

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

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.

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.

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.