

**Change—A Little Bit at a Time**  
**A Review of that Change in the Area of Professional Responsibility**

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**Introduction**

*Because things are the way they are, things will not stay the way they are.*<sup>2</sup>

In the law, change is inevitable. Sometimes it takes the form of a tsunami—sudden and unexpected, transforming the entire landscape—while other times it is a gentle lap of the waves against the shore that results in barely perceptible movement in the grains of sand on the beach. Looking back over the past year in professional responsibility, while there was a metamorphosis of the legal landscape, it is not visible to the casual observer. So what lessons can the discerning eye glean from such a gentle shift? Where are things no longer the way they were? Perhaps even more importantly, where are they about to change from the way they are to the way they will be? Developments in the rules governing professional responsibility for criminal law practitioners, both prosecutors and defense counsel (DC), are both a blessing and a curse. As a blessing, they guide the criminal lawyer in his or her practice of the law, but may be a curse when the guidance is not followed and leads to rules broken. An examination of some of the cases throughout the last year will help remind those who advocate on behalf of the Government, as well as those who represent the individual, what guidance exists and how not to run afoul of it.

**Mitigation Experts in a Death Penalty Case**

*If you play with fire, you're gonna get burned.*<sup>3</sup>

Some risks are worth taking and others are better left alone. *United States v. Loving* provides a word of warning to counsel trying death penalty cases on the use of mitigation experts.<sup>4</sup> The appellate court in *Loving* intimated that while *Loving's* defense team was not ineffective for failing to use a mitigation specialist because one of its members assiduously performed that function, the Government has a high burden to overcome in denying funds for such an expert, as does the defense in not availing itself of the opportunity to use one if provided.<sup>5</sup> The Court of Appeals

for the Armed Forces (CAAF) stated, “Despite a gradually emerging practice of hiring a social worker or other mitigation specialist, the prevailing norm at the time of Appellant’s trial was for the defense team to conduct a reasonable, independent investigation into the accused’s family and background in an effort to discover mitigating evidence.”<sup>6</sup>

Understanding the history of the *Loving* case can help sharpen the lessons it provides.<sup>7</sup> The case itself has a great deal of history, due in no small part to the five-stage military death penalty process, an extremely protracted process that keeps death penalty cases alive for a very long time.<sup>8</sup> *Loving* was convicted in 1989 of premeditated murder, felony murder, attempted murder, and several specifications of robbery.<sup>9</sup> A court-martial sentenced *Loving* to a dishonorable discharge, forfeiture of all pay and allowances, and death.<sup>10</sup> Before CAAF, *Loving* faulted DC counsel for failing to obtain the assistance of a mitigation specialist or social worker.<sup>11</sup> He also alleged deficiencies in the number of, approach to, and conduct of the background interviews that DC conducted with his family members and others, as well as deficiencies in the amount of social history records collected.<sup>12</sup> *Loving* also argued that during sentencing, DC only presented “skeletal information concerning *Loving's* background and environment that was wholly inadequate to present to the jury a true picture of his tortured life and the impact upon him.”<sup>13</sup> According to *Loving*, if “this true

<sup>6</sup> *Id.* at 19.

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

<sup>8</sup> *Id.* at 3.

<sup>9</sup> *Id.* at 2.

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

<sup>11</sup> *Id.* at 6. The U.S. Supreme Court issued its decision affirming *Loving's* death sentence on 3 June 1996, completing stage four of the five stage process under the UCMJ. *Loving v. United States*, 517 U.S. 748, 774 (1996). In the time since the Supreme Court’s decision, the case has remained pending within the military justice system, awaiting presidential action. *Loving's* case remains in a posture where his military remedies have not been exhausted, a critical component of any effort to obtain review in the Article III courts. See *Loving v. United States*, 62 M.J. 235, 248–51 (C.A.A.F. 2005). As a result, review in the Article III courts is not reasonably available to *Loving* so long as his case remains pending in the military justice system. A more detailed appellate history is documented in prior opinions. See *Loving v. United States*, 64 M.J. 132, 134–36 (C.A.A.F. 2006); *Loving*, 62 M.J. at 238–39; *Loving v. Hart*, 47 M.J. 438, 440 (C.A.A.F. 1998).

<sup>12</sup> *Loving*, 68 M.J. at 3.

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

<sup>2</sup> Bertolt Brecht, *quoted in Bertolt Brecht Quotes*, <http://www.brainyquote.com/quotes/quotes/b/bertoltbre131165.html> (last visited Nov. 16, 2009).

<sup>3</sup> Proverb, *quoted in THE YALE BOOK OF QUOTATIONS* 618 (Fred R. Shapiro ed. 2006).

<sup>4</sup> 68 M.J. 1 (C.A.A.F. 2009).

<sup>5</sup> *Id.* at 5–7.

picture had been presented there is a reasonable probability that at least one juror would have struck a different balance in the sentencing determination.”<sup>14</sup>

Prior to Loving’s trial, one of his counsel traveled to Loving’s hometown of Rochester, New York, and interviewed family members, a childhood teacher, a boxing coach, and even a police detective for area familiarization, all of whom provided testimony at trial.<sup>15</sup> The defense also examined and presented school records, as well as a childhood friend’s arrest record.<sup>16</sup> According to the CAAF, “Defense counsel spent a fair portion of his closing argument calling the members’ attention to Loving’s troubled background.”<sup>17</sup> The court went on to state, “In this case, the crux of our prejudice inquiry under *Strickland* is whether there is a reasonable probability that the mitigating evidence introduced at the *DuBay* hearing would have produced a different result had it been introduced at trial.”<sup>18</sup> The material presented at the *DuBay* hearing centered around a social worker, who gave her biopsychosocial assessment of Loving, and records from social services documenting visits to the home from 1967 to 1985, as well as childhood medical records.<sup>19</sup> Also addressed in greater specificity at the hearing was neighborhood gang violence.<sup>20</sup> The court found, however, that “trial defense counsel . . . presented a mitigation case to the members that devoted a significant degree of attention to Loving’s troubled childhood.”<sup>21</sup> Citing *Buckner v. Polk*, another murder case that ended in a death sentence, the *Loving* Court reiterated there is no prejudice under *Strickland* even when new evidence merely “round[s] out the details” of a personal history already presented to the jury.<sup>22</sup> The court found the *DuBay* hearing “did not ultimately change the sentencing profile presented by DC at trial.”<sup>23</sup> The court concluded that Loving failed to demonstrate that there was a reasonable probability that, but for counsel’s deficient performance, the result of the proceeding would have been different with at least one member deciding differently.<sup>24</sup>

Because the court concluded the use of such experts is the “emerging practice,”<sup>25</sup> it stands to reason that while counsel in *Loving* were able to provide effective representation in 1987 without a professional mitigation specialist,<sup>26</sup> to attempt to replicate that feat in 2010 is a good way to “get burned.” Similarly, the CAAF in *United States v. Kreutzer*,<sup>27</sup> another death penalty case from 2005, observed,

In light of recent Supreme Court decisions in this area, when a defendant subject to the death sentence requests a mitigation specialist, trial courts should give such requests careful consideration in view of relevant capital litigation precedent and any denial of such a request should be supported with written findings of fact and conclusions of law.<sup>28</sup>

The Supreme Court decision, alluded to in the previous paragraph, is *Wiggins v. Smith*.<sup>29</sup> In *Wiggins*, the Court emphasized the importance of the background investigation. In November 2009, the Supreme Court relooked at this issue in *Porter v. McCollum*, a case in which the Court identified the defendant’s status as a veteran and his struggles with posttraumatic stress disorder as highly relevant mitigation evidence.<sup>30</sup> The *Wiggins* Court reasoned the issue is not

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<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 9, 10.

<sup>16</sup> *Id.* at 10.

<sup>17</sup> *Id.* at 11. For an interesting comparison to another capital case, originally tried in the mid-80s, where counsel almost completely failed to investigate the accused’s background for mitigating circumstances and spent only six and a half hours preparing for the penalty phase, read *Pinholster v. Ayers* 590 F.3d 651 (9th Cir. 2009).

<sup>18</sup> *Loving*, 68 M.J. at 12.

<sup>19</sup> *Id.* at 12, 13.

<sup>20</sup> *Id.* at 13.

<sup>21</sup> *Id.* at 16.

<sup>22</sup> *Id.* (quoting *Buckner v. Polk*, 453 F.3d 195, 207 (4th Cir. 2006)).

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

<sup>24</sup> *Id.* at 18.

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<sup>25</sup> *Id.* at 19.

<sup>26</sup> *Id.* at 2. *But see* ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES, GUIDELINE 11.4.1.(D) (1989), *as cited in Loving*, 68 M.J. at 19 (internal quotation omitted) (“Counsel should secure the assistance of experts where it is necessary or appropriate for . . . presentation of mitigation.”).

<sup>27</sup> 61 M.J. 293 (C.A.A.F. 2005).

<sup>28</sup> *Id.* at 299 n.7.

<sup>29</sup> 539 U.S. 510 (2003).

<sup>30</sup> 130 S. Ct. 447, 454 (2009). While not a military case, Porter was a Korean War veteran who was sentenced to death for killing his former girlfriend and her boyfriend. During the findings portion of the trial, Porter represented himself, but during sentencing, he elected to be represented by his standby counsel who had only met with Porter once during the month-long interim between findings and sentencing. “It was the first time this lawyer had represented a defendant during a penalty phase proceeding.” *Id.* at 453. Unlike Loving’s legal team, Porter’s counsel “did not obtain any of Porter’s school, medical, or military service records or interview any members of Porter’s family.” *Id.* Porter’s attorney called only one witness and presented inconsistent evidence of his client’s behavior when intoxicated. He also stated that Porter had “other handicaps that weren’t apparent during the trial” and was not “mentally healthy.” *Id.* (internal quotations omitted). Years later, during a two-day post-conviction evidentiary hearing, Porter presented “extensive mitigating evidence,” including testimony from his company commander from Korea, none of which was brought out or apparently known at the original trial. *Id.* at 449. The trial court never heard about “(1) Porter’s heroic military service in two of the most critical—and horrific—battles of the Korean War, (2) his struggles to regain normality upon his return from war, (3) his childhood history of physical abuse, and (4) his brain abnormality, difficulty reading and writing, and limited schooling.” *Id.* at 454. Further emphasizing the importance of Porter’s military service, the court noted, toward the conclusion of their per curiam opinion that, “[o]ur Nation has a long

“whether counsel should have presented a mitigation case,” but rather “whether the investigation supporting counsel’s decision not to introduce mitigating evidence of Wiggins’ background *was itself reasonable*.”<sup>31</sup> *Wiggins* also affirmed that the court’s two-part test in *Strickland v. Washington*, decided some twenty years prior to *Wiggins*, is still the benchmark for deciding allegations of ineffective assistance of counsel.<sup>32</sup>

To find ineffective assistance under *Strickland*, the petitioner must first “show that counsel’s performance was deficient.”<sup>33</sup> Secondly, the petitioner must demonstrate “the deficiency prejudiced the defense.”<sup>34</sup> As the Court held in *Porter*, citing *Strickland*, “[w]e do not require a defendant to show ‘that counsel’s deficient conduct more likely than not altered the outcome’ of his penalty proceeding, but rather that he establish ‘a probability sufficient to undermine confidence in [that] outcome.’”<sup>35</sup> In holding the DC were deficient, the *Wiggins* Court ruled that in a death penalty case, a limited investigation into the accused’s background is only reasonable if further development of a mitigation case “would have been counterproductive, or that further investigation would have been fruitless.”<sup>36</sup> The language in *Wiggins* is also instructive for the proposition that DC need to use what resources are available to them. “Despite the fact that the Public Defender’s office made funds available for the retention of a forensic social worker, counsel chose not to commission such a [social history] report.”<sup>37</sup> In the military court-martial setting, this likely means the defense has an obligation to request funds for a mitigation expert and engage in an initial probing of the accused’s background to determine if further exploration is warranted. Again, *Loving* should be read cautiously. Do not interpret this case originally tried over twenty years ago to mean that a mitigation expert is optional in future death penalty cases. Given changing norms regarding capital litigation, DC risk a near certain finding of ineffective assistance of counsel

(IAC) for failing to avail themselves of the benefit of a qualified mitigation expert. Failure to do so will result in an appellate case just waiting to ignite into an inferno which char everyone in the vicinity.

### Expert Testimony in Child Sex Abuse Cases

*Statistics are no substitute for judgment.*<sup>38</sup>

In *United States v. Mazza*, the question presented to the appellate court was whether it constitutes ineffective assistance of counsel to (1) solicit unfavorable human lie detector testimony from the Government’s expert witness; (2) fail to object to admission of the victim’s videotaped interview; and (3) permit the videotape to be viewed by the panel during deliberations without any oversight from the court. The accused was convicted of indecent acts with his minor daughter and communicating indecent language. At trial, a doctor, who testified for the Government, was limited by the judge to testifying in general terms about how quickly child sex abuse victims report their cases and in what manner they report. The judge specifically directed the expert not to discuss the veracity of identified witnesses.<sup>39</sup>

On cross-examination, the civilian DC questioned the doctor on false reporting generally and the number of false reports made by individuals in the victim’s age group.<sup>40</sup> The doctor stated that of the “hundreds of thousands of child abuse reports each year,” the false accusation rate was only six to eight percent, and it was very rare for a child victim to make a false accusation.<sup>41</sup>

The judge cleared the courtroom, asked the civilian DC if he had considered the consequences of his questions, and warned counsel that his line of questioning would “open doors” for the Government.<sup>42</sup> When the civilian DC proceeded with his questioning, members then asked whether the doctor had interviewed the victim and, if so, whether the interview had been taped. The civilian DC objected, but the judge reminded the civilian DC he had opened, “a very, very, very large door; one I would not have, without you specifically wanting to open up, allowed to be opened.”<sup>43</sup> One of two taped interviews was admitted without further objection.<sup>44</sup> The doctor was not allowed to testify whether she believed the alleged victim’s statements, and the judge reminded the panel that it was their task, not

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tradition of according leniency to veterans in recognition of their service, especially for those who fought on the front lines as Porter did.” *Id.* at 455.

<sup>31</sup> 539 U.S. at 522–23.

<sup>32</sup> *Id.* at 521 (quoting *Strickland v. Washington*, 466 U.S. 668 (1984)). In January 2010, the Court used a *Strickland* analysis in deciding an ineffective assistance of counsel case. *Smith v. Spisak*, 130 S. Ct. 676 (2010). Despite defense counsel’s sentencing argument in which he described his client’s killings in detail, noted that his client’s “admiration for Hitler inspired his crimes,” commented that his client was “sick,” “twisted,” and “demented,” and that his client was “never going to be any different,” the Court held that even if the argument was inadequate, they still found “no ‘reasonable probability’ that a better closing argument without these defects would have made a significant difference” based on the evidence that had come out at trial. *Id.* at 685.

<sup>33</sup> *Strickland*, 466 U.S. at 668.

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

<sup>35</sup> *Porter*, 130 S. Ct. at 455, 456.

<sup>36</sup> *Wiggins*, 539 U.S. at 525.

<sup>37</sup> *Id.* at 524.

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<sup>38</sup> Henry Clay, *quoted in Statistics Quotes*, [http://www.brainyquote.com/quotes/keywords/statistics\\_2.html](http://www.brainyquote.com/quotes/keywords/statistics_2.html) (last visited Nov. 16, 2009).

<sup>39</sup> *Porter*, 130 S. Ct. at 470–71.

<sup>40</sup> *Id.* at 472.

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

<sup>42</sup> *Id.* at 472, 473.

<sup>43</sup> *Id.* at 473.

<sup>44</sup> *Id.*

the expert's responsibility, to determine creditability.<sup>45</sup> During closing argument, the civilian DC argued that the six to eight percent false report rate meant that there were six to eight thousand false reports each year.<sup>46</sup> The panel was apparently unconvinced and convicted the accused.

Ultimately, the appellate court found the civilian DC was not ineffective and his client's conviction was affirmed.<sup>47</sup> The CAAF stated, "Our analysis of counsel's performance is highly deferential."<sup>48</sup> The court went on to state, "While a different defense counsel might have chosen different tactical steps, the tactics used were part of a trial strategy that Appellant failed to show was unreasonable under the circumstances and prevailing professional norms."<sup>49</sup> Questioning the doctor on false reports clearly demonstrates a reasonable trial strategy to show the victim's statements were fabricated, since it was a "credibility contest" between the accused and his daughter, the court found.<sup>50</sup>

In 2007, subsequent to Mazza's initial trial, the CAAF held, in *United States v. Brooks*, that expert testimony regarding the percentage of false claims of sexual abuse of child victims was the "functional equivalent of vouching for the credibility or truthfulness of the victim" and thus, impermissible.<sup>51</sup> The *Mazza* court, however, distinguished its prior holding in *Brooks* by noting that in this case it was the defense that solicited the numbers as a clear part of their trial strategy, as opposed to the prior case when the Government sought out the statistical testimony.<sup>52</sup> The CAAF also found the tape was part of the defense strategy, since counsel requested during closing argument the panel view it and look for inconsistencies between the victim's in-court testimony and what she said during the taped interview.<sup>53</sup> As the appellate court observed, this was an extremely challenging case for the defense; however, giving the Government expert an opportunity to testify to the reliability of child sex abuse victims was probably not the best way to secure an acquittal.<sup>54</sup> Eliciting statistics, which the prosecution is generally barred from introducing because of their prejudicial nature, from the Government expert was simply betting against the odds.

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<sup>45</sup> *Id.* at 473, 474.

<sup>46</sup> *Id.* at 475.

<sup>47</sup> *Id.* at 476.

<sup>48</sup> *Id.* at 474 (quoting *Strickland v. Washington*, 466 U.S. 668, 689 (1984)).

<sup>49</sup> *Id.* at 476.

<sup>50</sup> *Id.* at 475.

<sup>51</sup> *United States v. Brooks*, 64 M.J. 325, 330 (C.A.A.F. 2007).

<sup>52</sup> *Mazza*, 67 M.J. at 475.

<sup>53</sup> *Id.* at 475, 476.

<sup>54</sup> *Id.* at 476.

## What Can Defense Disclose During the Course of a Negotiation?

*Death's brother, Sleep.*<sup>55</sup>

The factual background behind *United States v. Savage* involved the repeated stabbing of a victim, which caused life-threatening wounds, by a suspect who claimed to have been asleep during the episode.<sup>56</sup> On that particular night and in that particular place, death and sleep bore little resemblance. Savage pled guilty to AWOL and breaking restriction. Savage was found guilty of attempted premeditated murder for stabbing a German woman in the back seven times after she allowed him to spend a night at her house while he was AWOL. The incident occurred approximately thirty minutes after she had recommended he return to post and she had given him money to accomplish that task. Savage claimed that due to parasomnia, a sleep disorder, he was asleep while he stabbed his victim. The defense did not raise an insanity defense but requested an instruction on negating mens rea. The DC e-mailed the entire sanity board report, commonly known as the "long form," to the trial counsel without an order from the judge; the report included the accused's statement about the circumstances of the stabbing, which had been protected under Military Rule of Evidence (MRE) 302. The *Savage* court considered the following issues on appeal: Was Savage's DC ineffective during pretrial representation for disclosing the full contents of the sanity board report to the Government, and did the military judge err in her rulings regarding release and use of statements of the accused contained in the report?<sup>57</sup>

In response to the first question, the Army Court of Criminal Appeals (ACCA) found that the DC was not ineffective. The court noted that when the DC released the report, she was planning to rely on the defense of lack of mental responsibility, which might necessitate release of entire report. Under those circumstances, Appendix 22 to the *Manual for Courts-Martial* indicated it may have been appropriate for DC "to disclose the entire sanity report."<sup>58</sup> Accordingly, the court reasoned, "Defense counsel may have had a valid tactical reason to disclose the report, such as using the sanity board report to negotiate a favorable pretrial agreement with the convening authority."<sup>59</sup> The court also observed that the servicemember "failed to demonstrate that the outcome would have been different if his DC had not disclosed the entire sanity board report to the Government."<sup>60</sup> This was due in great part to the statements

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<sup>55</sup> VIRGIL, THE AENEID bk. VI (29-19 B.C.E.).

<sup>56</sup> 67 M.J. 656 (A. Ct. Crim. App. 2009).

<sup>57</sup> *Id.* at 656-62.

<sup>58</sup> *Id.* at 664.

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

<sup>60</sup> *Id.* at 665.

he made to German authorities that included much of the same damaging information contained in the report. Additionally, because the defense expert testified, the defense would have had to disclose Savage's statements to the doctor in any event.<sup>61</sup>

The Government's use of Savage's privileged discussion during the sanity board also helps establish parameters for the proper use of sanity board results. Defense disclosure of sanity board results to opposing counsel, perhaps to help leverage a more beneficial pretrial agreement, does not entitle the Government to the use of all statements made during the sanity board procedure.<sup>62</sup> Military Rule of Evidence 302 unequivocally states that "the defense must present expert testimony about appellant's statements made during a sanity board in order for the Government to use the statements at trial."<sup>63</sup> In *Savage*, the defense forfeited the protections of MRE 302 when the expert witness presented the sleep history evidence Savage had provided to the sanity board.<sup>64</sup> The defense could have chosen to have the prosecutor who reviewed the privileged information disqualified, but it did not.<sup>65</sup> Nevertheless, requesting the disqualification of a prosecutor remains a possible strategy available to DC in future cases.<sup>66</sup>

In the end, the court found "the panel did not believe the alleged parasomniac event affected appellant's ability to specifically intend that result, and neither do we."<sup>67</sup> The court's decision was based on the testimony of two experts, who were not "overwhelmingly confident" in the diagnosis of parasomnia, and Savage's lack of a "history of sleepwalking as a child."<sup>68</sup> Additionally, the time between Savage's conversation with the victim and the stabbing would not have provided sufficient time for him to enter a state of sleep deep enough to be consistent with parasomnia.<sup>69</sup> Finally, the court was influenced by the fact that the "deliberate and complex movements associated with the attack were inconsistent with a parasomniac event," violent parasomniac events are rare, and Savage fled the scene after stabbing her.<sup>70</sup>

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<sup>61</sup> *Id.* at 664–65.

<sup>62</sup> *Id.* at 664.

<sup>63</sup> *Id.* See, e.g., *United States v. Clark*, 62 M.J. 195 (C.A.A.F. 2005); *United States v. Cole*, 54 M.J. 572 (A. Ct. Crim. App. 2000).

<sup>64</sup> *Savage*, 67 M.J. at 662, 663.

<sup>65</sup> *Id.* at 662. See, e.g., *United States v. Bledsoe*, 26 M.J. 97 (C.M.A. 1998); *United States v. Rushatz*, 31 M.J. 450 (C.M.A. 1990).

<sup>66</sup> *Savage*, 67 M.J. at 662.

<sup>67</sup> *Id.* at 665.

<sup>68</sup> *Id.* at 666.

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

<sup>70</sup> *Id.*

## It Can't Hurt to Ask—Post-trial Relief from the Convening Authority

*Four things come not back:  
The spoken word; the sped arrow;  
Time past; the neglected opportunity.*<sup>71</sup>

Just because an appellate court finds that a neglected opportunity does not constitute IAC in a given case does not mean counsel's performance is worthy of emulation. *United States v. Gunderman* is one of those cases.<sup>72</sup> During sentencing, appellant made an unsworn statement in which he requested a bad conduct discharge in order to immediately return home to his wife and mother, who needed his assistance. As a result of Gunderman's concern for his family, his DC inquired whether he desired the court to refrain from adjudging forfeiture of pay and allowances. Gunderman responded affirmatively.<sup>73</sup>

A portion of the defense's closing argument was a reiteration of the request to avoid forfeitures for the pecuniary benefit of his family. At the conclusion of the trial, the judge discussed the sentence adjudged, the effects of the pretrial agreement, and the post-trial and appellate rights form. The judge attached a post-trial appellate rights form, which Gunderman initialed and signed, to the record. The form notified the appellant that automatic forfeitures occurred by operation of Article 58b, UCMJ, and that the appellant had the right to request that the convening authority defer both adjudged and automatic forfeitures. Following the court-martial, however, neither Gunderman nor his counsel requested forfeiture relief from the convening authority or mentioned a deferment or waiver request in subsequent post-trial 1105/1106 submissions.<sup>74</sup> This could be described as a neglected opportunity.

In making an IAC complaint on appeal, arising from a lack of a forfeiture relief request, appellate counsel submitted to the court an unsigned, unsworn document, based on an earlier conversation between Gunderman and his appellate counsel that appellate counsel titled "SWORN AFFIDAVIT."<sup>75</sup> On appeal, counsel raised the issue whether trial DC was ineffective for failing to "advise appellant that he could request disapproval of the adjudged forfeitures, deferral under Article 57, and waiver of automatic forfeitures under Article 58b, UCMJ."<sup>76</sup> The ACCA held that trial DC was not ineffective, but based that decision on the facts of the record of trial and did not

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<sup>71</sup> Omar Ibn, *quoted in* ROBERT DEBS HEINL, JR., *DICTIONARY OF MILITARY AND NAVAL QUOTATIONS* 225 (Naval Inst. Press 1966).

<sup>72</sup> 67 M.J. 683 (A. Ct. Crim. App. 2009).

<sup>73</sup> *Id.* at 683–84.

<sup>74</sup> *Id.* at 684–85.

<sup>75</sup> *Id.* at 685.

<sup>76</sup> *Id.* at 684.

consider an unsigned document as extrinsic evidence upon which to base a decision.<sup>77</sup> The court wrote, “The record reflects appellant’s trial defense counsel properly advised appellant of his post-trial appellate rights and was not ineffective in his representation.”<sup>78</sup> The court went on to note, “We decline to use an unsigned document as extrinsic evidence upon which to base a decision.”<sup>79</sup> Later, the court added that “the oath or swearing process itself has legal import” and that it “encourages a sense of obligation to tell the truth.”<sup>80</sup> Apparently the court believed counsel’s single advisement of his client was good enough to meet a minimum standard to place Gunderman on notice of the issue. While DC may have subsequently raised the issue with his client and his client may have opted not to submit a request to waive forfeitures, it seems more likely that Gunderman’s counsel neglected to address the issue with his client again.

Undoubtedly, counsel was busy, distracted by his next case and other clients asking questions about their futures; but until final action is taken on a case, counsel must remain diligent and not forget post-trial clients even when they no longer pass repeatedly through their office. Sometimes, the best opportunity to achieve results through advocacy comes post-trial, when the opportunity to convince the convening authority to take favorable action toward a client—perhaps, more accurately, the client’s family—is at its greatest.<sup>81</sup> While it is possible for a sharp DC in a seemingly hopeless case to pull the proverbial rabbit from his hat with an acquittal, in many cases, the die has already been cast by the time a client first walks into the DC’s office with a fat case file, evidencing guilt, complete with a signed confession. On these occasions, counsel may realize that their post-trial expertise may be what their client will need most.

Typically, the client will be facing his first court-martial, and advising the client of something as important as waiver of forfeitures once, on the eve of trial, is insufficient and unrealistic. In appropriate cases, the submission of a waiver of forfeitures should be included on a standard checklist, added to the calendar, or tasked to a responsible paralegal for preparation after it has been reviewed and approved by the attorney of record. Although DC can apparently fail in their duty to their clients and commit ineffective assistance of counsel in a number of ways, as the next cases demonstrate, prosecutors may have an equally difficult task in striking the right balance between the zealous pursuit of justice and the protection of the rights of

<sup>77</sup> *Id.* at 686, 688.

<sup>78</sup> *Id.* at 684.

<sup>79</sup> *Id.* at 686.

<sup>80</sup> *Id.* at 688.

<sup>81</sup> *United States v. Wheelus*, 49 M.J. 283, 287 (C.A.A.F. 1998) (“It has long been asserted that an accused’s best chance for post-trial clemency is the convening authority.”).

the accused.

### Improper Prosecutorial Interference with Defense Counsel

*[P]erhaps Hawaii’s most unique feature is its Aloha Spirit: the warmth of the people of Hawaii that wonderfully complements the Islands’ perfect temperatures.*<sup>82</sup>

Lieutenant Colonel (LtCol) Wiechmann was a retirement-eligible Marine charged with failing to obey a lawful order, making a false official statement, conduct unbecoming an officer, adultery, and obstructing justice.<sup>83</sup> Lieutenant Colonel Wiechmann visited the Trial Defense Services (TDS) and the Senior Defense Counsel (SDC) detailed himself to the case;<sup>84</sup> however, because the SDC had only one month of experience as a DC, he requested additional support through his TDS chain of command.<sup>85</sup> The Chief Defense Counsel of the Marine Corps (CDC) detailed a seasoned Reserve component lieutenant colonel to assist with the case.<sup>86</sup> The convening authority subsequently denied a defense request to fund the lieutenant colonel’s assignment, as was the normal practice, stating he could “find no authority for the Chief Defense Counsel of the Marine Corps to detail LtCol [S] to this case.”<sup>87</sup> It seems the convening authority in this case, located in Hawaii, was apparently a little slow to embrace the whole idea of Aloha Spirit on which the state prides itself.<sup>88</sup> This ultimately

<sup>82</sup> Hawaii’s Official Tourism Site—Facts About Hawaii, [http://www.gohawaii.com/about\\_hawaii/learn/introduction](http://www.gohawaii.com/about_hawaii/learn/introduction) (last visited Nov. 16, 2009).

<sup>83</sup> *United States v. Wiechmann*, 67 M.J. 456 (C.A.A.F. 2009).

<sup>84</sup> It is worth noting that in the Army, defense counsel are assigned to U.S. Army Trial Defense Service (USATDS), a separate organization that does not fall under the authority of the local staff judge advocate (SJA) or commander, as specified in Chapter 6 of Army Regulation 27-10. U.S. DEP’T OF ARMY, REG. 27-10, MILITARY JUSTICE (16 Nov. 2005). Authority to detail cases to individual defense counsel originates with the Chief, USATDS, and is typically delegated down to the Senior Defense Counsel (SDC) level. *Id.* para. 6-19. This differs from the Marine Corps which, although having a Chief Defense Counsel of the Marine Corps, does not have a distinct TDS organization. The Chief Defense Counsel “exercises general professional supervision” but not “operational or administrative control of SDCs of defense counsel.” MARINE CORPS MANUAL FOR LEGAL ADMINISTRATION (LEGADMINMAN) 2-5 (31 Aug. 1999). Within the Marines, “the authority to detail defense counsel is vested in the defense counsel’s commanding officer and cognizant command authority,” based on LEGADMINMAN. *Id.* at 2-7. This rule is derived from JAGMAN 0130, which states, “Navy and Marine Corps judge advocates may be detailed as trial and defense counsel by the judge advocate’s CO, OIC, or his designee.” MANUAL OF THE JUDGE ADVOCATE GENERAL (JAGMAN) 1-47 (20 June 2007), available at <http://www.jag.navy.mil/library/instructions/JAGMAN2007.pdf>. The LEGADMINMAN allows for this authority to be delegated to SDCs, which is typical of most installations. *Id.* at 2-7.

<sup>85</sup> *Wiechmann*, 67 M.J. at 458.

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

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

<sup>88</sup> According to one individual familiar with the case, the reticence to recognize LtCol [S] came about because LtCol Wiechmann had previously

created a question on appeal regarding whether LtCol Wiechmann was denied his Sixth Amendment Right to Counsel when the convening authority refused to recognize one of his two detailed DC.

The convening authority's refusal to recognize LtCol [S] resulted in a lack of funding for LtCol [S]'s travel. Citing the apparent confusion over who was financially responsible for paying for his travel, LtCol [S] requested a delay of the scheduled Article 32 hearing. The convening authority responded that "LtCol [S] is not detailed as counsel and has no authority to act in this matter."<sup>89</sup> At the Article 32 hearing, LtCol [S] objected that due to having just secured travel funds from elsewhere, he needed more time to meet with his client and prepare for the Article 32 hearing. The investigating officer decided to proceed with the hearing, although he did allow LtCol [S] to represent his client over Government counsel's objection. Lieutenant Colonel [S] and the SDC next asked for an opportunity to meet with the convening authority to discuss a pretrial agreement, which the defense hoped could have disposed of the case with an Article 15. The convening authority refused to meet with DC and even refused to receive the proposed pretrial agreement package on the basis that "LtCol [S] had not been properly detailed as defense counsel."<sup>90</sup> After the SDC removed LtCol [S]'s name from the proposal, the convening authority accepted the packet for review before ultimately denying the request. After the convening authority turned down an additional request from LtCol [S] for a meeting, the convening authority met with the SDC, without LtCol [S], to discuss the case in general and the viability of resolving the case with an Article 15. The convening authority also denied this proposal.<sup>91</sup>

At the initial hearing of LtCol Wiechmann's court-martial, the military judge made the standard inquiry regarding whom LtCol Wiechmann desired to represent him. Lieutenant Colonel Wiechmann indicated that he wished to be represented by LtCol [S] as lead DC and by the SDC as assistant DC, a position the Government opposed. After arraignment, the judge heard each side's arguments on the defense motion for appropriate relief to allow LtCol [S] to officially join the case. Granting the defense motion, the judge ruled that "the applicable departmental regulations authorized the CDC to detail LtCol [S] as defense counsel."<sup>92</sup> The parties then worked out an agreement in

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talked to LtCol [S] in his capacity as a civilian defense counsel; however, instead of retaining him at his own expense, LtCol Wiechmann had attempted to finagle the system into forcing the Marine Corps to pay for his civilian counsel.

<sup>89</sup> *Wiechmann*, 67 M.J. at 458.

<sup>90</sup> *Id.* at 459.

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

<sup>92</sup> *Id.* It is unclear which "departmental regulations" the judge was referring to that authorized the CDC to detail counsel since the plain meaning of the applicable language found in the LEGADMINMAN seems to indicate otherwise. The appellate court stated, "As neither party challenged the

which LtCol Wiechmann would plead guilty and submit paperwork for immediate retirement at the grade of major, and in return, the convening authority would suspend any confinement and discharge adjudged."<sup>93</sup>

On appeal, the court held that although the accused does not have the right to more than one detailed counsel, "the person authorized by regulations prescribed under section 827 of this title (Article 27) to detail counsel, in his sole discretion . . . may detail additional military counsel as assistant defense counsel."<sup>94</sup> The court further found that "[a] convening authority may not interfere with or impede an attorney-client relationship established between an accused and detailed defense counsel," which, in LtCol Wiechmann's case, was established at the time of LtCol [S]'s initial detailing as LtCol Wiechmann's DC.<sup>95</sup> The court also faulted the convening authority for not seeking clarification from officials at the departmental level before declining to recognize LtCol [S] as LtCol Wiechmann's counsel.<sup>96</sup> The court ultimately found that the convening authority's action hindered LtCol [S]'s representation of his client in the following respects:

- (1) the Article 32 proceeding was conducted without a full opportunity for LtCol [S] to prepare and participate;
- (2) LtCol [S] was excluded from pretrial disposition negotiations that the Government conducted with [the SDC], the less experienced defense counsel;
- (3) LtCol [S] was unable to represent Appellant in pretrial procedural matters, such as in a scheduling conference or by requesting a continuance.<sup>97</sup>

Accordingly, the court held that "the Government's actions infringed Appellant's right to the assistance of counsel."<sup>98</sup> In evaluating the case, the court looked for "structural error—an error so serious that no proof of prejudice is required—or whether the error must be tested

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military judge's interpretation of departmental regulations on appeal, we treat his ruling as the law of the case." *Id.* at 460. This indicates that if the Government had appealed, the appellate court may well have decided this portion of the case differently, and the rule should not be applied too broadly given that the case cites to *United States v. Parker*, 62 M.J. 459, 464 (C.A.A.F. 2006), for the proposition that the ruling applies the "law-of-the-case doctrine." In *Parker*, the court stated, "When a party does not appeal a ruling, the ruling of the lower court normally becomes the law of the case. The law-of-the-case doctrine, however, is a matter of appellate policy, not a binding legal doctrine."

<sup>93</sup> *Wiechman*, 67 M.J. at 459–60.

<sup>94</sup> *Id.* at 458 (quoting UCMJ art. 38(b)(6) (2008)).

<sup>95</sup> *Id.* at 456.

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

<sup>97</sup> *Id.* at 462.

<sup>98</sup> *Id.*

for prejudice.”<sup>99</sup> Finding no structural error, the court found that while the convening authority committed a violation of the servicemember’s Sixth Amendment Rights, it was harmless because LtCol [S] was constantly able to advise the SDC from the background.<sup>100</sup>

At first it may seem as though the convening authority wished to avoid the expense of funding the specially detailed DC, but the convening authority still refused to interact with him even after LtCol [S] received an alternate funding source. To a judge advocate outside the Marine Corps, things may seem to have gone from thrifty to petty. Given the widespread belief within the Marine Corps prior to this case that the applicable departmental regulation did not allow the CDC to detail counsel, however, perhaps this was as much a principled stand on regulation as much as anything else.<sup>101</sup> Ultimately, the appellate court found the Government wrongly interfered with LtCol Wiechmann’s right to counsel but found no prejudice. Under a slightly different factual scenario, the result could have turned in the opposite direction. The Government must avoid interfering with defense detailing decisions and must treat whomever the defense deems appropriate with a greater Aloha Spirit than the convening authority displayed in this case.<sup>102</sup>

### Cross-examining the Accused

*Retreat, hell! We're just attacking in another direction.*<sup>103</sup>

Everything really does depend on perspective—especially if one was drunk and is now charged with assaulting the police. Such was the case for the star of *United States v. Harrison*, a case that detailed the special rules the prosecutor must comply with when cross-examining the accused.<sup>104</sup> Mr. Harrison was on “Army Beach,” a U.S. Army-controlled beach on Oahu that had been declared off-limits at night.<sup>105</sup> Two military police (MP) officers, who patrolled the area to enforce the

directive, discovered him on the beach and asked him to leave the area.<sup>106</sup> From that point forward, Mr. Harrison’s and the MPs’ versions of what happened differed greatly.<sup>107</sup> As the court’s opinion declared, it was “the tale of two Rex Harrisons.”<sup>108</sup> The MPs described him as a belligerent drunk who assaulted them, while Mr. Harrison was characterized, in the appellate court’s description, as “having the milk of human kindness by the quart in every vein.”<sup>109</sup>

The trial quickly transformed into a credibility contest, pitting the MPs’ version against Mr. Harrison’s.<sup>110</sup> The case was prosecuted by two Special Assistant U.S. Attorneys (SAUSA).<sup>111</sup> They addressed Mr. Harrison’s claim that there was an elaborate conspiracy to convict him by asking him, on cross-examination, whether the other witnesses in the case were lying under oath and whether the SAUSAs were also part of the conspiracy to convict him.<sup>112</sup> The SAUSAs also elicited testimony, which they subsequently used during closing argument, that an internal investigation had been conducted after the incident and that, following the inquiry, the MPs had been promoted, clearly implying they were not found to have engaged in wrong doing.<sup>113</sup> Mr. Harrison was convicted of assaulting one of the officers and inflicting bodily injury.<sup>114</sup>

The Ninth Circuit Court of Appeals examined two issues on appeal. First, may a prosecutor question an accused on cross-examination about the truthfulness of another witness? Second, may counsel vouch for their witnesses?

The court answered the first question in the negative, stating “It’s black letter law that a prosecutor may not ask a defendant to comment on the truthfulness of another witness.”<sup>115</sup> The court also answered the second question in the negative, again faulting the Government, but this time

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

<sup>100</sup> *Id.* at 463.

<sup>101</sup> According to one senior Marine judge advocate, the CDC is now taking a more active role in detaling cases; however, the regional defense counsels are still getting detailing authority from their respective commanders.

<sup>102</sup> For Marine Corps convening authorities who believe their interference is authorized by the LEGADMINMAN, consider acting with restraint given the uncertainty of how that regulation will be interpreted by courts in the future.

<sup>103</sup> Major General Oliver P. Smith, *quoted in* Leatherneck’s Famous Marine Quotes, <http://www.mca-marines.org/leatherneck/quotes.asp> (last visited Nov. 20, 2009) (attributing the cited quote to Major General Oliver P. Smith, Commanding General, 1st Marine Division in Korea, 1950, regarding his order for Marines to move southeast to the Hamhung area from the Hagaru perimeter; however, MajGen Smith claimed he did not say it quite that way).

<sup>104</sup> 585 F.3d 1155 (9th Cir. 2009).

<sup>105</sup> *Id.* at 1162.

<sup>106</sup> *Id.*

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

<sup>108</sup> *Id.* at 1158.

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

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

<sup>111</sup> *Id.* at 1159. Judge advocates from the various services serve as Special Assistant United States Attorneys nominally under the authority of the U. S. Attorney. They are responsible for the prosecution of violations of federal law committed by civilians on military installations that come within the exclusive federal jurisdiction of the United States pursuant to U.S. Const. art. I, § 8, cl. 17, and 18 U.S.C. § 7. Criminal prosecution of civilians arising from these areas is exclusively within the jurisdiction of the United States, through the Department of Justice and the Office of the U.S. Attorney.

<sup>112</sup> *Id.* at 1158, 1159.

<sup>113</sup> *Id.* at 1159.

<sup>114</sup> *Id.* at 1158.

<sup>115</sup> *Id.* (citing *United States v. Combs*, 379 F.3d 564, 572 (9th Cir. 2004); *United States v. Geston*, 299 F.3d 1130, 1136 (9th Cir. 2002)).

for vouching for their own witnesses.<sup>116</sup> When Mr. Harrison suggested the arresting officers were motivated to lie about his actions, the court reasoned that the Government was entitled to rebut such statements.<sup>117</sup> However, when one of the prosecutors mentioned during closing argument that the officers had been promoted after the internal investigation into the event, the Government “crossed the line.”<sup>118</sup> This blatantly signaled the jury that information they were not privy to further supported the officers’ testimony.<sup>119</sup> The Government continued to inappropriately vouch for the officers when, also during closing argument, one of the prosecutor’s stated that the “Government stands behind” the testifying officers.<sup>120</sup>

The court found the DC “should have objected as soon as he saw the prosecutors step out of line.”<sup>121</sup> The appellate court further found that “the respected and experienced district judge should not have tolerated this protracted exhibition of unprofessional conduct.”<sup>122</sup> Mr. Harrison did not merit any relief, however, since he failed to show prejudice due to other insurmountable evidence the Government had presented in this credibility contest.<sup>123</sup>

#### **Article 10—Dealing with an Accused in Pre-Trial Confinement**

*Perfection is attained by slow degrees; it requires the hand of time.*<sup>124</sup>

If what Voltaire said about perfection is true, perhaps perfection was what the prosecutor hoped to produce in *United States v. Simmons*.<sup>125</sup> Unfortunately, by using a protracted process, the Government ended up with a dismissal rather than the perfect case.<sup>126</sup> Simmons pled guilty at a general court-martial to AWOL, failure to be at his place of duty, failure to follow orders, and disorderly conduct.<sup>127</sup> While he was also arraigned on charges of rape,

kidnapping, and multiple assaults, those charges were dismissed.<sup>128</sup> While this is an unpublished opinion and, as such, does not serve as precedent, it provides multiple teaching points for counsel dealing with an accused in pre-trial confinement (PTC). Simmons was placed into PTC following the alleged rape of his wife while he was AWOL.<sup>129</sup> He remained in PTC for 133 days before his trial, although he was arraigned on day 107.<sup>130</sup>

The events of this case took place in South Korea, where Simmons was assigned.<sup>131</sup> The first delay of this case resulted from the Government’s erroneous belief that the Status of Forces Agreement (SOFA) gave primary jurisdiction to the Korean government and that the U.S. military was barred from going forward with the case.<sup>132</sup> The appellate court viewed this misinterpretation by the Government of its own SOFA as “negligent,” and therefore “unreasonable,” and characterized the Government’s conduct as “the polar opposite of reasonable diligence.”<sup>133</sup> In addition to confusion over the SOFA, the Government cited an annual brigade training exercise as a cause for delay.<sup>134</sup> The court held that “[w]hile operational considerations are relevant, they are not an absolute excuse.”<sup>135</sup> This was particularly true when the operational consideration was just an annual exercise, as it was in *Simmons*.<sup>136</sup> Finally, the Government also blamed a plodding Criminal Investigative Division (CID) investigation for further delay because several follow-up interviews, which were not particularly informative, took an extended period of time to conduct.<sup>137</sup>

After the SOFA confusion was resolved, an investigating officer (IO) was appointed to the case on day forty-six of Simmons’s PTC.<sup>138</sup> (The original IO was later replaced by a second IO.) Despite the instructions in the IO’s appointment memorandum, which authorized the IO only seven calendar days to conduct the investigation, the IO took forty-one days from his appointment to complete and forward, on the eighty-sixth day of Simmons’s PTC, his final report.<sup>139</sup> The delay was due, in part, to the IO’s refusal to proceed with the investigation because he had

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<sup>116</sup> *Id.* at 1158, 1159.

<sup>117</sup> *Id.* at 1159.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* (quoting *United States v. Necoechea*, 986 F.2d 1273, 1276 (9th Cir. 1993)) (internal quotation omitted).

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

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

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 1160.

<sup>124</sup> Voltaire, *quoted in* Voltaire Quotes, <http://www.brainyquote.com/quotes/quotes/v/voltaire133391.html> (last visited Nov. 16, 2009).

<sup>125</sup> Army 20070486 (A. Ct. Crim. App. 2009) (Westlaw 2010) (memorandum opinion).

<sup>126</sup> *Id.* at 2.

<sup>127</sup> *Id.* at 1.

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<sup>128</sup> *Id.* n.2.

<sup>129</sup> *Id.* at 2.

<sup>130</sup> *Id.* at 2, 3 n.3.

<sup>131</sup> *Id.* at 3.

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

<sup>133</sup> *Id.* at 18.

<sup>134</sup> *Id.* at 4.

<sup>135</sup> *Id.* at 21.

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

<sup>137</sup> *Id.* at 22.

<sup>138</sup> *Id.* at 5.

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

prior plans to visit friends over a four-day weekend.<sup>140</sup> Eleven days after receiving the IO's report, the convening authority referred the case to a general court-martial.<sup>141</sup> When Simmons was arraigned, the judge docketed the case for forty days later "because there was nothing else available on the docket."<sup>142</sup> Ultimately, Simmons spent 134 days in PTC before being sentenced to 120 days of confinement, excluding an additional fifteen days of credit the accused received for illegal pre-trial punishment. He was also sentenced to a bad conduct discharge (BCD) and reduction to E-1.<sup>143</sup>

The issue the court took up on appeal was whether the judge erred by failing to dismiss the charges due to an Article 10 violation.<sup>144</sup> Ultimately, the Army court found that the Government did not exhibit reasonable diligence in processing the case.<sup>145</sup> Consequently, the court dismissed the case with prejudice, the standard remedy for a violation of Article 10.<sup>146</sup>

*Simmons* offers numerous lessons, both direct and indirect. First, inexperienced trial counsel (TC) should be closely monitored or assigned a second chair from the outset whenever an accused is placed in PTC. Lack of experience will not suffice as an excuse when the Government fails to move a case forward in a timely manner. Secondly, the Government should consult a subject matter expert whenever questions regarding the interpretation of a SOFA or some other international agreement or regulation, which may result in delay, arise, and the discussions should be memorialized on the record. Third, when operational realities occur, the Government should consider assigning another TC to move the case forward. If the "operational reality" is actually a training event, the Government should consider whether the training event has priority over an Article 32 hearing. Similarly, if a lengthy CID investigation is causing a delay, the Government should determine whether the information they are still pursuing is potentially case-changing or whether the case can go forward. This is especially true when there are no complex evidentiary issues, no physical evidence that requires time-consuming forensic evaluation, and no co-accused that would potentially necessitate grants of immunity, as was the case in *Simmons*.

The Government should also keep in mind that it may request the convening authority exclude certain periods of time from the Government's "clock" under the provisions of R.C.M. 707(c). Examples of excludable delay include preparation for complex cases, examining the mental capacity of the accused, processing a reserve component servicemember onto active duty, securing important witnesses or other evidence, and time to obtain security clearances or declassify documents.

Another obvious factor to consider is the identification of a "good" Article 32 officer before charges are preferred at the GCM level or as soon as a servicemember is placed in PTC. A "good" Article 32 officer is one who is not pending leave or TDY and is not otherwise so burdened with normal responsibilities that she can prioritize completion of the Article 32 process. If, despite one's best efforts in selecting a "good" Article 32 officer, the IO does not move forward in a timely manner and prodding from the TC is unable to achieve the desired results, the commander should direct the investigating officer to comply with the suspense as outlined in the appointment memorandum. If the commander must be involved, the TC should remind the commander not to discuss the merits of the case with the Article 32 officer in order to avoid even the appearance of unlawful command influence (UCI).

*Simmons* also highlights the need to have a plan for rapid action by the convening authority. Sometimes a specially scheduled appointment with the convening authority to address a pending case may be appropriate. Finally, the Government should keep in mind that when a servicemember is in PTC, the speedy trial clock does not stop at arraignment. While the judge assumes greater responsibility for the case following arraignment, the Government still has an obligation to move the case forward as expeditiously as possible. The Government's options include requesting other cases be moved to accommodate a case with potential Article 10 implications. Alternatively, the Government could request the assistance of another judge who is available earlier. Finally, the Government must establish a proper record for the appellate court so that its efforts are documented and available during appellate review.

### Vindictive Prosecution

*Men are often a lot less vindictive than women are, because we are rejected constantly every day.*<sup>147</sup>

Another trap Government counsel must be mindful to avoid is vindictive prosecution. However, as the following case demonstrates, the defense must overcome an extremely high burden to successfully challenge a case for vindictive

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

<sup>141</sup> *Id.* at 6.

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

<sup>143</sup> *Id.* at 1, 6.

<sup>144</sup> *Id.* at 2.

<sup>145</sup> *Id.* at 10.

<sup>146</sup> *Id.* at 2.

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<sup>147</sup> Warren Farrell, *quoted in* Vindictive Quotes, <http://www.brainyquote.com/quotes/keywords/vindictive.html> (last visited Nov. 16, 2009).

prosecution. In *Unites States v. Martinez*, an Air Force captain assigned to Iraq went on pass to Qatar.<sup>148</sup> While in Qatar, he repeatedly attempted to engage a female corporal in conversation. After two days of trying, Capt. Martinez finally succeeded in talking to the corporal, at which time he promptly told her that he liked her and wanted to have sex with her. He further told her that he wanted to come to her room when she got off work. She responded that she may not be in her room and ended the conversation. The next morning, Martinez went to her room three times attempting to locate her. After the third time of knocking and not receiving an answer, he unlocked her door and entered the room. Finding her in bed, he took off his shoes and crawled into bed with her, where he began to fondle her. She said she needed to go to a meeting and left, promptly reporting the incident. Without authorization, Martinez then took a plane back to the United States and was arrested the following day as he disembarked in Baltimore, Maryland. Martinez was ultimately court-martialed for his misconduct.<sup>149</sup>

On appeal, Martinez raised the issue of vindictive prosecution for the first time. Martinez alleged that he had “identified problems with operating procedures, equipment and standard of care,” which he claimed irritated the SJA, convening authority, the Article 32 IO, the judge, TC, DC, “and a myriad of others.”<sup>150</sup> The court explored whether he could raise the new issue on appeal and, if so, what facts he must show to support his claim. The court found that by failing to raise the issue at trial when he knew, or should have known, of the facts giving rise to the claim of vindictive prosecution, he had waived his right to make the claim on appeal.<sup>151</sup>

The court further found that even if Martinez had not waived the issue, he had nevertheless failed to offer any relevant evidence to meet *any* of the elements of the three-part test for vindictive prosecution.<sup>152</sup> To support such a claim, he had to show that (1) “others similarly situated” were not charged; (2) “he has been singled out for prosecution”; and (3) “his ‘selection . . . for prosecution’ was ‘invidious or in bad faith, *i.e.*, based on such impermissible considerations such as race, religion, or the desire to prevent his exercise of constitutional rights.’”<sup>153</sup> Failure to show any of the three prongs of the test must result in the failure of a claim of vindictive prosecution. Because the burden to establish a claim of vindictive prosecution falls on the moving party, challenging a case on grounds of vindictive

prosecution can be difficult.<sup>154</sup>

## A Look Ahead

### *Pending Professional Responsibility Cases*

*The best thing about the future is that it only comes one day at a time.*<sup>155</sup>

While this is the state of the law now, it is only a matter of time before it changes. On 18 March 2010, the Navy-Marine court issued yet another opinion<sup>156</sup> in *United States v. Denedo*, a case it addressed back in 2000 when it examined the case as a matter of mandatory review from Denedo’s conviction and adjudged discharge in 1998.<sup>157</sup> The Navy-Marine court also considered the case in 2007, when Denedo submitted a *writ of coram nobis* to stave off deportation proceedings that were a direct result of his earlier conviction.<sup>158</sup> The recently decided, unpublished case at the Navy-Marine court level came about after having risen to CAAF and the U.S. Supreme Court.<sup>159</sup> Denedo agreed to plead guilty at a BCD-level court-martial after his attorney advised him that a plea that downgraded the level of the court-martial would avoid any immigration consequences.<sup>160</sup> While the Navy-Marine court did not find

<sup>154</sup> *Martinez*, WL 1508451, at \*3.

<sup>155</sup> Abraham Lincoln, *quoted in* Expectation Quotes, <http://quotations.about.com/cs/inspirationquotes/a/Expectation1.htm> (last visited Dec. 8, 2009).

<sup>156</sup> *United States v. Denedo*, 2010 WL 996432 (N-M. Ct. Crim. App. 2010).

<sup>157</sup> 129 S. Ct. 2213 (2009). Denedo came to the United States in 1984 from Nigeria. He enlisted in the U.S. Navy and became a lawful permanent resident.

<sup>158</sup> The NMCCA agreed with Denedo that they had authority to review the case under such a writ; however, the court denied relief, and review was granted. *Denedo v. United States*, No. NMCCA 9900680 (N-M. Ct. Crim. App. 2007). The CAAF also agreed that review was appropriate in this case but remanded for further proceedings, believing relief was appropriate. 66 M.J. 114 (2008). The Government appealed Denedo’s ability to bring a writ, and certiorari was granted by the U.S. Supreme Court. The Supreme Court affirmed CAAF’s decision in a 5-4 decision, holding “only that the military appellate courts had jurisdiction to hear respondent’s request for a writ of *coram nobis*,” remanding it for further proceedings. 129 S. Ct. at 2224.

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

<sup>160</sup> *Id.* In 1998, military authorities charged Denedo, an alien, with conspiracy, larceny, and forgery. With counsel’s assistance, Denedo agreed to plead guilty to reduced charges, as he was advised by counsel that this would avoid any immigration consequences. The special court-martial accepted the plea and convicted and sentenced respondent. The Navy-Marine Corps Court of Criminal Appeals (NMCCA) affirmed, and Denedo was discharged from the Navy in 2000. In 2006, the Department of Homeland Security commenced removal proceedings against the alien based on his conviction. To avoid deportation, the alien filed a petition for a writ of *coram nobis* in the NMCCA which asked the NMCCA to vacate his conviction because he received ineffective assistance of counsel when his counsel not only failed to warn him of the implications of his conviction regarding his continued residence in the United States, but actually told him that by pleading guilty, he avoided any immigration consequences.

<sup>148</sup> 2009 WL 1508451 (A.F. Ct. Crim. App. 2009).

<sup>149</sup> *Id.* at \*1.

<sup>150</sup> *Id.* at \*2.

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

<sup>152</sup> *Id.* at \*3.

<sup>153</sup> *United States v. Argo*, 46 M.J. 454, 463 (C.A.A.F. 1997) (quoting *United States v. Garwood*, 20 M.J. 148, 154 (C.M.A. 1985)).

IAC in their most recent holding,<sup>161</sup> appellate counsel may yet again raise the issue to CAAF given the outcome of a similar Supreme Court case: *Padilla v. Kentucky*, less than two weeks later.<sup>162</sup> Like *Denedo*, *Padilla* involved an attorney's inaccurate legal advice on a collateral matter: immigration.<sup>163</sup> Unlike *Denedo*, *Padilla* has "dramatic[ally] depart[ed] from precedent"<sup>164</sup> and granted a new entitlement under the Sixth Amendment that Justice Scalia in his dissent terms a "Padilla warning"<sup>165</sup> that now requires that where the law "is truly clear," as the court found in this case, "the duty to give correct advice is equally clear."<sup>166</sup>

*Padilla* has the potential to affect nearly every case.<sup>167</sup> Most cases raise some collateral issue that, based on the outcome of the case, may require a DC to advise her client of ramifications that go beyond the potential sentence the judge may impose.<sup>168</sup> A felony conviction will affect one's

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<sup>161</sup> *Denedo*, 2010 WL 996432.

<sup>162</sup> *Padilla v. Kentucky*, No. 08-651, 2010 WL 1222274 (U.S. Mar. 31, 2010). On 22 March 2010, the U.S. Supreme Court granted certiorari on another IAC case, *Belleque v. Moore*, where Moore's counsel failed to file a motion to suppress his unconstitutional confession and advised him to plead guilty. The lower court decision can be found at 574 F.3d 1092 (9th Cir. 2009).

<sup>163</sup> *Padilla*, No. 08-651, 2010 WL 1222274. *Padilla* is a U.S. permanent resident of forty years who served in the U.S. military during Vietnam. He was charged with felony drug trafficking, among other things. He asked his attorney if a guilty plea would impact his immigration status, and his attorney told him he "did not have to worry about immigration status since he has been in the country so long." 253 S.W.3d 482, 483 (Ky. 2008)

<sup>164</sup> *Padilla*, No. 08-651, 2010 WL 1222274, at \*12. The concurring opinion notes that "[u]ntil today, the long standing and unanimous position of the federal courts was that reasonable defense counsel generally need only advise a client about the *direct* consequences of a criminal conviction." Justice Alito notes that "'virtually all jurisdictions'—including 'eleven federal circuits, more than thirty states, and the District of Columbia'—'hold that defense counsel need not discuss with their clients the collateral consequences of a conviction,' including deportation." *Id.* at \*12.

<sup>165</sup> *Id.* at \*20.

<sup>166</sup> *Id.* at \*8. The court did provide that "when the law is not succinct and straightforward (as it is in many [cases])," a defense counsel need only provide a general advisement. *Id.* Determining when the law is "succinct and straightforward" now becomes a challenge unto itself, especially given Justice Alito's comments that "many criminal defense attorneys have little understanding of immigration law," *id.* at \*12, and "'nothing is ever simple with immigration law' including the determination whether immigration law clearly makes a particular offense removable." *Id.* at \*14.

<sup>167</sup> While the majority opine that "the unique nature of deportation," *id.* at \*6, will not cause it to bleed over into other collateral matters, the dissent's perspective is quite different. Justice Scalia wrote, "[A]n obligation to advise about a conviction's collateral consequences has no logical stopping-point." *Id.* at \*20. He further stated, "We could expect years of elaboration upon these new issues in the lower courts, prompted by the defense bar's devising of ever-expanding categories of plea-invading misadvice and failures to warn-not to mention innumerable evidentiary hearings to determine whether misadvice really occurred or whether the warning was really given." *Id.*

<sup>168</sup> The Court defined collateral matters as "those matters not within the sentencing authority of the state trial court." *Id.* at \*6. The court then went on to say that "[d]eportation as a consequence of a criminal conviction is,

right to possess a firearm,<sup>169</sup> to vote, hold office, or serve on a jury.<sup>170</sup> The Court makes a point of stating that they "have never applied a distinction between direct and collateral consequences to define the scope of constitutionally 'reasonable professional assistance' required under *Strickland*," but then says they need not decide the question because of the "unique nature of deportation."<sup>171</sup> Given the "severity of deportation—'the equivalent of banishment or exile,'"<sup>172</sup> and the transformation in immigration law that has "made removal nearly an automatic result for a broad class of noncitizen offenders"<sup>173</sup> that eliminated the discretion of judges to intervene in cases,<sup>174</sup> the Court has now adopted the position that, "as a matter of federal law, deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes."<sup>175</sup> Even if lower courts do not extend their rulings to include a requirement to advise clients of these civil rights implications beyond immigration and mandate advisement only for immigration issues, such a mandate would still be a significant change, since there are nearly 3000 non-U.S. citizens in the Army alone.<sup>176</sup> There are also nearly 9000 individuals in the U.S. Army whose citizenship status is unknown.<sup>177</sup> These numbers also do not account for U.S. Army Reservists and National Guardsmen, who fall under the jurisdiction of the UCMJ when activated.<sup>178</sup> Although DC may only see one case involving immigration as a quasi-collateral issue during their time assigned to the Trial Defense Service, this lack of regularity is exactly what may set counsel up for failure and the inevitable IAC complaint,

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because of its close connection to the criminal process, uniquely difficult to classify as either a direct or a collateral consequence." *Id.*

<sup>169</sup> 18 U.S.C. § 922(g)(1) (2006).

<sup>170</sup> *United States v. Stockett*, 157 Fed. Appx. 920, 923 (2005). In his concurrence in *Padilla*, Justice Alito compiles a thorough list of secondary effects or collateral matters to illustrate his point to include even damaging one's reputation to make employment prospects difficult. *Id.* at \*12

<sup>171</sup> *Padilla*, No. 08-651, WL 1222274, at \*6. The Court also did not decide if there was prejudice in this case, the required second prong of a *Strickland* analysis, and thus whether *Padilla* was entitled to relief since the lower court had not ruled on the issue. *Id.* at \*11. It is possible that despite counsel's inaccurate advice, there was no prejudice because, even if *Padilla* had been properly advised by competent counsel, knew "his conviction for drug distribution made him subject to automatic deportation," and had opted to contest the charges, the Court would have found "no reasonable probability" of acquittal based on the overwhelming evidence, using a *Spisak* analysis. See note 32 and accompanying text.

<sup>172</sup> *Padilla*, No. 08-651, WL 1222274, at \*11.

<sup>173</sup> *Id.* at \*6.

<sup>174</sup> *Id.* \*4.

<sup>175</sup> *Id.* at \*5.

<sup>176</sup> As of 30 September 2009, according to George Wright, a U.S. Army spokesman at the Pentagon.

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

<sup>178</sup> MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 202, 204 (2008).

especially given that, as Justice Alito's opinion points out, immigration law is "ambiguous" and "may be confusing to practitioners not versed in the intricacies of immigration law."<sup>179</sup> Every new requirement represents just one more thing to forget and one more opportunity opportunity to commit IAC.

associated with—the big problems in the area of IAC, counsel are particularly vulnerable to nuanced changes. Hopefully, this article will alert the military justice practitioner to the dangers that lurk among the facts of their cases, allowing counsel to avoid not only a tongue lashing from the judge, but also IAC complaints for the DC or dismissal or reversal on appeal for the trial counsel.

### Conclusion

*If one thinks, one must reach conclusions.*<sup>180</sup>

When things, the law or otherwise, change incrementally, change is at its most difficult to spot. While it is easy to avoid—or at least identify the potential risks

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<sup>179</sup> *Id.* at \*14.

<sup>180</sup> Helen Keller, *quoted in* In Quotations: Quotations About Conclusions, <http://quotations.about.com/sitesearch.htm?terms=quotations+about+conclusions&pg=1&SUName=quotations&ac=&cs=&TopNode=99> (last visited Dec. 8, 2009).