

Annual Review of Developments in Instructions—2007

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Introduction

This annual installment of developments in instructions covers cases decided by the Court of Appeals for the Armed Forces (CAAF) during its 2007 term¹ and focuses on crimes, defenses, and evidence. It is written for military trial practitioners, and frequently refers to the relevant paragraphs in the *Military Judges' Benchbook (Benchbook)*.² The *Benchbook* remains the primary resource for drafting instructions.

Crimes

Constructive force for Rape

In *United States v. Terry*,³ a rape case that predated the recent amendments to Article 120, Uniform Code of Military Justice (UCMJ)⁴ the CAAF considered whether the evidence in the case raised the issue of constructive force.⁵

Air Force Staff Sergeant (SSgt) Terry worked as a hospital radiology technician.⁶ As part of his duties, he performed an ultrasound on Airman First Class (A1C) S.⁷ While chatting, SSgt Terry told A1C S that he was taking college classes and asked if she would help by letting him take ultrasound pictures of the veins in her arm.⁸ Airman First Class S agreed to come to the hospital the next day, a Saturday, to let him do so.⁹

When A1C S arrived, the radiology clinic was relatively deserted.¹⁰ Staff Sergeant Terry led her to the ultrasound room by a circuitous route and after examining her arms, told her that he was having trouble seeing veins and asked if he could examine her legs instead.¹¹ Airman First Class S agreed and the exam progressed in stages with SSgt Terry next requesting to examine A1C S's groin and finally her ovaries with an internal probe.¹²

¹ The 2007 term began on 1 October 2006 and ended on 30 September 2007. See U.S. Court of Appeals for the Armed Forces, Calendar, <http://www.armfor.uscourts.gov/Calendar.htm> (last visited June 16, 2008).

² U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK (15 Sept. 2002) [hereinafter BENCHBOOK].

³ 64 M.J. 295 (2007) (reversed for erroneous denial of challenge against a member).

⁴ UCMJ art. 120 (2008) (replacing the offenses in the previous Article 120 and some of the other sexual misconduct offenses in other articles with a new, comprehensive scheme of sexual misconduct offenses under Article 120, effective for offenses that occur on or after 1 October 2007).

⁵ See *United States v. Palmer*, 33 M.J. 7, 9 (C.M.A. 1991) (judge may instruct on the concept of constructive force, if raised by the evidence); *United States v. Hicks*, 24 M.J. 3, 6 (C.M.A. 1987).

⁶ *Terry*, 64 M.J. at 297.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at 297-98.

During this portion of the exam, SSgt Terry asked A1C S if she had ever had sex with a black man or had a one-night stand.¹³ He asked what she would do if he had a condom, and she felt his penis penetrate her vagina while simultaneously he pressed his hands on her back and grabbed her breast with his right hand.¹⁴ He told her not to scream.¹⁵ She crawled away from him and put her clothes back on.¹⁶ Terry told her not to tell anyone what happened.¹⁷

At trial, A1C S testified that she never intended on having intimate contact with SSgt Terry, and she did not leave the room because she was scared and felt trapped in the small room.¹⁸ After all the evidence, the military judge informed counsel that she intended to give an instruction on constructive force; the defense objected.¹⁹ The military judge overruled the objection, concluding there was some evidence that the accused threatened or intimidated the victim.²⁰

Constructive force exists when intimidation or threats of death or physical injury make resistance futile.²¹ The threats may be express or implied.²² In this case, the military judge instructed the members as follows:

Where intimidation or threats of death or physical injury make resistance futile, it is said that constructive force has been applied, thus satisfying the requirement of force. Hence, when the accused's actions and words or conduct, coupled with the surrounding circumstances, create a reasonable belief in the victim's mind that death or physical injury would be inflicted on her and that resistance would be futile, the act of sexual intercourse has been accomplished by force.²³

This was a correct statement of the law, if constructive force was raised. Constructive force is raised if "some evidence, without regard to its source or credibility, has been admitted upon which members might rely if they choose."²⁴ In this case, there was "some evidence" on which the members could rely to find that the accused intimidated A1C S into sexual intercourse without her consent and that her perception of the intimidation and her fear was reasonable.²⁵ As the CAAF noted, that evidence included the accused using his position to gain A1C S's trust for the purported test, the accused luring her to an isolated part of the hospital during off-duty hours, the accused telling her not to scream, and A1C's being scared.²⁶ Because there was some evidence of constructive force, the CAAF held the military judge did not abuse her discretion in giving the constructive force instruction.²⁷

This case reminds trial practitioners that, at least for rape offenses occurring before 1 October 2007, the intimidation or threats required for constructive force can be implied by the surrounding circumstances.²⁸ This case also presents an example of the application of the standard used by military judges in deciding whether to instruct on an issue. If the relatively low standard of "some evidence" is met, the military judge must instruct.

¹³ *Id.* at 298.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ MANUAL FOR COURTS-MARTIAL, UNITED STATES R.C.M. 920(e) discussion (2008) [hereinafter MCM].

²⁵ *Terry*, 64 M.J. at 299.

²⁶ *Id.*

²⁷ *Id.*

²⁸ The statutory amendments to Article 120 are effective for offenses that occur on or after 1 October 2007.

Military Judge's Responsibility to Determine Lawfulness of Order

In *United States v. Mack*,²⁹ the CAAF reiterated³⁰ that the lawfulness of an order is a question of law for the military judge to resolve.

Because Aviation Machinist's Mate Airman Mack was under investigation for selling drugs at his place of work and from his personal vehicle on the military installation, his commander imposed certain conditions of restraint upon him.³¹ The terms of the restriction required the accused to stay on the installation and to abide by eleven other conditions.³² These conditions included muster at specified times; no telephone calls, except for monitored calls with his wife and legal representative; only supervised visits with his wife; and a prohibition on operating or riding in a car.³³ The accused was charged with breaking restriction by failing to muster; operating or riding in a car; and making phone calls to individuals other than his wife and lawyer.³⁴

The defense moved, both before trial and after the government's case-in-chief, to dismiss all the specifications of breaking restriction, arguing that the conditions of the restriction were unlawful.³⁵ The military judge denied the motion because the legality of the restriction presented a mixed question of law and fact that he would give to the members to decide.³⁶ The military judge instructed the members on the elements of breaking restriction and the factors affecting the legality of the restriction.³⁷ The members found the accused not guilty of both specifications involving making telephone calls, but guilty of all five specifications involving failing to muster and both specifications involving operating or riding in a car.³⁸

The CAAF held that the military judge erred by having the members resolve the issue of legality of the order.³⁹ "As a matter of law, the presence of factual questions did not relieve the military judge of his responsibility to decide, as a preliminary matter, whether the order was lawful."⁴⁰ When the defense moves to dismiss a charge on the grounds that the order was unlawful, the military judge must first determine whether there is an adequate factual basis for the allegation that the order was lawful.⁴¹ If the military judge makes a preliminary finding that a specific set of words under a specific set of circumstances would constitute a lawful order, the prosecution must still prove beyond a reasonable doubt the facts necessary to establish the elements of the offense.⁴²

The CAAF found that there was a sufficient record for it to resolve the issue of the legality of the restriction order, without returning the case for further proceedings,⁴³ and concluded that the accused failed to rebut the presumption of

²⁹ 65 M.J. 108 (2007).

³⁰ See *United States v. New*, 55 M.J. 95 (2001) (holding that lawfulness of an order is not a separate and discrete element under Article 92 and, the military judge properly decides the issue of lawfulness of the order as a question of law); *United States v. Jeffers*, 57 M.J. 13 (2002) (holding that that lawfulness is a question of law); *United States v. Deisher*, 61 M.J. 313 (2005) (holding that the military judge erred when he ruled that the lawfulness of a no-contact order was to be resolved by the members).

³¹ *Mack*, 65 M.J. at 109–10.

³² *Id.* at 110.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at 111.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at 112.

⁴⁰ *Id.*

⁴¹ *Id.* at 111.

⁴² *Id.* at 111–12.

⁴³ *Id.* at 112.

lawfulness by demonstrating that the conditions did not fulfill a military duty or were otherwise unlawful.⁴⁴ Therefore, the CAAF found that the military judge's error, in submitting the question of lawfulness to the members, was harmless.⁴⁵

Mack reiterates that the lawfulness of an order is a question of law that must be decided by the military judge. The case also confirms that a military judge need not instruct the members on what is required for an order to be lawful.⁴⁶ It is the military judge who must resolve any necessary preliminary factual questions relating to lawfulness, and the military judge alone determines the lawfulness of the order.

***Mens Rea* Requirement for Wrongful Introduction of Drugs**

In *United States v. Thomas*,⁴⁷ the CAAF addressed whether the offense of wrongful introduction of drugs requires actual knowledge that a military installation was being entered.

Seaman Recruit Thomas pled guilty to wrongfully introducing marijuana onto an installation used by the armed forces.⁴⁸ During the providence inquiry, the accused admitted he drove onto a military installation with the marijuana.⁴⁹ However, he said he did not go through a security gate, and was unaware that he was actually driving onto military property.⁵⁰ While the accused's responses caused the military judge to briefly pause, he ultimately concluded the offense did not require that the accused had actual knowledge that he was taking drugs onto a military installation and accepted his plea.⁵¹

The CAAF set aside the conviction for wrongful introduction of drugs and affirmed the lesser included offense of wrongful possession of drugs holding that, for the offense of introduction of drugs onto a military installation, Article 112a, UCMJ, requires that the accused have actual knowledge that he was entering the installation.⁵²

Thomas is important in cases where knowledge of entry onto a military installation is in issue. The current model instruction in the *Benchbook* is accurate and sufficient. That instruction lists as the second element, "(2) That the accused actually knew (he) (she) introduced the substance."⁵³ The instructions later define the term "introduction" as "to bring into or onto a military (unit) (base) (station) (post) (installation) (vessel) (vehicle) (aircraft)."⁵⁴ In addition, the recently approved Interim Update to paragraphs 3-37-4 and 5-11-4 of the *Benchbook* explains the defense of ignorance of fact, as it pertains to entry onto a military installation.⁵⁵ The updated model instruction should assist the military judge in explaining to the members the nuances of the offense of wrongful introduction of drugs.⁵⁶

⁴⁴ *Id.* at 113.

⁴⁵ *Id.*

⁴⁶ On 20 April 2006, in order to reflect the holding in *United States v. Deisher*, the Army Trial Judiciary approved updates to the model instructions in paragraphs 3-14-2, 3-15-2, 3-16-1, 3-16-2, and 3-16-3 of the *Benchbook*. Based on the CAAF's opinion in *Deisher*, Note 5 and its instruction in ¶ 3-14-2, and identical notes and instructions in paragraphs 3-15-2, 3-16-1, 3-16-2, and 3-16-3 of the *Benchbook*, were deleted, because they did not accurately state the law. Those notes provided an instruction for those circumstances where the question of lawfulness, which was intertwined with questions of fact, was submitted to the members. However, the issue of lawfulness does not need to be submitted to the members, and that instruction was appropriately deleted from the *Benchbook*. Interim updates to the *Benchbook*, along with the 2008 *Electronic Benchbook* and the 2008 *Manual for Courts-Martial*, can be found on the public accessible Army Trial Judiciary homepage at www.jagcnet.army.mil/usatj.

⁴⁷ 65 M.J. 132 (2007).

⁴⁸ *Id.*

⁴⁹ *Id.* at 133.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* at 135.

⁵³ BENCHBOOK, *supra* note 2, ¶ 3-37-4c.

⁵⁴ *Id.* ¶ 3-37-4d. Since the *Thomas* opinion, the Army Trial Judiciary approved an interim update to ¶ 3-37-4 of the *Benchbook*, and part of that update was a change to the definition of "introduction." See BENCHBOOK, *supra* note 2, ¶ 3-37-4 (IC, n.d.). However, the only change was the addition of "(installation)" and "(vehicle)," which are in the actual language of the statute. This change is unrelated to the mens rea issue in *Thomas*. *Id.*

⁵⁵ In 2007, after the *Thomas* opinion, the Army Trial Judiciary approved interim updates to ¶ 3-37-4 and ¶ 5-11-4 of the *Benchbook*, which are provided in Appendix A of this article.

⁵⁶ However, if the evidence raises the issue of whether the accused knew that the substance was entering a military installation, then the military judge may want to further tailor the instructions to further clarify the mens rea requirement. The military judge may want to tailor the next to last sentence before Note 4 in paragraph 3-37-4d of the *Benchbook* as follows.

Defenses

Escalation of the Conflict and the Right to Self-Defense

In *United States v. Lewis*,⁵⁷ the CAAF revisited an issue concerning self-defense, addressed the year prior in *United States v. Dearing*.⁵⁸ In *Dearing*, the court relied on precedent in *United States v. Cardwell*⁵⁹ and held that the initial aggressor is entitled to defend himself if the adversary escalates the level of the conflict.

Private First Class Lewis was involved in a fight outside a club.⁶⁰ Eyewitness testimony offered differing accounts. There was evidence that, after some words, Private Harvey started to punch the accused, but the accused charged at Private Harvey and they both ended up on the ground.⁶¹ Private Harvey picked up the accused and slammed him to the ground.⁶² They wrestled, with Private Harvey on the top and apparently getting the better of the accused.⁶³ Private Harvey's friend, a power lifter, kicked the accused in the face.⁶⁴ The accused then stabbed Private Harvey multiple times.⁶⁵ When the accused could get up, he stopped stabbing Private Harvey, and left the area.⁶⁶

The government charged the accused with attempted murder.⁶⁷ At trial, the military judge instructed the members on self-defense, including the standard instruction on mutual combatants and initial aggressors.⁶⁸ The civilian defense counsel objected to that instruction and argued that a mutual combatant is not required to withdraw, if the situation escalated to a point where the accused is in fear of death or grievous bodily harm.⁶⁹ The military judge overruled the objection.⁷⁰ The accused was convicted of the lesser included offense of aggravated assault with a dangerous weapon against Private Harvey.⁷¹

On appeal, the Army court reversed the conviction and the case was certified to the CAAF.⁷² The government argued that Rule for Courts-Martial (RCM) 916(e)(4) does not allow the use of self-defense when the accused was an aggressor and

Knowledge by the accused of the presence of the substance, ~~and~~ knowledge of its contraband nature, and knowledge that the substance was entering a military installation may be inferred from the surrounding circumstances including but not limited to _____. However, you are not required to draw these inferences.

Also, in such a case, the military judge may want to add an instruction such as the following:

The accused must know that the substance was entering a military installation. A person who drives or walks onto a military installation without knowing it is a military installation, even if the person is aware of the presence and nature of a controlled substance, is not guilty of wrongful introduction of (_____) (a controlled substance).

⁵⁷ 65 M.J. 85 (2007).

⁵⁸ 63 M.J. 478 (2006).

⁵⁹ 15 M.J. 124 (C.M.A. 1983).

⁶⁰ *Lewis*, 65 M.J. at 86.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* at 87.

⁶⁷ *Id.*

⁶⁸ The military judge gave the following instruction to the members.

There exists evidence in this case that the accused may have been a person who voluntarily engaged in mutual fighting. A person who voluntarily engaged in mutual fighting, is not entitled to self defense *unless he previously withdrew in good faith*. The burden of proof on this issue is on the prosecution. If you are convinced beyond a reasonable doubt that *the accused voluntarily engaged in mutual fighting, then you have found that the accused gave up the right to self defense*.

Id. (emphasis added by the CAAF).

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

did not first withdraw in good faith.⁷³ The government also argued that *Cardwell* and *Dearing* must be overruled because they conflict with RCM 916(e)(4), which the government claimed was not substantive criminal law.⁷⁴

The CAAF found that neither *Cardwell* nor *Dearing* conflicted with RCM 916(e)(4) because it does not address escalation in general or the specific situation where the original aggressor or mutual combatant is not able to withdraw in good faith.⁷⁵ The court found this silence on inability to withdraw to be an ambiguity that could be resolved with common law self-defense principles, as it did in *Cardwell* and *Dearing*.⁷⁶ The CAAF stated that it did not believe the President intended the rule to require a mutual combatant, or even an initial aggressor, to withdraw in good faith, when he is physically incapable of doing so.⁷⁷

The court found that the military judge erred by not instructing that a mutual combatant can regain the right to self-defense when the conflict is escalated or, as in this case, he is unable to withdraw in good faith.⁷⁸ After concluding that the instructional error was not harmless beyond a reasonable doubt, the CAAF affirmed the decision of the Army court.⁷⁹

This is an important issue for trial practitioners because mutual affrays are common in the military. If there is some evidence that the accused is an aggressor or mutual combatant, and there is also some evidence that the adversary escalated the level of the conflict or the accused was physically incapable of withdrawing, the military judge must give such an instruction, unless affirmatively waived by defense counsel. The *Benchbook* was updated in 2007 to include instructions on the concepts of escalation of the conflict and physical inability to withdraw in good faith.⁸⁰ Trial practitioners should become familiar with these model instructions.

Affirmative Waiver of Mistake of Fact Instruction

In *United States v. Gutierrez*,⁸¹ the CAAF confirms that an affirmative waiver by the defense of an instruction on an affirmative defense is permissible.

Based on allegations that he held the victim down and touched her breasts and vagina, Private First Class Juan Gutierrez was charged with assault with intent to commit rape.⁸² All the parties agreed that the evidence raised the two lesser included offenses of indecent assault and assault consummated by a battery.⁸³ The defense requested a mistake of fact instruction for assault with intent to commit rape and indecent assault.⁸⁴ After discussing those two requested instructions, the following exchange took place.

MJ: And there doesn't appear to be any mistake of fact instruction with regard to battery. Are you requesting one?

DC: Your Honor, I simply do not want to request one for the battery.⁸⁵

⁷³ *Id.* at 87–88. Rule for Courts-Martial 916(e)(4) states, “The right to self-defense is lost . . . if the accused was an aggressor, engaged in mutual combat, or provoked the attack which gave rise to the apprehension, unless the accused had withdrawn in good faith after the aggression, combat, or provocation and before the offense alleged occurred.” MCM, *supra* note 24, R.C.M. 916(e)(4).

⁷⁴ *Lewis*, 65 M.J. at 88.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* at 89.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ In 2007, after the *Dearing* opinion, the Army Trial Judiciary approved interim updates to ¶ 5-2-6 of the *Benchbook*, which are provided in Appendix B of this article. See BENCHBOOK, *supra* note 2, ¶ 5-2-6.

⁸¹ 64 M.J. 374 (2007).

⁸² *Id.* at 375.

⁸³ *Id.*

⁸⁴ *Id.* at 376.

⁸⁵ *Id.*

The military judge subsequently instructed the members on mistake of fact for the offenses of assault with intent to commit rape and indecent assault, but not for assault consummated by a battery.⁸⁶ The members convicted the accused of assault consummated by a battery.⁸⁷

The military judge is required, under RCM 920, to instruct the members on any special defenses found in RCM 916 that are in issue.⁸⁸ An accused does not waive the instruction by failing to request it or by failing to object to its omission.⁸⁹ However, if it is affirmatively waived, the military judge is not required to give the instruction.⁹⁰ There are not magic words required for an affirmative waiver.⁹¹ However, there must be a “purposeful decision.”⁹²

Finding that the evidence in the record raised the defense of mistake of fact, the CAAF looked at whether the statement by the defense counsel constituted an affirmative waiver.⁹³ It found the military judge’s question and the defense counsel’s answer were clear.⁹⁴ The military judge presented the defense with an opportunity to request the instruction or to decline it.⁹⁵ The defense counsel made a decision to decline it.⁹⁶ The court concluded that this decision was a purposeful decision and, thus, an affirmative waiver.⁹⁷

Gutierrez is helpful to trial practitioners because the CAAF applied the same analysis for waiver of affirmative defenses as it did previously with waiver of lesser included offenses and unambiguously stated the defense can waive affirmative defense instructions. However, the judge must ensure the defense counsel clearly states on the record that the defense is actually waiving the instruction. A failure to request an affirmative defense instruction is insufficient.

Evidentiary Instructions

Character Evidence

In *United States v. Brooks*,⁹⁸ the CAAF revisited the issue of human lie detector testimony. Human lie detector testimony involves an opinion by a witness that a person was truthful or untruthful when he or she made a specific statement. Human lie detector testimony is improper.⁹⁹ One of the dangers of this type of testimony is that it invades the province of the court members to determine witness credibility. Although this issue can come in a number of ways, in *Brooks* it came up in a novel context; this issue was raised during expert testimony explaining the statistical probability of false allegations of child sexual abuse.

Staff Sergeant Brooks was convicted of two specifications of indecent liberties with a female under the age of sixteen.¹⁰⁰ He was sentenced to a dishonorable discharge, eighteen months confinement, total forfeitures of all pay and allowance, and reduction to E1.¹⁰¹ The allegations were made by a five-year-old girl whom Brooks and his wife baby-sat.¹⁰²

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ MCM, *supra* note 24, R.C.M. 920(e)(3), R.C.M. 916.

⁸⁹ *Gutierrez*, 64 M.J. at 376.

⁹⁰ *Id.*

⁹¹ *Id.* at 376–77.

⁹² *Id.* at 377.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* at 377–78.

⁹⁶ *Id.* at 378.

⁹⁷ *Id.*

⁹⁸ 64 M.J. 325 (2007).

⁹⁹ *United States v. Kasper*, 58 M.J. 314 (2003).

¹⁰⁰ *Brooks*, 64 M.J. at 326.

¹⁰¹ *Id.*

¹⁰² *Id.* at 326–27.

During the government's case-in-chief, the trial counsel called an expert witness in the field of clinical psychology.¹⁰³ During direct examination, the expert testified generally about the cognitive skills of children, the ability of children to tell the difference between what is true and untrue, and suggestibility.¹⁰⁴ The expert testified that he performed an examination of the five-year-old girl and determined that she was a normal little girl that could tell the difference between the truth and lies.¹⁰⁵ On cross-examination, the defense asked the expert about the ability of a child to fabricate a story and the impact of repeated interviews.¹⁰⁶ In response to the cross-examination, the trial counsel elicited that it would require a significant degree of sophistication for a child to make up a sexual abuse allegation from thin air.¹⁰⁷ The expert continued that the frequency of false allegations of child sexual abuse is about 5%.¹⁰⁸ The expert added that if you take away false allegations based on misinterpretation, the rate of purely fabricated allegations might be as low as 2%.¹⁰⁹ There was no defense objection and no limiting instruction was given at the time of the testimony.¹¹⁰ Before the court closed, the military judge gave the standard instructions on witness credibility and expert witnesses.¹¹¹

The CAAF explained that the Military Rules of Evidence (MRE) allow a witness to give an opinion or testify to the reputation of another witness's character for truthfulness, but the court reiterated the impropriety of human lie detector testimony.¹¹² The court defined human lie detector testimony as "an opinion as to whether the person was truthful in making a specific statement regarding a fact at issue in the case," and noted such testimony is inadmissible whether the witness is a lay or expert witness.¹¹³ In *Brooks*, the expert never gave an opinion about whether the girl was truthful when she made the allegations, but he did quantify the percentage of children who lie when making child sexual abuse allegations.¹¹⁴ To the court, quantifying the probability of the victim's truthfulness was the same thing: "This testimony provided a mathematical statement approaching certainty about the reliability of the victim's testimony."¹¹⁵

Finding plain error, the court set aside the findings and the sentence.¹¹⁶ The court concluded that the trial judge erred by "allowing testimony that was the functional equivalent of vouching for the credibility or truthfulness of the victim."¹¹⁷ The court found that the error materially prejudiced a substantial right of the accused because the case hinged on the victim's credibility.¹¹⁸ Although there was some medical evidence, there were no other witnesses, no confession, and no physical evidence to corroborate the victim's testimony.¹¹⁹ The court's concern was that "[a]ny impermissible evidence reflecting that the victim was truthful may have had a particular impact upon the pivotal credibility issue and ultimately the question of guilt."¹²⁰

The first lesson to learn from *Brooks* is timing. While the military judge gave the standard instructions on credibility of witnesses and expert testimony, to include the instruction that experts may not testify that they believe the victim, the CAAF

¹⁰³ *Id.* at 327.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 327.

¹¹¹ *Id.*

¹¹² *Id.* at 328.

¹¹³ *Id.* (quoting *United States v. Kasper*, 58 M.J. 314, 315 (2003)).

¹¹⁴ *Id.* at 327.

¹¹⁵ *Id.* at 329.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 326–27.

¹¹⁸ *Id.* at 330.

¹¹⁹ *Id.*

¹²⁰ *Id.*

reversed anyway.¹²¹ The court found that the instructions did not counteract the credibility quantification testimony because the victim's credibility was a central issue and the court was unable to tell if the members were impermissibly affected by the evidence.¹²² If this situation arises, the lesson for trial judges is that the only way a curative instruction will be effective is if it is given at the time of the impermissible testimony. "[T]he military judge must issue prompt cautionary instructions to ensure that the members do not make improper use of such testimony."¹²³ A prompt instruction may not be sufficient in some cases, but unless the instruction is given at the time of the testimony, the members may misuse the testimony and make a favorable credibility judgment about the victim, which may affect the way they view the other evidence. Military judges frequently struggle with the decision about when to intervene in a trial when it appears that counsel have missed an issue. When it comes to human lie detector testimony, military judges should not hesitate to do so.

Of course, intervening means that the judge must first recognize the issue in the context of a fast-moving trial. This requires trial judges to understand the rules for when a witness's credibility can be attacked or supported, and how. In child sexual abuse cases that involve expert testimony, the judge also has to understand the appropriate limits of expert testimony. These limits are laid out in *United States v. Harrison*¹²⁴:

An expert may testify as to what symptoms are found among children who have suffered sexual abuse and whether the child-witness has exhibited these symptoms. He or she may also "discuss 'various patterns of consistency in the stories of child sexual abuse victims and compar[e] those patterns with patterns in . . . [the victim's] story.'" However, to put "an impressively qualified expert's stamp of truthfulness on a witness' story goes too far." An expert should not be allowed to "go so far as to usurp the exclusive function of the jury to weigh the evidence and determine credibility."¹²⁵

Human lie detector testimony comes up in a number of ways. It can take the form of credibility quantification testimony, as in *Brooks*. It can take the form of a law enforcement agent explaining what behaviors he has been trained to look for during interviews to assess credibility and then stating whether a witness exhibited those behaviors during an interview.¹²⁶ Another frequent way human lie detector testimony comes up is when the accused testifies, his testimony conflicts with a number of prosecution witnesses, and, on cross-examination, the trial counsel wants to ask a question like, "So if you are telling the truth, then SGT Jones lied when he testified. Correct?" It is improper to ask any witness to comment on the credibility of another witness's testimony. Judges should be extra vigilant in child abuse cases and sexual assaults, where experts may be called to explain counter-intuitive behavior. In these cases, it may be wise to ask the proponent of an expert witness before trial, "What do you think your expert is going to be allowed to say?" If a judge can recognize when human lie detector testimony is likely to come up, he or she can usually head-off trouble.

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In *United States v. Schroder*,¹²⁷ the accused was convicted of raping his twelve-year-old daughter, JPR, and committing indecent acts with his twelve-year-old neighbor, SRS. The evidence against the accused included testimony by his step-daughter, SJS, who was nine at the time of the acts, of other acts of child molestation; and JPR, the same daughter he was convicted of raping.¹²⁸ The judge ruled that the uncharged acts of child molestation were admissible to prove the accused raped JPR and committed indecent acts with the neighbor.¹²⁹ The acts alleged in the indecent act specification were that the accused had the young girl sit on his lap, placed his hand on her leg, placed his hand on her buttocks, placed his hand upon

¹²¹ According to the opinion, the trial judge also gave a cautionary instruction at another point in the trial after a defense objection to credibility testimony by Dr. Acklin. *Id.* at 329. The opinion does not say what the testimony was or give the judge's instruction. Apparently, the instruction addressed character evidence other than the human lie detector testimony. *Id.*

¹²² *Id.* at 330.

¹²³ *United States v. Kasper*, 58 M.J. 314, 315 (2003).

¹²⁴ 31 M.J. 330 (C.M.A. 1990).

¹²⁵ *Id.* at 332 (citations omitted).

¹²⁶ *See, e.g., Kasper*, 58 M.J. 314.

¹²⁷ 65 M.J. 49 (2007).

¹²⁸ *Id.* at 51–52.

¹²⁹ The judge also ruled the charged rape of JPR was admissible to prove that Schroder had committed indecent acts with the neighbor. *Id.* at 52.

her groin area, kissed her neck, grabbed her buttocks, and pulled her toward his groin.¹³⁰ The accused was sentenced to a dishonorable discharge, ten years' confinement, reduction to E4, and total forfeiture of all pay and allowances.¹³¹

The court considered two instructional issues.¹³² The first issue was whether the judge had to craft an MRE 414¹³³ instruction separating the three charged acts that constituted acts of child molestation from the two charged acts that did not.¹³⁴ The second issue was whether the judge's instruction was correct about how the members could consider the MRE 414 evidence.¹³⁵

Before admitting MRE 414 evidence, a trial judge must make three findings: (1) that the accused is charged with an act of child molestation as defined by MRE 414; (2) that the proffered evidence is evidence of another act of child molestation; and (3) that the evidence is relevant under MREs 401 and 402.¹³⁶ The military judge must also conduct a MRE 403 balancing test, applying the factors from *United States v. Wright*.¹³⁷ The term "offense of child molestation" is defined by MRE 414(d)–(g).¹³⁸ When the definition is applied to the acts alleged in the indecent acts specification of the *Schroder* case, three acts are offenses of child molestation and two, kissing her on the neck and placing his hands upon SRS's leg, are not.

The defense first argued that the trial judge was required to tailor his instructions in a way that told the members they could only consider the uncharged acts of child molestation as it related to the three charged acts in the specification that met the definition in MRE 414.¹³⁹ The court disagreed.

The court pointed out that the specification, as a whole, alleged an offense of child molestation because it included allegations that met the definition in MRE 414.¹⁴⁰ The rule provides that evidence of other acts of child molestation is admissible "in a court-martial in which the accused is charged with an offense of child molestation."¹⁴¹ The court held that the trial judge was not required to disaggregate the instructions.¹⁴² First, the court looked at the rule itself. Military Rule Evidence 414(a) allows evidence of other acts of child molestation in a case where the accused is charged with an *offense* of child molestation.¹⁴³ The court pointed out that Congress did not limit application of the rule to specific acts. The court equated "offense" with the specification as a whole. The court also noted that its decision is consistent with the policy behind MRE 403; disaggregating the instruction might confuse the members.¹⁴⁴ Finally, the court feared that a different result might

¹³⁰ *Id.* at 51.

¹³¹ *Id.*

¹³² The military judge's instructions to the court members included:

Each offense must stand on its own and you must keep the evidence of each offense separate. The burden is on the prosecution to prove each and every element of each offense beyond a reasonable doubt. As a general rule, proof of one offense carries with it no inference that the accused is guilty of another offense. However, you may consider the similarities in the testimony of [SJS] and [JPR] concerning any alleged offensive touching with regard to the offense of rape. And you may consider the similarities in the testimony of [SRS], [SJS], and [JPR] concerning any alleged offensive touching with regard to the offense of indecent acts with a child.

Id. at 54.

¹³³ MCM, *supra* note 24, MIL. R. EVID. 414.

¹³⁴ *Schroder*, 65 M.J. at 54.

¹³⁵ *Id.*

¹³⁶ *Id.* at 52 (citing *United States v. Wright*, 53 M.J. 476, 482 (2000)).

¹³⁷ *Id.* The *Wright* factors include: the strength of the proof of the prior act, the probative weight of the evidence, the potential for less prejudicial evidence, distraction of the fact-finder, the time need for the uncharged acts, the temporal proximity between the acts, the frequency of the acts, intervening circumstances, and the relationship between the parties. *Wright*, 53 M.J. at 482.

¹³⁸ MCM, *supra* note 24, MIL. R. EVID. 414(d)–(g).

¹³⁹ *Schroder*, 65 M.J. at 54.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ MCM, *supra* note 24, MIL. R. EVID. 414(a).

¹⁴⁴ *Schroder*, 65 M.J. at 54; MCM, *supra* note 24, MIL. R. EVID. 403.

encourage prosecutors to charge multiple offenses separately where the interests of justice are served with a single specification.¹⁴⁵

The court's decision on this issue is clear, and, on its face, applies to all cases. Trial judges are not required to examine specifications charged act-by-act when drafting instructions on the use of MRE 414 evidence. However, there may be danger hiding in the weeds. It is impossible to tell from CAAF's opinion whether the five acts alleged in the indecent acts specification happened at the same time and place. If all five of these acts happened at the same time and place, then the court's decision is obviously correct. The five acts could be seen as a single offense, and the court's equation, offense equals specification, is right. But, assume for argument's sake that the kissing on the neck and placing of hands on the leg happened on one day and the other three acts occurred two months later. Now a single specification alleges two separate offenses, and the court's analysis appears less convincing. This could result in court members' considering MRE 414 evidence as proof of an offense that is not within the definition of "offense of child molestation" simply because an inexperienced prosecutor drafted a duplicitous specification.¹⁴⁶ Moreover, the court's policy concerns about confusion and over-charging do not apply to duplicitous specifications. This issue would not arise if prosecutors followed MRE 307¹⁴⁷ and limited each specification to one offense, but they frequently do not. Trial judges should look for this situation and try to find a way to explain it to the members without confusing them.¹⁴⁸

As to the sufficiency of the judge's instruction, the CAAF noted that admission of MRE 414 evidence is contrary to our historical reluctance to admit evidence of specific acts of bad character. Bad character evidence might relieve the government of its burden of proving each element of each offense beyond a reasonable doubt. The court identified instructions as one of the procedural safeguards to prevent court members from using MRE 414 evidence in an unconstitutional way. In *Schroder*, the court found the judge's instruction deficient. Although the judge instructed on the prosecution's burden of proof and the fact that proof of one offense does not carry an inference of guilt of another offense, the judge then told the members that they could consider the similarities in the testimony of the three victims. The court found that the instruction was "susceptible to unconstitutional interpretation."¹⁴⁹ The instructions permitted the members to conclude that the similarities between the charged and uncharged acts were sufficient evidence to convict the accused. The court makes the requirements clear: "the members must . . . be instructed that the introduction of such propensity evidence does not relieve the government of its burden of proving every element of every offense charged. Moreover, the factfinder may not convict on the basis of propensity evidence alone."¹⁵⁰ While the court found error in the instructions, it concluded there was no material prejudice to a substantial right of the accused and affirmed the conviction.¹⁵¹

The court points out that a formulaic instruction is not necessary, but cites *United States v. Dacosta*¹⁵² and Instruction 7-13-1¹⁵³ as good references to instruct the members properly on this issue. Trial judges should be aware that the instruction quoted in *Schroder* has been superseded. After *Dacosta*, the *Benchbook* Committee redrafted the instruction to address the requirements imposed on Army judges. Last year's instructions update¹⁵⁴ contains a good discussion of *Dacosta* and reprints the newly approved instruction. *Dacosta* deals with MRE 413 evidence, but the same principles apply to both MRE 413 and MRE 414. The conventional wisdom to follow the *Benchbook* is good advice in this area.

¹⁴⁵ *Schroder*, 65 M.J. at 54.

¹⁴⁶ A duplicitous specification is a specification that alleges more than one offense. MCM, *supra* note 24, R.C.M. 906(b)(5) discussion. "Each specification shall state only one offense." *Id.* R.C.M. 307(c)(4). "One specification should not allege more than one offense . . . However, if two acts or a series of acts constitute one offense, they may be alleged conjunctively." *Id.* R.C.M. 307(c)(3) discussion (G)(iv).

¹⁴⁷ *Id.* MIL. R. EVID. 307.

¹⁴⁸ One remedy judges and defense counsel should keep in mind is a motion for severance. *See id.* R.C.M. 906(b)(5).

¹⁴⁹ *Schroder*, 65 M.J. at 55.

¹⁵⁰ *Id.* at 56.

¹⁵¹ *Id.* at 51.

¹⁵² 63 M.J. 575 (Army Ct. Crim. App. 2006).

¹⁵³ BENCHBOOK, *supra* note 2, ¶ 7-13-1.

¹⁵⁴ Colonel Michael J. Hargis & Lieutenant Colonel Timothy Grammel, *Annual Review of Developments in Instructions—2006*, ARMY LAW., May 2007, at 48, 60.

Expert Witness Instruction

In *United States v. Foster*,¹⁵⁵ the appellant did not challenge the propriety of the judge's instructions directly; the appellant challenged the military judge's impartiality. The appellant claimed the judge was not impartial primarily because of the way the judge treated one of the defense's expert witnesses.¹⁵⁶ The appellant claimed that the judge improperly limited the expert's testimony; that the judge questioned the expert in a hostile, combative and scathing way; that the judge unfairly summarized the expert's testimony and failed to identify the witness as an expert in his instructions; and that the judge made intemperate remarks about the expert witness outside of the presence of the jury.¹⁵⁷ While discussing two instructional issues, *Foster's* importance is again emphasizing the importance for judges to follow the *Benchbook*.

Personnelman First Class Foster was convicted of committing indecent acts with a child on divers occasions and communicating a threat.¹⁵⁸ Foster had inappropriate sexual contact with his six-year-old stepdaughter and threatened her if she told her mother about the abuse.¹⁵⁹ The government's case centered on the stepdaughter's testimony, and the defense claimed that the story was not true.¹⁶⁰ The testimony of a developmental research psychologist with experience in evaluating children's testimony was a critical part of the defense's case. This is the expert that the judge supposedly mistreated. Foster was sentenced to a dishonorable discharge, confinement for five years, total forfeiture of all pay and allowances, and reduction to the lowest enlisted grade.¹⁶¹

After the parties questioned the defense's developmental research psychologist, the judge asked a series of questions based on court member questions.¹⁶² The opinion details the questions asked by the trial judge. The court was concerned about their tenor.¹⁶³ Many of the questions were leading and several were preceded by comments about the witness's earlier

¹⁵⁵ 64 M.J. 331 (2007).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 333.

¹⁵⁸ *Id.* at 332.

¹⁵⁹ *Id.* at 333.

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 332–33.

¹⁶² *Id.* at 335.

¹⁶³ *Id.* at 335–36. The judge's questions included:

Q: Have you ever interviewed [the victim]?

A: I have not.

Q: All right. I'm sure it wasn't your intent to gloss over this, but it was kind of glossed over early on in your testimony. I think they were just kind of rushing through to get to the crux of your testimony, but I understood you to say that in preparation for your testimony here today, you reviewed some paperwork but you were primarily interested in the number of times the children were interviewed, something along those lines. Tell me if you will what it is that you reviewed about this case before coming in to testify?

A. What I typically review would be a videotape—

Q. No, what have you reviewed in this case?

A. In this case, I was not—there was no documentation given to me from the forensic interviewer -- interview that was conducted with [the victim] or [the victim's brother]. That information was lost so, therefore, I was sent police reports and different things like that, but I—honestly, I did not even look at that because I'm mostly interested in the forensic interview and there was no documentation on that. So what I asked for was a list of documented interviews and who conducted them. So that's mostly what I reviewed.

Q: All right. So you had a list of the people involved in conducting interviews?

A. Right.

Q. Okay. But you did not review the police report or anything else that had been submitted to you?

A. That is correct. I did not review those.

Q. So you, therefore, do not know what was contained within the police report?

A. Right. Because to me, the time delay between when that interview was conducted and what was actually contained—what was contained in the report, there's such a delay that even the interviewer could reconstruct how they asked questions, what was asked, what was said, but that wasn't of value to me.

testimony and pretrial preparation. The court cautioned trial judges to be circumspect in what they say to the parties and how they examine witnesses because the members watch the judge.¹⁶⁴ Specifically, the court said, “Military judges should take care to elicit information in a neutral manner and to avoid the kind of approach reflected in this record that so closely resembles the tenor of cross-examination.”¹⁶⁵ The court noted favorably, however, that the military judge gave the instruction on the proper use of expert testimony and to disregard any statement by the judge that might indicate a personal opinion on his part.¹⁶⁶ The court found that the judge’s exchange with the expert witness, in the context of the whole record, did not cast doubt on the court-martial’s legality, fairness, and impartiality.¹⁶⁷

Q. It wasn’t, okay. On cross-examination you did indicate that if a child tells the same story over time, notwithstanding a number of interviews, intervening interviews, that that is not a suggestive interview. None of those interviews would be suggestive, in your opinion.

A. That is correct. But the caveat needs to be said that in that first interview, leading—which we don’t have documentation on, leading questions, misleading questions, that the child could get clear messages as far as details and what needs to be said, and that that could be false information that’s then maintained from interview to interview. And because I didn’t have that first interview, again, I can’t say, “Here are the original things and here’s how they were carried through.”

Q. Sure. Would it be important to you, for example, to talk to the person who conducted that first interview and determine the types of questions [which] were asked?

A. No, because they are reconstructing how an interview should be asked and what should—and I believe most interviewers would know enough [to know that] you shouldn’t ask leading questions, you should ask open-ended questions, but –

Q. So you—

A. —what actually happened is, we don’t know.

Q. So, in other words, you wouldn’t believe the person if that person told you that, “Gee, I asked non-leading questions.”

A. As a memory expert, years down the road I don’t know that they are going to reconstruct correctly because they’ve interviewed other people since then, and they don’t have documentation from how that interview—

Q. So you just chose, instead, just to ignore the whole thing, not even inquire as to how that interview is conducted.

A. I would look at it, but I would know that there are going to be memory errors incorporated because it wasn’t conducted—correctly done.

Q. And that’s why you didn’t read the police report, that’s why you didn’t contact the person or persons who conducted these interviews. Because you assumed there would be errors in how they would report to you how they conducted the interview?

A. Legally and ethically, I never contact the people that conduct the interview.

Q. So you got a list of names of people who conducted interviews with [the victim], you didn’t speak with those people; all you have is names?

A. Out of less—

Q. So you know the number of interviews, and a list of the people who conducted the interviews, and that’s it? With regard to the fact of the—this case?

A. That is correct, and then personal communication with defense counsel as far as other facts of the case and what was contained in those other things.

Q. So you don’t know, then, whether there was any source misattribution error at all in this case, do you?

A. I don’t think anyone can say that there was and I don’t think anyone can say that there was not.

Q. Okay. Understand. But you have no basis at all to state that that error that you identified is, in fact, an issue in this case.

A. If a forensic interviewer is not careful enough to record the testimony—

Q. I understand that, but you don’t know that. You don’t know that’s so, in this case, you don’t know if source attribution error is, in fact, an issue in this case?

A. That we never could know whether it is or isn’t.

Id.

¹⁶⁴ *Id.* at 336.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 337.

The defense also claimed that the judge's expert witness instruction was evidence that the judge was not impartial.¹⁶⁸ The defense complained that, although the judge gave the standard expert testimony instruction, the judge did not refer to the defense experts as "experts."¹⁶⁹ Further, the defense claimed that the judge failed to summarize accurately the testimony of the developmental research psychologist.¹⁷⁰ While the judge did not call the defense's experts "experts," the trial judge told the parties from the beginning of the trial that he would not refer to the expert witnesses on either side as experts.¹⁷¹ The trial judge explained, "he [did not] like to use the word 'expert' because he thought 'that puts kind of an imprimatur on the weight to be given to their testimony.'"¹⁷² Instead, the judge described the testimony of the defense's developmental research psychologist and forensic psychologist as "educational testimony."¹⁷³ The judge described the testimony of the government's clinical psychologist as "specialized testimony."¹⁷⁴ The court found this to be error but not evidence of partiality; the error affected both sides. However, the court did send a clear warning:

In moving beyond benchbook instructions, . . . military judges must use caution not to do so in a manner that either places undue emphasis on or minimizes the importance of expert testimony.

. . . The members are entitled to be informed of [the expert witness] designation and a military judge must not impose his or her own views to either diminish or enhance that important role."¹⁷⁵

In other words, follow the *Benchbook*.

The lessons for trial judges are clear. First, when framing questions for a witness based on court member questions, be careful not to advocate. A military judge can and should ask questions of some witnesses to develop the testimony. However, the questions should be couched in a way that does not call into question the judge's impartiality. Second, follow the *Benchbook*. Here, the trial judge gave the expert witness instruction, albeit with some deviation, and told the members to disregard his statements and demeanor during the course of the trial.¹⁷⁶ These instructions were part of the "context of the

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ The court does not settle this issue except to say that the summary was not challenged at trial, that on appeal the defense does not articulate what was wrong with the instruction, and that the complaint focuses on the use of the term "general information." *Id.* at 338. The court seems to merge the two claims together. *Id.*

¹⁷¹ *Id.* at 337.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 338.

¹⁷⁵ *Id.*

¹⁷⁶ The findings instructions included:

You have also heard the testimony of Dr. Mary Huffman and Lieutenant Commander Steven Talmadge who were allowed to testify in this case because their knowledge, skill, training, education and experience in their respective fields may assist you in understanding the evidence or in determining a fact in issue; however, you are not required to accept their testimony or give it more weight than the testimony of any other witness. You should, however, consider their qualifications in determining the weight you will accord their testimony.

. . . .

You will recall that Dr. Huffman did not testify about the nature of the pretrial interviews of [the victim] and [the victim's brother] that were conducted by various individuals in this case, nor about the types of questions that were used in conducting those interviews. Dr. Huffman did testify that because the videotape recording of a forensic interview of [the victim] by Special Agent Dillard had a blank audio track she was unable to perform an assessment of the types of questions asked during that interview. However, she did provide general information that suggestibility can cause memory errors, that every child is different in this regard with some children being more susceptible to suggestion than others, that age is a factor regarding the degree to which children are susceptible to suggestion, and that the type of questions employed during the interview process is significant in achieving a reliable result.

Dr. Huffman's testimony was permitted solely for its educational value to provide general information about children's memory in the courtroom due to repeated interviews and the effects of suggestion on memory to assist you in evaluating the evidence and determining the facts.

. . . .

Using the general educational information supplied by Lieutenant Commander Talmadge and Dr. Huffman, the specific information regarding the clinical evaluations of [the victim and her brother] supplied by Dr. Heidt-Kozisek, your own observations in

trial” that the court relied on to conclude that the court’s legality, fairness and impartiality were not in doubt. Even the most routine and minor instructions can be important.

Leniency Instruction

In *United States v. Carruthers*,¹⁷⁷ the CAAF considered whether the trial judge committed error by not giving a defense-requested leniency instruction. Staff Sergeant Carruthers was convicted of conspiracy and larceny for stealing over one million dollars worth of military property from the Fort Bragg Defense Reutilization and Marketing Office (DRMO). At trial, two of Carruthers’ co-conspirators testified against him.¹⁷⁸ One co-conspirator, Sergeant First Class (SFC) Rafferty, entered into a favorable pretrial agreement to plead guilty to a single count of larceny in federal district court.¹⁷⁹ At the time of trial, SFC Rafferty had not been indicted. Sergeant First Class Rafferty admitted all this during cross-examination.¹⁸⁰

The defense submitted a tailored leniency instruction to the military judge, which was more favorable than the standard *Benchbook* instruction.¹⁸¹ The judge declined to give the instruction because the standard leniency instruction was adequate.¹⁸² However, it appears that the judge was confused and was talking about the accomplice instruction.¹⁸³ The defense apparently thought the judge was talking about the witness-testifying-under-a-grant-of-immunity-or-promise-of-leniency instruction.¹⁸⁴ The judge’s instructions included an instruction based on the model accomplice instruction, but the instructions did not include the immunity-leniency instruction. The defense complained that the judge promised to give the leniency instruction and did not.¹⁸⁵ The CAAF disagreed¹⁸⁶ and held that the instruction given substantially covered the leniency issue.¹⁸⁷

Comparing the model instruction on accomplice testimony¹⁸⁸ to the immunity-leniency instruction,¹⁸⁹ the immunity-leniency instruction adds only three things: an explanation of what immunity is, a summary of the leniency terms, and an

court, your own experience in dealing with people, and all other factors I mentioned in determining witness credibility, it is your function to determine the credibility of the witnesses, the believability of their testimony and, ultimately, the facts of this case.

Id. at 337.

¹⁷⁷ 64 M.J. 340 (2007).

¹⁷⁸ *Id.* at 342.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 345.

¹⁸² *Id.*

¹⁸³ See BENCHBOOK, *supra* note 2, ¶ 7-10.

¹⁸⁴ See *id.* ¶ 7-19.

¹⁸⁵ *Carruthers*, 64 M.J. at 346.

¹⁸⁶ “[C]arruthers’ claim that the military judge agreed to issue the ‘standard instruction’ on leniency mischaracterizes the record.” *Id.* at 346.

¹⁸⁷ “We hold that the instructions in this case ‘substantially covered’ the leniency offered Rafferty and Nunes and addressed their possible motives to lie as a result of their favorable pretrial agreements.” *Id.*

¹⁸⁸ 7-10. ACCOMPLICE TESTIMONY

NOTE: Using this instruction. Instructions on accomplice testimony should be given whenever the evidence tends to indicate that a witness was culpably involved in a crime with which the accused is charged. The instructions should be substantially as follows:

A witness is an accomplice if he/she was criminally involved in an offense with which the accused is charged. The purpose of this advice is to call to your attention a factor specifically affecting the witness’ believability, that is, a motive to falsify his/her testimony in whole or in part, because of an obvious self-interest under the circumstances.

(For example, an accomplice may be motivated to falsify testimony in whole or in part because of his/her own self-interest in receiving (immunity from prosecution) (leniency in a forthcoming prosecution) (_____).)

In deciding the believability of (*state the name of the witness*), you should consider all the relevant evidence (including but not limited to (*here the military judge may specify significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides*)).

explanation about what happens if the witness does not tell the truth. Moreover, the accomplice testimony instruction contains a caution that an accomplice might be motivated to lie based on a self-interest in receiving immunity or leniency, the immunity-leniency instruction does not.¹⁹⁰ In this case the instruction the judge gave¹⁹¹ addressed the issue of an

Whether (*state the name of the witness*), who testified as a witness in this case, was an accomplice is a question for you to decide. If (*state the name of the witness*) shared the criminal intent or purpose of the accused, if any, or aided, encouraged, or in any other way criminally associated or involved himself/herself with the offense with which the accused is charged, he/she would be an accomplice.

As I indicated previously, it is your function to determine the credibility of all the witnesses, and the weight, if any, you will accord the testimony of each witness. Although you should consider the testimony of an accomplice with caution, you may convict the accused based solely upon the testimony of an accomplice, as long as that testimony was not self contradictory, uncertain, or improbable.

BENCHBOOK, *supra* note 2, ¶ 7-10.

¹⁸⁹ 7-19. WITNESS TESTIFYING UNDER A GRANT OF IMMUNITY OR PROMISE OF LENIENCY

NOTE 1: *Using this instruction.* When a witness testifies under a grant of immunity or promise of leniency, the following instructions should be given. Careful tailoring is required depending on the type and terms of immunity given or the leniency promised. One or more of the instructions following NOTES 2, 3, or 4 should be given. The instruction following NOTE 5 is always given. These instructions should be given immediately after the Instruction 7-7, *Credibility of Witnesses*.

NOTE 2: *Witness granted use (testimonial) immunity.* If the terms of the immunity are that the witness' testimony cannot be used against him, the following should be given:

(*Name of witness testifying under grant of immunity*) testified under a grant of immunity. This means that this witness was ordered to testify truthfully by the convening authority. Under this grant of immunity, nothing the witness said, and no evidence derived from that testimony, can be used against that witness in a criminal trial.

NOTE 3: *Witness granted transactional immunity.* If the terms of the immunity are that the witness will not be prosecuted, the following should be given:

(*Name of witness testifying under grant of immunity*) testified under a grant of immunity. Under the terms of this grant, the witness was ordered to testify truthfully by the convening authority and cannot be prosecuted for any offense about which he/she testified.

NOTE 4: *Witness promised leniency.* When a witness has been promised leniency in exchange for testimony, the following instruction may be useful in preparing a tailored instruction:

(*Name of witness testifying under promise of leniency*) testified in exchange for a promise from the convening authority to ((reduce) (suspend) (_____) the sentence the witness received in another court-martial by _____) (_____).

NOTE 5: *Mandatory instruction.* The following instruction is always given:

If the witness did not tell the truth, the witness can be prosecuted for perjury. In determining the credibility of this witness, you should consider the fact this witness testified under a (grant of immunity) (promise of leniency) along with all the other factors that may affect the witness' believability.

NOTE 6: *Accomplice instruction.* Witnesses who testify under a grant of immunity or in exchange for leniency are often accomplices. When an accomplice testifies, Instruction 7-10, *Accomplice Testimony*, must be given upon request. *United States v. Gillette*, 35 M.J. 468 (C.M.A. 1992).

Id. ¶ 7-19.

¹⁹⁰ See *supra* notes 188 and 189.

¹⁹¹ The judge gave the following instruction:

A witness is an accomplice if he was criminally involved in an offense with which the accused is charged. The purpose of this advice is to call to your attention a factor specifically affecting the witness' believability, that is, a motive to falsify his testimony in whole or in part, because of an obvious self-interest under the circumstances.

For example, an accomplice may be motivated to falsify testimony in whole or in part because of his own self-interest in receiving immunity from prosecution or leniency in a forthcoming prosecution.

The testimony of an accomplice, even though it may be corroborated and apparently credible, is of questionable integrity and should be considered by you with great caution.

In deciding the believability of Sergeant First Class Paul Rafferty, Mr. Grandy Hooper, Mr. Bob Nunes, Mr. Paul Morgan, and Mr. Jerry Roach, you should consider all the relevant evidence in this case and the extent to which their respective testimony is either corroborated or contradicted by other evidence in this case.

Whether Sergeant First Class Rafferty, Mr. Hooper, Mr. Nunes, Mr. Morgan, and/or Mr. Roach were accomplices is a question for you to decide. If those individuals shared the criminal intent or purpose of the accused, if any, or aided, encouraged, or in any other way criminally associated or involved themselves with the offenses with which the accused is charged, they would be an accomplice whose testimony must be considered with great caution.

Carruthers, 64 M.J. at 345.

accomplice's credibility; it merely omitted some nuts-and-bolts explanation about how immunity or leniency works. The instruction was clearly sufficient, and addressed the points in the defense-proposed instruction.¹⁹²

The lesson for trial judges is that there are two separate instructions for accomplice testimony and immunity-leniency. In some cases you will have an accomplice testify without immunity or a promise of leniency. The accomplice instruction alone is appropriate. There will be cases where a witness, not an accomplice, will testify under a grant of immunity or promise of leniency. The instruction on immunity-leniency alone is appropriate in that case, and might be given at the time of the witness's testimony. Finally, there will be cases where an accomplice testifies under a grant of immunity or promise of leniency. Ideally, a trial judge will give both instructions.¹⁹³ A trial judge could blend the two instructions into one, but must be careful to include the critical principles of both instructions.

Curative Instructions

Although not technically instructions cases, several 2007 opinions are worth reading to give judges an insight into curative instructions. For example, *United States v. Erickson*¹⁹⁴ illustrates how the appellate courts evaluate material prejudice where there has been prosecutorial misconduct. In *Erickson*, the issue was whether the trial counsel committed plain error during his sentencing argument by comparing the accused to Hitler, Saddam Hussein, and Osama bin Laden, and characterizing him as a demon that belonged in Hell.¹⁹⁵

Erickson sexually abused his two daughters over a six year period and pled guilty to those offenses.¹⁹⁶ During sentencing, the trial counsel argued:

What is evil? It's a dramatic question. It is not a concrete question and it defies a scientific answer. It likely means something different to virtually everyone. History, current events, are replete with examples of people who have been argued who are the embodiments of evil, Adolph Hitler, Saddam Hussein, Osama bin Laden. Men who have killed innocent women and children, poisoned the world with their rage and their fanaticism. Well, as awful as those men and those actions are there is an advantage, frankly, to evil that eventually becomes so open and notorious. You can see it coming. You can prepare your defenses. It has been quipped countless times that the greatest trick the devil ever performed was convincing the world that he didn't exist. The message there is that the evil that you can't see coming, the evil that is hidden, that is so insidious. Evil can hide the pitchfork, hide the horns, hide the tail. It can hide behind a façade of respectability, a façade of caring. Even a façade of, well, this accused. Staff Sergeant Erickson, sitting here in this courtroom, right here, right now, is evil. The insidious type.

....

This demon so masterfully manipulated his victims for so long a period of time, the little girls still don't see the evil.

....

¹⁹² The defense proposed the following instruction:

There is evidence and indeed it is not in dispute and all the evidence shows that SFC Paul Rafferty and Robert Nunes testified under an agreement with the Government to give truthful testimony in any proceeding when requested by the government in order to have their charges and sentences reduced. It is uncontroverted that SFC Paul Rafferty and Robert Nunes testified in whole or in part for this reason. You should therefore examine SFC Paul Rafferty's and Robert Nune's testimony with great care and caution in deciding whether or not to believe it. If, after doing so, you believe their testimony, in whole or in part, you should treat what you believe the same as any other believable evidence.

Id.

¹⁹³ "Although it would have been better to give the *Benchbook* leniency instruction once the issue was raised, the military judge did not err because the instruction he gave covered its 'critical principles.'" *Id.* at 346.

¹⁹⁴ 65 M.J. 221 (2007).

¹⁹⁵ *Id.* at 222.

¹⁹⁶ *Id.* at 223.

He is evil. The place for evil, of course, is hell. His children should not suffer him a single day of freedom before he goes there. Society should not suffer him a single day of freedom before he goes there.”¹⁹⁷

The military judge sentenced the accused to confinement for life with eligibility for parole.¹⁹⁸ On appeal, the Air Force Court of Criminal Appeals (AFCCA) held that the trial counsel’s sentencing argument “went well outside the bounds of fair comment and amounted to plain and obvious error,” but found no material prejudice to the accused.¹⁹⁹ The CAAF reviewed the case. To assess the prejudice, the CAAF used the test from *United States v. Fletcher*.²⁰⁰

[W]e look at the cumulative impact of any prosecutorial misconduct on the accused’s substantial rights and the fairness and integrity of his trial. . . . We believe the best approach involves a balancing of three factors: (1) the severity of the misconduct, (2) the measures adopted to cure the misconduct, and (3) the weight of the evidence supporting the conviction.²⁰¹

The CAAF determined that the impermissible part of the argument was not severe because it was a small portion of the trial counsel’s overall argument and it was part of a permissible theme.²⁰² The court determined the evidence of the harm done to the accused’s girls was significant and supported the sentence adjudged.²⁰³ Even though this was a judge-alone trial, the CAAF also discussed the second part of the *Fletcher* test. The military judge took no curative measures, meaning the judge did not say on the record that he would disregard the improper argument.²⁰⁴ The court applied the presumption that military judges know and follow the law. The court even expanded the presumption to include that the military judge is able to distinguish between proper and improper sentencing arguments.²⁰⁵ In the end, the court finds no material prejudice, but, in a footnote, the court sends a clear signal to trial judges. “While not the case here, if a defendant introduced evidence to rebut the presumption, we would then consider whether the military judge undertook ‘curative measures,’ such as a clear statement on the record that he would not consider the improper comments.”²⁰⁶

This opinion makes clear that it is worthwhile for trial judges to state on the record that he will disregard improper evidence or argument. Doing so ensures the record reflects that the judge caught the error, validating the presumption that the judge knows the law and making it much harder on appeal to rebut the presumption. This idea that the accused can offer evidence to rebut the presumption of judicial competence reminds judges to be temperate in their discussion of the case, including during Bridging the Gap sessions.

*United States v. Paxton*²⁰⁷ also involved a potentially improper sentencing argument. Technical Sergeant Paxton was convicted by members of rape, forcible sodomy, indecent liberties, indecent acts and indecent language, all with a child under sixteen.²⁰⁸ He was also convicted of providing alcohol to a minor, possession of child pornography, and incest.²⁰⁹ The sentence included a dishonorable discharge and confinement for twenty-six years.²¹⁰

Paxton did not testify on the merits or at the sentencing hearing. Paxton also did not make an unsworn statement. However, the defense did present the testimony of a clinical psychologist, who interviewed Paxton and performed several

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 222.

¹⁹⁹ *Id.* at 223. The test for plain error is: (1) there was error; (2) the error was plain or obvious; and (3) the error materially prejudiced a substantial right. *Id.*

²⁰⁰ 62 M.J. 175 (2005).

²⁰¹ *Erickson*, 65 M.J. at 224.

²⁰² *Id.*

²⁰³ *Id.* at 226.

²⁰⁴ *Id.* at 224.

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 225 n.2.

²⁰⁷ 64 M.J. 484 (2007).

²⁰⁸ *Id.* at 486.

²⁰⁹ *Id.*

²¹⁰ *Id.*

tests.²¹¹ The psychologist's testimony about the test results was "that Paxton had an inability or unwillingness to disclose personal information, that he engaged in 'impression management' to present himself more favorably, that he believed other people were largely responsible for his problems, and that he has a lack of initiative and an avoidance of adult forms of autonomy."²¹² Without objection from the defense counsel, the trial counsel later argued

You have to look at this individual and see that he really is a worthy candidate for rehabilitation. The MMPI tells you that he was trying to fake himself looking better The test he was taking for you to know more about him, he is trying to bamboozle you. He doesn't want you to know what kind of person he really is, the child rapist, the child pornography, that's the kind of person he is. It also tells you he is unwilling and has an inability to accept responsibility and to disclose personal information. He needs severe punishment and long-term treatment to make sure he is never going to do this again. Rehabilitation, as we know it, the doctor told us, we have long-term treatment facilities in our military disciplinary barracks. He needs to be there. We know it is going to take him a while, because he won't admit what he has done. He won't admit it to his doctor. He won't admit it to himself and until he admits it, he can't even get into the treatment. He has to volunteer to get into the treatment. You saw all the other things from the doctor's testimony that shows he is the kind of person who is not going to be proactively seeking that out. He has to get over that hurdle. He has to be punished long-term to make sure that he gets treatment and that he never does this again.²¹³

If an accused testifies or makes an unsworn statement and expresses no remorse or his expression of remorse is insincere, the trial counsel may properly comment on the accused's lack of remorse and urge the court members to consider the lack of remorse when evaluating the accused's rehabilitative potential.²¹⁴ Moreover, if the defense presents evidence that gives rise to an inference of no remorse or insincere remorse, the trial counsel may similarly comment.²¹⁵ However, the inference of no remorse cannot be drawn from the accused's decision to exercise his constitutional right to remain silent or his right to plead not guilty.²¹⁶ In *Paxton*, the court found no error because most of the trial counsel's argument was fair comment on the psychologist's testimony.²¹⁷ However, the trial counsel went too far by arguing that the accused had not admitted to the doctor or himself what he had done.²¹⁸ The psychologist's testimony did not address any conversations he had with Paxton about the offenses, so this part of the argument was beyond the facts established in the record.²¹⁹ The court found this portion of the argument was error.²²⁰ However, Paxton did not establish that the error was plain and obvious.²²¹

This case shows how carefully trial judges must follow the evidence and argument of counsel. It is a rare case where the accused will neither testify nor make an unsworn statement. However, in cases where the accused pleads not guilty and remains silent, judges must be alert and identify improper comments of the accused's exercise of his rights. In cases where the defense does not present evidence giving rise to an inference of no remorse, the judge's job is easy. However, in cases like *Paxton*, where the defense does present evidence that shows that the accused is not sorry for what he has done, the judge's job is much more difficult. The judge must pay careful attention to ensure that the scope of the argument does not exceed the scope of the evidence.

Finally, in *United States v. Moran*,²²² the court considered whether the trial counsel's comment during findings argument about the accused's invocation of his Fourth and Fifth Amendment rights materially prejudiced the accused. Airman First

²¹¹ *Id.*

²¹² *Id.* at 487.

²¹³ *Id.*

²¹⁴ *Id.* (citing *United States v. Edwards*, 35 M.J. 351, 355 (C.M.A. 1992)).

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.* at 488.

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.* at 487–88. *But see id.* at 491–92 (Effron, C.J., concurring in part and dissenting in part) (arguing that the trial counsel's argument was plain error and suggesting the case should be returned for a rehearing on sentence).

²²² 65 M.J. 178 (2007).

Class Moran was convicted by members of drunk driving and several specifications of drug use and distribution.²²³ During trial, three prosecution witnesses, all law enforcement officers, commented on the Moran's refusal to consent to give a hair sample, a blood sample, and his invocation of the Fifth Amendment right to counsel.²²⁴ The CAAF found admission of this testimony to be harmless beyond a reasonable doubt.²²⁵

The CAAF then considered the findings argument by the trial counsel, which included:

Now these drug charges. *What's probably certainly close to the some of the most damning evidence that you have in this courtroom today is the fact that on March 20th he is called into [the] investigations [office]* The OSI says, "We would like to take your hair." He says, "No, thank you. I want to speak to my attorney first."²²⁶

The first problem is that the argument misrepresents the evidence; the accused did decline to give a hair sample, but he did not say he wanted to speak to his attorney when he did so.²²⁷ The invocation of counsel came later.²²⁸ The bigger problem, of course, is that the trial counsel is commenting on the accused's invocation of his constitutional rights and presenting the invocation as substantive evidence of guilt.²²⁹ The defense counsel failed to object, and the military judge did not give a curative instruction.²³⁰ The CAAF held that the trial counsel and military judge committed plain error, but the error was harmless beyond a reasonable doubt.²³¹

The first lesson for trial judges is whether the testimony about the accused invoking his constitutional rights is admissible in the first place. Unfortunately, the CAAF did not resolve this issue because the court assumed error and then found the error harmless. Interestingly, the AFCCA concluded the witnesses' testimony was necessary to describe the events about which the officer was testifying.²³² In his concurring opinion, Chief Judge Effron sends a clear warning about this type of testimony:

Despite the "if error, harmless" resolution, the majority suggests that the admission of statements about Moran's invocation of rights may have been admissible. I certainly recognize that in some cases, testimony about a defendant's invocation of rights may be admissible. However, routine disclosure of the fact that an accused has asserted his constitutional rights should not be sanctioned under the guise of setting forth a chronology of events or merely to establish the "res gestae" of an offense. The rules dealing with admissibility of assertions of constitutional rights are rules of prohibition. *See, e.g., Military Rule of Evidence (M.R.E.) 301(f)(1); United States v. Gilley*, 56 M.J. 113, 120 (C.A.A.F. 2001) (assertion of Fifth Amendment rights generally inadmissible); *United States v. Turner*, 39 M.J. 259, 262 (C.M.A. 1994) (refusal to consent may not be considered as evidence of criminal conduct). Exceptions to these rules of prohibition are carved out of unique circumstances not present in this case.²³³

Judges should be very careful about allowing testimony that is otherwise inadmissible for the purpose of "showing how the investigation unfolded" or "showing the effect on the listener." Before admission, this testimony should be subjected to a MRE 403 balancing test²³⁴ to determine if the probative value is substantially outweighed by unfair prejudice.

²²³ *Id.* at 179.

²²⁴ *Id.*

²²⁵ *Id.* at 182–85.

²²⁶ *Id.* at 186 (emphasis added by the court).

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Id.* at 186–88.

²³² *Id.* at 183–84.

²³³ *Id.* at 188–89.

²³⁴ MCM, *supra* note 24, MIL. R. EVID. 403.

The second lesson is that judges must recognize improper argument and take appropriate action. As *Erickson*, *Paxton*, and *Moran* attest, counsel often miss issues, but the plain error doctrine puts the burden on the military judge to spot them and take corrective action. This often puts the judge in the uncomfortable position of deciding when, or even whether, to interject himself or herself into the case. *Erickson*, *Paxton*, and *Moran* illustrate that uncorrected, improper arguments by the trial counsel are plain and obvious error. The court gave no relief in *Erickson*, *Paxton* or *Moran* because there was no material prejudice to that accused. However, an improper argument will inevitably come up in a close case, and the trial judge's corrective action, or lack of it, may make the difference. Judges should think through in advance of trial the issue of when to interject themselves. *Paxton* and *Moran* are easy cases; the military justice system simply does not allow the exercise of a constitutional right to be used as substantive evidence of guilt or a lack of remorse. Judges should feel comfortable stopping testimony and argument about the accused's invocation of his rights. Judges should be comfortable instructing the members that the exercise of a constitutional right is not evidence of guilt or aggravation and that the members are required to disregard the testimony or argument. *Erickson* is a much closer case. All the trial counsel did wrong in *Erickson* was misstate the evidence. The trial counsel's argument included a permissible theme and used some hard-hitting historical examples.²³⁵ It is hard to fault a trial judge for not interfering in a situation like *Erickson*, but the trial judge might have addressed the factual misstatement²³⁶ and cautioned the members not to allow the argument to inflame their passions to the point that it affects their judgment. These cases illustrate that, in a close case, the judge's remedial action can make a difference, even in a judge-alone trial.

Conclusion

Although this year's cases contain many discrete lessons, all reinforce two broad themes. First, military judges must be careful when drafting instructions. Instructions ensure accurate fact-finding and serve as a procedural safeguard against unfairness. Second, military judges should follow the *Benchbook*. Deviating from the pattern instructions may be necessary from time to time because of legal developments or an unanticipated situation, but it should only be done with great care and after thoughtful deliberation.

²³⁵ Since it wasn't appealed, the CAAF applied the law of the case doctrine and accepted the court of criminal appeals' determination that there was plain error in *United State v. Erickson*, 65 M.J. 221, 224 n.1 (2007). One can reasonably wonder if the CAAF would have found plain error in this case:

[T]hese comments were made in the context of a permissible theme—that unseen evil is worse than open and obvious evil. It reflected both the general belief of young children that their father would not wish to do them harm and Erickson's actions to conceal his conduct. While we do not condone the references, in this context, and in view of the limited number of references in a lengthy argument, we do not consider the misconduct to be 'severe.'

Id. at 224.

²³⁶ One possible way is: "Members of the court, you must base the decisions in this case on the evidence as you remember it and apply the law as I instruct you. If counsel exaggerates or mis-states the evidence during argument, you do not have to accept their summary of the facts as correct. You must base your decisions on the evidence as you remember it."

Appendix A

Instruction 3-37-4, Drugs – Wrongful Introduction

Add a parenthesis before the word “Article” in the title of Instruction 3-37-4, page 377.

Replace the definition of “introduction” in paragraph d of Instruction 3-74-4, page 378, with the following:

“Introduction” means to bring into or onto a military (unit) (base) (station) (post) (installation) (vessel) (vehicle) (aircraft).

Replace NOTE 14 of Instruction 3-74-4 page 383, with the following:

NOTE 14: Other instructions. Instruction 7-3, Circumstantial Evidence (Knowledge), is normally applicable. A tailored circumstantial evidence instruction on intent is normally applicable if intent to distribute is alleged. If there is evidence the accused may have been ignorant of or mistaken about his or her presence on a military installation, or an issue of ignorance or mistake of fact concerning the presence or nature of the substance is raised, Instruction 5-11-4, Ignorance or Mistake—Drug Offenses, should be given.

Add the following before the period at the end of paragraph e(4) of Instruction 3-74-4, page 383:

; United States v. Thomas, 65 M.J. 132 (2007) (in order to be convicted of introduction of drugs onto a military installation under Article 112a, the accused must have actual knowledge that he or she was entering onto the installation)

Instruction 5-11-4, Ignorance or Mistake - Drug

Replace Instruction 5-11-4, pages 792 and 793, with the following:

5-11-4. IGNORANCE OR MISTAKE—DRUG OFFENSES

NOTE 1: Using this instruction. The military judge should review Instruction 5-11, the general discussion on the area of ignorance or mistake of fact or law, prior to using this instruction. Actual knowledge by the accused of the presence and nature of contraband drugs is necessary for a finding of guilty of Article 112a offenses. Ignorance can arise with respect to the presence of drugs, and mistake can be raised as to knowledge of their identity. Ignorance or mistake of the fact that a particular substance is contraband (i.e., that its possession, distribution, use, etc., was forbidden by law, regulation, or order) is not a defense. For a finding of guilty of wrongful introduction, the accused must also have actual knowledge that he or she entered into or onto a military unit, base, station, post, installation, vessel, vehicle, or aircraft. When the evidence raises such issues, the military judge must instruct upon them, sua sponte. A suggested guide follows:

The evidence has raised the issue of (ignorance) (mistake of fact) in relation to the offenses(s) of (state the alleged offense(s)). There has been (evidence) (testimony) tending to show that, at the time of the alleged offenses(s), the accused (did not know that (he) (she) had entered (into) (onto) a military (unit) (base) (station) (post) (installation) (vessel) (vehicle) (aircraft)) (did not know that (he) (she) had (state name of substance) (on (his) (her) person) (in (his) (her) belongings) (_____)) (did not know that (state name of substance) was in (his) (her) (food or drink) _____)) (was under the mistaken belief that the substance (he) (she) (used) (possessed) (distributed) (manufactured) (imported) (exported) (introduced) (_____)) was _____) (was unaware that the substance (he) (she) (used) (possessed) (distributed) (manufactured) (imported) (exported) (introduced) (_____)) was _____).

(I advised you earlier that the (possession) (distribution) (manufacture) (importation) (exportation) (introduction) must be knowing and conscious.) If the accused was in fact (ignorant that (he) (she) had entered (into) (onto) a military (unit) (base) (station) (post) (installation) (vessel) (vehicle) (aircraft)) (ignorant of (the presence of (state name of substance) in (his) (her) belongings) (_____)) (under the mistaken belief that the substance (he) (she) (used) (possessed) (distributed) (manufactured) (imported) (exported) (introduced) (_____)) was _____), then (he) (she) cannot be found guilty of the offenses(s) of (state the alleged offense(s)). The accused’s actual (unawareness) (erroneous belief), no matter how unreasonable, is a defense.

You should consider the inherent probability or improbability of the evidence presented on this matter. You should consider the accused's (age) (education) (experience) (_____), along with the other evidence in this case (including here the military judge may specify significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides)).

The burden is on the prosecution to establish the guilt of the accused. If you are satisfied beyond a reasonable doubt that the accused was not (ignorant of the fact that _____) (under the mistaken belief that _____), then the defense of (mistake) (ignorance) does not exist.

NOTE 2: When the accused believed the substance to be a different contraband from the one charged. The accused's belief that the substance possessed, used, distributed, etc., was a contraband substance different from the one charged is not a defense. An instruction to this effect should be given when the evidence raises the issue as to whether the accused had such belief.

Appendix B

Instruction 5-2-6, Self-Defense (18 Jul 07)

ADD THE FOLLOWING BEFORE THE PERIOD AT THE END OF THE FIRST SENTENCE IN NOTE 5 TO PARAGRAPH 5-2-6, OTHER INSTRUCTIONS (SELF-DEFENSE), ON PAGE 760:

, if it is physically impossible for the accused to withdraw in good faith, or if the adversary escalates the level of conflict

ADD THE FOLLOWING BEFORE THE PERIOD AT THE END OF THE FIRST PARAGRAPH IN THE INSTRUCTION FOLLOWING NOTE 5 TO PARAGRAPH 5-2-6, OTHER INSTRUCTIONS (SELF-DEFENSE), ON PAGE 760:

(unless it was physically impossible for (him) (her) to withdraw in good faith) (unless the adversary escalated the level of conflict)

ADD THE FOLLOWING AFTER THE FIRST COMMA IN THE FIRST PARAGRAPH IN THE INSTRUCTION FOLLOWING NOTE 7 TO PARAGRAPH 5-2-6, OTHER INSTRUCTIONS (SELF-DEFENSE), ON PAGE 761:

(if the accused was physically unable to withdraw in good faith) (or)

REPLACE THE CURRENT NOTE 6 TO PARAGRAPH 5-2-6, OTHER INSTRUCTIONS (SELF-DEFENSE), ON PAGE 761, WITH THE FOLLOWING:

NOTE 6: Burden of proof – provocateur or mutual combatant issue. Either the instruction following this NOTE, or one of the instructions following NOTE 7 or NOTE 8, or a combination of those instructions, is ordinarily required if any instruction in NOTE 5 is given.

ADD THE FOLLOWING AS NOTE 8 TO PARAGRAPH 5-2-6, OTHER INSTRUCTIONS (SELF-DEFENSE), ON PAGE 761:

NOTE 8: Escalation as reviving right to self-defense. The following instruction covers the burden of proof when there is an issue of whether the adversary escalated the level of the conflict. United States v. Dearing, 63 M.J. 478 (2006); United States v. Cardwell, 15 M.J. 124 (C.M.A. 1983); United States v. Lewis, 65 M.J. 85 (2007).

Even if you find that the accused (intentionally provoked an attack upon (himself) (herself)) (voluntarily engaged in mutual fighting), if the adversary escalated the level of the conflict, then the accused was entitled to act in self-defense if (he) (she) was in reasonable apprehension of immediate death or grievous bodily harm. Therefore, if the accused (intentionally provoked an attack upon (himself) (herself) by using force not likely to produce death or grievous bodily harm) (voluntarily engaged in mutual fighting not involving force likely to produce death or grievous bodily harm), and the adversary escalated the level of the conflict to one involving force likely to produce death or grievous bodily harm and thereby placed the accused in reasonable apprehension of immediate death or grievous bodily harm, the accused was entitled to use force (he) (she) actually believed was necessary to prevent death or grievous bodily harm.

Accordingly, even if you find beyond a reasonable doubt that the accused (intentionally provoked an attack upon (himself) (herself) by using force not likely to produce death or grievous bodily harm) (voluntarily engaged in mutual fighting not involving force likely to produce death or grievous bodily harm), but you have reasonable doubt that the adversary did not escalate the level of the conflict to one involving force likely to produce death or grievous bodily harm and thereby placed the accused in reasonable apprehension of immediate death or grievous bodily harm, the accused was entitled to act in self-defense. You must then decide if the accused acted in self-defense.

ADD THE FOLLOWING AS NOTE 9 TO PARAGRAPH 5-2-6, OTHER INSTRUCTIONS (SELF-DEFENSE), ON PAGE 761:

NOTE 9: Escalation as reviving right to self-defense in homicide case. In a homicide case, the military judge should consider whether the evidence raises a LIO of Article 119(c)(2). If the accused initially was perpetrating or attempting to perpetrate an offense directly affecting the victim e.g., battery, the evidence may raise Article 119(c)(2) as an LIO if the escalation of the level of the conflict by the victim may have been reasonably foreseeable under the circumstances.