

Annual Review of Developments in Instructions—1998

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Introduction

This article is the latest in a series of articles that address courts-martial instruction law;¹ it reviews cases decided in fiscal year 1998. The *Military Judges' Benchbook (Benchbook)*² continues to be a trial practitioner's primary source for drafting instructions. Practitioners, however, should recognize that issues might still arise that involve the lack of an instruction or an incorrectly tailored instruction.

Instructions on Offenses

Rape and Sodomy

In *United States v. Davis*,³ the accused was tried for raping,⁴ sodomizing,⁵ and taking indecent acts with his then nineteen year-old adopted stepdaughter, J.D.⁶ The victim was thirteen years old when the first of the charged offenses occurred, although the evidence at trial indicated that the abuse began when J.D. was ten or eleven. The judge admitted the earlier acts as uncharged misconduct evidence under Military Rule of Evidence (MRE) 404(b).⁷ Substantially following the *Benchbook* instruction, the military judge referenced the other acts while instructing the members on the elements of force and lack of consent.⁸

On appeal, the accused argued that this instruction constituted prejudicial error because it allowed the members to determine the issues of force and consent based, in part, on uncharged similar conduct preceding the date of the charged offenses.⁹ In finding this instruction proper, the appellate court first noted that the evidence supported the argument that J.D., having been conditioned to accede to the accused's demands for sex beginning at an early age, continued to labor under the accused's physical and psychological force until she left the home.¹⁰ Second, and more significantly, the court noted that the instructions "did not mandate a finding of parental compulsion but simply permitted the members to understand the implications of such conduct, were they to find it occurred, on the elements of force and consent."¹¹

In child sex abuse cases, counsel will often find that the molestation began at a very early age. Although these acts may fall outside the applicable statute of limitations,¹² trial counsel can consider offering these acts under either MRE 404(b) or 414.¹³ Additionally, trial counsel can provide a proposed instruction to the military judge that refers to these uncharged acts as relevant to the elements of force and consent.

Communicating a Threat

For the Gillespie family, Independence Day 1995 began with a camping vacation at Padre Island National Seashore,

1. See, e.g., Lieutenant Colonel Donna Wright & Colonel (Retired) Lawrence Cuculic, *Annual Review of Developments in Instructions—1997*, ARMY LAW., July 1998, at 39.

2. U.S. DEP'T OF ARMY, PAM 27-9, LEGAL SERVICES: MILITARY JUDGES' BENCHBOOK (30 Sept. 1996) (C1, 30 Jan. 1998) [hereinafter BENCHBOOK].

3. 47 M.J. 707 (N.M. Ct. Crim. App. 1997).

4. The elements of rape are: (1) that the accused committed an act of sexual intercourse, and (2) that the act of sexual intercourse was done by force and without consent. MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. IV, para. 45b(1) (1998) [hereinafter MCM].

5. The elements of sodomy are: (1) that the accused engaged in unnatural carnal copulation with a certain person [or with an animal], [One or both of the following may apply] (2) that the act was done with a child under the age of 16; (3) that the act was done by force and without consent. MCM, *supra* note 4, pt. IV, para. 51b.

6. The accused testified that J.D. initiated and instigated the relationship. He denied threatening her or using any kind of force. *Davis*, 47 M.J. at 709.

7. MCM, *supra* note 4, MIL. R. EVID. 404(b). The evidence tended to show a pattern or plan of parental conditioning of J.D., which was relevant on the issue of consent. *Davis*, 47 M.J. at 711.

Corpus Christi, Texas. It ended with the husband facing a general court-martial for assault and battery, disorderly conduct, carrying a concealed weapon, and communicating a threat to a United States Park Ranger.¹⁴ In *United States v. Gillespie*,¹⁵ the Air Force Court of Criminal Appeals addressed the instructional concerns with the offense of communicating a threat, when the alleged threatening language was problematic itself.¹⁶

The communicating a threat specification against Major Gillespie alleged, in pertinent part, that the accused did: “[W]rongfully communicate to James Bret Morris, a threat, to wit: I know a lot of very important people and know how to work the system by writing letters to my very powerful friends and I’m going to get you in lots of trouble, or words to that effect.”¹⁷

As a fair reading indicates, the specification does not allege that the accused’s threat was to make a false allegation against Ranger Morris. The instructional error occurred when the military judge told the members that, as to the third element of the offense,¹⁸ the language used by the accused under the circum-

stances amounted to a threat—a clear present determination or intent to injure the reputation of the park ranger presently or in the future.¹⁹ The court found that the instruction was insufficiently tailored because the specification could have covered lawful conduct, in other words, simply reporting the ranger to his superiors. Regarding prejudice, the court found a substantial risk that the members did not understand that to convict the accused they had to find that he threatened the ranger with a false allegation. Based on this conclusion, the court dismissed the specification.²⁰

Counsel must remain vigilant in identifying cases where the accused is charged with wrongfully communicating a threat on the basis of acts that are ostensibly protected by the First Amendment. Where the alleged threat may also show an intent to do a lawful act in a lawful manner, counsel must ensure that the military judge carefully tailors the instruction. The threat must contemplate the commission of an unlawful injurious act by the accused in an unlawful manner.

8. The military judge instructed, in pertinent part, that:

In deciding whether the victim did not resist or ceased resistance because of constructive force in the form of parental compulsion, you must consider all the facts and circumstances, including but not limited to, *the age of the child when the alleged abuse started*, the child’s ability to fully comprehend the nature of the acts involved, the child’s knowledge of the accused’s parental power, and any implicit or explicit threats of punishment or physical harm if the child does not obey the accused’s commands. If [J.D.] did not resist or ceased resistance due to the compulsion or duress of parental command, constructive force has been established and the acts was done by force and without consent.

If [J.D.] submitted to the act of sexual intercourse because resistance would’ve been futile under the totality of the circumstances, because of a reasonable fear of death or great bodily harm, or because she was unable to resist due to mental or physical inability, sexual intercourse was by force and without consent. If [J.D.] was incapable, due to her tender age and lack of mental development of giving consent, then the act was done by force and without consent. A child of tender years is not capable of consenting to an act of sexual intercourse until she understands the act, its motive, and its possible consequences.

In deciding whether [J.D.] had, at the time of the sexual intercourse, the requisite knowledge and mental development, capacity, or ability to consent, you should consider all the evidence in the case including, but not limited to, [J.D.’s] age, education and intelligence level *when the sexual conduct between her and the accused began*. If [J.D.] was incapable of giving consent, and if the accused knew or had reasonable cause to know that [J.D.] was incapable of giving consent, the act of sexual intercourse was done by force and without consent.

Id. at 710 (emphasis in original).

9. As noted by the Navy-Marine Court, with the promulgation of MRE 414, in addition to showing a pattern or plan of parental conditioning as evidence of a lack of consent, the uncharged acts of rape and sodomy would now also be admissible to show the accused’s propensity to engage in child molestation. *Id.* at 711 n.4.

10. *See United States v. Hansen*, 36 M.J. 599 (A.F.C.M.R. 1992).

11. *Davis*, 47 M.J. at 711.

12. Generally, a service member who is charged with an offense is not liable to be tried by a court-martial if the offense was committed more than five years before the receipt of sworn charges by the officer exercising summary court-martial jurisdiction. *See UCMJ art. 43* (1994).

13. *See MCM, supra* note 4, MIL. R. EVID. 414 (dealing with evidence of similar crimes in child molestation cases). *See also United States v. Wright*, 48 M.J. 896 (A.F. Ct. Crim. App. 1998); *United States v. Hughes*, 48 M.J. 700 (A.F. Ct. Crim. App. 1998).

14. *See MCM, supra* note 4, pt. IV, paras. 54, 73, 110, 112. The acts giving rise to the charges arose from the accused’s abusive treatment of his wife and the endless tirades, profanity, and threats he directed towards the U.S. Park Service Rangers called to quell the campsite disturbance.

15. 47 M.J. 750 (A.F. Ct. Crim. App. 1997).

16. *Id.*

17. *Id.* at 757.

Instructions on Defenses

Duress

The military judge must instruct the members on duress when it is in issue, like all affirmative defenses.²¹ This defense applies when the accused has a reasonable apprehension that he or another innocent person will immediately suffer death or serious bodily injury if he does not commit the criminal act.²² Once the defense is raised, the prosecution has the burden of proving beyond a reasonable doubt that the defense does not exist.²³ In *United States v. Vasquez*,²⁴ the Court of Appeals for the Armed Forces (CAAF) reviewed two elements of the duress defense.

While deployed to Turkey as part of Operation Provide Comfort, Airman Richard Vasquez shared an apartment with Airman Eric Little and Adnan Sert, a local national. Vasquez and Little eventually began social relationships with two women, Dilek Boy and Nazli Acar. Sometime thereafter, the Turkish police investigated a report that Sert was operating a house of prostitution and transported Sert, Boy, and Acar to the

police station for questioning.²⁵ The two women told the police that they were engaged to Vasquez and Little. After returning to the apartment, Boy told the accused that he needed to marry her or they would all go to jail. Vasquez complied; however, he was already married to someone else.²⁶ He was eventually charged with adultery, bigamy, and signing a false official statement. At trial, Vasquez claimed that he committed the offenses under duress. In particular, he asserted that he had been in fear for his safety and the safety of his friends.²⁷ While giving the instruction regarding the accused's own safety, the judge refused to give a duress instruction that encompassed Vasquez's concern for his friends.²⁸ On appeal, the CAAF affirmed the case.²⁹

The CAAF held that a reasonable apprehension does not exist if the accused has any reasonable opportunity to avoid committing the act without subjecting himself or another innocent person to the harm threatened.³⁰ Here, the court noted that the accused had a reasonable opportunity to seek legal advice or information concerning his fears of Turkish jails without relying on a "Hollywood dramatization."³¹ This reasonable opportunity negated a reasonable apprehension that another

18. As stated in the *Benchbook*, the elements of wrongfully communicating a threat are:

- (1) That (state the time and place alleged), the accused communicated certain language, to wit: (state the language alleged), or words to that effect;
- (2) That the communication was made known to (state the name of the person threatened, or a third person, as alleged);
- (3) That the language used by the accused under the circumstances amounted to a threat, that is, a clear, present determination or intent to injure the (person) (property) (reputation) of (state the name of the person allegedly threatened) (presently) (or) (in the future);
- (4) That the communication was wrongful; and
- (5) 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.

BENCHBOOK, *supra* note 2, para. 3-110-1.

19. *Gillespie*, 47 M.J. at 758.

20. *Id.* at 758-59.

21. A defense is "in issue" when some evidence, without regard to its source or credibility, has been admitted upon which members might rely if they choose. *See* MCM, *supra* note 4, R.C.M. 920 discussion.

22. *Id.* R.C.M. 916(h).

23. *Id.* R.C.M. 916(b).

24. 48 M.J. 426 (1998).

25. *Id.* at 427.

26. *Id.*

27. The accused testified he feared Turkish jails because he had seen a movie in which an American tourist was wrongfully thrown in prison and repeatedly beaten, tortured, and raped. *Id.*

28. *Id.* at 428.

29. *Id.* at 430.

30. *Id.*

31. *Id.*

person would immediately suffer death or serious bodily injury. The court further held that the “immediacy element of the duress defense is designed to encourage individuals promptly to report threats, rather than breaking the law themselves.” This element insures that a nexus exists between the threat and the wrongful act.³² Here, it was three days after his friends’ arrest before the accused decided to get married.

Mistake of Fact

In *United States v. Jones*,³³ the accused was charged, *inter alia*, with raping a fourteen year-old girl.³⁴ At trial, the accused requested that the judge instruct the members on reasonable mistake of fact regarding the victim’s consent.³⁵ The judge denied this request. In affirming the case, the Air Force Court of Criminal Appeals held: “The appellant did not testify, and there is therefore no evidence that he was under a mistaken belief regarding the consent of K.D., and if that mistaken belief was reasonable. We are unwilling to create a defense for the appellant by attributing thoughts to him by supposition.”³⁶

The CAAF subsequently affirmed, concluding that a mistake of fact instruction was not warranted.³⁷ The CAAF, however, emphasized two important points. First, if the evidence reasonably raises all the elements of an affirmative defense, the military judge must give that instruction *sua sponte*.³⁸ Only the form of a requested affirmative defense instruction is discretionary. Second, the defense may be raised by evidence pre-

sented by the prosecution, defense, or the court-martial; an accused need not testify to place the defense at issue.³⁹

In *United States v. Barrows*,⁴⁰ the Army Court of Criminal Appeals reviewed the mistake of fact defense as it related to the prosecution of a soldier for failing to inform sexual partners of his human immunodeficiency virus (HIV) status prior to intercourse.

In July 1993, Specialist Kevin Barrows was diagnosed as having the HIV antibody, which is the causative agent for acquired immune deficiency syndrome (AIDS).⁴¹ In September, Specialist Barrows met with his company commander, Captain Taft, who counseled him about his responsibilities as an HIV-infected soldier, and gave him the so-called safe-sex order.⁴² During the next two years, Specialist Barrows changed company commanders three times; however, none of them repeated Captain Taft’s order.⁴³

Between December 1994 and November 1995, Specialist Barrows had consensual sex with three different women. Although he periodically wore a condom, he never informed any of the women of his HIV status. In July and November of 1995, because he was feeling well and his T-cell count had increased, Specialist Barrows expressed doubts to Army medical personnel about his HIV-positive status.⁴⁴ Medical personnel, however, assured him that he remained HIV-positive.⁴⁵ In December 1995, Specialist Barrows told one woman that he was HIV-positive; an investigation ensued. He was subse-

32. *Id.* (quoting *United States v. Jennings*, 1 M.J. 414, 418 (C.M.A. 1976)).

33. 49 M.J. 85 (1998).

34. The victim, K.D., testified, in part, that she went with the accused to a park where she let him kiss her once, then stopped him because she had a boyfriend. K.D. then went back with the accused to his dormitory bedroom where she drank alcohol the accused gave to her. This made her sick and “wasted” and she started to pass out. The accused took off her bra, placed his mouth on her vagina, inserted his tongue and then tried to insert his penis into her vagina. She said no and he inserted his penis about one inch before she managed to push him away. *Id.* at 87.

35. See MCM, *supra* note 4, R.C.M. 916(j) (“It is a defense to an offense the accused held, as a result of an ignorance or mistake, an incorrect belief of the true circumstances such that, if the circumstances were as the accused believed them, the accused would not be guilty of the offense.”).

36. *Jones*, 49 M.J. at 90.

37. Mistake of fact to a charge of rape requires that a mistake of fact as to consent be both honest and reasonable. See *United States v. Willis*, 41 M.J. 435 (1995). Attempted rape, however, is a specific intent offense so the mistake of fact need only be honest. The instructional error was moot because the accused was acquitted of rape. Although convicted of attempted rape, the CAAF agreed with the lower court that there was no evidence the accused actually believed that K.D. was consenting to his sexual advances.

38. *Jones*, 49 M.J. at 90 (citing *United States v. Buckley*, 35 M.J. 262, 263 (C.M.A. 1992)).

39. See MCM, *supra* note 4, R.C.M. 916(b) discussion; see also *United States v. Taylor*, 26 M.J. 127, 131 (C.M.A. 1988).

40. 48 M.J. 783 (Army Ct. Crim. App. 1998).

41. *Id.* at 784.

42. Part of the oral and written counseling stated: “You will verbally advise all prospective sexual partners of your diagnosed condition prior to engaging in sexual intercourse. You are also ordered to use condoms should you engage in sexual intercourse with a partner.” *Id.* at 785.

43. *Id.*

44. *Id.* at 786.

quently charged with aggravated assault and violating a lawful order. At trial, Specialist Barrows claimed that Captain Taft's order was no longer valid after Captain Taft left command and none of his successors renewed the order. Specialist Barrows further argued that he did not have the means to cause death or grievous bodily harm because he believed that he was wrongly diagnosed with the HIV virus. The military judge denied the defense request for mistake of fact instructions to all offenses.⁴⁶

Assuming first that the continued validity of the order was a question of fact, the Army Court of Criminal Appeals held that the basis of the safe sex order was Specialist Barrows's diagnosed condition. During his counseling session, Specialist Barrows acknowledged that he understood that preventive measures were necessary to prevent transmission of the virus. In addition, he acknowledged that these measures remained necessary as long as he remained HIV-positive.⁴⁷ Captain Taft's departure from the command had no effect on the continued necessity of the preventive measures and, consequently, no effect on the continued validity of the order. Additionally, Specialist Barrows never questioned the order with any subsequent commander, and it was never rescinded or modified. The court held that the accused's assertion that these conditions caused him honestly to believe the order was no longer valid was mere speculation. Consequently, the military judge did not err by refusing to instruct the members on mistake of fact as to Captain Taft's order.⁴⁸

The court then addressed the mistake of fact defense as to the aggravated assault for acts of sexual intercourse occurring after Specialist Barrows expressed doubts about his HIV-status. The court held that Specialist Barrows's doubts, which were based primarily on his feeling healthy, constituted some evidence of an honest mistaken belief that he was wrongly diagnosed as HIV-positive.⁴⁹ Thus, the court inferred that if the panel decided that this mistaken belief was also reasonable under the circumstances, he would not be guilty of aggravated assault.

The judge erred by not giving the mistake of fact instruction as to the aggravated assault charge.⁵⁰

The court, however, found no prejudice because, even if honest, the mistaken belief was not reasonable. The evidence showed that the accused tested positive twice for the virus and was never told that he was not HIV-positive. The evidence also showed that the accused was told that feeling healthy was consistent with the initial stages of the disease, and not consistent with being HIV-negative. In addition, Specialist Barrows made a sworn statement that the reason he had unprotected sexual intercourse was because he was infatuated with the woman, not because he believed he was wrongly diagnosed.⁵¹

Evidentiary Instructions

Accomplices

In addition to the instruction on communicating a threat in *Gillespie*, the Air Force Court of Criminal Appeals also reviewed the judge's instruction on accomplice testimony. The witnesses at trial included the accused's wife and a woman at an adjacent campground who testified that the accused dropped a twenty-five foot radio antenna on his wife.⁵² The wife, a former Air Force officer herself, denied that the antenna hit her and confirmed her husband's testimony that he did not threaten a park ranger. She also corroborated the accused's claim that he showed his weapons to a park employee to find out if he could keep them in his recreational vehicle.

During a discussion of instructions in an Article 39(a)⁵³ session, the judge advised counsel that she planned to give an accomplice instruction regarding Mrs. Gillespie's testimony. The defense counsel objected on the grounds that an accomplice instruction should not be given on a defense witness.⁵⁴ The judge overruled the objection, pointing out that Mrs.

45. *Id.*

46. *Id.*

47. *Id.* at 787.

48. The court explained that the version of *Army Regulation (AR) 600-20* that was in effect at the time of the offenses required that, upon a change of assignment for an HIV-infected soldier, the counseling form must be forwarded to the gaining commander. *Id.* at 788 (citing U.S. DEP'T OF ARMY, REG. 600-20, PERSONNEL-GENERAL: ARMY COMMAND POLICY, para. 2-17 (30 Mar. 1988)). There was no guidance, however, about what to do when the commander departed the unit. The new version of *AR 600-20*, however, requires the successor commander to reissue the order by counseling the HIV-infected soldier in the same manner as that prescribed for a newly identified infected soldier. See U.S. DEP'T OF ARMY, REG. 600-20, PERSONNEL-GENERAL: ARMY COMMAND POLICY, para. 2-17 (22 Apr. 1994).

49. *Barrows*, 48 M.J. at 788.

50. *Id.*

51. *Id.* at 789.

52. *United States v. Gillespie*, 47 M.J. 750, 754 (A.F. Ct. Crim. App. 1997). The witness indicated that the accused screamed at his wife to assist him in disassembling the antenna. As his wife ignored him, sitting at a picnic table with her back to him, the accused allowed the pole to fall, hitting her on the back of the head. The accused then commented, "I told you I needed help." The witness stated that the accused had control of the pole at all times. *Id.*

53. UCMJ art. 39(a) (1994).

Gillespie's testimony was both favorable and unfavorable to the accused. The judge gave the standard accomplice instruction from the *Benchbook*.⁵⁵

In reviewing the propriety of this instruction, the Air Force Court summarized the law in this area. According to the court, the judge must give the accomplice instruction when: (1) the evidence raises a reasonable inference that a witness and the accused were accomplices in a crime "with which accused is charged," and (2) the instruction is requested by either side.⁵⁶ If neither side requests the instruction, it is not mandatory; however, the judge may give the instruction at her discretion.⁵⁷ The judge, however, has a *sua sponte* duty to instruct on accomplices if: (1) the accomplice's testimony is the only evidence on an element of an offense, and (2) a party has significantly impeached that testimony.⁵⁸

After concluding that Mrs. Gillespie could be considered an accomplice, the court considered whether the judge gave the instruction correctly. The court accepted the judge's conclusion that Mrs. Gillespie's testimony "cut both ways," but criticized the judge for failing to tailor the instruction to the circum-

stances of this case. The Air Force Court explained that when an accomplice testifies both favorably and unfavorably for the accused, the standard *Benchbook* instruction improperly shifts the burden of proof to the defense.⁵⁹ In such a case, a judge should also instruct the members that if they believe the accomplice's testimony, and it supports the accused's defense, they can find him not guilty based on the accomplice's testimony alone.⁶⁰

Sentencing Instructions

Matters Presented by the Prosecution

In 1998, a number of cases dealt with instructions during the sentencing phase of the court-martial. In *United States v. Lane*,⁶¹ the accused voluntarily absented himself from his court-martial after arraignment. The trial proceeded in his absence. During the sentencing phase, the trial counsel admitted an Air Force form reflecting the accused's status as absent without leave.⁶² Before the Air Force Court of Criminal Appeals, the appellant argued that the judge incorrectly

54. *Gillespie*, 47 M.J. at 754. The defense counsel argued that *United States v. Davis* and *United States v. McCue* supported his position. *Id.* (citing *United States v. Davis*, 32 M.J. 166 (C.M.A. 1991) and *United States v. McCue*, 3 M.J. 509 (A.F.C.M.R. 1977)). He also contended that the instruction would unduly prejudice the defense. *Id.*

55. *Id.* at 756. Specifically, the judge instructed the members:

You are advised that a witness is an accomplice if she was criminally involved in an offense with which the accused is charged. The purpose of this advice is to call to your attention a factor specifically affecting the witness's believability, that is, a motive to falsify her testimony in whole or in part, because of an obvious self-interest under the circumstances. The testimony of an accomplice, even though it may be apparently credible, is of questionable integrity and should be considered by you with great caution.

In deciding the believability of Meria Gillespie, you should consider evidence including but not limited to the testimony that she and the accused jointly occupied the motor home in which Connie Schmidt testified the pistol and [shotgun] were located and engaged in conversations in which obscenities were exchanged in public with her husband. Whether or not Meria Gillespie, who testified as a witness in this case, was an accomplice, is a question for you to decide. If Meria Gillespie shared the criminal intent or purpose of the accused, if any, or aided, encouraged, or in any other way criminally associated or involved herself with the offense with which the accused is charged; she would be an accomplice whose testimony must be considered with great caution.

Id. That instruction is directly from the *Benchbook*. BENCHBOOK, *supra* note 2, para. 7-10.

56. *Gillespie*, 47 M.J. at 755 (citing *United States v. Gillette*, 35 M.J. 468, 470 (C.M.A. 1992)).

57. *Id.* The court pointed out that accomplice testimony is viewed skeptically because in the case of a prosecution witness, the person might testify out of self-interest to obtain leniency from the prosecution. A defense witness may accept blame for an offense if the person could not be prosecuted for it. The court noted that Mrs. Gillespie was in such a situation because she had left the Air Force by the time of trial. *Id.*

58. *Id.* (citing *United States v. Lee*, 6 M.J. 96, 97 (C.M.A. 1978); *United States v. Sanders*, 34 M.J. 1086, 1092 (A.F.C.M.R. 1992)).

59. *Id.* (citing *United States v. Rosa*, 560 F.2d 149, 156 (3rd Cir.)). The standard instruction suggests that the accomplice's testimony should be disregarded. See BENCHBOOK, *supra* note 2, para. 7-10.

60. *Gillespie*, 47 M.J. at 755. The court suggested that an appropriate instruction would be:

I further charge you that, to the extent, if any, that you find the testimony of an accomplice tends to support the contention of the [accused], that is, tends to show the [accused] to be not guilty, you may consider such testimony in that respect and weigh such testimony, along with the other evidence in the case, under the rules given you in this charge, and you may find the [accused] not guilty based on an accomplice's testimony.

Id. The court, however, found that the instruction given did not prejudice the accused. The court cited several reasons supporting its finding. First, it was an evidentiary instruction and did not involve the elements. Second, in the credibility of the witnesses instruction, the court told the members to consider a witness's interests and biases. The court concluded that evidence of the accused's guilt was so compelling that the erroneous instruction had no effect on the findings. *Id.*

61. 48 M.J. 851 (A.F. Ct. Crim. App. 1998).

instructed the members on the use of this evidence. The appellant argued that the judge should have instructed that the evidence could only be used on the question of rehabilitation potential.

The Air Force Court reviewed the instruction and rejected the appellant's argument. First, the court pointed out that during the findings phase the judge had twice instructed the members not to draw any inference adverse to the accused based on his absence. During the sentencing instructions, the judge told the members that they could use the accused's absence in "assessing his military record." The judge further instructed the members that the accused's punishment should be based only on his convictions.⁶³ The Air Force Court found no error in the judge's instructions and concluded that "assessing his military record" logically inferred that the absence could be used as a factor in determining rehabilitation potential.

Extenuation and Mitigation

In *United States v. Simmons*,⁶⁴ the military judge refused a defense request to instruct the members that the accused had been abused as a child. During the sentencing phase, the accused's wife testified somewhat ambiguously about her husband's unhappy childhood and the abuse he suffered.⁶⁵ She also

stated that abused children grow up to abuse others.⁶⁶ An expert, who had counseled the couple, described the difficulty in treating victims of abuse.

The defense counsel asked the judge to instruct the members that the accused was emotionally and physically abused as a child and that such abuse could be a mitigating factor. The judge refused the request because neither the wife nor the expert had testified that the accused said he had been abused.⁶⁷

The CAAF held that in the absence of any direct evidence that the accused suffered abuse as a child, the judge did not err in refusing to give the instruction.⁶⁸ The court pointed out, however, that since the evidence was disputed, the judge should have instructed the members to consider the abuse as mitigating if they found that it occurred.⁶⁹

In *United States v. Perry*,⁷⁰ the CAAF reviewed a judge's denial of an instruction on the impact of a requirement to repay the cost of a service academy education.⁷¹ During a discussion on sentencing instructions, the defense counsel asked the judge to instruct the panel that if the accused was sentenced to a dismissal, he could be required to repay the cost of his Naval Academy education, which was approximately \$80,000.⁷² The defense counsel provided the judge with a memo from the Naval Academy comptroller that cited a law authorizing repay-

62. *Id.* at 857. Although the trial counsel offered the document under R.C.M. 1001(b)(5) as evidence of rehabilitation potential, the judge admitted it as part of the accused's personnel records under R.C.M. 1001(b)(2). *Id.* (citing MCM, *supra* note 4, R.C.M. 1001(b)(2)).

63. *Id.* at 858 n.1-2.

64. 48 M.J. 193 (1998).

65. *Id.* at 194. The accused had been found guilty of assaulting and kidnapping his wife. His wife testified in extenuation and mitigation that she and the accused had talked about the pain and abuse he had experienced during childhood; however, she was unsure of whether this conversation took place during the assaultive encounter. The judge then interjected and told the defense counsel to move on to a different area. *Id.*

66. *Id.* The accused's wife also testified that she knew the accused had experienced many of the same things he had done to her.

67. *Id.* at 194-95. The trial counsel objected to the instruction on the grounds that it would amount to a determination that the abuse had occurred. When the defense counsel argued that the wife testified to that effect, the judge pointed out the wife had said she could not recall. *Id.* Actually what the wife could not recall was the date of any conversation she had with the accused regarding the abuse. As to the expert testimony, the judge correctly noted that the expert never testified that the accused said he was abused. *Id.* at 195.

68. *Id.* The court first noted that the test for denial of an instruction is: (1) whether the instruction as given is correct, (2) whether the request addresses something not covered in the instructions as given, and (3) whether failure to give the instruction deprives the accused of a defense or seriously impairs its presentation. *Id.* (citing *United States v. Damatta-Olivera*, 37 M.J. 474, 478 (C.M.A. 1993)).

69. *Id.*

70. 48 M.J. 197 (1998).

71. The court-martial took place in July 1994, some 14 months after the accused graduated from the United States Naval Academy. The accused was found guilty of various offenses including attempted sodomy and indecent acts. *Id.* at 197-98.

72. *Id.* at 198. Counsel proposed the following instruction:

A dismissal may cause Ensign Perry to be liable to reimburse the U.S. [g]overnment for all or a portion of the costs associated with his education at the U.S. Naval Academy. As computed by the U.S. Naval Academy, the total cost of education for the past four years is approximately \$80,000.

Id.

ment.⁷³ The judge declined counsel's request on the grounds that he had not presented evidence on the matter and the memo, standing alone, was insufficient to show that collection was likely.⁷⁴

In upholding the judge's decision, the CAAF pointed to counsel's failure to produce evidence that collection efforts would actually be initiated against the accused. Specifically, the court noted that such efforts were discretionary with the Secretary of the Navy, and the Navy must satisfy certain procedural steps before it could recoup the costs.⁷⁵ In a concurring opinion, Judge Effron agreed with the result, but criticized the majority's language that a financial impact must be "a direct and proximate consequence of the punitive discharge and not merely a potential collateral consequence."⁷⁶ In Judge Effron's opinion, such overbroad language was not necessary to resolve this case, and it would result in needless litigation in the future.⁷⁷

In *United States v. Duncan*,⁷⁸ the Navy-Marine Court of Criminal Appeals considered the propriety of the judge's response to members' questions. At trial, the members interrupted their sentencing deliberations to ask whether rehabilitation or therapy would be required if the accused was confined and whether parole was available for a life sentence.⁷⁹ The judge responded by first explaining that the members were an "independent agency" whose job it was to determine guilt or innocence and impose an appropriate sentence.⁸⁰ The judge also told the members that other authorities would review the case, but they should do what they felt was right and not rely on what others might do. The judge concluded this portion of his

response by telling the members that they "should not be concerned" about parole. Regarding rehabilitation, the judge told the members that although participation in such programs was not mandatory, treatment was available and incentives existed for the confinee to participate.

The court found no error in the judge's instruction. It rejected appellant's argument that the judge's instruction went beyond merely answering the questions.

Death Penalty

Last year, the CAAF addressed instructions issues in two death penalty cases. The CAAF affirmed the death sentence in one case and reversed the sentence in the other. The CAAF had already reviewed the case of *United States v. Loving*⁸¹ once, and, in 1996, the Supreme Court affirmed the CAAF's comprehensive treatment of some seventy issues. *Loving* is the only military capital case heard by the nation's highest court. Following the Supreme Court's decision, Private Loving requested a writ of mandamus on the grounds that his death sentence was infirm because it was based in part on an invalid aggravating factor. Private Loving appealed to the CAAF after the Army Court of Criminal Appeals refused to grant the writ of mandamus.

Before discussing the merits of appellant's claim, a quick review of death penalty sentencing procedures might be helpful. As Judge Gierke pointed out in his lead opinion in *Loving v. Hart*,⁸² the military death penalty procedures involve a four-

73. The memo stated: "In accordance with PL 96-357, and effective with the Class of 1985, if any individual fails to fulfill their commitment, they may be liable to reimburse the U.S. government for all or a portion of the costs associated with their education at the Academy." *Id.*

74. *Id.* The judge offered counsel the opportunity to present additional evidence on the issue. The judge indicated that without an implementing regulation or some indication that collection efforts would be attempted in this case, he would not give the instruction. The defense counsel declined to present any evidence. *Id.*

75. *Id.* at 199. The court examined the law authorizing collections and noted that it had several procedural requirements: that the individual signed a contract providing for reimbursement of educational expenses, that notice of recoupment had been given to the individual and that a hearing had been conducted. *Id.* (citing 10 U.S.C. § 2005 (1988)).

76. 48 M.J. at 199-200 (Efron, J., concurring).

77. Military justice practitioners, of course, will recognize that Judge Effron views broadly an accused's right to present matters to the sentencing authority. *See, e.g., United States v. Britt*, 48 M.J. 233 (1998); *United States v. Jeffery*, 48 M.J. 229 (1998); *United States v. Grill*, 48 M.J. 131 (1998). It is not surprising that he would frown on any language that would encourage the prosecution to fight the admission of this type of evidence. Judge Sullivan's dissenting opinion echoed a familiar refrain—truth in sentencing. In his view, the judge should have given the instruction since the requested instruction was couched in terms indicating that recoupment was possible, not mandatory. Since the defense argued, however, that an appropriate punishment would include a punitive discharge and total forfeitures, the error was harmless. *Perry*, 48 M.J. at 201-02 (Sullivan, J., dissenting).

78. 48 M.J. 797 (N.M. Ct. Crim. App. 1998).

79. *Id.* at 802. The members asked: "Will rehabilitation/therapy be required if Private First Class Duncan is incarcerated?" and "In military justice, is parole granted or are sentences reduced for good behavior? If so do these reductions apply to a life sentence?" *Id.* The trial took place in 1995, before the enactment of Article 56a created the possibility of a sentence of confinement for life without eligibility for parole. *See* National Defense Authorization Act, Pub. L. No. 105-85, § 581(a)(1), 111 Stat. 1759 (1997).

80. *Id.* Before answering the members, the judge held an Article 39(a) session to discuss his proposed instruction with counsel. The defense proposed an instruction that was similar to the instruction as given, except that it was shorter and would have told the members to "assume that no parole or good behavior exists." *Id.*

81. 517 U.S. 748 (1996).

step process. First, the members must unanimously find that the accused committed the capital offense.⁸³ Second, they must unanimously conclude that at least one aggravating factor exists.⁸⁴ Third, any extenuating and mitigating circumstances must be outweighed by any aggravating circumstances, including the aggravating factors found to exist earlier.⁸⁵ Finally, the members must unanimously vote for death.⁸⁶

In 1989, Private Loving was convicted of the premeditated murder of Bobby Gene Sharpino and the felony-murder of Christopher Fay. He was also convicted of other offenses, including robbery, related to a two-day crime spree in Killeen, Texas. Both of the individuals he killed were cabdrivers. During the sentencing proceedings, the military judge instructed the members that unless they found at least one of three aggravating factors, they could not impose death as the sentence.⁸⁷ The three aggravating factors advanced by the prosecution were:

- (1) The premeditated murder of Bobby Gene Sharpino was committed while the accused was engaged in the commission or attempted commission of a robbery.⁸⁸
- (2) Having been found guilty of the felony murder of Christopher Fay . . . the accused was the actual perpetrator of the killing.⁸⁹
- (3) Having been found guilty of the premeditated murder of Bobby Gene Sharpino, the accused was also found guilty of another vio-

lation of Article 118, UCMJ, in the same case.⁹⁰

Although the judge did not define the term “actual perpetrator,” the members unanimously found all three factors existed; they sentenced the accused to death.

In his petition for extraordinary relief, the appellant argued that his death sentence was unconstitutional because it was based, in part, on a conviction for felony murder without a finding that he intended to kill Christopher Fay. He also argued that there was no finding that he exhibited a reckless indifference to human life in committing the underlying felony-robbery. In addressing this argument, Judge Gierke thoroughly traced the development of the “triggerman factor.”⁹¹ After reviewing the leading Supreme Court cases on this issue, Judge Gierke concluded that the death penalty may be imposed for felony murder only when the accused: (1) actually and intentionally killed the victim or (2) substantially participated in a felony and exhibited reckless indifference to human life. Turning then to the instructions given in *Loving*, the CAAF explained that the “triggerman factor” is constitutional if “it is understood to be limited to a person who kills intentionally or acts with reckless indifference to human life.”⁹²

Regarding the judge’s failure to explain the term “actual perpetrator,” the CAAF held that such an omission was not error because the accused’s intent in killing Mr. Fay was not an issue in the case.⁹³ Without any explanation, the court further held

82. 47 M.J. 438 (1998).

83. *Id.* at 442 (citing MCM, *supra* note 4, R.C.M. 1004(a)(2)).

84. *Id.* (citing MCM, *supra* note 4, R.C.M. 1004(b)(4)(A)). Actually it is R.C.M. 1004(b)(7) which states that the vote on the existence of an aggravating factor must be unanimous. See MCM, *supra* note 4, R.C.M. 1004(b)(7).

85. *Id.* (citing MCM, *supra* note 4, R.C.M. 1004(b)(4)(C)).

86. *Id.* (citing MCM, *supra* note 4, R.C.M. 1006(d)(4)(A)).

87. *United States v. Loving*, 41 M.J. 213, 232 (1994). Throughout this portion of the instructions, the judge used the term aggravating circumstance instead of aggravating factor. *Id.* The correct term, however, did appear on the sentencing worksheet. Prior to 1986, R.C.M. 1004 did use the term circumstance; however, Change 2 to the *Manual for Courts-Martial* introduced the term factor to distinguish it from aggravating circumstances that may be introduced in any sentencing case. See *MANUAL FOR COURTS-MARTIAL, UNITED STATES*, R.C.M. 1004 analysis, app. 21, at A21-70 (1984) (C2, 19 Feb. 1986) [hereinafter 1984 MCM].

88. See MCM, *supra* note 4, R.C.M. 1004 (c)(7)(B) (providing that in the case of premeditated murder, the murder was committed while the accused was committing or attempting to commit a robbery).

89. See MCM, *supra* note 4, R.C.M. 1004 (c)(8). The version in effect at the time of trial provided, “that only in the case of a violation of Article 118(4), the accused was the actual perpetrator.” 1984 MCM, *supra* note 86, R.C.M. 1004. In 1991, this provision was changed to add the language “or was a principal whose participation in the burglary, sodomy, rape, robbery, or aggravated arson was major and who manifested a reckless indifference for human life.” *Id.* analysis, app. 21, at A21-73 (C5, 27 June 1991).

90. See MCM, *supra* note 4, R.C.M. 1004 (c)(7)(J).

91. The “triggerman factor” is commonly used to describe R.C.M. 1004 (c)(8).

92. *Loving v. Hart*, 47 M.J. 438, 444 (1998).

93. *Id.* at 445. The court described the killing in summary fashion and noted that the defense did not raise accident or unintentional killing as issues in the case. The court concluded that no reasonable factfinder could have found that the killing was other than intentional. *Id.*

that even if it was error, such error was harmless. Finally, to cover all the bases, the court concluded that even if the instructions on the “triggerman factor” were deficient, the finding on the other two aggravating factors clearly met the requirements of the second step of the four-step death penalty process.

Moving on to the third step of the process, the weighing of the aggravating factors, the court concluded that any error here was also harmless. The court reasoned that even if Mr. Fay’s killing was not properly an aggravating factor, the members could have properly considered it as an aggravating circumstance; therefore, the result of the weighing would have been unchanged. Finally, the CAAF rejected the contention that Private Loving was improperly sentenced for two capital murders, instead of one, and three aggravating factors, instead of two. The court pointed to the minimal references to the number of offenses and aggravating factors argued by counsel or instructed on by the judge. The court concluded that because neither counsel nor the judge emphasized numbers, this could not have influenced the sentencing deliberations.⁹⁴

Although the CAAF affirmed Private Loving’s death sentence, it strongly urged judges to define the term “actual perpetrator” in their instructions on this factor.⁹⁵ An upcoming change to the *Benchbook* will contain such language. Along with the “substantially participates” language, instructions on the “triggerman factor” should now be understandable to court members. Trial defense counsel should recognize that aggressive advocacy is essential when contesting the availability of multiple aggravating factors. Appellate courts have not been receptive to the argument that an accused suffers prejudice when he faces the death penalty on multiple factors, and one or more are later deemed invalid.⁹⁶ Convincing the trial judge that

an aggravating factor does not apply may be the accused’s “best shot.”

In the other capital case decided this term by the CAAF, *United States v. Simoy*,⁹⁷ the court focused on the fourth step of the death penalty deliberation process i.e., the vote on the death penalty itself. The court overturned the death sentence because the judge instructed the members to vote on death first.⁹⁸ In a relatively short opinion, the court held that the instruction violated Rule for Courts-Martial 1006(d)(3)(A),⁹⁹ which provides that the voting on sentences begins with the least severe offense and continues with the next least severe, until the required concurrence is reached.

The CAAF characterized the instruction as a “plain, clear, obvious error that affected the substantial rights of the appellant.”¹⁰⁰ The court pointed out that some members who voted for death might have agreed upon the lesser sentence of life imprisonment and if three-fourths had done so, confinement for life would have resulted. The court rejected the argument that the defense waived the error by failing to object or submit its own instruction.¹⁰¹

The court’s decision in *Simoy* is not surprising given its earlier opinion in *United States v. Thomas*.¹⁰² Addressing the same issue, the CAAF also overturned the death sentence in that case. Given the clarity of the court’s holding in both cases, the judge’s instruction should clearly state that once the first three steps are completed, voting on death as a possible sentence is no different than in a non-capital case. In other words, voting begins with the least severe sentence proposed and progresses upward, if necessary.

94. *Id.* at 447. Two other judges joined Judge Gierke in the lead opinion. Judge Sullivan wrote a concurring opinion in which he broadly asserted that as a matter of common sense, any finding that an accused is an actual perpetrator means that he intended to kill. *Id.* at 447 (Sullivan, J., concurring). While the majority limited its holding to the facts of this case and the absence of any issue as to intent, Judge Sullivan would apparently hold that any “actual perpetrator” must have intended the death of his victim. Such a view ignores the scenario mentioned by the majority: an accused who fires a weapon wildly in a crowded room. Such a person may not intend to kill but if he kills someone then he is an “actual perpetrator.” Judge Effron joined in denying the appellant’s denial of his petition for extraordinary relief but dissented in affirming the death sentence because of concerns over affidavits filed by court members describing irregularities in the sentence voting procedures. *Id.* at 454-60 (Efron, J., concurring in part and dissenting in part).

95. *Loving*, 47 M.J. at 445 n.4.

96. See *United States v. Curtis*, 32 M.J. 252, 270 (C.M.A. 1991); 33 M.J. 101 (C.M.A. 1991), *rev’d. on reconsid.*, 46 M.J. 129 (1997).

97. ___ M.J. ___, No. 97-7001 (C.A.A.F. Oct. 20, 1998), *rev’g*, 46 M.J. 592 (A.F. Ct. Crim. App. 1996).

98. *Id.* The judge instructed the members that: “If the aggravating circumstance has been found unanimously by proof beyond reasonable doubt, and if one or more members proposed consideration of the death sentence, begin your voting by considering the death sentence proposal, which have the lightest additional punishment if any.” *Id.*

99. MCM, *supra* note 4, R.C.M. 1006(d)(3)(A).

100. *Simoy*, ___ M.J. at ___.

101. *Id.* This was the government’s argument before the CAAF and the position adopted by the Air Force Court of Criminal Appeals in its opinion, which affirmed the death sentence. *Simoy*, 46 M.J. 592 (A.F. Ct. Crim. App. 1996).

102. 46 M.J. 311 (1997).

Conclusion

The foregoing cases prove that when formulating trial strategy, and deciding what evidence to present, counsel must con-

template panel instructions early in the case and anticipate which substantive instructions the judge will give.