

Just a Little Down the Track: 2004 Developments in the Sentencing

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*And what makes robbers bold but too much lenity?*¹

At the Start/Finish Line

The biggest news in sentencing this year surrounded a U.S. Supreme Court opinion that, in all likelihood, has no application to sentencing in the military—*Blakely v. Washington*.² Nonetheless, there is much else to discuss in military sentencing this year. Like last year's article,³ this one also covers a potpourri of sentencing issues: sentencing evidence, sentencing argument, fines and contingent confinement, and the effective date of life without the possibility of parole. The lessons to be drawn are discussed after each case. Whether military practitioners take the same lessons is immaterial to the ultimate goal—educating the adversaries in the “pits”⁴ so that either side may ultimately prevail in obtaining a sentence that meets the ends of justice.⁵ While the cases as a whole do not break much new ground, practitioners must still understand them, because each case, in its own way, pushes the car of justice just a little further down the track.

On the Pole: Prior Convictions

As a trial counsel, almost nothing has a greater impact on sentencing argument than a convicted Soldier's prior criminal conviction. Offering such evidence will most assuredly give the trial counsel's case the extra push needed to get a higher sentence than would be possible without such evidence. As a general matter, prior convictions are admissible in sentencing under Rule for Courts-Martial (RCM) 1001(b)(3).⁶ A question, however, is just how much information about the prior conviction may be admissible? *United States v. Malhiot*⁷ dealt with this very issue. Prefacing its opinion, the Air Force Court of Criminal Appeals noted that because the military's sentencing scheme “operates within a narrow range of admissible evidence,”⁸ evidence that is logically relevant may not be legally relevant.⁹ This case demonstrates the difficulty of distinguishing between the two concepts.¹⁰

¹ WILLIAM SHAKESPEARE, HENRY THE SIXTH, pt. iii, act II, sc. vi.

² 124 S. Ct. 2531 (2004). The Court declared unconstitutional Washington's Sentencing Reform Act to the extent that trial judges were able to increase a sentence without an admission by the defendant or a finding of fact by a jury that the facts supporting an increase were true beyond a reasonable doubt. *See id.* at 2543. This case should not have any impact on courts-martial, because the sentencing authority makes no findings of fact and arrives at a sentence only after the presentation of evidence from both sides.

³ Major Jan E. Aldykiewicz, *Recent Developments in Sentencing: A Sentencing Potpourri from Pretrial Agreement Terms Affecting Sentencing to Sentence Rehearings*, ARMY LAW., July 2004, at 100.

⁴ Professor John B. Neibel, University of Houston Law Center, (referencing a favorite phrase of my first-year property teacher when discussing trying a case).

⁵ The accused has been convicted, so the question is what shall the sentence be? The members are instructed:

You should bear in mind that our society recognizes five principal reasons for the sentence of those who violate the law. They are rehabilitation of the wrongdoer, punishment of the wrongdoer, protection of society from the wrongdoer, preservation of good order and discipline in the military, and deterrence of the wrongdoer and those who know of his/her crime(s) and his/her sentence from committing the same or similar offenses.

U.S. DEP'T OF ARMY, PAM., 27-9, MILITARY JUDGE'S BENCHBOOK ch. 2, § V, para. 2-5-21, at 61 (15 Sept. 2002).

⁶ MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1001(b)(3) [hereinafter MCM].

⁷ 60 M.J. 695 (A.F. Ct. Crim. App. 2004).

⁸ *Id.* at 696.

⁹ *Id.*

¹⁰ *See id.*

After accepting Malhiot's guilty plea to three drug specifications,¹¹ the military judge held an Article 39(a)¹² session to review proposed sentencing evidence.¹³ The trial counsel offered evidence of a civilian conviction from a Georgia state court that the appellant received for attempting to elude, reckless driving, driving under the influence, and failing to have proof of insurance.¹⁴ These offenses occurred a few weeks after the investigation began into the offenses for which the accused stood convicted.¹⁵ The trial counsel offered, without defense counsel objection, two exhibits: a certified copy of the state court conviction¹⁶ and a letter of reprimand issued to the appellant by his command regarding the conviction.¹⁷ The trial counsel then offered the police cruiser's videotape showing the appellant's erratic driving while the police officer followed in hot pursuit, as well as the events that occurred after appellant crashed his vehicle in a residential neighborhood.¹⁸ The trial counsel offered the videotape as evidence of the appellant's lack of rehabilitation potential¹⁹ and as evidence that fully explained the circumstances of his prior conviction.²⁰

The defense counsel objected to the videotape's admission because: (1) the tape was outside the scope of RCM 1001(b); (2) it was cumulative of the record of conviction and the letter of reprimand; and (3) it was more prejudicial than probative under Military Rule of Evidence (MRE) 403.²¹ Aside from a foundational objection, the defense counsel argued that RCM 1001(b)(5) permits admission of an *opinion* regarding rehabilitative potential.²² The military judge conducted an *in camera* review of the disputed evidence; after which, he admitted the tape conditioned on the trial counsel's being able to lay a proper foundation.²³ The military judge found that the tape was not cumulative because it "fully explains the events and circumstances that occurred that evening."²⁴ In response to the MRE 403 objection, even though the military judge stated that the evidence was "real, real, real bad for the defense," the military judge ruled the evidence had "significant probative value" of the appellant's rehabilitation potential.²⁵ The military judge did not address the defense's objections to the form of the evidence.²⁶

During its sentencing case-in-chief, the trial counsel called the arresting officer, who laid a proper foundation for the tape, including numerous details about the aggravated nature of the car chase.²⁷ The defense counsel did not specifically

¹¹ *Id.* The appellant admitted to using marijuana and ecstasy three times each and distributing small amounts of ecstasy on two occasions. *Id.*

¹² See UCMJ art. 39(a) (2002).

¹³ *Malhiot*, 60 M.J. at 696. The sentencing authority in this case was a panel of officers. *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at 697. In addition to documenting the pleas and findings, the record contained the appellant's sentence, which included confinement for forty-eight months (all but thirty days was probated), a fine of \$1,625, court-ordered restitution of \$11,000, performance of forty hours of community service, and submission to drug and alcohol testing. *Id.*

¹⁷ *Id.* The trial counsel offered the reprimand under RCM 1001(b)(2), which permits the admission of personnel records of the accused. MCM, *supra* note 6, R.C.M. 1001(b)(2).

¹⁸ *Id.*

¹⁹ A witness's opinion as to a service member's rehabilitation potential or lack thereof, is admissible under RCM 1001(b)(5). See MCM, *supra* note 6, R.C.M. 1001(b)(5). As a point of interest to military justice practitioners, in this space last year, Major Aldykiewicz discussed *United States v. Griggs*, 59 M.J. 712 (A.F. Ct. Crim. App. 2004), *review granted*, 60 M.J. 315 (2004), and the Air Force Court's conclusion that the military judge did not abuse his discretion in applying RCM 1001(b)(5) to defense evidence. Aldykiewicz, *supra* note 3, at 110-12 (concluding that "the rationale used by the *Griggs* court . . . that rehabilitative potential opinions are limited in scope, regardless of which side seeks the opinion, is compelling). Since that article's publication, the Court of Appeals for the Armed Forces (CAAF) granted review on the issue of whether the military judge abused his discretion in applying RCM 1001(b)(5) to defense evidence. *Griggs*, 60 M.J. at 315. The reasons for restricting a witness's testimony regarding whether an accused should remain in the military are, as pointed out by the *Griggs* court, applicable to the defense—the risk of confusion regarding an element of punishment (discharge) and retention in the military (appropriateness of continued service) and the usurpation of the sentencing authority's role. *Griggs*, 59 M.J. at 714. These concerns are compelling reasons for the CAAF to hold that witness's opinion about the appropriateness of a service member's discharge is not legally relevant evidence under RCM 1001(c).

²⁰ *Malhiot*, 60 M.J. at 697.

²¹ *Id.*

²² *Id.* Indeed, the rule states: "(A) In general. The trial counsel may present, by testimony or oral deposition in accordance with R.C.M. 702(g)(1), evidence in the form of *opinions* concerning the accused's previous performance as a servicemember and potential for rehabilitation." MCM, *supra* note 6, R.C.M. 1001(b)(5)(A) (emphasis added).

²³ *Malhiot*, 60 M.J. at 697.

²⁴ *Id.* (quoting the military judge).

²⁵ *Id.* (quoting the military judge).

²⁶ *Id.*

²⁷ *Id.*

object to the details of the chase, but maintained his remaining objections.²⁸ Later, the trial counsel called the appellant's first sergeant to testify about the appellant's duty performance.²⁹ During the colloquy with the trial counsel, the witness discussed, over defense objection, Malhiot's poor duty performance, including specific instances of conduct when he was not where he was supposed to be while on duty as a bay orderly.³⁰ The witness also opined, without further defense objection, on the futility of undertaking additional rehabilitation efforts to get the appellant to comply with duty requirements.³¹

After sentencing proceedings, the panel of officers sentenced Malhiot to a bad conduct discharge, confinement for one year, and reduction to the grade of E-1.³² In light of the evidence admitted, the Air Force court had to determine whether the military judge abused his discretion when he admitted the videotape and the first sergeant's testimony, and whether the military judge committed plain error in admitting the detailed testimony about the events on the videotape.³³

The court held that "[i]t was clearly error to admit the videotape and to allow the police officer to testify about the events on the videotape as *rehabilitation* evidence."³⁴ Although the evidence at issue may have been logically relevant in fashioning an appropriate sentence,³⁵ the court reasoned that RCM 1001(b)(5) strictly limits the evidence's legal relevance to *opinion* evidence, which neither the videotape nor the police officer's testimony was.³⁶ Just because evidence may not be admissible under one rule, however, does not mean that the same evidence may not be admissible under another.³⁷ The court, therefore, looked at whether the evidence was admissible under RCM 1001(b)(3) as evidence of a conviction, because, as the court noted, the rule does not address how much detail about the prior conviction the trial counsel may present.³⁸ Relying on the logic of its opinion in *United States v. Douglas*,³⁹ the court determined that the evidence was also not admissible as a prior conviction.⁴⁰ In *Douglas*, the court concluded, "We believe the clear import of the President's rule is to limit the evidence that prosecution can introduce under R.C.M. 1001(b)(3) to a document that reflects the fact of a conviction, including a description of the offense, the sentence, and any action by appellate or reviewing authorities."⁴¹ Based on its own decision in *Douglas* and the CAAF review of that case, the Air Force court held that the evidence was also not admissible under RCM 1001(b)(3).⁴² In this case, the underlying details were not necessary to explain the nature of the prior conviction⁴³ because the "offenses are clearly listed—and are understandable as written—in the Lowndes County court documents and the letter of reprimand."⁴⁴ The court, therefore, held that the military judge erred when he admitted the videotape and plainly erred when he admitted the police officer's testimony regarding the aggravating circumstances of the chase.⁴⁵

²⁸ *Id.*

²⁹ *Id.* at 699.

³⁰ *Id.* A bay orderly assists the dorm manager in maintaining the dormitory's grounds and common areas. *Id.*

³¹ *Id.* at 700.

³² *Id.* at 696.

³³ The court used a plain error analysis with respect to the detailed testimony because the defense counsel did not object to its introduction. *Id.* at 697.

³⁴ *Id.* at 697.

³⁵ *See id.* at 698.

³⁶ *See id.* at 697-8.

³⁷ *United States v. Ariail*, 48 M.J. 285, 287 (1998) (holding that appellant's answers on a U.S. Department of Defense Form 398-2, National Agency Questionnaire, regarding traffic offenses, were not evidence of prior convictions, but were admissible as a part of a personnel record under RCM 1001(b)(2)).

³⁸ *Malhiot*, 60 M.J. at 698.

³⁹ 55 M.J. 563 (A.F. Ct. Crim. App. 2001), *aff'd*, 57 M.J. 270 (2002) (holding that a stipulation of fact from a previous court-martial was not admissible as evidence of a conviction under RCM 1001(b)(3) but was admissible as part of a personnel record under RCM 1001(b)(2)).

⁴⁰ *Malhiot*, 60 M.J. at 698.

⁴¹ *Id.* (quoting *United States v. Douglas*, 55 M.J. 563, 566 (A.F. Ct. Crim. App. 2001)).

⁴² *Id.*

⁴³ The court noted that Judge Baker in his concurrence in *Douglas* observed that the Air Force court "went too far in holding that the underlying details of a prior conviction are not admissible under RCM 1001(b)(3), even when necessary to explain the nature of the offense." *Id.* (quoting *Douglas*, 57 M.J. at 273 (Baker, J. concurring in result)). Thus, Judge Baker would permit details of the underlying conviction when the document showing the conviction "does not clearly state the prior offense," but that document *cannot* "be used as a vehicle to develop the facts behind the prior conviction." *Id.* (quoting *Douglas*, 57 M.J. at 274 (Baker, J. concurring in result)).

⁴⁴ *Id.*

⁴⁵ *Id.* at 699.

With respect to the testimony from the appellant's first sergeant, the Air Force court analyzed the issue as one of uncharged misconduct because the witness described specific instances of misconduct.⁴⁶ The court held that the testimony ran afoul of RCM 1001(b)(5)(D) because the evidence, while logically relevant, was not legally relevant.⁴⁷ The court looked to the rule's discussion, which states that when rendering an opinion on the magnitude or quality of rehabilitation potential, a witness "generally may not further elaborate on the accused's rehabilitation potential, such as describing the particular reasons for forming the opinion."⁴⁸ The witness's testimony, the court observed, "exceeded the bounds" of the rule by offering specific instances of misconduct and by discussing ineffective additional rehabilitation efforts.⁴⁹ The court noted that testimony regarding an accused's previous performance must be in the form of an opinion unless such evidence is submitted in the form of a document, "in which case the document must come from the 'personnel records of the accused' as required by R.C.M. 1001(b)(2)."⁵⁰ The court, therefore, concluded the military judge also abused his discretion in admitting the first sergeant's testimony.⁵¹

After analyzing for prejudice using the factors from *United States v. Kerr*,⁵² the court determined that the strength of both sides' evidence was a draw—both were moderately strong.⁵³ Calling the case "a textbook example of the risk of unfair prejudice, confusion of the issues, and the needless presentation of cumulative evidence," the court held that the military judge's cumulative errors materially prejudiced the appellant's substantial rights under RCM 1001.⁵⁴ Rather than return the case for rehearing, the court reassessed the sentence in accordance with *United States v. Sales*,⁵⁵ approving a sentence of a bad conduct discharge, confinement for eight months, total forfeiture of all pay and allowances for eight months, and reduction to the grade of E-1.⁵⁶

Although this case is from the Air Force, its lessons to Army judge advocates are no less important. If the trial counsel has evidence of a prior conviction, the government is unlikely to succeed at getting the details of the underlying conviction into evidence under RCM 1001(b)(3). By its terms, the rule contemplates evidence of the *fact* of a conviction and nothing else.⁵⁷ If trial counsel wants to get other detailed information regarding a conviction into evidence, this case offers no support. At best, trial counsel could try to rely on Judge Baker's concurrence in *Douglas*, but that support is limited. Although the underlying fact of a prior conviction may be powerful evidence of the accused's lack of rehabilitation, such evidence is simply not *legally* relevant in the current sentencing scheme.

On the Outside Pole: Evidence in Aggravation

The engine for a trial counsel's sentencing case is aggravation evidence. Rule for Courts-Martial 1001(b)(4) permits the trial counsel to "present evidence as to any aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty."⁵⁸ Generally, this rule "only require[s], as a threshold, a reasonable linkage between the offense and alleged effect thereof."⁵⁹ The difficulty, of course, is in determining the range of what effect is

⁴⁶ *Id.*

⁴⁷ *Id.* at 700.

⁴⁸ *Id.* at 699 (quoting MCM, *supra* note 6, RCM 1001(b)(5)(D) discussion).

⁴⁹ *Id.* at 700.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² 51 M.J. 401, 405 (1999) (listing the factors as: "(1) the strength of the Government's case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question").

⁵³ See *Malhiot*, 60 M.J. at 700.

⁵⁴ *Id.* at 702.

⁵⁵ 22 M.J. 305 (C.M.A. 1986) (holding that if the court of criminal appeals can determine that in the absence of any error, the sentence would have been of a certain magnitude, it can cure any error by reassessing the sentence; if the error is of constitutional magnitude, the court must be satisfied beyond a reasonable doubt that its reassessment cured any error).

⁵⁶ *Malhiot*, 60 M.J. at 702. There appears to be a discrepancy between the punishment listed in the beginning of the opinion, which does not list any forfeitures, and the punishment as reassessed, which included total forfeiture of all pay and allowances for eight months.

⁵⁷ "The trial counsel may introduce evidence of military or civilian convictions of the accused." MCM, *supra* note 6, R.C.M. 1001(b)(3)(A).

⁵⁸ *Id.* R.C.M. 1001(b)(4).

⁵⁹ *United States v. Witt*, 21 M.J. 637 (A.C.M.R. 1985).

“directly relating to or resulting from” the offense.⁶⁰ A case that illustrates the breadth of that range is *United States v. Anderson*,⁶¹ a case that involved the admission of a U.S. Senate Report as aggravation evidence.

A military judge sitting at a general court-martial convicted Anderson of various offenses involving child pornography, including transporting child pornography in interstate commerce.⁶² During sentencing and over defense objection, the military judge admitted as RCM 1001(b)(4) aggravation evidence a portion of a U.S. Senate Report prepared in conjunction with amendments to the Child Pornography Prevention Act of 1995.⁶³ The evidence at issue specifically addressed the impact of child pornography on the victimized children, particularly the physical and psychological harm they experience.⁶⁴ The evidence also addressed the impact on society as a whole, the danger to children by sexualizing minors, and “the resulting unwholesome environment that affects the psychological and emotional development of children in general.”⁶⁵ Lastly, the report addressed the impact of such pornography on, and its illicit use by, pedophiles, child molesters, and child pornographers.⁶⁶ The defense counsel argued that the report was “too attenuated” to qualify as aggravation evidence, and even if the evidence were admissible under RCM 1001(b)(4), the evidence’s probative value was substantially outweighed by its prejudicial effect under MRE 403.⁶⁷

The Air Force court perceived three different questions that needed to be answered:

- (1) Are the children depicted in pornographic images properly classified as “victims” for the purposes of the application of the R.C.M. 1001(b)(4)?
- (2) If so, does the fact that these children are not specifically identified preclude consideration of impact evidence?
- (3) Is the admitted portion of the Senate Report sufficiently “direct” to qualify for admission as impact evidence under R.C.M. 1001(b)(4)?⁶⁸

The court agreed with the majority of federal courts that the children depicted in pornography are the direct victims of such offenses because they suffer direct psychological and emotional harm through the invasion of their privacy.⁶⁹ Regarding the second question, the court agreed with the Coast Guard Court of Criminal Appeals in *United States v. Marchand*,⁷⁰ which held that RCM 1001(b)(4) does not require child pornography victims to be identified particularly “for the sentencing authority to properly benefit from impact testimony relating to the increased risk of behavioral problems.”⁷¹ With respect to the last question, the court observed that although the relationship of the appellant’s offenses must be direct, “there is no requirement that the impact be limited to matters that have already occurred.”⁷² In very clear language, the court observed, “[t]he increased predictable risk that child pornography victims may develop psychological or behavioral problems is precisely the kind of information the sentencing authority needs to fulfill” its function of discerning a proper sentence.⁷³

The court also discussed the rule’s limit. The court determined that in the context of Anderson’s case, the “impact upon the children used in the production of the pornography is sufficiently direct” and could assist the sentencing authority in evaluating the consequences of the appellant’s behavior.⁷⁴ The court did not specifically analyze Anderson’s argument that the impact of child pornography on society and children in general, and the impact on and uses made of child pornography by

⁶⁰ For example, in *United States v. Rust*, 41 M.J. 472 (1995), the CAAF held that the lower Air Force court’s determination that a murder-suicide note’s admission fell outside RCM 1001(b)(4) ambit because the connection between appellant’s dereliction of duty and a murder-suicide was “too indirect” to qualify as an effect directly related to or resulting from the appellant’s misconduct. *Rust*, 41 M.J. at 478.

⁶¹ 60 M.J. 548 (A.F. Ct. Crim. App. 2004), *review denied*, 60 M.J. 403 (2004).

⁶² *Id.* at 549.

⁶³ *Id.* at 555.

⁶⁴ *Id.* at 556.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at 555.

⁶⁹ *Id.*

⁷⁰ 56 M.J. 630 (C.G. Ct. Crim. App. 2001).

⁷¹ *Anderson*, 60 M.J. at 556.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* at 557.

other offenders, was “too much to lay at his feet.”⁷⁵ Perhaps as a signal to the field, however, the court did state, that it did not necessarily agree with his argument.⁷⁶ Nonetheless, because the military judge, at the invitation of the trial counsel, restricted his consideration of the evidence at issue to only the impact on the children depicted, and not on society, the court held that the military judge gave the evidence its proper weight.⁷⁷ With respect to the required MRE 403 balancing test, the court was satisfied that the military judge did conduct that test by virtue of his stated reliance on *United States v. Witt*.⁷⁸

The exploding number of child pornography cases within the military justice system makes *Anderson* a case of great import.⁷⁹ If trial counsel want to introduce similar evidence, *Anderson* is strong support for that proposition. The question of how far counsel can push the envelope to include evidence of impact on children or society at large is not answered definitively. The *Anderson* court certainly gives ammunition to the government to push that limit in its discussion regarding how much can be laid at an accused’s feet.⁸⁰ If a child does not have to be identified with any degree of particularity to argue future impact, is there a principled distinction for forbidding admission of impact evidence on society at large? Is not such general impact evidence as speculative as the “increased predictable risk that child pornography victims *may* develop psychological or behavioral problems”?⁸¹ Given the CAAF’s refusal to grant review on *Anderson*, Army practitioners can point to the case to support admission of the Senate Report or similar evidence. Nonetheless, in seeking such evidence’s admission or in deciding to offer societal impact evidence, counsel must always be aware of the possible impact on the case on review. Trial counsel should always ask, “Do I really need to get this evidence admitted to secure a fair and just sentence?”

Switching from victim impact evidence to unit impact evidence, the Coast Guard Court of Criminal Appeals in *United States v. Fay*,⁸² addressed several alleged impacts on Fay’s unit as a result of his drug involvement. A military judge sitting as a special court-martial convicted Fay of wrongfully distributing ecstasy and MET, a Schedule II controlled substance, and wrongful possession of marijuana.⁸³ At the presentencing stage, the trial counsel called the command’s port services branch chief, who testified that the appellant had been assigned to the unit for approximately six months.⁸⁴ Without defense objection, the witness further testified that the nature of the appellant’s offenses had a negative impact on the unit’s mission by causing the command to devote thirty to forty man-hours working on a better way of managing people to prevent similar acts in the future.⁸⁵ The witness also testified that the appellant’s crimes had an adverse impact on the efficiency of the unit because of lowered morale among permanently assigned personnel who expressed concern about being lumped together with disciplinary-problem personnel.⁸⁶ Further, the unit used close supervision to ensure that the appellant was doing his job, including five musters per day and more frequent inspections of his room for cleanliness.⁸⁷ Because the defense did not object to the admission of any of this testimony, Fay alleged that the military judge committed plain error in admitting it.⁸⁸ Fay argued that the evidence did not “show any specific impact caused by or resulting from Appellant’s actions.”⁸⁹ The court made short work of the appellant’s allegation. The court found that of the evidence offered, only the testimony regarding the need for close supervision, musters, and inspections “might be clear or obvious error.”⁹⁰ Nonetheless, in the court’s view, the testimony had little, if any, impact on the sentence, and the court rejected appellant’s assignment of error.⁹¹

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ 21 M.J. 637 (A.C.M.R. 1985) (holding that if an objection is made under MRE 403, the military judge must apply MRE 403’s balancing test).

⁷⁹ A LEXIS-NEXIS search using the search terms “child pornography” with a two-year date restriction within the Armed Forces Court of Appeals and the Courts of Criminal Appeals source returned 108 cases.

⁸⁰ See *supra* note 75 and accompanying text.

⁸¹ *Anderson*, 60 M.J. at 548 (emphasis added).

⁸² 59 M.J. 747 (C.G. Ct. Crim. App. 2004), *review denied*, 60 M.J. 46 (2004).

⁸³ *Id.*

⁸⁴ *Id.* at 748.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* Rule for Courts-Martial 1001(b)(4) does permit the government to introduce “evidence of significant adverse impact on the mission, discipline, or efficiency of the command directly and immediately resulting from the accused’s offense.” MCM, *supra* note 6, R.C.M. 1001(b)(4).

⁹⁰ *Fay*, 59 M.J. at 748.

⁹¹ *Id.*

Although the Coast Guard court made rather short work of the assignment of error, the case shows the line that must be drawn between the effects of a Soldier's misconduct on the unit and the administrative consequences that flow from that misconduct. Courts have found that evidence such as reduced unit efficiency,⁹² the emotional reaction to the unauthorized wearing of uniform patches, badges, and tabs,⁹³ and the revocation of a required security clearance⁹⁴ is directly related to or resulting from the misconduct and, therefore, admissible. On the other hand, however, musters, inspections, and close supervision do not result from the misconduct, but are independent command reactions thereto. As shown below, the same is true for the administrative consequences of a court-martial itself.

United States v. Stapp,⁹⁵ is a case that decided whether it was proper for a Soldier's first sergeant to testify concerning the effects of the court-martial itself as aggravation evidence under RCM 1001(b)(4). The appellant was found guilty of various offenses involving a teenage runaway who hid in the barracks at Fort Lewis.⁹⁶ At trial, the military judge admitted, over defense objection, the first sergeant's testimony that the unit was unable to recover properly from a field exercise because of the court-martial.⁹⁷ He also testified that several other noncommissioned officers were involved in the court-martial and had to leave their duties to attend the trial.⁹⁸ Further, the first sergeant testified that his presence had an adverse impact on unit morale because a subordinate noncommissioned officer had to stand in for him at a training meeting while the he testified.⁹⁹

Beginning its analysis, the court framed its premise succinctly: While "evidence of the natural and probable consequences of the offenses of which an accused has been found guilty is ordinarily admissible at trial," the accused is not responsible for "every circumstance or consequence of misconduct," and such evidence is not admissible.¹⁰⁰ Further, the court pointed out that the offense "must play a material role in bringing about the effect at issue."¹⁰¹ Absent such a connection, the military judge "should not admit evidence of an alleged consequence if an independent, intervening event played the only important part in bringing about the effect."¹⁰²

Applying that analytical framework to the case here, the court found that the military judge erred when he permitted the first sergeant to testify concerning the administrative effects of the court-martial itself.¹⁰³ Because the discretion to allow or direct a Soldier to attend a court-martial as either a witness or a spectator belongs to the unit commander and the discretion to order production of witnesses at trial during presentencing belongs to the military judge, the court reasoned that the exercise of such discretion cannot be attributed to an accused.¹⁰⁴ Further, "evidence of the administrative burden of the court-martial process is ordinarily not" proper unit impact evidence admissible under RCM 1001(b)(4).¹⁰⁵ The court buttressed its conclusion with the probable consequence of permitting such evidence: "If we were to conclude otherwise, trial counsel would be able to argue to the sentencing authority at trial that an accused may be punished more harshly for the inconvenience of the trial."¹⁰⁶

Also as part of the government's case, the runaway girl's mother testified to her daughter's emotional state and need for professional counseling and to her difficulty in retrieving her daughter's belongings from the barracks.¹⁰⁷ On cross-examination, the defense counsel sought to test the mother's credibility and basis for her opinions by asking whether she had

⁹² *United States v. Key*, 55 M.J. 537 (A.F. Ct. Crim. App. 2001) (holding that impact on unit efficiency caused by removal of the appellant and a co-accused were a direct result of the charged misconduct).

⁹³ *United States v. Armon*, 51 M.J. 83 (1999).

⁹⁴ *United States v. Thornton*, 32 M.J. 112 (C.M.A 1991).

⁹⁵ 60 M.J. 795 (Army Ct. Crim. App. 2004).

⁹⁶ *Id.* at 796-97.

⁹⁷ *Id.* at 799.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 800.

¹⁰¹ *Id.* at 800-01.

¹⁰² *Id.* at 801.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* Perhaps a weightier argument in a deployed setting.

¹⁰⁷ *Id.* at 800.

been aware that her daughter was hiding in the barracks and attempting to avoid detection.¹⁰⁸ The military judge prevented the defense counsel from doing so.¹⁰⁹ The court held that the military judge abused his discretion on several points.¹¹⁰ First, the court found no evidence that the appellant had anything to do with the mother's difficulty in retrieving her daughter's belongings.¹¹¹ Additionally, the military judge's refusal to permit cross-examination of the mother was error because the evidence being sought was logically and legally relevant to determining an appropriate sentence.¹¹² The court noted that such evidence was relevant to the defense's impeachment effort because the mother's awareness of her daughter's efforts to evade detection and her willingness to stay at Fort Lewis "may have indicated a motive for [the mother] to fabricate or exaggerate certain aspects of her testimony to paint [her daughter] in a more favorable light."¹¹³ The mother's ignorance of such facts could have, in the court's judgment, "undercut the weight given her testimony concerning the psychological and physical effects" on the daughter.¹¹⁴ As a result of the military judge's cumulative errors and the partial improvidence of the appellant's guilty plea, the court reassessed the sentence.¹¹⁵

Fay and *Stapp* should serve as stop signs for overly aggressive trial counsel offering aggravation evidence. *Anderson*, however, offers support for a wide RCM 1001(b)(4) scope. The Army and Coast Guard's courts' approaches are conservative and tied to the text of RCM 1001(b)(4). The Air Force court's tack, while acknowledging the apparent limit of the rule's language, offers support for a more aggressive approach, at least with respect to child pornography cases. This more expansive approach could be explained by the lack of a "victim" who can come into court and testify about the personal effects of child pornography. If a witness testifies, the appellate courts will apparently apply a stricter approach and require a direct connection. For the Army practitioner, the Army court's admonition that the offense "must play a material role in bringing about the effect at issue"¹¹⁶ should serve as bright red light through which counsel jumps at his own peril.¹¹⁷

Bringing up the Rear: Sentencing Argument

Before the sentencing authority fashions a sentence, counsel for both sides have the opportunity under RCM 1001(g) to argue for an appropriate sentence.¹¹⁸ The limits of proper argument have been much discussed in various court opinions.¹¹⁹ *United States v. Rodriguez*¹²⁰ addresses an important facet of proper argument: whether racial references during a sentencing argument are subject to a prejudice analysis.¹²¹

Before a military judge at a general court-martial, Rodriguez pled guilty to conspiracy to commit larceny, making false official statements, wrongfully selling and disposing of military property, wrongful appropriation, and larceny.¹²² During her sentencing argument, the trial counsel stated: "These are not the actions of somebody who is trying to steal to give bread so his child doesn't starve, sir, some sort of a Latin movie here. These are actions of somebody who is showing that he is greedy."¹²³ The defense counsel objected to the trial counsel's use of the term "steal" and to the trial counsel's apparent comment on pretrial negotiations,¹²⁴ but the defense counsel did not object to the reference to a Latin movie.¹²⁵ The Navy-

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 802.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 803.

¹¹⁶ *Id.* at 800-01.

¹¹⁷ During an airborne operation, a red light indicates that a jump should not be made. If a jumper intends to exit the aircraft anyway, the jumpmaster will not prevent him from doing so. U.S. DEP'T OF ARMY, FIELD MANUAL 57-220, STATIC LINE PARACHUTING TECHNIQUES AND TRAINING 10-12a. (19 Aug. 1996).

¹¹⁸ MCM, *supra* note 6, R.C.M. 1001(g).

¹¹⁹ See, e.g., Aldykiewicz, *supra* note 3, at 123-27 (cataloguing last year's cases concerning argument).

¹²⁰ 60 M.J. 87 (2004).

¹²¹ *Id.* at 88.

¹²² *Id.* at 87.

¹²³ *Id.* at 88.

¹²⁴ *Id.*

Marine court could discern no logical basis for the comment and found the comment improper and erroneous.¹²⁶ The court also stated that the comment was a gratuitous reference to race, not argument based on racial animus, nor argument likely to evoke racial animus.¹²⁷ The lower court then tested for prejudice and found none.¹²⁸ The Navy Judge Advocate General certified the issue whether the lower court erred when it found that the portion of the trial counsel's sentencing argument comparing Private Rodriguez' actions to a Latin movie was "merely a 'gratuitous' reference to race" as opposed to an argument based upon racial animus and therefore did not require reversal of the sentence.¹²⁹

The CAAF found that the parties framed a different question: Whether such an argument should be tested for prejudice.¹³⁰ The government argued that like other improper arguments, the improper reference to race or ethnicity should be tested for prejudice.¹³¹ Rodriguez, however, pointed out that a statement about race is different, and any argument with such a statement should be deemed *per se* prejudicial.¹³² The CAAF did not adopt the appellant's point, noting that the majority of federal jurisdictions test for prejudice in such cases.¹³³ Where there is no prejudice to an accused, the CAAF noted that it will not forsake society's other interests in the timely and efficient administration of justice, the interests of victims, and in the military context, the potential impact on national security.¹³⁴ Based on the specific facts of the case, including the nature of the improper argument and that it occurred before a military judge alone during presentencing, the CAAF held that there was no prejudice to a substantial right of the accused.¹³⁵ The CAAF did note that "it is the rare case indeed, involving the most tangential allusion, where the unwarranted reference to race or ethnicity will not be obvious error."¹³⁶

The CAAF's decision not to adopt a *per se* rule in this area of the law is well-reasoned and strikes a fair balance of interests at stake. Had the argument been made before members, the finding of no prejudice might have very well been different.¹³⁷ The lesson for counsel, however, is very clear: do not make unwarranted, racially-based prosecutorial arguments. Should a trial counsel make a racially-based argument, the burden likely will be overwhelming on appeal.

At the Finish Line: Fines and Contingent Confinement

The CAAF addressed the issue of fines and contingent confinement in *United States v. Palmer*.¹³⁸ In this case, the appellant separately conspired with two employees of the Navy Exchange to steal automotive parts and tires from the Exchange, which the appellant would then use or sell in his private business.¹³⁹ The aggregate value of the illegally obtained items exceeded \$100,000.¹⁴⁰ The court-martial found Palmer guilty of conspiracy and larceny and fined him \$30,000, which if not paid would result in an additional period of twelve months confinement (on top of the thirty months of adjudged confinement).¹⁴¹ After approving the sentence on 31 December 2000, the convening authority notified Palmer that he had thirty days to pay the fine and after thirty days, the fine would be considered delinquent.¹⁴² On 29 January 2001, the

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.* at 89.

¹³² *Id.*

¹³³ *Id.* (citing several federal cases).

¹³⁴ *Id.* at 89-90.

¹³⁵ *Id.* at 90.

¹³⁶ *Id.*

¹³⁷ *Id.* ("Our concern with unwarranted statements about race and ethnicity are magnified when the trial is before members.").

¹³⁸ 59 M.J. 362 (2004).

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 363.

¹⁴² *Id.*

appellant requested an additional thirty days to pay the fine.¹⁴³ The convening authority granted an extension until 9 February 2001.¹⁴⁴ On that date, appellant paid \$5,000.¹⁴⁵ On 13 February 2001, he paid \$17,175, leaving a \$7,825 balance.¹⁴⁶ Because the appellant had not paid the fine by the extension date, the convening authority ordered a hearing under the provisions of RCM 1113(d)(3)¹⁴⁷ to determine whether the contingent confinement should be executed.¹⁴⁸ On 14 February 2001, the hearing officer determined by a preponderance of evidence that appellant was delinquent; failed to show he was indigent or that he made good faith efforts to pay; and that there was evidence that he had the intent to hide assets.¹⁴⁹ The hearing officer recommended that the appellant be given until 1 March 2001 to pay the balance and, if not paid, to serve an additional ninety-five days of confinement.¹⁵⁰ On 28 February 2001, the convening authority informed Palmer that he adopted the hearing officer's recommendations.¹⁵¹ On 8 March 2001, when no further monies were received, the convening authority remitted the remaining balance and ordered executed the additional ninety-five days of confinement.¹⁵² On 9 March 2001, Palmer paid \$3,000 to the Hickham Air Force Base Finance and Accounting Office.¹⁵³ On 22 March 2001, the convening authority rejected the \$3,000 and informed the appellant that the remission and execution of confinement had not changed.¹⁵⁴ The issues on appeal were whether the Air Force court erred in its treatment of the appellant's failure to pay his debt, his 9 March 2001 partial payment, or the execution of the contingent confinement.¹⁵⁵ The CAAF affirmed the lower court and found that the convening authority's action were proper.¹⁵⁶

The CAAF began its analysis by noting that RCM 1003(b)(3) provides that "a fine may be accompanied by a provision in the sentence that, in the event the fine is not paid, the person fined shall, in addition to any period of confinement adjudged, be further confined until a fixed period considered an equivalent punishment to the fine has expired."¹⁵⁷ The court noted that there was no dispute that the appellant received all the due process rights to which he was entitled.¹⁵⁸ Nonetheless, Palmer argued that he was entitled to consideration of something short of contingent confinement because he made good faith efforts to pay the fine.¹⁵⁹ He further asserted that the government's acceptance of the \$3,000 payment was a constructive waiver of the 1 March 2001 deadline and a constructive retraction of the convening authority's 8 March 2001 order.¹⁶⁰ Regarding the first argument, the CAAF observed that there was a substantial basis in the record to support the hearing officer's finding that the appellant did not make good faith efforts to pay the fine.¹⁶¹ The court noted that the record supported a finding that the appellant tried to remove assets from his control and did not take reasonable steps to liquidate assets to make timely payment.¹⁶² Further, the appellant's payment history supported the finding that he did not make good

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ Rule for Courts-Martial 1113(d)(3) provides:

(3) Confinement in lieu of fine. Confinement may not be executed for failure to pay a fine if the accused demonstrates that the accused has made good faith efforts to pay but cannot because of indigency, unless the authority considering imposition of confinement determines, after giving the accused notice and opportunity to be heard, that there is no other punishment adequate to meet the Government's interest in appropriate punishment.

MCM, *supra* note 6, R.C.M. 1113(d)(3).

¹⁴⁸ *Palmer*, 59 M.J. at 363.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 363-64. The days of confinement represented the proportional amount of fine remaining to be paid. *Id.* at 364 n3.

¹⁵¹ *Id.* at 364.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.* The CAAF noted that the Commander, 15th Air Base Wing, Hickham Air Force Base, took all the actions relevant to the issue under various authorities granted and delegated to him. *Palmer*, 59 M.J. at 364 n.5.

¹⁵⁵ *Id.* at 363.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 364 (quoting MCM, *supra* note 6, RCM 1003(b)(3)).

¹⁵⁸ *Id.* at 365.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

faith efforts to pay the fine.¹⁶³ The CAAF also found support in the record to conclude that Palmer was not indigent.¹⁶⁴ Under these circumstances, the court held that the convening authority was not obligated to withdraw or amend his 8 March 2001 action when the appellant paid \$3,000.¹⁶⁵ Finally, the court noted that after the convening authority remitted the balance on the fine, there was no fine to which to apply the \$3,000 payment.¹⁶⁶ Finally, the court declared that absent indigence, the appellant's unilateral efforts to make partial payment did not create any obligation on the convening authority to accept payment or amend his prior action remitting the fine and executing the contingent confinement.¹⁶⁷

For counsel who have concerns about how to implement RCM 1003(b)(3)'s provision for increasing confinement based on the nonpayment of a fine, *Palmer* serves to dissipate some of the fog. To be sure, a fine as an element of punishment may be relatively rare, but in the right case, such as in *Palmer*, it can be an effective motivation for a convicted servicemember to express remorse for his misconduct.

Effective Date of Life Without Eligibility for Parole (LWOP)

The last case on last year's hit parade is *United States v. Ronghi*.¹⁶⁸ This case involved the effective date of the punishment of confinement for LWOP, which was part of the National Defense Authorization Act for Fiscal Year 1998, signed into law on 18 November 1997, and incorporated into the *Manual* on 11 April 2002.¹⁶⁹

On 13 January 2000, Ronghi indecently assaulted, forcibly anally sodomized, and murdered with premeditation an eleven year-old girl while deployed with the 82d Airborne Division in Kosovo.¹⁷⁰ At trial, both the defense counsel and the appellant agreed that the maximum authorized punishment included LWOP.¹⁷¹ On 1 August 2000, a court-martial panel of officer members sentenced appellant to LWOP, a dishonorable discharge, forfeiture of all pay and allowances, and reduction to the lowest enlisted grade.¹⁷² The convening authority approved the sentence as adjudged.¹⁷³ The CAAF granted review to determine if LWOP was an authorized punishment at the time of appellant's court-martial.¹⁷⁴ The CAAF affirmed the case.¹⁷⁵ The court observed that absent a clear direction by Congress to the contrary, a law takes effect on the date of its enactment; therefore, the punishment was authorized for an appropriate offense on 19 November 1997, the day after its enactment.¹⁷⁶ The executive order which incorporated the punishment also stated that it would apply only to offenses committed after 18 November 1997.¹⁷⁷ Further, the court found that there was no conflict between the *2000 Manual for Courts-Martial* and the statute authorizing LWOP.¹⁷⁸ Indeed, as the court noted, the punishment was not a new type of punishment outside those authorized by RCM 1003, but was an authorized longer term of confinement.¹⁷⁹ The court, therefore, held that LWOP was an authorized punishment at the time of appellant's court-martial and for appellant's offenses.¹⁸⁰

¹⁶³ *Id.* The court noted that he made his first payment on the last day of the first extension (and then only one-sixth of the amount owed); his second payment was after the extension (leaving a substantial unpaid balance); his last payment was a month beyond the deadline. *Id.*

¹⁶⁴ *Id.* The court observed that the appellant did not contend that he was indigent and his appellate defense counsel conceded that he was "technically" not indigent. *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 366.

¹⁶⁷ *Id.*

¹⁶⁸ 60 M.J. 83 (2004).

¹⁶⁹ *Id.* at 83.

¹⁷⁰ *Id.* at 84.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 86.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 85.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 86.

Conclusions

The cases in sentencing this year clarified some issues while leaving others unresolved. Because sentencing occurs in the vast majority of courts-martial, counsel in the “pits” are well-advised to keep abreast of the newest developments in this areas of the law. The price of failure may be a rehearing with all the attendant costs, psychological (for any victims) or financial (for the government). Although rule-driven, the outer limits of RCM 1001(b) remain to be fixed. In any case, the trial counsel is well-advised to employ a reasoned, strategic approach to the introduction of evidence that may be close to the line. While *Anderson* and *Fay* are cases where counsel may have employed such analysis, *Malhiot*, *Stapp* and *Rodriguez* are reminders of the pitfalls that await counsel. Trial counsel, who will no doubt be long gone from the assignment that gave rise to the issue, must nonetheless take the long view and ensure that justice is done at that trial on that date and for all time.