

To Err Is Human, to Obtain Relief Is Divine¹

Major Kwasi L. Hawks
Professor, Criminal Law Department
The Judge Advocate General's Legal Center and School
Charlottesville, Virginia

Introduction

Though few in number, this past year saw significant case developments in the areas of ineffective assistance of counsel (IAC), prosecutorial misconduct, pretrial restraint, and speedy trial. The Supreme Court weighed in on whether the defense can engage in prospective waivers of the right to speedy trial,² and the Court of Appeals for the Armed Forces (CAAF) clarified when 305(k)³ credit is appropriate for restriction tantamount to confinement.⁴ The CAAF visited when trial counsel should warn a witness about potential perjury,⁵ and the Army Court of Criminal Appeals (ACCA) addressed whether a defense counsel can waive his client's right to make an unsworn statement during sentencing.⁶

It's Miller Time!

Perhaps most notable during the past year was CAAF's expansion of the expected competence of a defense attorney in the case of *United States v. Miller*.⁷ Interior Communications Electrician Third Class Miller served aboard the USS *Harry S. Truman*, where he had access to a common computer on board the ship.⁸ He established a password protected account on that common computer to store approximately 100 pornographic images.⁹ Miller pled guilty at a general court martial to misuse of a government computer, receiving child pornography, and possession of visual depictions of minors engaged in sexually explicit conduct.¹⁰ The military judge accepted Miller's pleas and sentenced him to confinement for a year, reduction to E-1, and a bad conduct discharge.¹¹ The Navy-Marine Court of Criminal Appeals affirmed both the findings and sentence.¹²

On appeal, Miller claimed that, upon his release from the Navy, the law of his home state required him to register as a sex offender, and that his home state's court system sentenced him to three years confinement for violating the state sex offense registration statute.¹³ He further claimed that he learned of this sex offender registration requirement for the first time at his transition from the Navy brig to civilian life.¹⁴

The CAAF granted review of three issues. The first issue concerned whether there had been ineffective assistance of appellate defense counsel due to his lack of extensive communications with the appellant.¹⁵ The second and third issues concerned trial defense counsel's alleged failure to inform his client that conviction of possession of child pornography

¹ ALEXANDER POPE, AN ESSAY ON CRITICISM, available at <http://poetry.eserver.org/essay-on-criticism.html> (last visited Oct. 1, 2007).

² *Zedner v United States*, 126 S. Ct. 1976 (2006).

³ MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 305(k) (2005) [hereinafter MCM] (providing remedies for improper pretrial confinement).

⁴ *United States v. Regan*, 62 M.J. 299 (2006).

⁵ *United States v. Edmond*, 63 M.J. 343 (2006), *pet. for rev. granted*, 64 M.J. 397 (2007).

⁶ *United States v. Dobrava*, 64 M.J. 503 (Army Ct. Crim. App. 2006).

⁷ *Miller*, 63 M.J. 452 (2006).

⁸ *Id.* at 454.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at 455.

¹⁴ *Id.*

¹⁵ *Id.* at 452-53.

triggered certain sex offender reporting requirements; specifically whether such an alleged failure constituted IAC, and whether it rendered improvident the accused's pleas.¹⁶

Appellate Ineffective Assistance of Counsel

*What we have here is failure to communicate.*¹⁷

Appellant argued that his detailed appellate defense counsel never personally communicated with him, that he did not raise any issues on his behalf before the Navy court, and that he did not question whether the photographs met the statutory definition of child pornography.¹⁸ Detailed appellate counsel sent the appellant a letter introducing himself, explaining his role, and counseling that the appellant should reply with any issues he wished to raise within twenty days.¹⁹ However, four days after sending the letter, appellant's appellate counsel submitted a brief to the court identifying no issues for relief.²⁰

The court first noted that the two-pronged test for ineffective assistance of appellate counsel is the same as that for a trial defense counsel: (1) whether counsel's performance was so deficient that he was not effectively fulfilling his constitutional role to ensure a fair trial; and (2) whether counsel's deficient performance actually prejudiced the accused so as to deny him a fair trial.²¹

In *United State v. Polk*, the CAAF had modified the two original prongs of the test and added a third.²² The prevailing test for ineffective assistance of counsel in military courts is now:

- (1) "Are the allegations made by appellant true; and, if they are, is there a reasonable explanation for counsel's actions in the defense of the case?";
- (2) If the allegations are true, "did the level of advocacy 'fall[] measurably below the performance . . . [ordinarily expected] of fallible lawyers?";
- and (3) "If ineffective assistance of counsel is found to exist, 'is . . . there . . . reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt?'"²³

Applying *Polk* to appellant's claim of appellate IAC, the court held that appellate counsel should have waited longer than four days to give appellant an opportunity to respond, but since the appellant never responded to the letter (not within or after twenty days), appellant suffered no prejudice and hence there was no ineffective assistance of appellate counsel.²⁴ Though clearly not a preferred method of representation, the court's holding supports the proposition that appellate counsel may effectively represent a client without ever engaging him in dialogue.

*It does much more harm than good. Your collateral damage is very heavy.*²⁵

The CAAF next turned to the issue of whether the accused's plea was involuntary and therefore failed to meet the requirements of RCM 910(d).²⁶ Appellant argued that because he was not informed by his trial defense counsel or the military judge that persons convicted by military courts of possessing child pornography would have to register as sex offenders, his plea was not voluntary.²⁷ Appellant's argument raised the issue of what effects collateral consequences of

¹⁶ *Id.* at 453.

¹⁷ COOL HAND LUKE (VHS Warner Home Video 1967).

¹⁸ *Miller*, 63 M.J. at 455.

¹⁹ *Id.* at 456.

²⁰ *Id.*

²¹ *Id.* at 455-56 (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)).

²² 32 M.J. 150, 153 (C.M.A. 1991)).

²³ *Miller*, 63 M.J. at 456 (quoting *Polk*, 32 M.J. at 153) (internal citations omitted).

²⁴ *Id.*

²⁵ Former Secretary of Defense Caspar Weinberger, Brainy Quote, available at http://www.brainyquote.com/quotes/authors/c/caspar_weinberger.html (last visited Oct. 1, 2007).

²⁶ MCM, *supra* note 3, R.C.M. 910(d) (requiring that a plea be voluntary).

²⁷ *Miller*, 63 M.J. at 456.

criminal activity have on a guilty plea. A collateral consequence is a penalty for committing an offense over and above those adjudged in a criminal sentence.²⁸ In analyzing Miller's collateral consequence of having to register as a sex offender, the court looked to *United States v. Bedania* and *United States v. Williams* for guidance:

[W]hen collateral consequences of a court-martial conviction -- such as administrative discharge, loss of a license or a security clearance, removal from a military program, failure to obtain promotion, deportation, or public derision and humiliation -- are relied upon as the basis for contesting the providence of a guilty plea, the appellant is entitled to succeed only when the collateral consequences are major and the appellant's misunderstanding of the consequences (a) results foreseeably and almost inexorably from the language of a pretrial agreement; (b) is induced by the trial judge's comments during the providence inquiry; or (c) is made readily apparent to the judge, who nonetheless fails to correct that misunderstanding. In short, chief reliance must be placed on defense counsel to inform an accused about the collateral consequences of a court-martial conviction and to ascertain his willingness to accept those consequences.²⁹

The court found in the instant case that the accused's apparent misunderstanding about his obligation to register as a sex offender did not arise from the terms of the pretrial agreement, nor did it arise from comments of the military judge, nor was it apparent to the military judge during providence.³⁰ Accordingly, there was no basis to find the accused's plea involuntary.³¹

Having addressed Miller's claims of ineffective assistance of appellate counsel and lack of a provident plea, CAAF next analyzed Miller's claim of IAC for his *trial* defense counsel's apparent failure to warn him that he would be required to register as a sex offender. Relying on *Polk*,³² and reviewing the decisions of several federal circuits, the CAAF found that "Appellant did not receive ineffective assistance of trial defense counsel."³³ Conceding that "the requirement of registering as a sex offender is a serious consequence of a conviction," the court nonetheless reasoned that such mandatory registration "is a consequence that is separate and distinct from the court-martial process. This consequence is a result of, but not part of, the court-martial process."³⁴ Therefore, failure of trial defense counsel to inform his client of these collateral consequences did not rise to the level of IAC.³⁵

*I haven't dismissed you yet.*³⁶

Although the court had disposed of all the issues raised by Miller, it wasn't finished. Though not finding IAC, the court qualified its opinion by stating that "information of this type may have been helpful to Appellant in understanding the consequences of his guilty plea, in accepting those consequences, and in pleading guilty."³⁷ Sketching a brief history of sex offender registration requirements in state and federal law, the court observed that every state and the federal government require sex offender registration.³⁸ The court also noted that a Department of Defense (DOD) Instruction, 1325.7, identifies those offenses which require mandatory registration.³⁹ Though not requiring defense counsel to become knowledgeable about the "plethora" of state sex offender laws, the court did express an expectation that counsel will be aware of the federal registration statute as well as the DOD Instruction.⁴⁰ The court highlighted that registration requirements may affect an

²⁸ *Id.* at 457 (citing BLACK'S LAW DICTIONARY 278 (8th ed. 1999)).

²⁹ *Id.* (quoting *United States v. Bedania*, 12 M.J. 373, 376 (C.M.A. 1982); *United States v. Williams*, 53 M.J. 293, 296 (2000)).

³⁰ *Id.*

³¹ *Id.* at 457.

³² *Polk*, 32 M.J. 150, 153 (C.M.A. 1991).

³³ *Miller*, 63 M.J. at 457-58.

³⁴ *Id.*

³⁵ *Id.* at 458.

³⁶ A FEW GOOD MEN (Columbia Pictures 1992).

³⁷ *Miller*, 63 M.J. at 458.

³⁸ *Id.* at 458-59.

³⁹ *Id.* at 459 (citing U.S. DEP'T OF DEFENSE, INSTR. 1325.7, ADMINISTRATION OF MILITARY CORRECTIONAL FACILITIES AND CLEMENCY AND PAROLE AUTHORITY enclosure 27 (17 July 2001)).

⁴⁰ *Id.*

accused's decisions before and at trial and will certainly impose legal obligations after conviction.⁴¹ In light of the impact a registration requirement has on a prospective convict and the fact that it is not onerous for a counsel to be generally aware that certain offenses trigger registration requirements, the court created a new rule.

The New Rules

Effective ninety days after the opinion,⁴² military counsel are required to advise an accused prior to trial that conviction of a triggering offense imposes a registration requirement.⁴³ Counsel are required also to state on the record that they have done so.⁴⁴ The CAAF actually used the word "should," not the word "required," and noted that failure to notify an accused would not be per se ineffective assistance of counsel.⁴⁵ The court stated that it would "carefully consider" such a failure in evaluating allegations of ineffective assistance.⁴⁶ The court sought to fulfill two functions by imposing the rule. First, it would "promote a professional dialogue" between the accused and counsel by requiring discussion on a legal issue which is probably new to the accused.⁴⁷ Second, the court sought to give an accused a full opportunity to consider the impact of registration requirements on his or her decisions at trial.⁴⁸

*J'accuse!*⁴⁹ *The Dissenting Concurrence*

Judge Crawford concurred in the result, agreeing that the failure of counsel to advise of the registration requirements did rise to the level of ineffective assistance of counsel.⁵⁰ However, Judge Crawford was troubled by the court's "continuing pattern of engaging in judicial rulemaking by usurping the authority of the President as delegated to him by Congress pursuant to Article 36(a), Uniform Code of Military Justice."⁵¹ She viewed the new requirement as a judicial overstretch which violated the separation of powers doctrine.⁵²

Noting the majority's lack of specifics regarding how the rule should be implemented,⁵³ Judge Crawford examined many significant collateral consequences that counsel are not required to warn an accused of prior to entry of plea.⁵⁴ She also noted that the American Bar Association suggests that defense counsel advise a defendant of the collateral consequences of his plea, but does not require this advice.⁵⁵ Judge Crawford closed by calling the new rule in *Miller* "a step down the slippery slope of judicial rulemaking [that] lays the foundation for creating a future laundry list of potential collateral consequences that military judges and defense counsel will have to discuss with an accused before his or her plea is accepted as provident or voluntary."⁵⁶ Rightly or not, however, the new rule is here.

⁴¹ *Id.*

⁴² *Id.* The case was decided 29 August 2006 and the rule became effective 27 November 2006. CITE for this statement.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ Taken from the title of Emile Zola's open letter to French President Felix Faure regarding the so-called Dreyfus Affair. Wikipedia, *Dreyfus affair*, http://en.wikipedia.org/wiki/Dreyfus_Affair (last visited Oct. 1, 2007).

⁵⁰ *Miller*, 63 M.J. at 460.

⁵¹ *Id.* at 459 (citing 10 U.S.C. § 836(a) (2000)).

⁵² *Id.* at 460.

⁵³ *Id.* at n.3. "The majority opinion . . . does not address the requirements for trial defense counsel to advise an accused of the consequences of a conviction for one of the enumerated offenses in the event there is a contested case." *Id.*

⁵⁴ *Id.* at 460. These include deportation, loss of professional license, loss of vocational license (piloting), exposure to consecutive sentences, other immigration consequences, loss of franchise rights (voting), loss of eligibility to work as a civil servant, loss of freedom of travel, diminished access to firearms, even loss of a driver's license. *Id.*

⁵⁵ *Id.* at 461.

⁵⁶ *Id.* at 462.

Bad Initiative: *United States v. Dobrava*⁵⁷ and the Limits of Counsel Discretion

*As for now, I'm in control here.*⁵⁸

Just as the CAAF engaged in rule making in *United States v. Miller*, the Army appellate court came close to undertaking some rulemaking of its own in the case of *United States v. Dobrava*.⁵⁹ Consistent with his pleas, a military judge sitting as a court-martial convicted Staff Sergeant (SSG) Dobrava of larceny and making a false official statement.⁶⁰ According to appellant's affidavit, as the government gave its sentencing argument, defense counsel turned to appellant and said, "Oh I am sorry, I forgot to put you on for your unsworn statement."⁶¹ The court sentenced SSG Dobrava to five months confinement, a bad conduct discharge, and reduction to the grade of E-1.⁶² The convening authority approved all elements of the sentence except the five months confinement, which he reduced to three months per the terms of a pretrial agreement.⁶³

On appeal to the ACCA, SSG Dobrava alleged ineffective assistance of counsel for his defense counsel's failure to put him on the stand for an unsworn statement when he wanted to do so.⁶⁴

In an affidavit to the ACCA, the trial defense counsel responded by claiming that the omission was "unplanned, but not inadvertent."⁶⁵ Defense counsel alleged in his affidavit that he had advised SSG Dobrava early in the representation to prepare an unsworn statement, but that he saw no such statement until he noticed his client writing notes on an index card during a break in the sentencing proceeding.⁶⁶ Concerned that an excellent mitigation case would be "diluted" by a thoughtless and hastily written unsworn statement, counsel resolved to omit the unsworn statement without discussing the matter with SSG Dobrava.⁶⁷ Defense counsel thereby sought to acquit himself by running under the broad umbrella of judicial deference usually accorded to counsel's tactical decisions.

Distinguishing an attorney's tactical decisions from those decisions personal to an accused, the court quoted the Supreme Court's decision in *Florida v. Nixon*:

[C]ertain decisions regarding the exercise or waiver of basic trial rights are of such moment that they cannot be made for the defendant by a surrogate. *A defendant . . . has the ultimate authority to determine whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal.* Concerning those decisions, an attorney must both consult with the defendant and obtain consent to the recommended course of action.⁶⁸

The court also cited CAAF's holding in *United States v. Marcum*.⁶⁹ In *Marcum*, with his client being tried in absentia, counsel submitted a draft unsworn statement authored by the accused before his departure.⁷⁰ Finding this impermissible, CAAF held that the "decision to make an unsworn statement is personal to the accused."⁷¹

⁵⁷ *Dobrava*, 64 M.J. 503 (Army Ct. Crim. App. 2006).

⁵⁸ Secretary of State Alexander Haig, in response to a reporter's question as to who was in charge of the White House in the wake of the 30 March 1981 assassination attempt on President Ronald Reagan. Wikipedia, *Alexander Haig*, http://en.wikipedia.org/wiki/Alexander_Haig (last visited Oct. 1, 2007).

⁵⁹ *Dobrava*, 64 M.J. 503.

⁶⁰ *Id.*

⁶¹ *Id.* at 504.

⁶² *Id.* at 503.

⁶³ *Id.* at 503-04.

⁶⁴ *Id.* at 504.

⁶⁵ *Id.* at 505.

⁶⁶ *Id.* at 504.

⁶⁷ *Id.* at 504-05.

⁶⁸ *Id.* at 506 (quoting *Florida v. Nixon*, 543 U.S. 175, 187 (2004)) (alteration in original) (internal citations omitted).

⁶⁹ *Marcum*, 60 M.J. 198 (2004).

⁷⁰ *Id.* at 208-09.

⁷¹ *Id.*

Questioning why defense counsel did not have time during a break in the proceedings to discuss an unsworn statement with his client, or why he did not ask the judge for a recess to do the same, the ACCA found that counsel's "performance at sentencing . . . fell below the objective standard of reasonableness."⁷²

Prejudice

The court then turned to whether counsel's deficient performance prejudiced the appellant. Appellant asserted that he wanted to use the unsworn statement to talk about his family, his future plans, his contrition, and desire to remain in the service.⁷³ The court speculated that precisely such expressions coupled with the favorable sentencing testimony and an exemplary service record may have persuaded the military judge to shorten his sentence or even permit retention in the Army.⁷⁴ Accordingly, the court found that the appellant met his burden of showing ineffective assistance of counsel, and set aside the sentence.⁷⁵

The New Rules: Part II

While CAAF required a bold step for defense counsel with regard to collateral matters, the Army court encouraged greater caution from trial courts and defense counsel in the area of unsworn statements. In a closing footnote, the court encouraged counsel to memorialize any decision by the accused not to offer unsworn testimony in writing and to attach such a memorandum to the record as an appellate exhibit.⁷⁶ The court further encouraged military judges to be alert to an accused's failure to offer unsworn remarks and conduct an inquiry to ensure the waiver was knowing and intelligent.⁷⁷ The Army court however, declined to make its guidance mandatory and did not suggest that failure to do so would trigger "careful consideration" of any particular outcome.⁷⁸ While the impact of ACCA's guidance on defense practice may be unclear, it is very clear that no one but the accused may waive his right to make an unsworn statement.⁷⁹

*United States v Edmond:*⁸⁰ *Prosecutorial Overreach*

*Your Honor, the witness has rights*⁸¹ (and so does the accused!)

In *United States v. Edmond*, CAAF addressed improper conduct by both trial and defense counsel.⁸² Staff Sergeant Edmond was a supply sergeant accused of, *inter alia*, wrongful disposition of military property and conspiracy to commit larceny.⁸³ He was specifically accused of ordering cell phones via the unit supply system and then unlawfully converting those cell phones to his private use.⁸⁴ He was alleged to have conspired with Derrick McQueen, a Soldier who had left the service via administrative discharge prior to Edmond's trial.⁸⁵ Staff Sergeant Edmond's trial defense counsel located

⁷² *Dobrava*, 64 M.J. at 506.

⁷³ *Id.*

⁷⁴ *Id.* at 507. The ACCA found IAC despite the fact that the pre-trial agreement reduced the adjudged confinement by forty percent, and despite the fact that the convening authority deferred reduction in rank and waived automatic forfeitures for six months. *Id.* at 503-04. It also is unclear why ACCA issued a published opinion in this case when, on appeal, the government did not oppose a sentencing rehearing for appellant. *Id.* at 505.

⁷⁵ *Id.* at 508.

⁷⁶ *Id.* at n.2.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* at 506.

⁸⁰ *Edmond*, 63 M.J. 343 (2006), *pet. for rev. granted*, 64 M.J. 397 (2007).

⁸¹ A FEW GOOD MEN (Columbia Pictures 1992).

⁸² *Edmond*, 63 M.J. at 344-45.

⁸³ *Id.*

⁸⁴ *Id.* at 346.

⁸⁵ *Id.*

McQueen and interviewed him. Despite McQueen telling Edmond's defense counsel that "he did not believe his testimony could help Edmond and that he did not want to testify," defense counsel nonetheless subpoenaed McQueen for trial.⁸⁶ On the day of trial, McQueen arrived and was interviewed by the trial counsel, who arranged a meeting with McQueen, himself and the Special Assistant U.S. Attorney (SAUSA) for the staff judge advocate's office.⁸⁷ While each party to the meeting recounted a slightly different version of the meeting, it is clear that the trial counsel and the SAUSA told McQueen that if he testified in a way that corroborated SSG Edmond's defense, he would be committing perjury.⁸⁸ The SAUSA later wrote in an affidavit that she told McQueen that "the government would seek justice" if McQueen testified.⁸⁹ Trial counsel told McQueen that he "could either testify or not testify."⁹⁰ After McQueen expressed an intent to leave, trial counsel told him he was "free to go."⁹¹ McQueen immediately left without speaking to the accused's defense counsel.⁹²

At the conclusion of the defense case, trial and defense counsel entered into a stipulation of fact stating that, if McQueen was called to testify, he would invoke his privilege against self-incrimination.⁹³ Trial counsel later argued to the members that they could not hear from McQueen whether there was a conspiracy between him and the accused because McQueen had invoked his right against self-incrimination.⁹⁴

On appeal to ACCA, SSG Edmond alleged prosecutorial misconduct and ineffective assistance of counsel.⁹⁵ The Army court commissioned a *DuBay* hearing,⁹⁶ which unearthed the facts as expressed above, and found no prosecutorial misconduct or ineffective assistance of counsel.⁹⁷ The ACCA therefore affirmed the findings and sentence.⁹⁸

Prosecutorial Misconduct

The CAAF looked first to the *DuBay* finding that trial counsel's conversation with McQueen was a good faith attempt to inform and protect McQueen.⁹⁹ The court reviewed a holding by the Court of Appeals for the Ninth Circuit, which found that warnings for perjury are generally only justified when a prosecutor has a strong basis for believing there is a "direct conflict between the witness' proposed testimony and her own prior [sworn] testimony."¹⁰⁰ The court then looked to the record. In his *DuBay* testimony, trial counsel cited McQueen's demeanor and the fact that his testimony was in conflict with two government witnesses as evidence that he would commit perjury.¹⁰¹ The court pointed out that all three witnesses, McQueen and the two government witnesses, might all testify truthfully and be in conflict due to differing memories, understandings, or interpretations of past events.¹⁰² The court then looked at the nature of trial counsel's "advice" to McQueen. The trial counsel had said "I know this is a lie . . . I am going to make sure the SAUSA sits in and listens to you testify to that . . ." ¹⁰³ The court found a direct parallel between these facts and the Ninth Circuit holding cited above. The federal court held that

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* at 347. The SAUSA's affidavit also made it clear that McQueen was told that he was not being pressured not to testify but "as officers of the court, [they] merely wanted to make sure he was informed before he testified." *Id.*

⁹⁰ *Id.* at 346.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* at 347.

⁹⁴ *Id.* at 352.

⁹⁵ *Id.* at 345.

⁹⁶ *United States v. Dubay*, 37 C.M.R. 411 (C.M.A. 1967).

⁹⁷ *Edmond*, 63 M.J. at 345.

⁹⁸ *Id.*

⁹⁹ *Id.* at 348-49.

¹⁰⁰ *Id.* (quoting *United States v. Vavages*, 151 F.3d 1185, 1190 (9th Cir. 1998)).

¹⁰¹ *Id.* at 348.

¹⁰² *Id.* at 349.

¹⁰³ *Id.* The Special Assistant U.S. Attorney (SAUSA) would be responsible for trying civilians on base.

when a prosecutor combines a standard perjury admonition with a clear statement of belief that proposed testimony would be a lie, the prosecutor has substantially interfered with the witness's decision to testify.¹⁰⁴ The court found the *DuBay* judge's findings to be clearly erroneous and found that the trial counsel's actions unlawfully dissuaded a material defense witness from testifying.¹⁰⁵ The court hastened to add that it does not seek to discourage a trial judge or counsel from advising witnesses of the penalty for testifying falsely, but that the warning cannot be emphasized to the point where they threaten or intimidate a witness.¹⁰⁶

The court found ample references in the record to identify trial counsel as being responsible for giving McQueen an option to leave, and viewed this as "problematic" as there is no ambiguity in RCM 703's requirements¹⁰⁷ that the defense be entitled to compulsory process.¹⁰⁸

Ineffective Assistance of Counsel

The court, having found prosecutorial misconduct, declined to examine prejudice to the accused caused by that misconduct without first visiting the issue of ineffective assistance of counsel. The court in effect found it difficult to parse out the impact of the prosecutorial misconduct from the impact of defense counsel's "acquiescence and inaction."¹⁰⁹ At the *DuBay* hearing, Edmond's defense counsel admitted that he did not speak to McQueen on the day of trial, and conceded that he "probably should have."¹¹⁰ The CAAF found this concession "striking in light of [defense counsel's] stated belief that McQueen had testimony that was favorable to his client, even if he could not remember what that testimony would have been."¹¹¹ The CAAF also found this concession disturbing in light of McQueen's *DuBay* testimony that would have corroborated the accused's version of events.¹¹² Therefore, CAAF held that defense counsel's failure to interview McQueen, and subsequent entry into the stipulation of fact, demonstrated deficient performance, when he could have taken simple steps to secure the testimony of a witness he had previously deemed relevant and necessary to his defense.¹¹³

Prejudice

The court then looked to the combined prejudice arising from the prosecutorial misconduct and the ineffective assistance of counsel. McQueen's testimony would have directly refuted two charges before the court, larceny and conspiracy.¹¹⁴ The court chided defense counsel for not just failing to procure McQueen's testimony, but also for entering "the stipulation of fact into evidence, thereby placing before the members the information that Edmond's coconspirator could not testify without incriminating himself," thus implying that Edmond was also guilty.¹¹⁵ Trial counsel's comment during closing that the panel could not hear from McQueen because he had invoked his right against self-incrimination served to exacerbate defense counsel's mistakes.¹¹⁶ Because hearing McQueen's testimony may have resulted in a different verdict, the court found prejudice to the accused and set aside findings for the larceny and conspiracy charges, as well as the sentence.¹¹⁷

¹⁰⁴ *Id.* (citing *Vavages*, 151 F.3d at 1190)).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at n.5.

¹⁰⁷ MCM, *supra* note 3, R.C.M. 703.

¹⁰⁸ *Id.* at 350.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 351.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.* at 352.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

I'm Gonna Make Her an Offer She Cannot Refuse

In *United States v. Regan*, the CAAF addressed whether mandatory inpatient drug treatment results in pretrial confinement credit under RCM 305(k).¹¹⁹ After testing positive a third time for cocaine, the accused's acting commander gave her an ultimatum: go to inpatient drug treatment, or go to pretrial confinement.¹²⁰ The accused selected treatment but after three weeks in the program was disenrolled and placed in pretrial confinement.¹²¹ While enrolled, she was only permitted to leave the facility with escorts, there were secure doors to the facility, she was limited in her visits to the gift shop, and was denied a three hour pass to eat dinner with her daughter.¹²² The trial judge awarded twenty-one days of *Mason* credit¹²³ for her twenty-one days in the facility, but denied her request for additional credit under RCM 305(k).¹²⁴ Though awarding *Mason* credit because the accused had "no choice" between inpatient treatment and confinement, the trial judge denied 305(k) credit, finding that the inpatient facility's restrictions "were for legitimate medical reasons."¹²⁵

On appeal to CAAF,¹²⁶ the accused sought additional pretrial confinement credit under the provisions of RCM 305.¹²⁷ Rule for Court-Martial 305(k) authorizes confinement credit for violations of RCM 305's provisions, such as the requirement for a forty-eight hour review by a neutral and detached officer, the seventy-two hour commander's review, and the seven day magistrate's review.¹²⁸ Rule for Court-Martial 305(k) credit is only available for restriction tantamount to confinement when the conditions of such restrictions constitute actual physical restraint.¹²⁹ The CAAF noted that, while the accused was subject to physical restraint such as locked doors and constant escort, nothing in her restraint distinguished her from any other inpatient.¹³⁰ The facility treated her as a patient and not a prisoner.¹³¹ The court also noted that the accused wanted this treatment and that she did not remain in the facility against her will.¹³² Accordingly, the CAAF found no error in declining to give appellant additional RCM 305(k) credit.¹³³

Zedner v. United States:¹³⁴ *Hurry Up and Wait*

You can't lose what you don't own.

The Speedy Trial Act of 1974 generally requires a federal criminal trial to begin within seventy days after a defendant is charged or makes an initial appearance.¹³⁵ The Act is similar to RCM 707¹³⁶ in that it allows for a number of authorized

¹¹⁸ *Regan*, 62 M.J. 299 (2006).

¹¹⁹ *Id.*

¹²⁰ *Id.* at 300.

¹²¹ *Id.*

¹²² *Id.* at 301.

¹²³ *United States v. Mason*, 19 M.J. 274 (C.M.A. 1985) (day-for-day credit is given for pretrial restriction equivalent to confinement).

¹²⁴ *Regan*, 62 M.J. at 301. Rule for Courts-Martial 305(k) provides for "administrative credit against the sentence adjudged for any confinement served as a result of" noncompliance with other provisions of RCM 305. MCM, *supra* note 3, R.C.M. 305(k).

¹²⁵ *Regan*, 62 M.J. at 301.

¹²⁶ The Air Force Court of Criminal Appeals had affirmed the findings and sentence. *Id.* at 299.

¹²⁷ *Id.*

¹²⁸ MCM, *supra* note 3, R.C.M. 305.

¹²⁹ *Id.*; *see also* *United States v. Rendon*, 58 M.J. 221, 224-25 (2003). To come within the scope of R.C.M. 305, then, "the conditions or terms of the restriction constitute physical restraint depriving an accused of his or her freedom." *Id.* at 224.

¹³⁰ *Regan*, 62 M.J. at 302.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Zedner*, 126 S. Ct. 1976 (2006).

¹³⁵ 18 U.S.C. §§ 3161-3174 (2000).

delays to “stop” the speedy trial clock.¹³⁷ Among the reasons for delay under the Speedy Trial Act is a catch-all, authorizing a federal judge to authorize delay whenever the “ends of justice” outweigh the public’s and defendant’s interest in a speedy trial.¹³⁸ Upon successful motion, a district court must dismiss the charges, but has discretion to dismiss with or without prejudice.¹³⁹

In *Zedner*, the defendant was charged with fraud of a public institution for attempting to pass \$10 million dollars in bonds of poor quality.¹⁴⁰ At the district court’s third status conference, the judge agreed to grant the defendant another continuance, but only if the defendant would waive his Speedy Trial Act claims “for all time.”¹⁴¹ Once the judge granted the continuance, the defendant’s trial was repeatedly delayed.¹⁴² The defendant was ultimately tried seven years after his original indictment.¹⁴³ The district court denied defendant’s speedy trial motion, citing his earlier “all time” waiver.¹⁴⁴

The Second Circuit upheld the conviction on the grounds that, while a defendant’s waiver of speedy trial rights may be ineffective because of the public interest served by compliance with the act, an exception is justified when the delay is occasioned in part by the defendant’s conduct.¹⁴⁵ The court likely was referring to delay caused in part by defendant’s bizarre conduct and the required subsequent inquiry into his competence.¹⁴⁶

Disagreeing with both lower courts, the Supreme Court began its analysis by noting that the Speedy Trial Act contains no opt-out provision for a defendant.¹⁴⁷ Rather than protecting the rights solely of the defendant, the Court emphasized the Act’s concomitant protection of the public’s right to speedy trials.¹⁴⁸ Contrasting a prospective waiver with the retrospective waiver permitted by 18 U.S.C. § 3161(a)(2), the Court found that, unlike a prospective waiver, the prosecution and court do not know whether a defendant will retrospectively waive his speedy trial rights, and thus there is incentive even with retrospective waivers to bring a case to trial.¹⁴⁹ According to the Court, the Act also specifies that speedy trial violations must be identified prior to trial to avoid such defense gamesmanship as nullifying a long and costly trial in its late stages, only after it has gone poorly for the defense.¹⁵⁰

Finding a 91-day delay not excludable from the speedy trial clock despite defendant’s prospective speedy trial waiver, the Court reversed the Second Circuit and remanded to the district court, with instructions for the district court to decide whether the Speedy Trial Act violation warranted dismissal of the case with or without prejudice.¹⁵¹

¹³⁶ MCM, *supra* note 3, R.C.M. 707. Unlike the Speedy Trial Act’s seventy day requirement, RCM 707(a) requires the government to bring an accused to trial within 120 days of either prefferal or imposition of restraint. *Id.*

¹³⁷ See, e.g., 18 U.S.C. § 3161(h)(1) (delay resulting from other proceedings regarding the defendant); *id.* § 3161(h)(3) (unavailability of defendant or essential witness); *id.* § 3161(h)(4) (defendant unable or incompetent to stand trial). Rule for Court-Martial 707((b)(3)(E) excludes periods during which “appellate courts have issued stays in the proceedings,” when the accused is “absent without authority,” when the accused is incompetent or in the custody of the Attorney General, and when the military judge or convening authority authorize pretrial delays. MCM, *supra* note 3, R.C.M. 707(b)(3)(E).

¹³⁸ 18 U.S.C. § 3161(h)(8).

¹³⁹ *Zedner*, 126 S. Ct. at 1984.

¹⁴⁰ Some bonds were issued by the “Ministry of Finance of the U.S.A.” and contained misspellings like “Onited States,” “Cgicago,” and “Dhtladelphla (Philadelphia).” *Id.* at 1981.

¹⁴¹ *Id.* “Petitioner’s counsel responded that the defense would ‘waive for all time.’” *Id.* At the court’s request, both the defendant and his counsel also signed a written waiver. *Id.* at 1982.

¹⁴² Among the reasons for delay was the defendant’s attempt to subpoena the President, the Secretary of the Treasury, and late Chinese leader “Chiang Kai-Shek.” *Id.*

¹⁴³ *Id.* at 1983.

¹⁴⁴ *Id.* at 1982-83.

¹⁴⁵ *Id.* at 1983.

¹⁴⁶ The petitioner was at one point ruled incompetent to stand trial and hospitalized for several months after which he was “found to be delusional but competent to stand trial and he was released.” *Id.* at 1982-83.

¹⁴⁷ *Id.* at 1985.

¹⁴⁸ *Id.* “That public interest cannot be served, the Act recognizes, if defendants may opt out of the Act entirely.” *Id.*

¹⁴⁹ *Id.* at 1986.

¹⁵⁰ *Id.* at 1986-87.

¹⁵¹ *Id.* at 1990. Rule for Courts-Martial 707 also provides a trial judge discretion to dismiss a case for a speedy trial violation with or without prejudice. MCM, *supra* note 3, R.C.M. 707(d)(1).

Though RCM 707, rather than the Speedy Trial Act, applies to military trials, *Zedner* may by analogy prevent prospective waivers of RCM 707.¹⁵² Rule for Court-Martial 705(c)(1)(B) prohibits the waiver of speedy trial rights as part of a pretrial agreement.¹⁵³ So the issue is moot, since no accused would prospectively waive his right to speedy trial without some inducement from the government. Or would he? In 1994, the Court of Military Appeals (COMA) addressed a related issue in *United States v. Montanino*.¹⁵⁴ Facing court-martial, Specialist (SPC) Montanino began working with a military defense counsel who subsequently deployed to the Sinai peninsula.¹⁵⁵ Prior to his arraignment, SPC Montanino declined to have a new military defense counsel assigned and instead requested a delay until the return of his original defense counsel, who was expected to return in approximately three months.¹⁵⁶ Specialist Montanino's counsel ultimately returned within three months, and the trial proceeded.¹⁵⁷ Specialist Montanino moved to dismiss his case prior to trial in accordance with RCM 707.¹⁵⁸ The trial court declined to grant his motion, holding the Trial Defense Service responsible for the delay.¹⁵⁹

In affirming the trial court's decision,¹⁶⁰ the COMA pointed out that the appellant could have requested his detailed counsel *and* demanded speedy trial, which would have required the government to return the detailed defense counsel or prove that he was not reasonably available.¹⁶¹ Because "appellant voluntarily agreed to the delay, however," the court found no speedy trial violation.¹⁶²

In a *Montanino* scenario, *Zedner* raises the question of what if counsel had not returned in a timely fashion. Had Montanino's counsel been deployed for five, six, or eight months, particularly if the expectation had been three, would *Montanino* still stand for the proposition that the accused's request for a delay tolled the speedy trial clock? The author submits the answer is no. At a minimum the government would have been required to periodically extend the delay, perhaps thirty days at a time. The impact of *Zedner* is to perhaps prohibit an accused from agreeing to a blanket delay until the government meets some condition within its control.¹⁶³

Conclusion

The 2006 term had some important developments in the areas of ineffective assistance of counsel, prosecutorial misconduct, pretrial restraint, and speedy trial. The Supreme Court ruled that a defendant cannot prospectively "forever waive" his speedy trial rights.¹⁶⁴ The CAAF expanded the zone of competence required of defense counsel, requiring them to be conversant in the area of sex offender registration,¹⁶⁵ told prosecutors to beware of trying to dissuade a witness from

¹⁵² MCM, *supra* note 3, R.C.M. 707.

¹⁵³ *Id.* at R.C.M. 707(c)(1)(B).

¹⁵⁴ *Montanino*, 40 M.J. 364 (C.M.A. 1994).

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 365. The government in the case requested that the defense counsel be declared unavailable per Army Regulation 27-10, mandating the detailing of substitute counsel. The military judge declined by stating:

The U.S. government sent him there, and . . . can bring him back. Until the U.S. government makes some effort to get him back and fails in that effort, I'm not prepared to say that . . . [Captain S is] unavailable and that substitute counsel needs to be appointed. . . . I'm not prepared to say that he's unavailable because I'm not sure anyone here has told me that if requested, that he wouldn't be returned for whatever it takes to try the case. . . .

Id.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ The Army Court of Military Review also had affirmed the trial court. *Id.* at 364.

¹⁶¹ *Id.* at 366.

¹⁶² *Id.* Judge Wiss dissented from the decision on the grounds that it was unreasonable to expect a fundamentally unrepresented accused (as his counsel was in Egypt, while he was in Fort Drum, NY) to have known and exercised his rights. *Id.*

¹⁶³ *E.g.*, the return of a military witness, or counsel.

¹⁶⁴ *Zedner v. United States*, 126 S. Ct. 1976 (2006).

¹⁶⁵ *United States V. Miller*, 63 M.J. 452 (2006).

testifying,¹⁶⁶ and distinguished illegal pretrial confinement from pretrial restriction otherwise entitled to sentence credit.¹⁶⁷ Finally, the ACCA suggested that the waiver of an accused's unsworn statement be memorialized as an appellate exhibit, and that the military judge discuss such a waiver with the accused on the record.¹⁶⁸

¹⁶⁶ United States v. Edmond, 63 M.J. 343 (2006), *pet. for rev. granted*, 64 M.J. 397 (2007).

¹⁶⁷ United States v. Regan, 62 M.J. 299 (2006).

¹⁶⁸ United States v. Dobrava, 64 M.J. 503, 508 n.2 (Army Ct. Crim. App. 2006).