the Supreme Court relooked at this issue in *Porter v. McCollum*, a case in which the Court identified the defendant’s status as a veteran and his struggles with posttraumatic stress disorder as highly relevant mitigation evidence.³⁰ The *Wiggins* Court reasoned the issue is not

¹⁴ *Id.*

¹⁵ *Id.* at 9, 10.

¹⁶ *Id.* at 10.

¹⁷ *Id.* at 11. For an interesting comparison to another capital case, originally tried in the mid-80s, where counsel almost completely failed to investigate the accused’s background for mitigating circumstances and spent only six and a half hours preparing for the penalty phase, read *Pinholster v. Ayers* 590 F.3d 651 (9th Cir. 2009).

¹⁸ *Loving*, 68 M.J. at 12.

¹⁹ *Id.* at 12, 13.

²⁰ *Id.* at 13.

²¹ *Id.* at 16.

²² *Id.* (quoting *Buckner v. Polk*, 453 F.3d 195, 207 (4th Cir. 2006)).

²³ *Id.*

²⁴ *Id.* at 18.

²⁵ *Id.* at 19.

²⁶ *Id.* at 2. *But see* ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES, GUIDELINE 11.4.1.(D) (1989), *as cited in Loving*, 68 M.J. at 19 (internal quotation omitted) (“Counsel should secure the assistance of experts where it is necessary or appropriate for . . . presentation of mitigation.”).

²⁷ 61 M.J. 293 (C.A.A.F. 2005).

²⁸ *Id.* at 299 n.7.

²⁹ 539 U.S. 510 (2003).

³⁰ 130 S. Ct. 447, 454 (2009). While not a military case, Porter was a Korean War veteran who was sentenced to death for killing his former girlfriend and her boyfriend. During the findings portion of the trial, Porter represented himself, but during sentencing, he elected to be represented by his standby counsel who had only met with Porter once during the month-long interim between findings and sentencing. “It was the first time this lawyer had represented a defendant during a penalty phase proceeding.” *Id.* at 453. Unlike Loving’s legal team, Porter’s counsel “did not obtain any of Porter’s school, medical, or military service records or interview any members of Porter’s family.” *Id.* Porter’s attorney called only one witness and presented inconsistent evidence of his client’s behavior when intoxicated. He also stated that Porter had “other handicaps that weren’t apparent during the trial” and was not “mentally healthy.” *Id.* (internal quotations omitted). Years later, during a two-day post-conviction evidentiary hearing, Porter presented “extensive mitigating evidence,” including testimony from his company commander from Korea, none of which was brought out or apparently known at the original trial. *Id.* at 449. The trial court never heard about “(1) Porter’s heroic military service in two of the most critical—and horrific—battles of the Korean War, (2) his struggles to regain normality upon his return from war, (3) his childhood history of physical abuse, and (4) his brain abnormality, difficulty reading and writing, and limited schooling.” *Id.* at 454. Further emphasizing the importance of Porter’s military service, the court noted, toward the conclusion of their per curiam opinion that, “[o]ur Nation has a long

“whether counsel should have presented a mitigation case,” but rather “whether the investigation supporting counsel’s decision not to introduce mitigating evidence of Wiggins’ background *was itself reasonable*.”³¹ *Wiggins* also affirmed that the court’s two-part test in *Strickland v. Washington*, decided some twenty years prior to *Wiggins*, is still the benchmark for deciding allegations of ineffective assistance of counsel.³²

To find ineffective assistance under *Strickland*, the petitioner must first “show that counsel’s performance was deficient.”³³ Secondly, the petitioner must demonstrate “the deficiency prejudiced the defense.”³⁴ As the Court held in *Porter*, citing *Strickland*, “[w]e do not require a defendant to show ‘that counsel’s deficient conduct more likely than not altered the outcome’ of his penalty proceeding, but rather that he establish ‘a probability sufficient to undermine confidence in [that] outcome.’”³⁵ In holding the DC were deficient, the *Wiggins* Court ruled that in a death penalty case, a limited investigation into the accused’s background is only reasonable if further development of a mitigation case “would have been counterproductive, or that further investigation would have been fruitless.”³⁶ The language in *Wiggins* is also instructive for the proposition that DC need to use what resources are available to them. “Despite the fact that the Public Defender’s office made funds available for the retention of a forensic social worker, counsel chose not to commission such a [social history] report.”³⁷ In the military court-martial setting, this likely means the defense has an obligation to request funds for a mitigation expert and engage in an initial probing of the accused’s background to determine if further exploration is warranted. Again, *Loving* should be read cautiously. Do not interpret this case originally tried over twenty years ago to mean that a mitigation expert is optional in future death penalty cases. Given changing norms regarding capital litigation, DC risk a near certain finding of ineffective assistance of counsel

(IAC) for failing to avail themselves of the benefit of a qualified mitigation expert. Failure to do so will result in an appellate case just waiting to ignite into an inferno which char everyone in the vicinity.

Expert Testimony in Child Sex Abuse Cases

*Statistics are no substitute for judgment.*³⁸

In *United States v. Mazza*, the question presented to the appellate court was whether it constitutes ineffective assistance of counsel to (1) solicit unfavorable human lie detector testimony from the Government’s expert witness; (2) fail to object to admission of the victim’s videotaped interview; and (3) permit the videotape to be viewed by the panel during deliberations without any oversight from the court. The accused was convicted of indecent acts with his minor daughter and communicating indecent language. At trial, a doctor, who testified for the Government, was limited by the judge to testifying in general terms about how quickly child sex abuse victims report their cases and in what manner they report. The judge specifically directed the expert not to discuss the veracity of identified witnesses.³⁹

On cross-examination, the civilian DC questioned the doctor on false reporting generally and the number of false reports made by individuals in the victim’s age group.⁴⁰ The doctor stated that of the “hundreds of thousands of child abuse reports each year,” the false accusation rate was only six to eight percent, and it was very rare for a child victim to make a false accusation.⁴¹

The judge cleared the courtroom, asked the civilian DC if he had considered the consequences of his questions, and warned counsel that his line of questioning would “open doors” for the Government.⁴² When the civilian DC proceeded with his questioning, members then asked whether the doctor had interviewed the victim and, if so, whether the interview had been taped. The civilian DC objected, but the judge reminded the civilian DC he had opened, “a very, very, very large door; one I would not have, without you specifically wanting to open up, allowed to be opened.”⁴³ One of two taped interviews was admitted without further objection.⁴⁴ The doctor was not allowed to testify whether she believed the alleged victim’s statements, and the judge reminded the panel that it was their task, not

tradition of according leniency to veterans in recognition of their service, especially for those who fought on the front lines as Porter did.” *Id.* at 455.

³¹ 539 U.S. at 522–23.

³² *Id.* at 521 (quoting *Strickland v. Washington*, 466 U.S. 668 (1984)). In January 2010, the Court used a *Strickland* analysis in deciding an ineffective assistance of counsel case. *Smith v. Spisak*, 130 S. Ct. 676 (2010). Despite defense counsel’s sentencing argument in which he described his client’s killings in detail, noted that his client’s “admiration for Hitler inspired his crimes,” commented that his client was “sick,” “twisted,” and “demented,” and that his client was “never going to be any different,” the Court held that even if the argument was inadequate, they still found “no ‘reasonable probability’ that a better closing argument without these defects would have made a significant difference” based on the evidence that had come out at trial. *Id.* at 685.

³³ *Strickland*, 466 U.S. at 668.

³⁴ *Id.*

³⁵ *Porter*, 130 S. Ct. at 455, 456.

³⁶ *Wiggins*, 539 U.S. at 525.

³⁷ *Id.* at 524.

³⁸ Henry Clay, *quoted in Statistics Quotes*, http://www.brainyquote.com/quotes/keywords/statistics_2.html (last visited Nov. 16, 2009).

³⁹ *Porter*, 130 S. Ct. at 470–71.

⁴⁰ *Id.* at 472.

⁴¹ *Id.*

⁴² *Id.* at 472, 473.

⁴³ *Id.* at 473.

⁴⁴ *Id.*

the expert's responsibility, to determine creditability.⁴⁵ During closing argument, the civilian DC argued that the six to eight percent false report rate meant that there were six to eight thousand false reports each year.⁴⁶ The panel was apparently unconvinced and convicted the accused.

Ultimately, the appellate court found the civilian DC was not ineffective and his client's conviction was affirmed.⁴⁷ The CAAF stated, "Our analysis of counsel's performance is highly deferential."⁴⁸ The court went on to state, "While a different defense counsel might have chosen different tactical steps, the tactics used were part of a trial strategy that Appellant failed to show was unreasonable under the circumstances and prevailing professional norms."⁴⁹ Questioning the doctor on false reports clearly demonstrates a reasonable trial strategy to show the victim's statements were fabricated, since it was a "credibility contest" between the accused and his daughter, the court found.⁵⁰

In 2007, subsequent to Mazza's initial trial, the CAAF held, in *United States v. Brooks*, that expert testimony regarding the percentage of false claims of sexual abuse of child victims was the "functional equivalent of vouching for the credibility or truthfulness of the victim" and thus, impermissible.⁵¹ The *Mazza* court, however, distinguished its prior holding in *Brooks* by noting that in this case it was the defense that solicited the numbers as a clear part of their trial strategy, as opposed to the prior case when the Government sought out the statistical testimony.⁵² The CAAF also found the tape was part of the defense strategy, since counsel requested during closing argument the panel view it and look for inconsistencies between the victim's in-court testimony and what she said during the taped interview.⁵³ As the appellate court observed, this was an extremely challenging case for the defense; however, giving the Government expert an opportunity to testify to the reliability of child sex abuse victims was probably not the best way to secure an acquittal.⁵⁴ Eliciting statistics, which the prosecution is generally barred from introducing because of their prejudicial nature, from the Government expert was simply betting against the odds.

⁴⁵ *Id.* at 473, 474.

⁴⁶ *Id.* at 475.

⁴⁷ *Id.* at 476.

⁴⁸ *Id.* at 474 (quoting *Strickland v. Washington*, 466 U.S. 668, 689 (1984)).

⁴⁹ *Id.* at 476.

⁵⁰ *Id.* at 475.

⁵¹ *United States v. Brooks*, 64 M.J. 325, 330 (C.A.A.F. 2007).

⁵² *Mazza*, 67 M.J. at 475.

⁵³ *Id.* at 475, 476.

⁵⁴ *Id.* at 476.

What Can Defense Disclose During the Course of a Negotiation?

*Death's brother, Sleep.*⁵⁵

The factual background behind *United States v. Savage* involved the repeated stabbing of a victim, which caused life-threatening wounds, by a suspect who claimed to have been asleep during the episode.⁵⁶ On that particular night and in that particular place, death and sleep bore little resemblance. Savage pled guilty to AWOL and breaking restriction. Savage was found guilty of attempted premeditated murder for stabbing a German woman in the back seven times after she allowed him to spend a night at her house while he was AWOL. The incident occurred approximately thirty minutes after she had recommended he return to post and she had given him money to accomplish that task. Savage claimed that due to parasomnia, a sleep disorder, he was asleep while he stabbed his victim. The defense did not raise an insanity defense but requested an instruction on negating mens rea. The DC e-mailed the entire sanity board report, commonly known as the "long form," to the trial counsel without an order from the judge; the report included the accused's statement about the circumstances of the stabbing, which had been protected under Military Rule of Evidence (MRE) 302. The *Savage* court considered the following issues on appeal: Was Savage's DC ineffective during pretrial representation for disclosing the full contents of the sanity board report to the Government, and did the military judge err in her rulings regarding release and use of statements of the accused contained in the report?⁵⁷

In response to the first question, the Army Court of Criminal Appeals (ACCA) found that the DC was not ineffective. The court noted that when the DC released the report, she was planning to rely on the defense of lack of mental responsibility, which might necessitate release of entire report. Under those circumstances, Appendix 22 to the *Manual for Courts-Martial* indicated it may have been appropriate for DC "to disclose the entire sanity report."⁵⁸ Accordingly, the court reasoned, "Defense counsel may have had a valid tactical reason to disclose the report, such as using the sanity board report to negotiate a favorable pretrial agreement with the convening authority."⁵⁹ The court also observed that the servicemember "failed to demonstrate that the outcome would have been different if his DC had not disclosed the entire sanity board report to the Government."⁶⁰ This was due in great part to the statements

⁵⁵ VIRGIL, THE AENEID bk. VI (29-19 B.C.E.).

⁵⁶ 67 M.J. 656 (A. Ct. Crim. App. 2009).

⁵⁷ *Id.* at 656-62.

⁵⁸ *Id.* at 664.

⁵⁹ *Id.*

⁶⁰ *Id.* at 665.

he made to German authorities that included much of the same damaging information contained in the report. Additionally, because the defense expert testified, the defense would have had to disclose Savage's statements to the doctor in any event.⁶¹

The Government's use of Savage's privileged discussion during the sanity board also helps establish parameters for the proper use of sanity board results. Defense disclosure of sanity board results to opposing counsel, perhaps to help leverage a more beneficial pretrial agreement, does not entitle the Government to the use of all statements made during the sanity board procedure.⁶² Military Rule of Evidence 302 unequivocally states that "the defense must present expert testimony about appellant's statements made during a sanity board in order for the Government to use the statements at trial."⁶³ In *Savage*, the defense forfeited the protections of MRE 302 when the expert witness presented the sleep history evidence Savage had provided to the sanity board.⁶⁴ The defense could have chosen to have the prosecutor who reviewed the privileged information disqualified, but it did not.⁶⁵ Nevertheless, requesting the disqualification of a prosecutor remains a possible strategy available to DC in future cases.⁶⁶

In the end, the court found "the panel did not believe the alleged parasomniac event affected appellant's ability to specifically intend that result, and neither do we."⁶⁷ The court's decision was based on the testimony of two experts, who were not "overwhelmingly confident" in the diagnosis of parasomnia, and Savage's lack of a "history of sleepwalking as a child."⁶⁸ Additionally, the time between Savage's conversation with the victim and the stabbing would not have provided sufficient time for him to enter a state of sleep deep enough to be consistent with parasomnia.⁶⁹ Finally, the court was influenced by the fact that the "deliberate and complex movements associated with the attack were inconsistent with a parasomniac event," violent parasomniac events are rare, and Savage fled the scene after stabbing her.⁷⁰

⁶¹ *Id.* at 664–65.

⁶² *Id.* at 664.

⁶³ *Id.* See, e.g., *United States v. Clark*, 62 M.J. 195 (C.A.A.F. 2005); *United States v. Cole*, 54 M.J. 572 (A. Ct. Crim. App. 2000).

⁶⁴ *Savage*, 67 M.J. at 662, 663.

⁶⁵ *Id.* at 662. See, e.g., *United States v. Bledsoe*, 26 M.J. 97 (C.M.A. 1998); *United States v. Rushatz*, 31 M.J. 450 (C.M.A. 1990).

⁶⁶ *Savage*, 67 M.J. at 662.

⁶⁷ *Id.* at 665.

⁶⁸ *Id.* at 666.

⁶⁹ *Id.*

⁷⁰ *Id.*

It Can't Hurt to Ask—Post-trial Relief from the Convening Authority

*Four things come not back:
The spoken word; the sped arrow;
Time past; the neglected opportunity.*⁷¹

Just because an appellate court finds that a neglected opportunity does not constitute IAC in a given case does not mean counsel's performance is worthy of emulation. *United States v. Gunderman* is one of those cases.⁷² During sentencing, appellant made an unsworn statement in which he requested a bad conduct discharge in order to immediately return home to his wife and mother, who needed his assistance. As a result of Gunderman's concern for his family, his DC inquired whether he desired the court to refrain from adjudging forfeiture of pay and allowances. Gunderman responded affirmatively.⁷³

A portion of the defense's closing argument was a reiteration of the request to avoid forfeitures for the pecuniary benefit of his family. At the conclusion of the trial, the judge discussed the sentence adjudged, the effects of the pretrial agreement, and the post-trial and appellate rights form. The judge attached a post-trial appellate rights form, which Gunderman initialed and signed, to the record. The form notified the appellant that automatic forfeitures occurred by operation of Article 58b, UCMJ, and that the appellant had the right to request that the convening authority defer both adjudged and automatic forfeitures. Following the court-martial, however, neither Gunderman nor his counsel requested forfeiture relief from the convening authority or mentioned a deferment or waiver request in subsequent post-trial 1105/1106 submissions.⁷⁴ This could be described as a neglected opportunity.

In making an IAC complaint on appeal, arising from a lack of a forfeiture relief request, appellate counsel submitted to the court an unsigned, unsworn document, based on an earlier conversation between Gunderman and his appellate counsel that appellate counsel titled "SWORN AFFIDAVIT."⁷⁵ On appeal, counsel raised the issue whether trial DC was ineffective for failing to "advise appellant that he could request disapproval of the adjudged forfeitures, deferral under Article 57, and waiver of automatic forfeitures under Article 58b, UCMJ."⁷⁶ The ACCA held that trial DC was not ineffective, but based that decision on the facts of the record of trial and did not

⁷¹ Omar Ibn, *quoted in* ROBERT DEBS HEINL, JR., *DICTIONARY OF MILITARY AND NAVAL QUOTATIONS* 225 (Naval Inst. Press 1966).

⁷² 67 M.J. 683 (A. Ct. Crim. App. 2009).

⁷³ *Id.* at 683–84.

⁷⁴ *Id.* at 684–85.

⁷⁵ *Id.* at 685.

⁷⁶ *Id.* at 684.

consider an unsigned document as extrinsic evidence upon which to base a decision.⁷⁷ The court wrote, “The record reflects appellant’s trial defense counsel properly advised appellant of his post-trial appellate rights and was not ineffective in his representation.”⁷⁸ The court went on to note, “We decline to use an unsigned document as extrinsic evidence upon which to base a decision.”⁷⁹ Later, the court added that “the oath or swearing process itself has legal import” and that it “encourages a sense of obligation to tell the truth.”⁸⁰ Apparently the court believed counsel’s single advisement of his client was good enough to meet a minimum standard to place Gunderman on notice of the issue. While DC may have subsequently raised the issue with his client and his client may have opted not to submit a request to waive forfeitures, it seems more likely that Gunderman’s counsel neglected to address the issue with his client again.

Undoubtedly, counsel was busy, distracted by his next case and other clients asking questions about their futures; but until final action is taken on a case, counsel must remain diligent and not forget post-trial clients even when they no longer pass repeatedly through their office. Sometimes, the best opportunity to achieve results through advocacy comes post-trial, when the opportunity to convince the convening authority to take favorable action toward a client—perhaps, more accurately, the client’s family—is at its greatest.⁸¹ While it is possible for a sharp DC in a seemingly hopeless case to pull the proverbial rabbit from his hat with an acquittal, in many cases, the die has already been cast by the time a client first walks into the DC’s office with a fat case file, evidencing guilt, complete with a signed confession. On these occasions, counsel may realize that their post-trial expertise may be what their client will need most.

Typically, the client will be facing his first court-martial, and advising the client of something as important as waiver of forfeitures once, on the eve of trial, is insufficient and unrealistic. In appropriate cases, the submission of a waiver of forfeitures should be included on a standard checklist, added to the calendar, or tasked to a responsible paralegal for preparation after it has been reviewed and approved by the attorney of record. Although DC can apparently fail in their duty to their clients and commit ineffective assistance of counsel in a number of ways, as the next cases demonstrate, prosecutors may have an equally difficult task in striking the right balance between the zealous pursuit of justice and the protection of the rights of

⁷⁷ *Id.* at 686, 688.

⁷⁸ *Id.* at 684.

⁷⁹ *Id.* at 686.

⁸⁰ *Id.* at 688.

⁸¹ *United States v. Wheelus*, 49 M.J. 283, 287 (C.A.A.F. 1998) (“It has long been asserted that an accused’s best chance for post-trial clemency is the convening authority.”).

the accused.

Improper Prosecutorial Interference with Defense Counsel

*[P]erhaps Hawaii’s most unique feature is its Aloha Spirit: the warmth of the people of Hawaii that wonderfully complements the Islands’ perfect temperatures.*⁸²

Lieutenant Colonel (LtCol) Wiechmann was a retirement-eligible Marine charged with failing to obey a lawful order, making a false official statement, conduct unbecoming an officer, adultery, and obstructing justice.⁸³ Lieutenant Colonel Wiechmann visited the Trial Defense Services (TDS) and the Senior Defense Counsel (SDC) detailed himself to the case;⁸⁴ however, because the SDC had only one month of experience as a DC, he requested additional support through his TDS chain of command.⁸⁵ The Chief Defense Counsel of the Marine Corps (CDC) detailed a seasoned Reserve component lieutenant colonel to assist with the case.⁸⁶ The convening authority subsequently denied a defense request to fund the lieutenant colonel’s assignment, as was the normal practice, stating he could “find no authority for the Chief Defense Counsel of the Marine Corps to detail LtCol [S] to this case.”⁸⁷ It seems the convening authority in this case, located in Hawaii, was apparently a little slow to embrace the whole idea of Aloha Spirit on which the state prides itself.⁸⁸ This ultimately

⁸² Hawaii’s Official Tourism Site—Facts About Hawaii, http://www.gohawaii.com/about_hawaii/learn/introduction (last visited Nov. 16, 2009).

⁸³ *United States v. Wiechmann*, 67 M.J. 456 (C.A.A.F. 2009).

⁸⁴ It is worth noting that in the Army, defense counsel are assigned to U.S. Army Trial Defense Service (USATDS), a separate organization that does not fall under the authority of the local staff judge advocate (SJA) or commander, as specified in Chapter 6 of Army Regulation 27-10. U.S. DEP’T OF ARMY, REG. 27-10, MILITARY JUSTICE (16 Nov. 2005). Authority to detail cases to individual defense counsel originates with the Chief, USATDS, and is typically delegated down to the Senior Defense Counsel (SDC) level. *Id.* para. 6-19. This differs from the Marine Corps which, although having a Chief Defense Counsel of the Marine Corps, does not have a distinct TDS organization. The Chief Defense Counsel “exercises general professional supervision” but not “operational or administrative control of SDCs of defense counsel.” MARINE CORPS MANUAL FOR LEGAL ADMINISTRATION (LEGADMINMAN) 2-5 (31 Aug. 1999). Within the Marines, “the authority to detail defense counsel is vested in the defense counsel’s commanding officer and cognizant command authority,” based on LEGADMINMAN. *Id.* at 2-7. This rule is derived from JAGMAN 0130, which states, “Navy and Marine Corps judge advocates may be detailed as trial and defense counsel by the judge advocate’s CO, OIC, or his designee.” MANUAL OF THE JUDGE ADVOCATE GENERAL (JAGMAN) 1-47 (20 June 2007), available at <http://www.jag.navy.mil/library/instructions/JAGMAN2007.pdf>. The LEGADMINMAN allows for this authority to be delegated to SDCs, which is typical of most installations. *Id.* at 2-7.

⁸⁵ *Wiechmann*, 67 M.J. at 458.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ According to one individual familiar with the case, the reticence to recognize LtCol [S] came about because LtCol Wiechmann had previously

created a question on appeal regarding whether LtCol Wiechmann was denied his Sixth Amendment Right to Counsel when the convening authority refused to recognize one of his two detailed DC.

The convening authority's refusal to recognize LtCol [S] resulted in a lack of funding for LtCol [S]'s travel. Citing the apparent confusion over who was financially responsible for paying for his travel, LtCol [S] requested a delay of the scheduled Article 32 hearing. The convening authority responded that "LtCol [S] is not detailed as counsel and has no authority to act in this matter."⁸⁹ At the Article 32 hearing, LtCol [S] objected that due to having just secured travel funds from elsewhere, he needed more time to meet with his client and prepare for the Article 32 hearing. The investigating officer decided to proceed with the hearing, although he did allow LtCol [S] to represent his client over Government counsel's objection. Lieutenant Colonel [S] and the SDC next asked for an opportunity to meet with the convening authority to discuss a pretrial agreement, which the defense hoped could have disposed of the case with an Article 15. The convening authority refused to meet with DC and even refused to receive the proposed pretrial agreement package on the basis that "LtCol [S] had not been properly detailed as defense counsel."⁹⁰ After the SDC removed LtCol [S]'s name from the proposal, the convening authority accepted the packet for review before ultimately denying the request. After the convening authority turned down an additional request from LtCol [S] for a meeting, the convening authority met with the SDC, without LtCol [S], to discuss the case in general and the viability of resolving the case with an Article 15. The convening authority also denied this proposal.⁹¹

At the initial hearing of LtCol Wiechmann's court-martial, the military judge made the standard inquiry regarding whom LtCol Wiechmann desired to represent him. Lieutenant Colonel Wiechmann indicated that he wished to be represented by LtCol [S] as lead DC and by the SDC as assistant DC, a position the Government opposed. After arraignment, the judge heard each side's arguments on the defense motion for appropriate relief to allow LtCol [S] to officially join the case. Granting the defense motion, the judge ruled that "the applicable departmental regulations authorized the CDC to detail LtCol [S] as defense counsel."⁹² The parties then worked out an agreement in

talked to LtCol [S] in his capacity as a civilian defense counsel; however, instead of retaining him at his own expense, LtCol Wiechmann had attempted to finagle the system into forcing the Marine Corps to pay for his civilian counsel.

⁸⁹ *Wiechmann*, 67 M.J. at 458.

⁹⁰ *Id.* at 459.

⁹¹ *Id.*

⁹² *Id.* It is unclear which "departmental regulations" the judge was referring to that authorized the CDC to detail counsel since the plain meaning of the applicable language found in the LEGADMINMAN seems to indicate otherwise. The appellate court stated, "As neither party challenged the

which LtCol Wiechmann would plead guilty and submit paperwork for immediate retirement at the grade of major, and in return, the convening authority would suspend any confinement and discharge adjudged."⁹³

On appeal, the court held that although the accused does not have the right to more than one detailed counsel, "the person authorized by regulations prescribed under section 827 of this title (Article 27) to detail counsel, in his sole discretion . . . may detail additional military counsel as assistant defense counsel."⁹⁴ The court further found that "[a] convening authority may not interfere with or impede an attorney-client relationship established between an accused and detailed defense counsel," which, in LtCol Wiechmann's case, was established at the time of LtCol [S]'s initial detailing as LtCol Wiechmann's DC.⁹⁵ The court also faulted the convening authority for not seeking clarification from officials at the departmental level before declining to recognize LtCol [S] as LtCol Wiechmann's counsel.⁹⁶ The court ultimately found that the convening authority's action hindered LtCol [S]'s representation of his client in the following respects:

- (1) the Article 32 proceeding was conducted without a full opportunity for LtCol [S] to prepare and participate;
- (2) LtCol [S] was excluded from pretrial disposition negotiations that the Government conducted with [the SDC], the less experienced defense counsel;
- (3) LtCol [S] was unable to represent Appellant in pretrial procedural matters, such as in a scheduling conference or by requesting a continuance.⁹⁷

Accordingly, the court held that "the Government's actions infringed Appellant's right to the assistance of counsel."⁹⁸ In evaluating the case, the court looked for "structural error—an error so serious that no proof of prejudice is required—or whether the error must be tested

military judge's interpretation of departmental regulations on appeal, we treat his ruling as the law of the case." *Id.* at 460. This indicates that if the Government had appealed, the appellate court may well have decided this portion of the case differently, and the rule should not be applied too broadly given that the case cites to *United States v. Parker*, 62 M.J. 459, 464 (C.A.A.F. 2006), for the proposition that the ruling applies the "law-of-the-case doctrine." In *Parker*, the court stated, "When a party does not appeal a ruling, the ruling of the lower court normally becomes the law of the case. The law-of-the-case doctrine, however, is a matter of appellate policy, not a binding legal doctrine."

⁹³ *Wiechman*, 67 M.J. at 459–60.

⁹⁴ *Id.* at 458 (quoting UCMJ art. 38(b)(6) (2008)).

⁹⁵ *Id.* at 456.

⁹⁶ *Id.*

⁹⁷ *Id.* at 462.

⁹⁸ *Id.*

for prejudice.”⁹⁹ Finding no structural error, the court found that while the convening authority committed a violation of the servicemember’s Sixth Amendment Rights, it was harmless because LtCol [S] was constantly able to advise the SDC from the background.¹⁰⁰

At first it may seem as though the convening authority wished to avoid the expense of funding the specially detailed DC, but the convening authority still refused to interact with him even after LtCol [S] received an alternate funding source. To a judge advocate outside the Marine Corps, things may seem to have gone from thrifty to petty. Given the widespread belief within the Marine Corps prior to this case that the applicable departmental regulation did not allow the CDC to detail counsel, however, perhaps this was as much a principled stand on regulation as much as anything else.¹⁰¹ Ultimately, the appellate court found the Government wrongly interfered with LtCol Wiechmann’s right to counsel but found no prejudice. Under a slightly different factual scenario, the result could have turned in the opposite direction. The Government must avoid interfering with defense detailing decisions and must treat whomever the defense deems appropriate with a greater Aloha Spirit than the convening authority displayed in this case.¹⁰²

Cross-examining the Accused

*Retreat, hell! We're just attacking in another direction.*¹⁰³

Everything really does depend on perspective—especially if one was drunk and is now charged with assaulting the police. Such was the case for the star of *United States v. Harrison*, a case that detailed the special rules the prosecutor must comply with when cross-examining the accused.¹⁰⁴ Mr. Harrison was on “Army Beach,” a U.S. Army-controlled beach on Oahu that had been declared off-limits at night.¹⁰⁵ Two military police (MP) officers, who patrolled the area to enforce the

directive, discovered him on the beach and asked him to leave the area.¹⁰⁶ From that point forward, Mr. Harrison’s and the MPs’ versions of what happened differed greatly.¹⁰⁷ As the court’s opinion declared, it was “the tale of two Rex Harrisons.”¹⁰⁸ The MPs described him as a belligerent drunk who assaulted them, while Mr. Harrison was characterized, in the appellate court’s description, as “having the milk of human kindness by the quart in every vein.”¹⁰⁹

The trial quickly transformed into a credibility contest, pitting the MPs’ version against Mr. Harrison’s.¹¹⁰ The case was prosecuted by two Special Assistant U.S. Attorneys (SAUSA).¹¹¹ They addressed Mr. Harrison’s claim that there was an elaborate conspiracy to convict him by asking him, on cross-examination, whether the other witnesses in the case were lying under oath and whether the SAUSAs were also part of the conspiracy to convict him.¹¹² The SAUSAs also elicited testimony, which they subsequently used during closing argument, that an internal investigation had been conducted after the incident and that, following the inquiry, the MPs had been promoted, clearly implying they were not found to have engaged in wrong doing.¹¹³ Mr. Harrison was convicted of assaulting one of the officers and inflicting bodily injury.¹¹⁴

The Ninth Circuit Court of Appeals examined two issues on appeal. First, may a prosecutor question an accused on cross-examination about the truthfulness of another witness? Second, may counsel vouch for their witnesses?

The court answered the first question in the negative, stating “It’s black letter law that a prosecutor may not ask a defendant to comment on the truthfulness of another witness.”¹¹⁵ The court also answered the second question in the negative, again faulting the Government, but this time

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 463.

¹⁰¹ According to one senior Marine judge advocate, the CDC is now taking a more active role in detaling cases; however, the regional defense counsels are still getting detailing authority from their respective commanders.

¹⁰² For Marine Corps convening authorities who believe their interference is authorized by the LEGADMINMAN, consider acting with restraint given the uncertainty of how that regulation will be interpreted by courts in the future.

¹⁰³ Major General Oliver P. Smith, *quoted in* Leatherneck’s Famous Marine Quotes, <http://www.mca-marines.org/leatherneck/quotes.asp> (last visited Nov. 20, 2009) (attributing the cited quote to Major General Oliver P. Smith, Commanding General, 1st Marine Division in Korea, 1950, regarding his order for Marines to move southeast to the Hamhung area from the Hagaru perimeter; however, MajGen Smith claimed he did not say it quite that way).

¹⁰⁴ 585 F.3d 1155 (9th Cir. 2009).

¹⁰⁵ *Id.* at 1162.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 1158.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.* at 1159. Judge advocates from the various services serve as Special Assistant United States Attorneys nominally under the authority of the U. S. Attorney. They are responsible for the prosecution of violations of federal law committed by civilians on military installations that come within the exclusive federal jurisdiction of the United States pursuant to U.S. Const. art. I, § 8, cl. 17, and 18 U.S.C. § 7. Criminal prosecution of civilians arising from these areas is exclusively within the jurisdiction of the United States, through the Department of Justice and the Office of the U.S. Attorney.

¹¹² *Id.* at 1158, 1159.

¹¹³ *Id.* at 1159.

¹¹⁴ *Id.* at 1158.

¹¹⁵ *Id.* (citing *United States v. Combs*, 379 F.3d 564, 572 (9th Cir. 2004); *United States v. Geston*, 299 F.3d 1130, 1136 (9th Cir. 2002)).

for vouching for their own witnesses.¹¹⁶ When Mr. Harrison suggested the arresting officers were motivated to lie about his actions, the court reasoned that the Government was entitled to rebut such statements.¹¹⁷ However, when one of the prosecutors mentioned during closing argument that the officers had been promoted after the internal investigation into the event, the Government “crossed the line.”¹¹⁸ This blatantly signaled the jury that information they were not privy to further supported the officers’ testimony.¹¹⁹ The Government continued to inappropriately vouch for the officers when, also during closing argument, one of the prosecutor’s stated that the “Government stands behind” the testifying officers.¹²⁰

The court found the DC “should have objected as soon as he saw the prosecutors step out of line.”¹²¹ The appellate court further found that “the respected and experienced district judge should not have tolerated this protracted exhibition of unprofessional conduct.”¹²² Mr. Harrison did not merit any relief, however, since he failed to show prejudice due to other insurmountable evidence the Government had presented in this credibility contest.¹²³

Article 10—Dealing with an Accused in Pre-Trial Confinement

*Perfection is attained by slow degrees; it requires the hand of time.*¹²⁴

If what Voltaire said about perfection is true, perhaps perfection was what the prosecutor hoped to produce in *United States v. Simmons*.¹²⁵ Unfortunately, by using a protracted process, the Government ended up with a dismissal rather than the perfect case.¹²⁶ Simmons pled guilty at a general court-martial to AWOL, failure to be at his place of duty, failure to follow orders, and disorderly conduct.¹²⁷ While he was also arraigned on charges of rape,

kidnapping, and multiple assaults, those charges were dismissed.¹²⁸ While this is an unpublished opinion and, as such, does not serve as precedent, it provides multiple teaching points for counsel dealing with an accused in pre-trial confinement (PTC). Simmons was placed into PTC following the alleged rape of his wife while he was AWOL.¹²⁹ He remained in PTC for 133 days before his trial, although he was arraigned on day 107.¹³⁰

The events of this case took place in South Korea, where Simmons was assigned.¹³¹ The first delay of this case resulted from the Government’s erroneous belief that the Status of Forces Agreement (SOFA) gave primary jurisdiction to the Korean government and that the U.S. military was barred from going forward with the case.¹³² The appellate court viewed this misinterpretation by the Government of its own SOFA as “negligent,” and therefore “unreasonable,” and characterized the Government’s conduct as “the polar opposite of reasonable diligence.”¹³³ In addition to confusion over the SOFA, the Government cited an annual brigade training exercise as a cause for delay.¹³⁴ The court held that “[w]hile operational considerations are relevant, they are not an absolute excuse.”¹³⁵ This was particularly true when the operational consideration was just an annual exercise, as it was in *Simmons*.¹³⁶ Finally, the Government also blamed a plodding Criminal Investigative Division (CID) investigation for further delay because several follow-up interviews, which were not particularly informative, took an extended period of time to conduct.¹³⁷

After the SOFA confusion was resolved, an investigating officer (IO) was appointed to the case on day forty-six of Simmons’s PTC.¹³⁸ (The original IO was later replaced by a second IO.) Despite the instructions in the IO’s appointment memorandum, which authorized the IO only seven calendar days to conduct the investigation, the IO took forty-one days from his appointment to complete and forward, on the eighty-sixth day of Simmons’s PTC, his final report.¹³⁹ The delay was due, in part, to the IO’s refusal to proceed with the investigation because he had

¹¹⁶ *Id.* at 1158, 1159.

¹¹⁷ *Id.* at 1159.

¹¹⁸ *Id.*

¹¹⁹ *Id.* (quoting *United States v. Necoechea*, 986 F.2d 1273, 1276 (9th Cir. 1993)) (internal quotation omitted).

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.* at 1160.

¹²⁴ Voltaire, quoted in Voltaire Quotes, <http://www.brainyquote.com/quotes/quotes/v/voltaire133391.html> (last visited Nov. 16, 2009).

¹²⁵ Army 20070486 (A. Ct. Crim. App. 2009) (Westlaw 2010) (memorandum opinion).

¹²⁶ *Id.* at 2.

¹²⁷ *Id.* at 1.

¹²⁸ *Id.* n.2.

¹²⁹ *Id.* at 2.

¹³⁰ *Id.* at 2, 3 n.3.

¹³¹ *Id.* at 3.

¹³² *Id.*

¹³³ *Id.* at 18.

¹³⁴ *Id.* at 4.

¹³⁵ *Id.* at 21.

¹³⁶ *Id.*

¹³⁷ *Id.* at 22.

¹³⁸ *Id.* at 5.

¹³⁹ *Id.*

prior plans to visit friends over a four-day weekend.¹⁴⁰ Eleven days after receiving the IO's report, the convening authority referred the case to a general court-martial.¹⁴¹ When Simmons was arraigned, the judge docketed the case for forty days later "because there was nothing else available on the docket."¹⁴² Ultimately, Simmons spent 134 days in PTC before being sentenced to 120 days of confinement, excluding an additional fifteen days of credit the accused received for illegal pre-trial punishment. He was also sentenced to a bad conduct discharge (BCD) and reduction to E-1.¹⁴³

The issue the court took up on appeal was whether the judge erred by failing to dismiss the charges due to an Article 10 violation.¹⁴⁴ Ultimately, the Army court found that the Government did not exhibit reasonable diligence in processing the case.¹⁴⁵ Consequently, the court dismissed the case with prejudice, the standard remedy for a violation of Article 10.¹⁴⁶

Simmons offers numerous lessons, both direct and indirect. First, inexperienced trial counsel (TC) should be closely monitored or assigned a second chair from the outset whenever an accused is placed in PTC. Lack of experience will not suffice as an excuse when the Government fails to move a case forward in a timely manner. Secondly, the Government should consult a subject matter expert whenever questions regarding the interpretation of a SOFA or some other international agreement or regulation, which may result in delay, arise, and the discussions should be memorialized on the record. Third, when operational realities occur, the Government should consider assigning another TC to move the case forward. If the "operational reality" is actually a training event, the Government should consider whether the training event has priority over an Article 32 hearing. Similarly, if a lengthy CID investigation is causing a delay, the Government should determine whether the information they are still pursuing is potentially case-changing or whether the case can go forward. This is especially true when there are no complex evidentiary issues, no physical evidence that requires time-consuming forensic evaluation, and no co-accused that would potentially necessitate grants of immunity, as was the case in *Simmons*.

The Government should also keep in mind that it may request the convening authority exclude certain periods of time from the Government's "clock" under the provisions of R.C.M. 707(c). Examples of excludable delay include preparation for complex cases, examining the mental capacity of the accused, processing a reserve component servicemember onto active duty, securing important witnesses or other evidence, and time to obtain security clearances or declassify documents.

Another obvious factor to consider is the identification of a "good" Article 32 officer before charges are preferred at the GCM level or as soon as a servicemember is placed in PTC. A "good" Article 32 officer is one who is not pending leave or TDY and is not otherwise so burdened with normal responsibilities that she can prioritize completion of the Article 32 process. If, despite one's best efforts in selecting a "good" Article 32 officer, the IO does not move forward in a timely manner and prodding from the TC is unable to achieve the desired results, the commander should direct the investigating officer to comply with the suspense as outlined in the appointment memorandum. If the commander must be involved, the TC should remind the commander not to discuss the merits of the case with the Article 32 officer in order to avoid even the appearance of unlawful command influence (UCI).

Simmons also highlights the need to have a plan for rapid action by the convening authority. Sometimes a specially scheduled appointment with the convening authority to address a pending case may be appropriate. Finally, the Government should keep in mind that when a servicemember is in PTC, the speedy trial clock does not stop at arraignment. While the judge assumes greater responsibility for the case following arraignment, the Government still has an obligation to move the case forward as expeditiously as possible. The Government's options include requesting other cases be moved to accommodate a case with potential Article 10 implications. Alternatively, the Government could request the assistance of another judge who is available earlier. Finally, the Government must establish a proper record for the appellate court so that its efforts are documented and available during appellate review.

Vindictive Prosecution

*Men are often a lot less vindictive than women are, because we are rejected constantly every day.*¹⁴⁷

Another trap Government counsel must be mindful to avoid is vindictive prosecution. However, as the following case demonstrates, the defense must overcome an extremely high burden to successfully challenge a case for vindictive

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 6.

¹⁴² *Id.*

¹⁴³ *Id.* at 1, 6.

¹⁴⁴ *Id.* at 2.

¹⁴⁵ *Id.* at 10.

¹⁴⁶ *Id.* at 2.

¹⁴⁷ Warren Farrell, *quoted in* Vindictive Quotes, <http://www.brainyquote.com/quotes/keywords/vindictive.html> (last visited Nov. 16, 2009).

prosecution. In *Unites States v. Martinez*, an Air Force captain assigned to Iraq went on pass to Qatar.¹⁴⁸ While in Qatar, he repeatedly attempted to engage a female corporal in conversation. After two days of trying, Capt. Martinez finally succeeded in talking to the corporal, at which time he promptly told her that he liked her and wanted to have sex with her. He further told her that he wanted to come to her room when she got off work. She responded that she may not be in her room and ended the conversation. The next morning, Martinez went to her room three times attempting to locate her. After the third time of knocking and not receiving an answer, he unlocked her door and entered the room. Finding her in bed, he took off his shoes and crawled into bed with her, where he began to fondle her. She said she needed to go to a meeting and left, promptly reporting the incident. Without authorization, Martinez then took a plane back to the United States and was arrested the following day as he disembarked in Baltimore, Maryland. Martinez was ultimately court-martialed for his misconduct.¹⁴⁹

On appeal, Martinez raised the issue of vindictive prosecution for the first time. Martinez alleged that he had “identified problems with operating procedures, equipment and standard of care,” which he claimed irritated the SJA, convening authority, the Article 32 IO, the judge, TC, DC, “and a myriad of others.”¹⁵⁰ The court explored whether he could raise the new issue on appeal and, if so, what facts he must show to support his claim. The court found that by failing to raise the issue at trial when he knew, or should have known, of the facts giving rise to the claim of vindictive prosecution, he had waived his right to make the claim on appeal.¹⁵¹

The court further found that even if Martinez had not waived the issue, he had nevertheless failed to offer any relevant evidence to meet *any* of the elements of the three-part test for vindictive prosecution.¹⁵² To support such a claim, he had to show that (1) “others similarly situated” were not charged; (2) “he has been singled out for prosecution”; and (3) “his ‘selection . . . for prosecution’ was ‘invidious or in bad faith, *i.e.*, based on such impermissible considerations such as race, religion, or the desire to prevent his exercise of constitutional rights.’”¹⁵³ Failure to show any of the three prongs of the test must result in the failure of a claim of vindictive prosecution. Because the burden to establish a claim of vindictive prosecution falls on the moving party, challenging a case on grounds of vindictive

prosecution can be difficult.¹⁵⁴

A Look Ahead

Pending Professional Responsibility Cases

*The best thing about the future is that it only comes one day at a time.*¹⁵⁵

While this is the state of the law now, it is only a matter of time before it changes. On 18 March 2010, the Navy-Marine court issued yet another opinion¹⁵⁶ in *United States v. Denedo*, a case it addressed back in 2000 when it examined the case as a matter of mandatory review from Denedo’s conviction and adjudged discharge in 1998.¹⁵⁷ The Navy-Marine court also considered the case in 2007, when Denedo submitted a *writ of coram nobis* to stave off deportation proceedings that were a direct result of his earlier conviction.¹⁵⁸ The recently decided, unpublished case at the Navy-Marine court level came about after having risen to CAAF and the U.S. Supreme Court.¹⁵⁹ Denedo agreed to plead guilty at a BCD-level court-martial after his attorney advised him that a plea that downgraded the level of the court-martial would avoid any immigration consequences.¹⁶⁰ While the Navy-Marine court did not find

¹⁵⁴ *Martinez*, WL 1508451, at *3.

¹⁵⁵ Abraham Lincoln, *quoted in* Expectation Quotes, <http://quotations.about.com/cs/inspirationquotes/a/Expectation1.htm> (last visited Dec. 8, 2009).

¹⁵⁶ *United States v. Denedo*, 2010 WL 996432 (N-M. Ct. Crim. App. 2010).

¹⁵⁷ 129 S. Ct. 2213 (2009). Denedo came to the United States in 1984 from Nigeria. He enlisted in the U.S. Navy and became a lawful permanent resident.

¹⁵⁸ The NMCCA agreed with Denedo that they had authority to review the case under such a writ; however, the court denied relief, and review was granted. *Denedo v. United States*, No. NMCCA 9900680 (N-M. Ct. Crim. App. 2007). The CAAF also agreed that review was appropriate in this case but remanded for further proceedings, believing relief was appropriate. 66 M.J. 114 (2008). The Government appealed Denedo’s ability to bring a writ, and certiorari was granted by the U.S. Supreme Court. The Supreme Court affirmed CAAF’s decision in a 5-4 decision, holding “only that the military appellate courts had jurisdiction to hear respondent’s request for a writ of *coram nobis*,” remanding it for further proceedings. 129 S. Ct. at 2224.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* In 1998, military authorities charged Denedo, an alien, with conspiracy, larceny, and forgery. With counsel’s assistance, Denedo agreed to plead guilty to reduced charges, as he was advised by counsel that this would avoid any immigration consequences. The special court-martial accepted the plea and convicted and sentenced respondent. The Navy-Marine Corps Court of Criminal Appeals (NMCCA) affirmed, and Denedo was discharged from the Navy in 2000. In 2006, the Department of Homeland Security commenced removal proceedings against the alien based on his conviction. To avoid deportation, the alien filed a petition for a writ of *coram nobis* in the NMCCA which asked the NMCCA to vacate his conviction because he received ineffective assistance of counsel when his counsel not only failed to warn him of the implications of his conviction regarding his continued residence in the United States, but actually told him that by pleading guilty, he avoided any immigration consequences.

¹⁴⁸ 2009 WL 1508451 (A.F. Ct. Crim. App. 2009).

¹⁴⁹ *Id.* at *1.

¹⁵⁰ *Id.* at *2.

¹⁵¹ *Id.*

¹⁵² *Id.* at *3.

¹⁵³ *United States v. Argo*, 46 M.J. 454, 463 (C.A.A.F. 1997) (quoting *United States v. Garwood*, 20 M.J. 148, 154 (C.M.A. 1985)).

IAC in their most recent holding,¹⁶¹ appellate counsel may yet again raise the issue to CAAF given the outcome of a similar Supreme Court case: *Padilla v. Kentucky*, less than two weeks later.¹⁶² Like *Denedo*, *Padilla* involved an attorney's inaccurate legal advice on a collateral matter: immigration.¹⁶³ Unlike *Denedo*, *Padilla* has "dramatic[ally] depart[ed] from precedent"¹⁶⁴ and granted a new entitlement under the Sixth Amendment that Justice Scalia in his dissent terms a "Padilla warning"¹⁶⁵ that now requires that where the law "is truly clear," as the court found in this case, "the duty to give correct advice is equally clear."¹⁶⁶

Padilla has the potential to affect nearly every case.¹⁶⁷ Most cases raise some collateral issue that, based on the outcome of the case, may require a DC to advise her client of ramifications that go beyond the potential sentence the judge may impose.¹⁶⁸ A felony conviction will affect one's

¹⁶¹ *Denedo*, 2010 WL 996432.

¹⁶² *Padilla v. Kentucky*, No. 08-651, 2010 WL 1222274 (U.S. Mar. 31, 2010). On 22 March 2010, the U.S. Supreme Court granted certiorari on another IAC case, *Belleque v. Moore*, where Moore's counsel failed to file a motion to suppress his unconstitutional confession and advised him to plead guilty. The lower court decision can be found at 574 F.3d 1092 (9th Cir. 2009).

¹⁶³ *Padilla*, No. 08-651, 2010 WL 1222274. *Padilla* is a U.S. permanent resident of forty years who served in the U.S. military during Vietnam. He was charged with felony drug trafficking, among other things. He asked his attorney if a guilty plea would impact his immigration status, and his attorney told him he "did not have to worry about immigration status since he has been in the country so long." 253 S.W.3d 482, 483 (Ky. 2008)

¹⁶⁴ *Padilla*, No. 08-651, 2010 WL 1222274, at *12. The concurring opinion notes that "[u]ntil today, the long standing and unanimous position of the federal courts was that reasonable defense counsel generally need only advise a client about the *direct* consequences of a criminal conviction." Justice Alito notes that "'virtually all jurisdictions'—including 'eleven federal circuits, more than thirty states, and the District of Columbia'—'hold that defense counsel need not discuss with their clients the collateral consequences of a conviction,' including deportation." *Id.* at *12.

¹⁶⁵ *Id.* at *20.

¹⁶⁶ *Id.* at *8. The court did provide that "when the law is not succinct and straightforward (as it is in many [cases])," a defense counsel need only provide a general advisement. *Id.* Determining when the law is "succinct and straightforward" now becomes a challenge unto itself, especially given Justice Alito's comments that "many criminal defense attorneys have little understanding of immigration law," *id.* at *12, and "'nothing is ever simple with immigration law' including the determination whether immigration law clearly makes a particular offense removable." *Id.* at *14.

¹⁶⁷ While the majority opine that "the unique nature of deportation," *id.* at *6, will not cause it to bleed over into other collateral matters, the dissent's perspective is quite different. Justice Scalia wrote, "[A]n obligation to advise about a conviction's collateral consequences has no logical stopping-point." *Id.* at *20. He further stated, "We could expect years of elaboration upon these new issues in the lower courts, prompted by the defense bar's devising of ever-expanding categories of plea-invading misadvice and failures to warn-not to mention innumerable evidentiary hearings to determine whether misadvice really occurred or whether the warning was really given." *Id.*

¹⁶⁸ The Court defined collateral matters as "those matters not within the sentencing authority of the state trial court." *Id.* at *6. The court then went on to say that "[d]eportation as a consequence of a criminal conviction is,

right to possess a firearm,¹⁶⁹ to vote, hold office, or serve on a jury.¹⁷⁰ The Court makes a point of stating that they "have never applied a distinction between direct and collateral consequences to define the scope of constitutionally 'reasonable professional assistance' required under *Strickland*," but then says they need not decide the question because of the "unique nature of deportation."¹⁷¹ Given the "severity of deportation—'the equivalent of banishment or exile,'"¹⁷² and the transformation in immigration law that has "made removal nearly an automatic result for a broad class of noncitizen offenders"¹⁷³ that eliminated the discretion of judges to intervene in cases,¹⁷⁴ the Court has now adopted the position that, "as a matter of federal law, deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes."¹⁷⁵ Even if lower courts do not extend their rulings to include a requirement to advise clients of these civil rights implications beyond immigration and mandate advisement only for immigration issues, such a mandate would still be a significant change, since there are nearly 3000 non-U.S. citizens in the Army alone.¹⁷⁶ There are also nearly 9000 individuals in the U.S. Army whose citizenship status is unknown.¹⁷⁷ These numbers also do not account for U.S. Army Reservists and National Guardsmen, who fall under the jurisdiction of the UCMJ when activated.¹⁷⁸ Although DC may only see one case involving immigration as a quasi-collateral issue during their time assigned to the Trial Defense Service, this lack of regularity is exactly what may set counsel up for failure and the inevitable IAC complaint,

because of its close connection to the criminal process, uniquely difficult to classify as either a direct or a collateral consequence." *Id.*

¹⁶⁹ 18 U.S.C. § 922(g)(1) (2006).

¹⁷⁰ *United States v. Stockett*, 157 Fed. Appx. 920, 923 (2005). In his concurrence in *Padilla*, Justice Alito compiles a thorough list of secondary effects or collateral matters to illustrate his point to include even damaging one's reputation to make employment prospects difficult. *Id.* at *12

¹⁷¹ *Padilla*, No. 08-651, WL 1222274, at *6. The Court also did not decide if there was prejudice in this case, the required second prong of a *Strickland* analysis, and thus whether *Padilla* was entitled to relief since the lower court had not ruled on the issue. *Id.* at *11. It is possible that despite counsel's inaccurate advice, there was no prejudice because, even if *Padilla* had been properly advised by competent counsel, knew "his conviction for drug distribution made him subject to automatic deportation," and had opted to contest the charges, the Court would have found "no reasonable probability" of acquittal based on the overwhelming evidence, using a *Spisak* analysis. See note 32 and accompanying text.

¹⁷² *Padilla*, No. 08-651, WL 1222274, at *11.

¹⁷³ *Id.* at *6.

¹⁷⁴ *Id.* *4.

¹⁷⁵ *Id.* at *5.

¹⁷⁶ As of 30 September 2009, according to George Wright, a U.S. Army spokesman at the Pentagon.

¹⁷⁷ *Id.*

¹⁷⁸ MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 202, 204 (2008).

especially given that, as Justice Alito's opinion points out, immigration law is "ambiguous" and "may be confusing to practitioners not versed in the intricacies of immigration law."¹⁷⁹ Every new requirement represents just one more thing to forget and one more opportunity opportunity to commit IAC.

associated with—the big problems in the area of IAC, counsel are particularly vulnerable to nuanced changes. Hopefully, this article will alert the military justice practitioner to the dangers that lurk among the facts of their cases, allowing counsel to avoid not only a tongue lashing from the judge, but also IAC complaints for the DC or dismissal or reversal on appeal for the trial counsel.

Conclusion

*If one thinks, one must reach conclusions.*¹⁸⁰

When things, the law or otherwise, change incrementally, change is at its most difficult to spot. While it is easy to avoid—or at least identify the potential risks

¹⁷⁹ *Id.* at *14.

¹⁸⁰ Helen Keller, *quoted in* In Quotations: Quotations About Conclusions, <http://quotations.about.com/sitesearch.htm?terms=quotations+about+conclusions&pg=1&SUName=quotations&ac=&cs=&TopNode=99> (last visited Dec. 8, 2009).

A View from the Bench

Findings, Sentencing, and the “Good Soldier”¹

Colonel Mike Hargis
Chief Circuit Judge, 4th Judicial Circuit
Fort Bliss, Texas

Introduction

You are a defense counsel (DC) assigned to Fort Swampy. The senior defense counsel just gave you a case in which an E-7 platoon sergeant has been charged with wrongfully using marijuana. You have talked with the platoon sergeant and have done some basic pretrial investigation. From what you can determine, your client has no disciplinary record prior to the marijuana use, except an Article 15 for shoplifting a candy bar from the post exchange during basic training some fifteen years ago. Everyone in the unit loves him. Your client even has a Soldier’s Medal for helping motorists trapped in a collapsed freeway during the San Francisco earthquake; a letter of commendation from the local mayor for spending an entire weekend filling sandbags for local residents when the river flooded last year; received the maximum score on his APFT; and qualified “expert” on his weapon at every range for the last eight years. He also has top blocks and glowing language on every single evaluation report ever given to him. A range of witnesses—from private to lieutenant colonel—say they would be proud to serve with him again, even if convicted as charged.

You read Rule for Courts-Martial (RCM) 1001(c)(1)(B),² remember the language about “particular acts” and can’t wait to blast the Government with all the specifics at sentencing (if you even get that far).³ However, you also recall being told at the Criminal Law Advocacy Course that it is a good idea to start presenting your sentencing evidence during the findings portion of the case. On the other hand, you also remember that different rules govern the admissibility of evidence at different stages of the trial. This note explores the rules you should consider before deciding whether and when to offer this information.

¹ For a good in-depth discussion of this subject, see Randall D. Katz & Lawrence D. Sloan, *In Defense of the Good Soldier Defense*, 170 MIL.L. REV. 117 (Dec. 2001).

² MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1001(c)(1)(B) (2008) [hereinafter MCM].

³ For a good overall discussion of a good soldier defense, see *United States v. Brewer*, 43 M.J. 43 (1995).

Findings

When you ask your client how he could test positive for marijuana, he shrugs and says “Sir, I have no earthly idea.” You’ve looked at the chain of custody: nothing. You’ve talked to the lab folks: nothing. What’s left? How about the “Good Soldier” defense.⁴

Generally, evidence of a person’s character is not admissible to show that the person acted in conformity with that character on a particular occasion.⁵ However, an accused can offer evidence of a character trait that is “pertinent” to the charged offense to show that the accused did act in conformance with that character trait.⁶

What is a “pertinent” character trait? It is generally a character trait that is relevant to the charged offense.⁷ For example, truthfulness might be a pertinent character trait for a charge of false swearing, but not for a charge of assault consummated by a battery. As a DC, how should you offer a “Good Soldier” defense on the merits? Under Military Rule of Evidence (MRE) 405(a), you can prove it by opinion or reputation evidence only, not by specific acts of conduct (except in very limited circumstances under MRE 405(b)). Remember that the witnesses must have a sufficient foundation to testify about their opinion of the accused’s character or his reputation for that character in the community. (See *United States v. Breeding*⁸ for a good discussion of those foundational requirements.)

⁵ MCM, *supra* note 2, MIL. R. EVID. 404(a).

⁶ *Id.* MIL. R. EVID. 404(a)(1). The power of character evidence cannot be underestimated. The Supreme Court long has recognized that, in some circumstances, character evidence alone “may be enough to raise a reasonable doubt of guilt,” as “the jury may infer that” an accused with such a good character “would not be likely to commit the offense charged.” *United States v. Gagan*, 43 M.J. 200 (1995) (citations omitted). See also U.S. DEP’T OF ARMY, PAM. 27-9, MILITARY JUDGES’ BENCHBOOK para. 7-8-1 (10 Jan. 2010).

⁷ According to Professors Saltzburg, Schinasi, and Schlueter, the term “pertinent” is roughly equivalent to the legal term “relevant.” STEPHEN A. SALTZBURG ET AL., MILITARY RULES OF EVIDENCE MANUAL 4-82, 4-83 (6th ed. 2006). Those scholars have said that “good military character” can be a pertinent character trait to “virtually any offense a service member is charged with.” *Id.* at 4-82 n.14; see generally *United States v. Wilson*, 28 M.J. 48 (C.M.A. 1989). Specifically, the Court of Military Appeals (CMA) has held it pertinent to a drug charge under Article 112(a). *United States v. Belz*, 20 M.J. 33 (C.M.A. 1985).

⁸ 44 M.J. 345 (1996).

If you decide to present a “Good Soldier” defense, be familiar with the Government’s ability to respond to it. The defense holds the key to the character door; if you don’t open it, the Government cannot attack your client’s character. The Government’s ability to attack your client’s character is also limited by how far you open the door. Under MRE 405(a), the Government can cross-examine a witness on *relevant* specific instances of conduct. The narrower the character trait offered by you under MRE 404(a)(1), the narrower the range of specific instances of conduct that will be relevant to challenge the basis of that opinion.⁹ However, “good military character” is about as broad a character trait as possible. By offering this type evidence, you probably kick the character door off its hinges and allow the Government a nearly unfettered opportunity to cross-examine the witness.

To recap, you as the DC can offer a pertinent character trait in the accused’s defense at trial. The character trait must be relevant to the charged offense, but, even then, you can only use opinion or reputation evidence on direct examination to prove it, not specific acts (except in very limited circumstances). When you do offer this evidence, the Government can cross-examine the witnesses about relevant specific instances of misconduct; the wider the character trait offered, the wider the range of allowable specific acts on cross-examination.

In this case, you know the only misconduct your client has committed is shoplifting, so you are comfortable offering the “Good Soldier” defense. You’d love to tell the members the reason your client received the Soldier’s Medal and about the other specific acts of laudable conduct, but you know you can’t do that now. You call a raft of witnesses to give their opinions about his good military character and their knowledge about his reputation in the unit for the same, but not their “opinions about his reputation.” Disappointed and thinking he’ll look foolish for asking “Did you know the accused shoplifted a candy bar 15 years ago?” when all the witnesses already know about it, the trial counsel (TC) decides not to ask about the specific instance on cross-examination, although he could have.¹⁰

However, the TC does say, “Mr. Witness, you just testified that the accused has good military character, in essence is a good Soldier. Would a good Soldier use

marijuana?” Immediately, you object, and the military judge (MJ) responds, “Basis?” You explain that the Government is prohibited from asking guilt-assuming questions on findings; whether the accused used marijuana is, after all, the question at issue on findings. Based on *United States v. Brewer*, the MJ should sustain your objection.¹¹

Sentencing—Government

Despite your best efforts, your client is convicted as charged. You now move to the sentencing phase of the court-martial, where the rules are a bit different.

The Government proceeds first. They must fit all their evidence into five “pigeon-holes”: RCM 1001(b)(1) through (5). If the evidence does not fit into one of these “pigeon-holes,” it is inadmissible.¹² Let’s review the two most frequently cited rules: RCM 1001(b)(4) and 1001(b)(5).

The Government is allowed to offer aggravation evidence under RCM 1001(b)(4) when that evidence “directly relate[s] to or result[s] from the offense[] of which the accused has been found guilty.”¹³ If such evidence exists, the Government could offer evidence as to the impact on the unit of the accused’s drug use—maybe he was hospitalized for the use and the unit was without a platoon sergeant for a day or two—or the cost to the Army of the hospitalization.

Now the TC decides he wants to offer the shoplifting charge under RCM 1001(b)(4). Does it come in? The answer is no. Although the TC could have asked the “have you heard?” question about it on findings given the “Good Soldier” defense, it is *not* admissible as aggravation evidence; the TC will not be able to show that the shoplifting was a direct result of, or relates to, the drug use of which your client was convicted.¹⁴

The TC may also offer evidence of rehabilitative potential through opinion testimony of witnesses.¹⁵ Because the opinion of rehabilitative potential involves the accused’s ability to become a productive member of society—not just whether he should stay in the Army¹⁶—the witness must

⁹ Typically, the Government will ask the defense character witness if he or she “has heard” or “is aware” of “salient facts or events that logically bear upon the character trait in issue.” *United States v. Brewer*, 43 M.J. 43, 46 (1995). Restating the language from MRE 405(a), the Air Force Court of Criminal Appeals characterized those cross-examination questions as limited to “relevant facts bearing on the trait at issue.” *United States v. Pruitt*, 43 M.J. 864 (A.F. Ct. Crim. App. 1996), *aff’d* 46 M.J. 148 (1997).

¹⁰ Keep in mind here that the Government can ask about the shoplifting—the underlying misconduct—not the Article 15 itself, which was the Government’s response to the misconduct. *United States v. Robertson*, 39 M.J. 211 (C.M.A. 1994). The TC is stuck with the answer—no extrinsic evidence of that specific act is allowed. *Id.*

¹¹ 43 M.J. 43 (1995).

¹² The Government’s evidence must also be in the proper form—for example, non-hearsay—and it must pass MRE 403 muster. While the Defense can ask for the MRE to be relaxed for them (RCM 1001(c)(3)), they are not initially relaxed for the Government.

¹³ MCM, *supra* note 2, R.C.M. 1001(b)(4).

¹⁴ On the other hand, the TC could offer the Article 15 under RCM 1001(b)(2). Here, the Article 15 comes in as evidence of the underlying misconduct and the accused’s character of prior service—in contrast to the Article 15’s inadmissibility on findings.

¹⁵ MCM, *supra* note 2, R.C.M. 1001(b)(5).

¹⁶ However, the Defense does not suffer from such a limitation on sentencing.

have sufficient knowledge of the accused to render such an opinion. It is up to the TC to lay the foundation for the opinion. The TC must establish that the witness knows the accused more thoroughly than as just a face in formation. Absent a sufficient foundation, the opinion testimony is inadmissible.

To avoid definitional problems, counsel should develop a habit of offering this evidence in one of two ways. Once sufficient foundation for the opinion has been laid, counsel could ask the witness, “Do you recall reading the definition of rehabilitative potential in the *Manual for Courts-Martial (MCM)*? Applying that definition to all you know about the accused, what is your opinion of the accused’s rehabilitative potential?”¹⁷ Alternatively,¹⁸ the TC could read the definition from the *MCM* to the witness and then ask the witness to apply the definition in rendering an opinion. Following either of these methods can help avoid the potential that a witness may give an opinion that is a euphemism for discharge.

In summary, the Government must be prepared to identify into which of the five “pigeon-holes” of RCM 1001(b) proffered evidence falls. Evidence offered under RCM 1001(b)(4) must directly relate to, or result from, the offense of which the accused was convicted. A sufficient foundation must be laid for opinion evidence offered under RCM 1001(b)(5), and the evidence must relate to the accused’s rehabilitation potential as a member of society, not just as a member of the Army.

Sentencing—Defense

As previously noted, the defense can request a relaxation of the MREs when presenting its sentencing case. Such a request carries certain risks, and, as with the presentation of character evidence during findings, the defense holds the key to relaxing the rules. If the military judge grants the defense request to relax the rules during the defense case, the military judge may relax the rules during rebuttal to the same degree.¹⁹ While the Government may not be able to offer some hearsay evidence in their case in chief on the merits, the Government may offer, and the MJ may accept, the same evidence in rebuttal once the evidentiary rules have been relaxed.

¹⁷ While this is an acceptable method—as it reduces the likelihood that the Government witness will give an impermissible opinion on whether the accused should stay in the Army—it is not the preferred method. This is because while counsel and the witness may now be on the “same sheet of music,” the members are not.

¹⁸ This is the preferred method, because the members now hear the definition too and all trial participants are on the same “sheet of music.”

¹⁹ *MCM*, *supra* note 2, R.C.M. 1001(d).

Evidence offered by the defense must also fit into the RCM 1001(b) “pigeon-holes,” although the “pigeon-holes” for defense evidence are much larger than those for Government-offered evidence. Defense evidence must be offered in rebuttal to Government evidence,²⁰ or must be presented in extenuation²¹ or in mitigation.²² Let’s focus on the latter.

While the DC in the opening scenario was prevented from telling the members what a great person the accused is during findings, he can and should offer evidence of the accused’s personal story during the sentencing case. Rule for Court-Martial 1001(c)(1)(B) does not limit the defense to opinion or reputation evidence, but allows the defense to admit “*particular acts of good conduct or bravery and evidence of the reputation or record of the accused . . . for . . . any other trait that is desirable in a service member.*”²³ This language is sufficiently broad to allow admission of nearly all praise worthy information about specific acts of the accused’s conduct. In this case, the Soldier’s Medal citation, the letter of commendation from the mayor, the APFT score, the weapons qualification scores, and the accused’s noncommissioned officer evaluation reports are all admissible and are commonly submitted in the form of a “Good Soldier” book.

Finally, although RCM 1001(b)(5) precludes the Government from offering euphemistic testimony about the accused’s potential for further productive service in the Army, the rule does not preclude the defense from directly offering such opinions. Clarifying prior, contradictory opinions, the Court of Appeals for the Armed Forces has held that RCM 1001(b)(5) is a limitation on Government evidence only;²⁴ the defense can offer the opinion testimony of witnesses who testify they would serve with the accused again.²⁵ Again, offering such evidence presents certain risk. Opening the door to opinion testimony may allow the Government to call witnesses on rebuttal to show the opinions of defense witnesses are “not a consensus view of the command.”²⁶

²⁰ *Id.* R.C.M. 1001(c).

²¹ *Id.* R.C.M. 1001(c)(1)(A).

²² *Id.* R.C.M. 1001(c)(1)(B).

²³ *Id.* R.C.M. 1001(c)(1)(B).

²⁴ *United States v. Griggs*, 61 M.J. 402 (C.A.A.F. 2005).

²⁵ As the Court of Appeals for the Armed Forces noted, even the Defense cannot offer explicit opinion testimony that the accused should not receive a punitive discharge, although there is a “thin line” between that and what the defense can do.

²⁶ *Id.* at 410 (citing *United States v. Aurich*, 31 M.J. 95, 96–97 (C.M.A. 1990)).

Conclusion

When planning your case strategy, understand and incorporate the MREs and the RCMs that apply to each phase of the trial. Knowing what you can and cannot do—and more importantly what your opponent can and cannot do in response—will go far in making your case presentation much more valuable and effective.

CLE News

1. Resident Course Quotas

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

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

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

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

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

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

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

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

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

ATRRS. No.	Course Title	Dates
GENERAL		
5-27-C22	58th Judge Advocate Officer Graduate Course	10 Aug 09 – 20 May 10
5-27-C22	59th Judge Advocate Officer Graduate Course	16 Aug 10 – 26 May 11
5-27-C20	181st JAOBC/BOLC III (Ph 2)	19 Feb – 5 May 10
5-27-C20	182d JAOBC/BOLC III (Ph 2)	16 Jul – 29 Sep 10
5F-F1	212th Senior Officer Legal Orientation Course	14 – 18 Jun 10
5F-F1	213th Senior Officer Legal Orientation Course	30 Aug – 3 Sep 10
5F-F52S	13th SJA Team Leadership Course	7 – 9 Jun 10
5F-F52	40th Staff Judge Advocate Course	7 – 11 Jun 10
JARC-181	Judge Advocate Recruiting Conference	21 – 23 Jul 10
5F-F70	Methods of Instruction	22 – 23 Jul 10

NCO ACADEMY COURSES		
512-27D30	4th Advanced Leaders Course (Ph 2)	8 Mar – 13 Apr 10
512-27D30	5th Advanced Leaders Course (Ph 2)	21 May – 29 Jun 10
512-27D30	6th Advanced Leaders Course (Ph 2)	26 Jul – 31 Aug 10
512-27D40	2d Senior Leaders Course (Ph 2)	8 Mar – 13 Apr 10
512-27D40	3d Senior Leaders Course (Ph 2)	21 May – 29 Jun 10
512-27D40	4th Senior Leaders Course (Ph 2)	26 Jul – 31 Aug 10
WARRANT OFFICER COURSES		
7A-270A0	17th JA Warrant Officer Basic Course	24 May – 18 Jun 10
7A-270A1	21st Legal Administrators Course	14 – 18 Jun 10
7A-270A2	11th JA Warrant Officer Advanced Course	6 – 30 Jul 10
ENLISTED COURSES		
512-27D-BCT	12th BCT NCOIC Course	10 – 14 May 10
5F-F57	2010 BJA Symposium	10 – 14 May 10
512-27DC5	32d Court Reporter Course	19 Apr – 18 Jun 10
512-27DC5	33d Court Reporter Course	26 Jul – 24 Sep 10
512-27DC6	10th Senior Court Reporter Course	12 – 16 Jul 10
512-27DC7	13th Redictation Course	29 Mar – 2 Apr 10
ADMINISTRATIVE AND CIVIL LAW		
5F-F24	34th Administrative Law for Military Installations and Operations	15 – 19 Mar 10
5F-F202	8th Ethics Counselors Course	12 – 16 Apr 10
5F-F29	28th Federal Litigation Course	2 – 6 Aug 10
5F-F22	63d Law of Federal Employment Course	23 – 27 Aug 10
5F-F24E	2010 USAREUR Administrative Law CLE	13 – 17 Sep 10
CONTRACT AND FISCAL LAW		
5F-F10	163d Contract Attorneys Course	19 – 30 July 10
5F-F101	9th Procurement Fraud Advisors Course	10 – 14 May 10

CRIMINAL LAW		
5F-F33	53d Military Judge Course	19 Apr – 7 May 10
5F-F301	13th Advanced Advocacy Training Course	1 – 4 Jun 10
5F-F31	16th Military Justice Managers Course	23 – 27 Aug 10
5F-F34	34th Criminal Law Advocacy Course	13 – 24 Sep 10
INTERNATIONAL AND OPERATIONAL LAW		
5F-F47	54th Operational Law of War Course	26 Jul – 6 Aug 10
5F-F41	6th Intelligence Law Course	9 – 13 Aug 10
5F-F48	3d Rule of Law	16 – 20 Aug 10
5F-F47E	2010 USAREUR Operational Law CLE	20 – 24 Sep 10

3. Naval Justice School and FY 2009–2010 Course Schedule

For information on the following courses, please contact Jerry Gallant, Registrar, Naval Justice School, 360 Elliot Street, Newport, RI 02841 at (401) 841-3807, extension 131.

Naval Justice School Newport, RI		
CDP	Course Title	Dates
0257	Lawyer Course (020) Lawyer Course (030)	25 Jan – 2 Apr 10 2 Aug – 9 Oct 10
0258	Senior Officer (030) Senior Officer (040) Senior Officer (050) Senior Officer (060) Senior Officer (070)	12 – 16 Apr 10 (Newport) 24 – 28 May 10 (Newport) 12 – 16 Jul 10 (Newport) 23 – 27 Aug 10 (Newport) 27 Sep – 1 Oct 10 (Newport)
2622	Senior Officer (Fleet) (020) Senior Officer (Fleet) (030) Senior Officer (Fleet) (040) Senior Officer (Fleet) (050)	14 – 18 Dec 10 (Hawaii) 10 – 14 May 10 (Naples, Italy) 19 – 23 Jul 10 (Quantico, VA) 26 – 30 Jul 10 (Camp Lejeune, NC)
03RF	Legalman Accession Course (020) Legalman Accession Course (030)	15 Jan – 2 Apr 10 10 May 23 Jul 10
049N	Reserve Legalman Course (010) (Ph I)	29 Mar – 9 Apr 10
056L	Reserve Legalman Course (010) (Ph II)	12 – 23 Apr 10
03TP	Trial Refresher Enhancement Training (020)	2 – 6 Aug 10
4040	Paralegal Research & Writing (020)	19 – 30 Apr 10 (Norfolk)

4046	Mid Level Legalman Course (020)	14 – 25 Jun 10 (Norfolk)
4048	Legal Assistance Course (010)	19 – 23 Apr 10
3938	Computer Crimes (010)	21 – 25 Jun 10
525N	Prosecuting Complex Cases (010)	19 – 23 Jul 10
627S	Senior Enlisted Leadership Course (Fleet) (090) Senior Enlisted Leadership Course (Fleet) (100) Senior Enlisted Leadership Course (Fleet) (110) Senior Enlisted Leadership Course (Fleet) (120) Senior Enlisted Leadership Course (Fleet) (130) Senior Enlisted Leadership Course (Fleet) (140) Senior Enlisted Leadership Course (Fleet) (150) Senior Enlisted Leadership Course (Fleet) (160) Senior Enlisted Leadership Course (Fleet) (170)	19 – 23 Apr 10 (Bremerton) 10 – 14 May 10 (Naples) 1 – 3 Jun 10 (San Diego) 2 – 4 Jun 09 (Norfolk) 29 Jun – 1 Jul 10 (San Diego) 9 – 13 Aug 10 (Great Lakes) 13 – 17 Sep 10 (Pendleton) 13 – 17 Sep 10 (Hawaii) 22 – 24 Sep 10 (Norfolk)
7485	Classified Info Litigation Course (010)	3 – 7 May 10
748A	Law of Naval Operations (010)	13 – 17 Sep 10
748B	Naval Legal Service Command Senior Officer Leadership (010)	26 Jul – 6 Aug 10
786R	Advanced SJA/Ethics (010)	26 – 30 Jul 10
7878	Legal Assistance Paralegal Course (010)	30 Aug – 3 Sep 10
846L	Senior Legalman Leadership Course (010)	26 – 30 Jul 10
846M	Reserve Legalman Course (010) (Ph III)	26 Apr – 7 May 10
850T	Staff Judge Advocate Course (010) Staff Judge Advocate Course (020)	19 – 30 Apr 10 (Norfolk) 5 – 16 Jul 10 (San Diego)
850V	Law of Military Operations (010)	7 – 18 Jun 10
900B	Reserve Lawyer Course (010) Reserve Lawyer Course (020)	14 – 18 Jun 10 20 – 24 Sep 10
932V	Coast Guard Legal Technician Course (010)	2 – 13 Aug 10
961A (PACOM)	Continuing Legal Education (020) Continuing Legal Education (030)	25 – 26 Jan 10 (Yokosuka) 10 – 11 May 10 (Naples)
961J	Defending Complex Cases (010)	12 – 16 Jul 10
961M	Effective Courtroom Communications (020)	12 – 16 Apr 10 (San Diego)
NA	Iraq Pre-Deployment Training (030) Iraq Pre-Deployment Training (040)	6 – 9 Apr 10 6 – 9 Jul 10

Naval Justice School Detachment Norfolk, VA		
0376	Legal Officer Course (050) Legal Officer Course (060) Legal Officer Course (070) Legal Officer Course (080) Legal Officer Course (090)	29 Mar – 16 Apr 10 3 – 21 May 10 14 Jun – 2 Jul 10 12 – 30 Jul 10 16 Aug – 3 Sep 10
0379	Legal Clerk Course (050) Legal Clerk Course (060) Legal Clerk Course (070)	5 – 16 Apr 10 19 – 30 Jul 10 23 Aug – 3 Sep 10
3760	Senior Officer Course (050) Senior Officer Course (060) Senior Officer Course (070)	24 – 28 May 10 9 – 13 Aug 10 13 – 17 Sep 10
Naval Justice School Detachment San Diego, CA		
947H	Legal Officer Course (050) Legal Officer Course (060) Legal Officer Course (070) Legal Officer Course (080)	3 – 21 May 10 7 – 25 Jun 10 19 Jul – 6 Aug 10 16 Aug – 3 Sep 10
947J	Legal Clerk Course (040) Legal Clerk Course (050) Legal Clerk Course (060) Legal Clerk Course (070) Legal Clerk Course (080)	29 Mar – 9 Apr 10 3 – 14 May 10 7 – 18 Jun 10 26 Jul – 6 Aug 10 16 – 27 Aug 10
3759	Senior Officer Course (050) Senior Officer Course (060) Senior Officer Course (070) Senior Officer Course (080) Senior Officer Course (090)	29 Mar – 2 Apr 10 (San Diego) 19 – 23 Apr 10 (Bremerton) 26 – 30 Apr 10 (San Diego) 24 – 28 May 10 (San Diego) 13 – 17 Sep 10 (Pendleton)

4. Air Force Judge Advocate General School Fiscal Year 2010 Course Schedule

For information about attending the following courses, please contact Jim Whitaker, Air Force Judge Advocate General School, 150 Chennault Circle, Maxwell AFB, AL 36112-5712, commercial telephone (334) 953-2802, DSN 493-2802, fax (334) 953-4445.

Air Force Judge Advocate General School, Maxwell AFB, AL	
Course Title	Dates
Judge Advocate Staff Officer Course, Class 10-B	16 Feb – 16 Apr 10
Paralegal Craftsman Course, Class 10-02	16 Feb – 24 Mar 10
Paralegal Apprentice Course, Class 10-03	2 Mar – 14 Apr 10
Area Defense Counsel Orientation Course, Class 10-B	29 Mar – 2 Apr 10
Defense Paralegal Orientation Course, Class 10-B	29 Mar – 2 Apr 10

Military Justice Administration Course, Class 10-A	26 – 30 Apr 10
Advanced Labor & Employment Law Course, Class 10-A (off-site, Rosslyn, VA)	27 – 29 Apr 10
Paralegal Apprentice Course, Class 10-04	27 Apr – 10 Jun 10
Reserve Forces Judge Advocate Course, Class 10-B	1 – 2 May 10
Advanced Trial Advocacy Course, Class 10-A	3 – 7 May 10
Environmental Law Update Course (DL), Class 10-A	4 – 6 May 10
Operations Law Course, Class 10-A	10 – 20 May 10
Negotiation & Appropriate Dispute Resolution, Class 10-A	17 – 21 May 10
Reserve Forces Paralegal Course, Class 10-A	7 – 11 Jun 10
Staff Judge Advocate Course, Class 10-A	14 – 25 Jun 10
Law Office Management Course, Class 10-A	14 – 25 Jun 10
Paralegal Apprentice Course, Class 10-05	22 Jun – 5 Aug 10
Judge Advocate Staff Officer Course, Class 10-C	12 Jul – 10 Sep 10
Paralegal Craftsman Course, Class 10-03	12 Jul – 17 Aug 10
Paralegal Apprentice Course, Class 10-06	10 Aug – 23 Sep 10
Environmental Law Course, Class 10-A	23 – 27 Aug 10
Trial & Defense Advocacy Course, Class 10-B	13 – 24 Sep 10
Accident Investigation Course, Class 10-A	20 – 24 Sep 10

5. Civilian-Sponsored CLE Courses

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

AAJE: American Academy of Judicial Education
P.O. Box 728
University, MS 38677-0728
(662) 915-1225

ABA: American Bar Association
750 North Lake Shore Drive
Chicago, IL 60611
(312) 988-6200

AGACL: Association of Government Attorneys in Capital Litigation
Arizona Attorney General's Office
ATTN: Jan Dyer
1275 West Washington
Phoenix, AZ 85007
(602) 542-8552

ALIABA: American Law Institute-American Bar Association
Committee on Continuing Professional Education
4025 Chestnut Street
Philadelphia, PA 19104-3099
(800) CLE-NEWS or (215) 243-1600

APRI: American Prosecutors Research Institute
99 Canal Center Plaza, Suite 510
Alexandria, VA 22313
(703) 549-9222

ASLM: American Society of Law and Medicine
Boston University School of Law
765 Commonwealth Avenue
Boston, MA 02215
(617) 262-4990

CCEB: Continuing Education of the Bar
University of California Extension
2300 Shattuck Avenue
Berkeley, CA 94704
(510) 642-3973

CLA: Computer Law Association, Inc.
3028 Javier Road, Suite 500E
Fairfax, VA 22031
(703) 560-7747

CLESN: CLE Satellite Network
920 Spring Street
Springfield, IL 62704
(217) 525-0744
(800) 521-8662

ESI: Educational Services Institute
5201 Leesburg Pike, Suite 600
Falls Church, VA 22041-3202
(703) 379-2900

FBA: Federal Bar Association
1815 H Street, NW, Suite 408
Washington, DC 20006-3697
(202) 638-0252

FB: Florida Bar
650 Apalachee Parkway
Tallahassee, FL 32399-2300
(850) 561-5600

GICLE: The Institute of Continuing Legal Education
P.O. Box 1885
Athens, GA 30603
(706) 369-5664

GII: Government Institutes, Inc.
966 Hungerford Drive, Suite 24
Rockville, MD 20850
(301) 251-9250

GWU: Government Contracts Program
The George Washington University
National Law Center
2020 K Street, NW, Room 2107
Washington, DC 20052
(202) 994-5272

IICLE: Illinois Institute for CLE
2395 W. Jefferson Street
Springfield, IL 62702
(217) 787-2080

LRP: LRP Publications
1555 King Street, Suite 200
Alexandria, VA 22314
(703) 684-0510
(800) 727-1227

LSU: Louisiana State University
Center on Continuing Professional Development
Paul M. Herbert Law Center
Baton Rouge, LA 70803-1000
(504) 388-5837

MLI: Medi-Legal Institute
15301 Ventura Boulevard, Suite 300
Sherman Oaks, CA 91403
(800) 443-0100

NCDA: National College of District Attorneys
University of South Carolina
1600 Hampton Street, Suite 414
Columbia, SC 29208
(803) 705-5095

NDAA: National District Attorneys Association
National Advocacy Center
1620 Pendleton Street
Columbia, SC 29201
(703) 549-9222

NITA: National Institute for Trial Advocacy
1507 Energy Park Drive
St. Paul, MN 55108
(612) 644-0323 (in MN and AK)
(800) 225-6482

NJC: National Judicial College
Judicial College Building
University of Nevada
Reno, NV 89557

NMTLA: New Mexico Trial Lawyers' Association
P.O. Box 301
Albuquerque, NM 87103
(505) 243-6003

PBI: Pennsylvania Bar Institute
104 South Street
P.O. Box 1027
Harrisburg, PA 17108-1027
(717) 233-5774
(800) 932-4637

PLI: Practicing Law Institute
810 Seventh Avenue
New York, NY 10019
(212) 765-5700

TBA: Tennessee Bar Association
3622 West End Avenue
Nashville, TN 37205
(615) 383-7421

TLS: Tulane Law School
Tulane University CLE
8200 Hampson Avenue, Suite 300
New Orleans, LA 70118
(504) 865-5900

UMLC: University of Miami Law Center
P.O. Box 248087
Coral Gables, FL 33124
(305) 284-4762

UT: The University of Texas School of Law
Office of Continuing Legal Education
727 East 26th Street
Austin, TX 78705-9968

VCLE: University of Virginia School of Law
Trial Advocacy Institute
P.O. Box 4468
Charlottesville, VA 22905

6. Information Regarding the Judge Advocate Officer Advanced Course (JAOAC)

a. The JAOAC is mandatory for an RC company grade JA's career progression and promotion eligibility. It is a blended course divided into two phases. Phase I is an online nonresident course administered by the Distributed Learning Division (DLD) of the Training Developments Directorate (TDD), at TJAGLCS. Phase II is a two-week resident course at TJAGLCS each January.

b. Phase I (nonresident online): Phase I is limited to USAR and Army NG JAs who have successfully completed the Judge Advocate Officer's Basic Course (JAIBC) and the Judge Advocate Tactical Staff Officer Course (JATSOC) prior to enrollment in Phase I. Prior to enrollment in Phase I, a student must have obtained at least the rank of CPT and must have completed two years of service since completion of JAIBC, unless, at the time of their accession into the JAGC they were transferred into the JAGC from prior commissioned service. Other cases are reviewed on a case-by-case basis. Phase I is a prerequisite for Phase II. For further information regarding enrolling in Phase I, please contact the Judge Advocate General's University Helpdesk accessible at <https://jag.learn.army.mil>.

c. Phase II (resident): Phase II is offered each January at TJAGLCS. Students must have submitted all Phase I subcourses for grading, to include all writing exercises, by 1 November in order to be eligible to attend the two-week resident Phase II in January of the following year.

d. Regarding the January 2010 Phase II resident JAOAC, students who fail to submit all Phase I non-resident subcourses by 2400 1 November 2009 will not be allowed to attend the resident course.

e. If you have additional questions regarding JAOAC, contact LTC Jeff Sexton, commercial telephone (434) 971-3357, or e-mail jeffrey.sexton@us.army.mil.

7. Mandatory Continuing Legal Education

Judge Advocates must remain in good standing with the state attorney licensing authority (i.e., bar or court) in at least one state in order to remain certified to perform the duties of an Army Judge Advocate. This individual responsibility may include requirements the licensing state has regarding continuing legal education (CLE).

To assist attorneys in understanding and meeting individual state requirements regarding CLE, the Continuing Legal Education Regulators Association (formerly the Organization of Regulatory Administrators) provides an exceptional website at www.clereg.org (formerly www.cleusa.org) that links to all state rules, regulations and requirements for Mandatory Continuing Legal Education.

The Judge Advocate General's Legal Center and School (TJAGLCS) seeks approval of all courses taught in Charlottesville, VA, from states that require prior approval as a condition of granting CLE. For states that require attendance to be reported directly by providers/sponsors, TJAGLCS will report student attendance at those courses. For states that require attorneys to self-report, TJAGLCS provides the appropriate documentation of course attendance directly to students. Attendance at courses taught by TJAGLCS faculty at locations other than Charlottesville, VA, must be self-reported by attendees to the extent and manner provided by their individual state CLE program offices.

Regardless of how course attendance is documented, it is the personal responsibility of each Judge Advocate to ensure that their attendance at TJAGLCS courses is accounted for and credited to them and that state CLE attendance and reporting requirements are being met. While TJAGLCS endeavors to assist Judge Advocates in meeting their CLE requirements, the ultimate responsibility remains with individual attorneys. This policy is consistent with state licensing authorities and CLE administrators who hold individual attorneys licensed in their jurisdiction responsible for meeting licensing requirements, including attendance at and reporting of any CLE obligation.

Please contact the TJAGLCS CLE Administrator at (434) 971-3309 if you have questions or require additional information.

Current Materials of Interest

1. The Judge Advocate General's Fiscal Year 2010 On-Site Continuing Legal Education Training.

Date	Region	Location	Units	ATR RS Num ber	POCs
23 – 30 Apr 2010	Western On-Site & FX	San Francisco, CA (followed by FX at Fort Hunter Liggett 25 – 30 Apr)	87th LSO 6th LSO 75th LSO 78th LSO	004	LTC Tomson T. Ong Tomson.Ong@us.army.mil Tong@LASuperiorCourt.org 562.491.6294 Mr. Khahn Do Khahn.K.Do@usar.army.mil 650.603.8652
1 – 2 May 2010	Midwest On-Site	Fort McCoy, WI	WIARNG, WI ANG	NA	COL Julio R. Barron Julio.barron2@us.army.mil 608.242.3077 (DSN 724) MSG Al Rohmeyer Aloysisu.rohmeyer@us.army.mil 608.242.3076 (DSN 724)
6 – 12 Jun 2010	Midwest On-Site & FX	Fort McCoy, WI (includes an FX – exact dates TBD)	91st LSO 9th LSO 139th LSO	006	SFC Treva Mazique 708.209.2600 Treva.Mazique@usar.army.mil
16 – 18 Jul 2010	Heartland On-Site	San Antonio, TX	1st LSO 2nd LSO 8th LSO 214th LSO	007	LTC Chris Ryan Christopher.w.ryan1@dhs.gov Christopher.w.ryan@us.army.mil 915.526.9385 MAJ Rob Yale Roburt.yale@navy.mil Rob.yale@us.army.mil 703.463.4045
24 – 25 Jul 2010	Make-up On-Site	TJAGLCS, Charlottesville, VA			COL Vivian Shafer Vivian.Shafer@us.army.mil 301.944.3723

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

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

b. Access to the JAGCNet:

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

- (a) Active U.S. Army JAG Corps personnel;
- (b) Reserve and National Guard U.S. Army JAG Corps personnel;
- (c) Civilian employees (U.S. Army) JAG Corps personnel;
- (d) FLEP students;

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

(2) Requests for exceptions to the access policy should be e-mailed to: LAAWSXXI@jagc-smtp.army.mil

c. How to log on to JAGCNet:

(1) Using a Web browser (Internet Explorer 6 or higher recommended) go to the following site: <http://jagcnet.army.mil>.

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

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

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

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

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

(7) Once granted access to JAGCNet, follow step (c), above.

3. TJAGSA Publications Available Through the LAAWS XXI JAGCNet

The TJAGSA, U.S. Army, Charlottesville, Virginia continues to improve capabilities for faculty and staff. We have installed new computers throughout TJAGSA, all of which are compatible with Microsoft Windows XP Professional and Microsoft Office 2003 Professional.

The TJAGSA faculty and staff are available through the Internet. Addresses for TJAGSA personnel are available by e-mail at jagsch@hqda.army.mil or by accessing the JAGC directory via JAGCNET. If you have any problems, please contact LTMO at (434) 971-3257. Phone numbers and e-mail addresses for TJAGSA personnel are available on TJAGSA Web page at <http://www.jagcnet.army.mil/tjagsa>. Click on "directory" for the listings.

For students who wish to access their office e-mail while attending TJAGSA classes, please ensure that your office e-mail is available via the web. Please bring the address with you when attending classes at TJAGSA. If your office does not have web accessible e-mail, forward your office e-mail to your AKO account. It is mandatory that you have an AKO account. You can sign up for an account at the Army Portal, <http://www.jagcnet.army.mil/tjagsa>. Click on "directory" for the listings.

Personnel desiring to call TJAGSA can dial via DSN 521-7115 or, provided the telephone call is for official business only, use the toll free number, (800) 552-3978; the receptionist will connect you with the appropriate department or directorate. For additional information, please contact the LTMO at (434) 971-3264 or DSN 521-3264.

4. The Army Law Library Service

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

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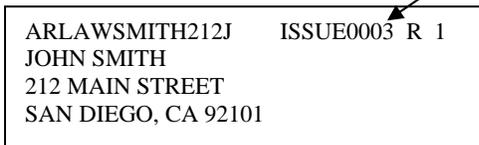
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