

## Annual Developments in Sentencing & Post-Trial—2006

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### Introduction

The 2006 term for the Court of Appeals of the Armed Forces (CAAF) and service courts produced a number of significant cases in the areas of both sentencing and post-trial. Contrasted with the 2005 court term where so many sentencing cases dealt with the defense case and, in particular, the accused's unsworn statement, the 2006 court term seemed to focus on the Government's case. Accordingly this article will focus on a sampling of cases pertaining to Government evidence under Rule for Court-Martial (RCM) 1001(b).<sup>1</sup> In the post-trial arena, the landmark case of *United States v. Moreno*,<sup>2</sup> and the processing timelines that it established, was a major decision across the services. Since *Moreno* was discussed in last year's symposium, this article will focus on post-trial cases that have been issued since the *Moreno* decision.

### Sentencing

From the 2006 new developments cases in sentencing, this article will cover issues involving: personnel records under RCM 1001(b)(2);<sup>3</sup> aggravation evidence under RCM 1001(b)(4);<sup>4</sup> rehabilitative potential evidence under RCM 1001(b)(5);<sup>5</sup> and post-confinement forfeitures under RCM 1107(d)(2).<sup>6</sup>

#### *RCM 1001(b)(2) Evidence*<sup>7</sup>

The case of *United States v. Reyes*<sup>8</sup> highlights the problems that can arise when the trial counsel, defense counsel, and the military judge all fail to examine the documents offered and admitted into evidence. In *Reyes*, an enlisted panel found Corporal (Cpl) Reyes guilty of assault, conspiracy to commit assault, and drunk and disorderly conduct.<sup>9</sup> The panel further found Cpl Reyes not guilty of one assault charge, modified a charge of conspiracy to commit assault, and reduced a specification of assault with a deadly weapon (baseball bat) to the lesser included offense of assault consummated by battery.<sup>10</sup> The facts of the court-martial stemmed from a couple of late night brawls involving two groups of Marines.<sup>11</sup>

During the sentencing phase, the government offered an exhibit (PE 6), which the trial counsel described as "excerpts from [Appellant's] Service Record Book."<sup>12</sup> Though not completely clear from the record, this exhibit appears to have been offered under RCM 1001(b)(2).<sup>13</sup> Even though the accused was only a corporal (E-4), his Service Record Book was a voluminous 139-page exhibit.<sup>14</sup> The military judge admitted PE 6 without objection from trial defense counsel.<sup>15</sup> Not until

<sup>1</sup> MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1001(b) (2005) [hereinafter MCM].

<sup>2</sup> 63 M.J. 129 (2006).

<sup>3</sup> MCM, *supra* note 1, R.C.M. 1001(b)(2).

<sup>4</sup> *Id.* R.C.M. 1001(b)(4).

<sup>5</sup> *Id.* R.C.M. 1001(b)(5).

<sup>6</sup> *Id.* R.C.M. 1007(d)(2).

<sup>7</sup> *Id.* R.C.M. 1001(b)(2).

<sup>8</sup> 63 M.J. 265 (2006).

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

<sup>10</sup> *Id.* at 266.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> MCM, *supra* note 1, R.C.M. 1001(b)(2).

<sup>14</sup> *Reyes*, 63 M.J. at 266.

the record reached the Navy-Marine Corps Court of Criminal Appeals (NMCCA) was it discovered that a number of “unrelated documents were ‘[t]ucked between the actual excerpts’ of the Service Record book.”<sup>16</sup> These additional documents included, among others:

- the entire military police investigation;
- the SJA’s Article 34 pretrial advice;
- inadmissible photographs;
- inadmissible hearsay; and
- appellant’s offer to plead guilty to charges on which the members had found appellant not guilty.<sup>17</sup>

In analyzing the case, the CAAF applied the plain error analysis set forth in *United States v. Powell* in which they held “in the absence of objection at trial, the reviewing court will apply a plain error analysis under which Appellant must show that there was error, that the error was plain or obvious, and that the error materially prejudiced a substantial right.”<sup>18</sup> In *Reyes*, the NMCCA correctly determined that the military judge erred in admitting the extraneous material.<sup>19</sup> Moreover, the military judge incorrectly instructed the panel that they could adjudge a dishonorable discharge, where in actuality only a bad-conduct discharge was authorized for the offenses which Cpl Reyes was convicted.<sup>20</sup> The NMCCA found that there were errors and that they were plain and obvious. However, they determined that these errors were not prejudicial to the accused.<sup>21</sup>

The CAAF found differently. They determined that Cpl Reyes met his burden by establishing that, given the errors, the panel might have been “substantially swayed” in adjudging a sentence.<sup>22</sup> Given the inadmissible evidence presented to the panel, the military judge’s instruction to deliberate on *all of the evidence presented*, and the erroneous punitive discharge instruction, the CAAF was not confident that these errors did not influence the panel to adjudge a punitive discharge.<sup>23</sup> Accordingly, the sentence was set aside and a rehearing authorized. The obvious practice pointer to be learned from this case is for all parties, whether trial counsel, defense counsel, or military judge, to review every page of every document being offered and admitted into evidence.

#### *RCM 1001(b)(4) Evidence*<sup>24</sup>

Aggravation evidence under RCM 1001(b)(4) is an oft-contested portion of any sentencing case.<sup>25</sup> In many cases, the issues surrounding it stem from either what is or what is perceived to be uncharged misconduct being introduced by the government. Under RCM 1001(b)(4),

The trial counsel may present evidence as to any aggravating circumstances *directly relating to or resulting from the offenses of which the accused has been found guilty*. Evidence in aggravation includes, but is not limited to, evidence of financial, social, psychological, and medical impact on or cost to any person or

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<sup>15</sup> *Id.*

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

<sup>17</sup> *Id.* at 266-67. With respect to the inadmissible evidence contained in PE 6, the CAAF quoted the NMCCA opinion:

We are at a loss as to how the trial counsel could in good faith represent to the military judge that these materials were excerpts from the appellant’s service record without a further explanation as to their contents. We are equally perplexed by the trial defense counsel’s failure to object to the introduction of these portions of the exhibit, and by the military judge’s failure to inquire further before admitting the exhibit.

*Id.* at 267 (quoting *United States v. Reyes*, No. 200301064, 2005 CCA LEXIS 132, \*4-\*5 (N-M. Ct. Crim. App. Apr. 29, 2005) (unpublished)).

<sup>18</sup> *Id.* (citing *United States v. Powell*, 49 M.J. 460, 463-65 (1998)).

<sup>19</sup> *Id.* Additionally, the CAAF found that defense counsel’s failure to object constituted deficient performance. *Id.*

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

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

<sup>22</sup> *Id.* at 268.

<sup>23</sup> *Id.* at 267-68.

<sup>24</sup> MCM, *supra* note 1, R.C.M. 1001(b)(4).

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

entity who was the victim of an offense committed by the accused and evidence of significant adverse impact on the mission, discipline, or efficiency of the command directly and immediately resulting from the accused's offense.<sup>26</sup>

During the 2006 term, the CAAF issued *United States v. Bungert*<sup>27</sup> whose primary issue dealt with aggravation evidence introduced during the government's sentencing case. In 2003, Avionics Technician Third Class Bungert was asked to give a voluntary urine sample.<sup>28</sup> He did. A few days later, Bungert informed his commander that his urine would test positive.<sup>29</sup> Ever the mission-focused Coast Guardsman, Bungert selflessly offered to turn in eleven other drug users from the hangar deck in exchange for "a deal."<sup>30</sup> All of the individuals named by Bungert submitted to command directed urinalyses, and six of the eleven were interviewed by the Coast Guard Investigative Service (CGIS).<sup>31</sup> There was nothing in the evidence that any of the eleven individuals "dimed out" by Bungert had ever used narcotics.<sup>32</sup> Ultimately, Bungert pled guilty to, and was convicted of *inter alia*, distributing and using methamphetamines.<sup>33</sup>

During the sentencing phase of Bungert's court-martial, the government called two witnesses. The crux of each witness's respective testimony dealt with the sideshow investigation that resulted from Bungert's implications of the eleven individuals.<sup>34</sup> Bungert's supervisor testified that as a result appellant's allegations, "the base was shut down for a day, the command was locked down and a base-wide urinalysis was conducted, flight operations were cancelled and maintenance operations were shut down."<sup>35</sup> Additionally, the CGIS agent who investigated the case testified about the amount of time he spent investigating the eleven individuals implicated by Bungert.<sup>36</sup> The trial defense counsel made no objection to the testimony of either witness.<sup>37</sup> Moreover, during trial counsel's sentencing argument, he focused on the testimony of the two witnesses and the baseless allegations. Additionally, he asked the military judge to take into consideration the wasted time and energy of the individuals who were involved in the investigation.<sup>38</sup> Again, the trial defense counsel did not object.<sup>39</sup>

Since this issue was first raised on appeal, the court applied a plain error analysis. To establish plain error, appellant must show: "(1) that there was error, (2) that the error was plain or obvious, and (3) that the error materially prejudiced one of his substantial rights."<sup>40</sup> All three prongs must be satisfied. In the present case, the court did not address the first two prongs because Bungert failed to establish the third prong, that he was prejudiced in any substantial way from the testimony of the government's witnesses.<sup>41</sup>

The practice pointer to be taken away from this case is primarily for defense counsel. Object! Make the argument that the evidence is not proper aggravation evidence—that it is uncharged misconduct. If the objection is sustained, that is good for your client. If that objection fails, object with Military Rule of Evidence (MRE) 403<sup>42</sup> which will force the military judge to conduct a balancing test on the record.

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<sup>26</sup> *Id.* (emphasis added).

<sup>27</sup> 62 M.J. 346 (2006).

<sup>28</sup> *Id.* at 347.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* Of these eleven other drug users, Bungert claimed that he had specific knowledge through personal contact about six of the individuals. *Id.* He suspected the other five to be involved in drug use. *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

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

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

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

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 348.

<sup>41</sup> *Id.* Although Bungert's counsel argued that both witnesses comprised the government's entire case in aggravation, they failed to explain how the sentence might have been different without the testimony. *Id.*

<sup>42</sup> MCM, *supra* note 1, MIL. R. EVID. 403.

During the sentencing phase of a court-martial, the sentencing authority may consider evidence of an accused's rehabilitative potential.<sup>44</sup> Rule for Court-Martial 1001(b)(5) permits a witness to testify about an accused's rehabilitative potential.<sup>45</sup> The trial counsel, through witnesses, may present this opinion testimony provided each witness: (1) "possess[es] sufficient information and knowledge about the accused to offer a rationally-based opinion that is helpful to the sentencing authority;"<sup>46</sup> (2) bases his or her opinion upon "relevant information and knowledge" relating to the accused's personal circumstances;<sup>47</sup> and (3) limits his or her opinion to "whether the accused has rehabilitative potential and to the magnitude or quality of any such potential."<sup>48</sup> Witnesses may not present opinion testimony "regarding the appropriateness of a punitive discharge or whether the accused should be returned to the accused's unit."<sup>49</sup> On the other hand, the defense is not completely hampered by the limitations of RCM 1001(b)(5).<sup>50</sup> However, should the defense present "evidence that could not be introduced by the prosecution under RCM 1001(b)(5),"<sup>51</sup> such as whether a witness would welcome the accused back in the unit, "the door may be opened for the prosecution to present [contradictory] evidence in rebuttal."<sup>52</sup>

During the 2006 court term, the CAAF addressed the rehabilitative potential question when it rendered its *United States v. Hill* decision.<sup>53</sup> The appellant, a thirty-nine-year-old physician's assistant, pled guilty to seven specifications of dereliction of duty and conduct unbecoming an officer.<sup>54</sup> The specifications all stemmed from various sexual indiscretions the appellant took with various enlisted female patients during their sick call visits to the clinic.<sup>55</sup> During the defense's sentencing case, the defense counsel called the appellant's battalion commander who testified about rehabilitative potential.<sup>56</sup> Specifically, defense counsel asked whether the battalion commander thought appellant should be returned to his unit.<sup>57</sup> The battalion commander responded that he would "not want [appellant] back as a clinician, but as an officer, a platoon leader . . ."<sup>58</sup> During cross-examination, the trial counsel delved further into the witnesses's response indicating he would take him back as a platoon leader.<sup>59</sup>

<sup>43</sup> *Id.* R.C.M. 1001(b)(5).

<sup>44</sup> *United States v. Griggs*, 61 M.J. 402, 407 (2005).

<sup>45</sup> MCM, *supra* note 1, R.C.M. 1001(b)(5).

<sup>46</sup> *Id.* R.C.M. 1001(b)(5)(B).

<sup>47</sup> *Id.* R.C.M. 1001(b)(5)(C). However, "the opinion of the witnesses or deponent regarding the severity or nature of the accused's offense or offenses may not serve as the principal basis for an opinion of the accused's rehabilitative potential." *Id.*

<sup>48</sup> *Id.* R.C.M. 1001 (b)(5)(D).

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

<sup>50</sup> *United States v. Griggs*, 61 M.J. 402, 410 (2005). Although defense witnesses can testify that they would work with or welcome an accused back at the unit, they still are not still permitted to testify about whether or not an accused should receive a punitive discharge. *Id.* at 409-10.

<sup>51</sup> *United States v. Hill*, 62 M.J. 271, 272 (2006).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

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

<sup>55</sup> *Id.* at 272-73.

<sup>56</sup> *Id.* at 273.

<sup>57</sup> *Id.* The colloquy between the defense counsel and the witness from the record of trial is set forth as follows:

Q. Now, sir, the Judge has to make several decisions today. One of them is whether or not [Appellant] should remain in the Army, and I'm not going to ask you whether you think he should remain [in] the Army, but if the decision is made for him to remain in the Army, do you believe he could be a - - would you take him back into the battalion?

A. I'd have no qualms with that.

Q. What do you base that answer on, sir?

A. Based on the potential that he's shown me. Let me caveat that and say I would not want him back as a clinician, but as an officer, a platoon leader, I feel that he would succeed.

*Id.*

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

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

Q. If you had a platoon leader who sexually assaulted one of his subordinates, would you expect that person to stay in your battalion?

A. The question was, if the Judge's decision was to retain him in the Army, and he chose my battalion, would I accept that, and I said yes. If I was sitting in that panel over there as a juror, would I allow him to remain in the Army, no --<sup>60</sup>

At that moment, the trial judge promptly jumped in, stating that the battalion commander's remarks were "not responsive" and consisted of testimony "that a witness is not allowed to make."<sup>61</sup>

After the court-martial, the military judge conducted a "Bridge the Gap"<sup>62</sup> session with counsel for both parties. During that session, he made a comment that "[he] was thinking of keeping him until his commander said he didn't want him back," or words to that effect.<sup>63</sup> Based on the trial judge's comment, the defense counsel raised this as an issue in his post-trial submission to the convening authority.<sup>64</sup> In turn, the convening authority ordered a post-trial 39(a).<sup>65</sup>

At the post-trial 39(a), the post-trial judge pondered whether the trial judge considered the battalion commander's inadmissible testimony when adjudging the sentence.<sup>66</sup> Ultimately, the post-trial judge found that the trial judge's remark "constituted incompetent evidence that could not be used to impeach the sentence under Military Rule of Evidence (MRE) 606(b)."<sup>67</sup> Moreover the post-trial judge found that "even if the trial judge's comments could be considered, there was no evidence that the battalion commander . . . 'ever opined, either directly or euphemistically, that the accused should be discharged'"<sup>68</sup>

Following affirmation by the Army Court of Criminal Appeals (ACCA), the case was appealed to CAAF which determined that the record failed to definitively establish "whether the trial judge was referring to: (1) the testimony of the battalion commander that he would not want Appellant back in his unit *as a clinician*, or (2) the battalion commander's remarks about not retaining Appellant *in the Army* if he was on the panel."<sup>69</sup> The court further determined that the defense bore the burden of disproving the first explanation and showing that the trial judge relied on the second explanation, the inadmissible testimony.<sup>70</sup> In this case, the defense did not meet its burden. The CAAF noted that appellant "opened the door" as to views pertaining to the retention of Appellant in the unit.<sup>71</sup> Thus, the trial judge was permitted to consider the testimony that the battalion commander would not want appellant back as a clinician.<sup>72</sup> Furthermore, with respect to the second alternative, the CAAF noted that "the trial judge expressly stated that the battalion commander's remarks were 'not

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

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* United States v. Hill, 62 M.J. 271, 273 (2006). "Bridge the Gap" sessions are informal post-trial meetings intended to be used as professional and skill development for trial and defense counsel. See United States v. Copeney, 34 M.J. 28, 29 (C.M.A. 1992).

<sup>63</sup> *Hill*, 62 M.J. at 273

<sup>64</sup> *Id.* at 274.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

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

<sup>68</sup> *Id.* Specifically, concerning the Bridge the Gap remarks, the post-trial judge made the following findings of fact:

[The] remarks [during the informal Bridge the Gap discussion] are not evidence that he considered extraneous information. [The trial judge's] comment that the commander said he didn't want him back is consistent with [the commander's] admitted testimony that he didn't want him back as a *clinician*. Most importantly, [the commander] *never* testified the accused should be discharged. He was not permitted to complete his answer to the question the defense identifies as resulting in the impermissible opinion. A fair reading of the record supports the conclusion that [the trial judge] cut off [the commander's] answer once it became clear that [the commander] was giving his opinion as a juror not as the accused's commander. [The trial judge, during the sentencing proceeding,] appropriately cut off the answer since the witness was improperly invading the province of the sentencing authority.

*Id.* The post-trial judge added: "In the context of his entire testimony as a defense witness, [the commander] clearly indicated his support for the accused's continued service in the Army." *Id.*

<sup>69</sup> *Id.* at 275. (emphasis added).

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

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

responsive' and consisted of testimony 'that a witness is not allowed to make.'"<sup>73</sup> Given this, the court rested on the presumptions that the military judge knows the rules of evidence, considers only admissible testimony, and follows his own evidentiary rulings.<sup>74</sup>

### *Post-Confinement Forfeitures*

Issues dealing with post-confinement forfeitures are somewhat of a hybrid of sentencing and post-trial. This is certainly an easily over-looked area to which chiefs of justice need to be attuned to in an effort to avoid any subtle pitfalls. The issue in *United States v. Stewart*<sup>75</sup> involved whether forfeitures were improperly imposed on Airman First Class Stewart's pay and allowances after he was released from confinement and returned to active status. Stewart entered the room of a fellow servicemember and, while she was unconscious, indecently assaulted and videotaped her unclothed body.<sup>76</sup> Contrary to his pleas, a panel found him guilty of one specification each of unlawful entry, indecent assault and indecent acts.<sup>77</sup> On 13 October 2001, the panel adjudged a sentence of reduction to the grade of Airman Basic (E-1), confinement for fifteen months and forfeiture of all pay and allowances.<sup>78</sup> The members did not adjudge a punitive discharge.<sup>79</sup> The forfeiture of all pay and allowances took effect on 27 October 2001.<sup>80</sup> Following his term of confinement, Stewart was returned to active duty on 14 April 2002.<sup>81</sup> However, until 31 August 2002, the Defense Finance and Accounting Service (DFAS) continued to withhold total forfeitures.<sup>82</sup> The DFAS correctly determined that Airman Stewart, following his release from confinement, should have only forfeited up to a maximum of two-thirds pay.<sup>83</sup> Airman Stewart was reimbursed the amount of pay and allowances erroneously withheld.<sup>84</sup> This determination was presumably based on the non-binding discussion to RCM 1107(d)(2) which states, "[w]hen an accused is not serving confinement, the accused should not be deprived of more than two-thirds pay for any month as a result of one or more sentences by court-martial and other stoppages or involuntary deductions, unless requested by the accused."<sup>85</sup>

The discussion to RCM 1107(d)(2) follows CAAF's 1987 decision in *United States v. Warner*<sup>86</sup> in which it held that if a service member is released from confinement and still in a duty status, no more than two-thirds pay may be withheld from his pay.<sup>87</sup> Furthermore, in *United States v. Lonnette*,<sup>88</sup> a decision rendered subsequent to *Stewart*, the CAAF held "if a sentence 'provides for' continued forfeiture of all pay and allowances after a servicemember is released from confinement but before execution of the discharge, that portion of the sentence should be amended to provide for forfeiture of two-thirds pay until the discharge is executed."<sup>89</sup> Both *Warner* and *Lonnette*, and the discussion to RCM 1107(d)(2), are based on the overarching policy concern that an accused "should not be deprived of all means of supporting himself or his family while on active duty."<sup>90</sup>

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<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 276.

<sup>75</sup> 62 M.J. 291 (2006).

<sup>76</sup> *Id.* at 292.

<sup>77</sup> *Id.*

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

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

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

<sup>81</sup> *Id.* at 291.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> MCM, *supra* note 1, R.C.M. 1107(d)(2) discussion.

<sup>86</sup> 25 M.J. 64 (C.M.A. 1987).

<sup>87</sup> *Stewart*, 62 M.J. at 293.

<sup>88</sup> 62 M.J. 296 (2006).

<sup>89</sup> *Stewart*, 62 M.J. at 293 (citing *Warner*, 25 M.J. at 67).

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

Though this policy was in effect at the time the *Stewart* trial occurred, the appellate courts in *Stewart* had a more fundamental question with which to wrestle. What exactly did the members intend when adjudging a sentence that included forfeiture of all pay and allowances but no punitive discharge? There are two ways of answering this question. As the court recognized, “[o]n the one hand, this sentence could be read to reflect the members’ intent to sentence Appellant to continuous forfeitures so long as he was in the armed forces.”<sup>91</sup> It is plausible that the members intended this to be the case because there was nothing in the adjudged sentence that limited the forfeitures. Thus, as the government argued, the members intended total forfeitures subject to the operation of applicable law and regulation.<sup>92</sup> On the other hand, as the court conversely surmised “in light of RCM 1003(b)(2), the discussion of RCM 1107(d)(2), and *Warner*, [the] sentence could be read to reflect the members’ intent to sentence Appellant to forfeiture of all pay and allowances during that period in which he was in confinement.”<sup>93</sup>

In reaching its decision, the CAAF recognized its earlier opinion in *Waller v. Swift*<sup>94</sup> in which it held that an accused cannot receive a sentence harsher than that adjudged by the panel.<sup>95</sup> Moreover, for ambiguous sentences, as in *Stewart*, an accused cannot be subjected to a “greater sentence than that which is clearly indicated.”<sup>96</sup> Since the adjudged sentence did not expressly specify partial forfeitures, the court affirmed only those forfeitures “coterminous with the time Appellant spent in confinement.”<sup>97</sup> Specifically, the CAAF held:

[W]here a sentence to forfeiture of all pay and allowances is adjudged, such sentence shall run until such time as the servicemember is discharged or returns to a duty status, whichever comes first, unless the sentencing authority expressly provides for partial forfeitures post-confinement. The sentencing authority shall specify the duration and the amount of such partial forfeitures, subject to R.C.M. 1103(b)(2), the discussion accompanying R.C.M. 1107(d)(2), and *Warner*.<sup>98</sup>

A sentencing instruction from the military judge to cover this potential issue is unlikely.<sup>99</sup> Therefore, chiefs of justice and staff judge advocates (SJAs) need to remain vigilant of situations such as that in *Stewart* where the adjudged sentence includes confinement and total forfeitures but no punitive discharge.

### Post-Trial

In the world of post-trial, no case during last year’s term of court was larger than *United States v. Moreno*.<sup>100</sup> Although a 2006 case, *Moreno* hit with such an impact that it was included in the 2006 New Developments Symposium II.<sup>101</sup> Instead of replowing the ground discussed in last year’s article, a few cases that followed will be discussed from the 2006 term to show that, if nothing else, the sky is in fact not falling. Additionally, the article will discuss the combined case of *United States v.*

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

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> 30 M.J. 139, 143 (C.M.A. 1990).

<sup>95</sup> *Stewart*, 62 M.J. at 294.

<sup>96</sup> *Id.*. The CAAF further expounded on the principle of ambiguous sentences, stating:

The principal that an accused should not be subjected to an ambiguous, uncertain sentence is grounded in longstanding United States jurisprudence. “Sentences in criminal cases should reveal with fair certainty the intent of the court and exclude any serious misapprehensions by those who must execute them.” *United States v. Daugherty*, 269 U.S. 360, 363, 46 S. Ct. 156, 70 L. Ed. 309 (1926). A sentence that is so ambiguous that a reasonable person cannot determine what the sentence is may be found illegal. *United States v. Earley*, 816 F.2d 1428, 1430 (10th Cir. 1987). However, not all ambiguous sentences are illegal. *Id.* at 1431. A sentence need not be so clear as to eliminate every doubt, but sentences should be clear enough to allow an accused to ascertain the intent of the court or of the members. *See Id.*

*Id.*

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

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

<sup>99</sup> Colonel Michael J. Hargis & Lieutenant Colonel Timothy Grammel, *Annual Review of Developments in Instructions—2006*, ARMY LAW., May. 2007, at 48.

<sup>100</sup> 63 M.J. 129 (2006).

<sup>101</sup> Major John T. Rothwell, “I Made a Wrong Mistake”: Sentencing & Post-Trial in 2005, ARMY LAW., June. 2006, at 41.

*Alexander, United States v. Vanderschaaf*,<sup>102</sup> both certified for review by The Judge Advocate General (TJAG) of the Army and containing a common issue, whether the respective convening authorities had actually approved the adjudged findings when the SJA's recommendations (SJARs) were silent as to the aggravating language.

### *Post-Trial Processing*

By now, most chiefs of justice have "120" tattooed on their forearms. This number references the standard set in *Moreno* as the number of days for the government to get a case processed through the system from the end of trial to action by the convening authority.<sup>103</sup> Though not a complete return to the draconian ninety-day standard established in *Dunlap v. Convening Authority*,<sup>104</sup> failure by the government to meet this 120-day standard will trigger a rebuttable presumption of unreasonable delay which will in turn trigger the *Barker v. Wingo*<sup>105</sup> four pronged analysis.<sup>106</sup> When analyzing a case for unreasonable post-trial delay, the appellate courts will examine: (1) the length of the delay; (2) the reasons for the delay; (3) whether the appellant (or defense counsel) has asserted the right to speedy post-trial processing; and (4) prejudice suffered by the appellant.<sup>107</sup> If the court concludes that an appellant has been denied the due process right to speedy post-trial review and appeal, the court will grant relief unless it is convinced beyond a reasonable doubt that the constitutional error is harmless.<sup>108</sup> Generally, if appellant cannot show that he has been materially prejudiced by the delay, the courts do not examine the other three factors. In many post-trial delay cases, the prejudice factor is the most difficult prong for an appellant to establish.

Following the *Moreno* decision, the CAAF rendered more decisions in which the appellant was granted relief to a certain degree. In *United States v. Toohey*,<sup>109</sup> 2240 days (6.1 years) elapsed from the end of trial until a decision was rendered by the service court. Applying the *Barker* analysis, the CAAF found that the first three prongs weighed heavily in appellant's favor.<sup>110</sup> They further found that even where there is no finding of prejudice suffered by an appellant, they will find a "due process violation only when, in balancing the other three factors, the delay is so egregious that tolerating it would adversely affect the public's perception of fairness and integrity of the military justice system."<sup>111</sup>

In addition to examining whether there was a due process violation as a result of the delay, the CAAF looked at whether relief was due appellant under Article 66(c), Uniform Code of Military Justice (UCMJ).<sup>112</sup> This provision of the Code says that the "Court of Criminal Appeals [CCA] may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved."<sup>113</sup> The CAAF determined that the service court in this case "applied an erroneous legal standard and thus abused its

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<sup>102</sup> 63 M.J. 269 (2006).

<sup>103</sup> Specifically, the court indicated that there would be a presumption of unreasonable delay in cases where it took more than: (1) 120 days to get a record processed from the end of trial to action; (2) 30 days to get a record mailed and docketed at the service court; or (3) 18 months for the service court to render a decision. *Moreno*, 63 M.J. at 143.

<sup>104</sup> 48 C.M.R. 751 (C.M.A. 1974).

<sup>105</sup> 407 U.S. 514, 530 (1972).

<sup>106</sup> *Moreno*, 63 M.J. at 142.

<sup>107</sup> *Id.* (citing *Barker*, 407 U.S. at 530).

<sup>108</sup> *United States v. Kreutzer*, 61 M.J. 293, 298 (2005) (citing *Chapman v. California*, 386 U.S. 18, 24 (1967)).

<sup>109</sup> *United States v. Toohey (Toohey II)* 63 M.J. 353 (2006). Appellant, contrary to his pleas, was convicted of rape and assault consummated by battery. *Id.* at 355. On 13 August 1998, he was sentenced to reduction to E-1, forfeiture of all pay and allowances, confinement for twelve years and a dishonorable discharge. *Id.* at 357. The transcript was 943 pages and the ROT was composed of eleven volumes. *United States v. Toohey (Toohey I)*, 60 M.J. 703, 710 (N-M. Ct. Crim. App. 2004).

<sup>110</sup> *Toohey II*, 63 M.J. at 362.

<sup>111</sup> *Id.*

<sup>112</sup> UCMJ art. 66(c) (2005).

<sup>113</sup> *Id.* Article 66(c) states:

In a case referred to it, the Court of Criminal Appeals may act only with respect to the findings and sentence as approved by the convening authority. It may affirm such findings of guilty and sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, it may weight the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.

*Id.*

discretion”<sup>114</sup> when it required that a case “rise to the level of ‘most extraordinary’ before the court would consider exercising its unique Article 66(c), UCMJ, authority.”<sup>115</sup> The service courts were cautioned that the fundamental inquiry should be whether the sentence was appropriate “in light of all circumstances, and no single predicate criteria of ‘most extraordinary’ should be erected to foreclose application of Article 66(c), UCMJ, consideration of relief.”<sup>116</sup> Notably, CAAF expressed concern that the CCA did not view the 2240 days of delay in Toohey’s case as being among “the most extraordinary of circumstances.”<sup>117</sup>

Since *Toohey* was remanded to the lower court, the CAAF did not fashion a specific relief. It did, however, remind the lower court of the non-exhaustive range of relief options set forth in *Moreno*<sup>118</sup> and recommended that it should allow the parties the “opportunity to address the issue of meaningful relief in light of the due process violation and the circumstances of this case.”<sup>119</sup>

Another unreasonably long post-trial delay case was *United States v. Harvey*.<sup>120</sup> In addition to the more prevalent issue pertaining to unlawful command influence, the government took 2031 days (5.6 years) to complete post-trial and appellate review.<sup>121</sup> Despite being neither an unusually long record nor a complex case, it took over one year for the convening authority to take action in appellant’s case.<sup>122</sup> It then took another 701 days for appellant’s case to be briefed by her assigned appellate defense counsel.<sup>123</sup> The government took 210 days to file a responsive brief before the NMCCA.<sup>124</sup> After the case had been fully briefed and submitted to the NMCCA, it took 555 days before the lower court rendered a decision.<sup>125</sup>

The CAAF again analyzed this case applying the four *Barker* factors.<sup>126</sup> In reviewing the prejudice factor, CAAF placed an emphasis on their conclusion that Harvey’s appeal was meritorious with respect to an unlawful command influence issue (UCI).<sup>127</sup> However, despite being successful on the UCI issue, the court still did not find that appellant had suffered prejudice.<sup>128</sup> Nonetheless, when balancing all four *Barker* factors, the CAAF viewed the delay in this case, just as in *Toohey*, to have been “so egregious that tolerating it would adversely affect the public’s perception of the fairness and integrity of the military justice system.”<sup>129</sup> The findings and sentence were set aside and a rehearing was authorized.<sup>130</sup> Because no other meaningful relief could be provided, the CAAF ordered in the event that a rehearing is held resulting in a conviction and a

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<sup>114</sup> *Toohey II*, 63 M.J. at 362.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* (citing *United States v. Toohey (Toohey I)*, 60 M.J. 703, 710 (N-M. Ct. Crim. App. 2004)).

<sup>118</sup> *Id.* at 363. In *Moreno* the CAAF determined that a rehearing was the appropriate remedy. *United States v. Moreno*, 63 M.J. 129, 143 (2006). The court indicated that it had considered a range of options it had at its disposal such as directing a day-for-day credit for each day of unreasonable and unexplained delay. *Id.* However, they determined that such a remedy would have no meaningful effect because *Moreno* had already served the full term of adjudged confinement. *Id.* Furthermore, the court considered dismissing the charge and specification with prejudice:

Dismissal would be a consideration if the delay either impaired *Moreno*'s ability to defend against the charge at a rehearing or resulted in some other evidentiary prejudice. See *Tardif*, 57 M.J. at 224 (citing *United States v. Timmons*, 22 C.M.A. 226, 227, 46 C.M.R. 226, 227 (1973); *United States v. Gray*, 22 C.M.A. 443, 445, 47 C.M.R. 484, 486 (1973)).

*Id.* However the court found no such evidence. *Id.* Ultimately, because they had to set aside the sentence in order to permit a rehearing, there was no direct sentence relief that we could be granted to the accused. *Id.* As such, the court determined in the event a rehearing was conducted resulting in a conviction, the maximum authorized punishment could be no worse than a punitive discharge. *Id.* at 143-44.

<sup>119</sup> *Toohey II*, 63 M.J. at 363.

<sup>120</sup> *Harvey*, 64 M.J. 13 (2006).

<sup>121</sup> *Id.* at 23.

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

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

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Barker v. Wingo*, 407 U.S. 514, 530 (1972).

<sup>127</sup> *Harvey*, 64 M.J. at 24.

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

<sup>129</sup> *Id.* (quoting *United States v. Toohey (Toohey II)*, 63 M.J. 353, 363 (2006)).

<sup>130</sup> *Id.*

sentence, the convening authority may approve no portion of the sentence other than a punitive discharge.<sup>131</sup>

Not all unreasonably lengthy post-trial delays result in the appellant getting any relief as evidenced by *United States v. Allison*.<sup>132</sup> The post-trial process in Mess Management Specialist Seaman Allison's case took 1867 days (5.1 years) from trial to appellate decision by the CCA.<sup>133</sup> The CAAF found that the lengthy delay denied Allison of his right to speedy review and appeal.<sup>134</sup> However, considering the entire record taking into account all the circumstances of the case and finding no merit in Allison's main appellate issue, they determined that the error was harmless beyond reasonable doubt and no relief was warranted.<sup>135</sup>

For Army chiefs of justice, the sky does not appear to be falling. Moreover, processing times in Army jurisdictions have noticeably improved. For example in fiscal year 2006, out of 1149 records processed, the average processing time from the end of trial to action was 149 days (See Appendix).<sup>136</sup> Since 11 June 2006, when the *Moreno* processing standards took effect, out of 624 records processed, the average time has dropped to 104 days.<sup>137</sup>

#### *Staff Judge Advocate's Recommendations and Promulgating Orders*

The convening authority is not required to take action on the findings.<sup>138</sup> However, in the convening authority's sole discretion, he may:

- (1) Change a finding of guilty to a charge or specification to a finding of guilty to an offense that is a lesser included offense of the offense stated in the charge or specification; or
- (2) Set aside any finding of guilty and (A) Dismiss the specification, and if appropriate the charge, or (B) Direct a rehearing in accordance with subsection (e) of [RCM 1107].<sup>139</sup>

With respect to the action on sentence, the convening authority may "disapprove a legal sentence, in whole or in part, mitigate the sentence, and change a punishment to one of a different nature as long as the severity of the punishment is not increased."<sup>140</sup> When taking action, the convening authority *must* consider three things: (1) the result of trial, (2) the SJAR, and (3) any matters submitted by the accused under RCM 1105.<sup>141</sup> The convening authority *may* consider: the record of trial, personnel records of the accused, and such other matters as the convening authority deems appropriate.<sup>142</sup>

The appellate case of *United States v. Alexander; United States v. Vanderschaaf*<sup>143</sup> involved two unrelated cases with an identical issue that was certified for review by The Judge Advocate General of the Army. The Army court in both cases did not approve the findings reached by their respective general courts-martial, and in both cases, ordered that certain aggravating language appearing in the respective promulgating orders be deleted.

Specialist (SPC) Alexander, in a case originating out of Afghanistan, was originally charged both with using and distributing marijuana on divers occasions "while receiving special pay under 37 U.S.C. § 310."<sup>144</sup> This quoted language

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

<sup>132</sup> 63 M.J. 365 (2006).

<sup>133</sup> *Id.* at 366-67.

<sup>134</sup> *Id.* at 371.

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

<sup>136</sup> Email from Clerk of Court, Army Court of Criminal Appeals, to author (June 4, 2007) (on file with author).

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

<sup>138</sup> MCM, *supra* note 1, R.C.M. 1107(c).

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

<sup>140</sup> *Id.* R.C.M. 1107(d).

<sup>141</sup> *Id.* R.C.M. 1107(b)(3)(A) (emphasis added).

<sup>142</sup> *Id.* R.C.M. 1107(b)(3)(B) (emphasis added).

<sup>143</sup> 63 M.J. 269 (2006).

<sup>144</sup> *Id.* at 270.

increases the maximum period of confinement by five years for each offense.<sup>145</sup> At a general court-martial before a military judge sitting alone, he pled guilty to both offenses.<sup>146</sup> In the SJAR to the convening authority, the “while receiving special pay” language was omitted from the gist of the offense section of the document.<sup>147</sup> The SJA recommended that the convening authority reduce the adjudged confinement to comply with the terms of the pretrial agreement but did not make a specific recommendation as to the findings.<sup>148</sup> Accordingly, the convening authority’s action reduced the period of confinement, as recommended by the SJA, but was silent with respect to the findings.<sup>149</sup>

Following the convening authority’s action, the promulgating order was finalized.<sup>150</sup> The action portion of the promulgating order was identical to the convening authority’s action.<sup>151</sup> However, unlike the SJAR, the description of the specifications in the promulgating order included “while receiving special pay under 37 U.S.C. § 310,” the language that was omitted from the SJAR.<sup>152</sup>

Turn now to Private (PVT) Vanderschaaf’s case. There the appellant was charged with multiple specifications in violation of Article 112a, UCMJ.<sup>153</sup> Each specification correctly stated the offenses and included the aggravating language that the offenses had been committed “on divers occasions.”<sup>154</sup> Similar to SPC Alexander, PVT Vanderschaaf pled guilty at a general court-martial before a military judge sitting alone.<sup>155</sup> In the SJAR to the convening authority, the “on divers occasions” language was omitted from the gist of the offense section.<sup>156</sup> The SJAR also recommended that the convening authority reduce the adjudged period of confinement to comply with the terms of the pretrial agreement but was silent with respect to findings.<sup>157</sup> The convening authority’s action followed the SJA’s advice.<sup>158</sup> The promulgating order that followed contained “on divers occasions” in the specification description.<sup>159</sup>

In neither case, under RCM 1105<sup>160</sup> and 1106,<sup>161</sup> did the defense object to the wording of the respective specification descriptions.<sup>162</sup> The issue in each case was first raised before the Army service court. In both cases, ACCA agreed with the appellants.<sup>163</sup> In doing so, ACCA found that the respective convening authorities approved the findings of guilty only with respect to the language contained in the SJARs.<sup>164</sup> In other words, with respect to *while receiving special pay under 37 U.S.C. § 310* in SPC Alexander’s case and *on divers occasions* in PVT Vanderschaaf’s case, those portions of the findings were disapproved.<sup>165</sup> Accordingly, the Army court ordered issued corrected promulgating orders in each case, deleting the language at issue.<sup>166</sup> The Judge Advocate General of the Army certified both cases for review by the CAAF.<sup>167</sup>

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<sup>145</sup> UCMJ art. 112a (2002).

<sup>146</sup> *Alexander*, 63 M.J. at 270.

<sup>147</sup> *Id.* at 270-71.

<sup>148</sup> *Id.* at 271.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

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

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 272.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

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

<sup>160</sup> MCM, *supra* note 1, R.C.M. 1105.

<sup>161</sup> *Id.* R.C.M. 1106.

<sup>162</sup> *Alexander* 63 M.J. at 271; *Vanderschaaf*, 63 M.J. at 272.

<sup>163</sup> *Alexander* 63 M.J. at 271; *Vanderschaaf*, 63 M.J. at 272.

<sup>164</sup> *Alexander* 63 M.J. at 271; *Vanderschaaf*, 63 M.J. at 272.

<sup>165</sup> *Alexander* 63 M.J. at 271; *Vanderschaaf*, 63 M.J. at 272.

<sup>166</sup> *Alexander* 63 M.J. at 271; *Vanderschaaf*, 63 M.J. at 272.

The CAAF, however, disagreed with Army court.<sup>168</sup> In reaching their decision, four of the judges determined that the requirements of RCM 1106(d)(3)(A)<sup>169</sup> were met in both cases.<sup>170</sup> “[T]he SJA’s recommendation may provide the convening authority with ‘concise information’ about the findings, ‘without specifying exactly what acts the appellant was found guilty of or what language was excepted or substituted.’”<sup>171</sup> “Although disapproval of the findings requires express action by the convening authority, the convening authority is not required to take express action to approve the findings.”<sup>172</sup> Therefore, in both cases, the language contained in the SJAR’s was sufficient in providing a “general depiction of the offense, without the necessity for reciting the details of each element and aggravating factor.”<sup>173</sup>

Despite the court’s ruling, the CAAF did provide some practical guidance to SJA offices in recognizing that “the potential for error could be reduced if the recommendation prepared by an SJA included the findings portion of a proposed promulgating order, thereby providing greater assurance of congruence between the recommendation and the promulgating order.”<sup>174</sup>

## Conclusion

The 2006 court term proved to be quite eventful in the areas of both sentencing and post-trial. In the past couple of court terms significant cases were decided in both areas. Since the bulk of courtroom time is spent handling guilty pleas and conducting sentencing cases, both trial counsel and defense counsel need to remain intimately familiar with the RCM 1001 and the case law that interprets it. Similarly, since there are still a number of cases still in the appellate queue, none of the services are by any means out of the *Moreno* woods. It will certainly be an interesting year to see how the courts handle post-trial delay cases if the processing time cases continue to decline.

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<sup>167</sup> *Alexander* 63 M.J. at 271; *Vanderschaaf*, 63 M.J. at 272.

<sup>168</sup> *Id.* at 276.

<sup>169</sup> MCM, *supra* note 1, R.C.M. 1106(d)(3)(A).

<sup>170</sup> *Alexander*, 63 M.J. at 276.

<sup>171</sup> *Id.* at 276 (quoting *United States v. Gunkle*, 55 M.J. 26, 33 (2001) (citation and quotation marks omitted)).

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

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

**Appendix**

**Pre-Moreno Court-Martial Processing Time  
2006  
Army Wide<sup>175</sup>**

Average Number of Days							
	Records used	Preferral to first 39a	First 39a to Termination	Termination to Action	Action to Dispatch	Dispatch to Rec'd by Clerk of Ct.	Total Days
GCM	815	89	23	149	30	9	300
SPCM	334	56	6	147	17	8	234
OVERALL	1149	79	18	149	26	9	281

**Post-Moreno Court-Martial Processing Time  
Cases terminated after 11 June 2006  
Army Wide<sup>176</sup>**

Average Number of Days							
	Records used	Preferral to first 39a	First 39a to Termination	Termination to Action	Action to Dispatch	Dispatch to Rec'd by Clerk of Ct.	Total Days
GCM	420	87	24	102	22	9	244
SPCM	204	50	10	107	13	8	188
OVERALL	624	75	19	104	19	9	226

<sup>175</sup> E-mail from Clerk of Court, Army Court of Criminal Appeals, to author (June 4, 2007) (on file with author).

<sup>176</sup> *Id.*