

Recent Developments in Sentencing

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Introduction

The court-martial sentencing procedure provides for “presentation of much of the same information to the court-martial as would be contained in a pre-sentence report, but it does so within the protections of an adversarial proceeding.”¹ Rule for Courts-Martial (R.C.M.) 1001 specifies five categories of evidence for the prosecution² and three categories of evidence for the defense³ at the sentencing phase of the court-martial. The objective of the sentencing phase is to educate the sentencing authority to arrive at a proper and fair sentence for the accused.

Presentencing Evidence

R.C.M. 1001(b)(2): Personal Data and Character of Prior Service of the Accused

In two recent cases, the Court of Appeals for the Armed Forces (CAAF) upheld the admission of documentary evidence

from the personnel records of the accused pursuant to R.C.M. 1001(b)(2).⁴ At issue in *United States v. Ariail*⁵ was a Department of Defense (DD) Form 398-2, National Agency Questionnaire, offered by the prosecution as part of the accused's personnel record.⁶ In completing the questionnaire, the accused detailed a series of traffic violations and the disposition of each.⁷ The court held that the exhibit reflected appellant's “‘past conduct and performance’ and [was] ‘maintained according to’ Army regulations.”⁸ Although neither the *Manual for Courts-Martial (Manual)* nor *Army Regulation 27-10*⁹ mentions the DD Form 398-2, the accused filled out the form and made no objection to the document as inaccurate or incomplete.¹⁰

The accused in *United States v. Clemente*¹¹ faced charges relating to attempted larceny and larceny of mail matter. During sentencing, the prosecution introduced two letters of reprimand—for child neglect and spouse abuse—from the accused's

1. *United States v. Clemente*, 50 M.J. 36 (1999).

2. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1001(b) (1998) [hereinafter MCM]. The five categories identified for the prosecution are: (1) service data from the charge sheet; (2) personal data and character of prior service of the accused; (3) evidence of prior convictions of the accused; (4) evidence in aggravation; and (5) evidence of rehabilitative potential. *Id.*

3. *Id.* R.C.M. 1001(c). The categories for the defense are: (1) matter in extenuation, (2) matter in mitigation, and (3) statement by the accused. *Id.*

4. *Id.* R.C.M. 1001(b)(2). This rule states:

Personal data and character of prior service of the accused. Under regulations of the Secretary concerned, trial counsel may obtain and introduce from the personnel records of the accused evidence of the accused's marital status; number of dependents, if any; and character of prior service. Such evidence includes copies of reports reflecting the past military efficiency, conduct, performance, and history of the accused and evidence of any disciplinary actions including punishments under Article 15.

‘Personnel records of the accused’ includes any records made or maintained in accordance with departmental regulations that reflect the past military efficiency, conduct, performance, and history of the accused. If the accused objects to a particular document as inaccurate or incomplete in a specified respect, or as containing matter that is not admissible under the Military Rules of Evidence, the matter shall be determined by the military judge. Objections not asserted are waived.

Id.

5. 48 M.J. 285 (A.F. Ct. Crim. App. 1998).

6. *Id.* at 286.

7. *Id.* The arrests and dispositions included the following: speeding/\$65 fine; improper lane change/\$35 fine; no helmet/\$70 fine; wrong class license/\$200 fine; driving with suspended license/\$200 fine. *Id.*

8. *Id.* at 287.

9. U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE, para. 5-26(a) (24 June 1996).

10. *Ariail*, 48 M.J. at 287.

11. 50 M.J. 36 (1999).

personnel file.¹² The CAAF noted that while “R.C.M. 1001(b)(2) does not provide blanket authority to introduce all information . . . maintained in the personnel records of an accused,”¹³ in this case there was no defense objection concerning accuracy of the records. The information addressed in the letters of reprimand directly rebutted the “picture of concern for the welfare of his family, which was presented by [the accused] during sentencing.”¹⁴

The foregoing cases remind trial counsel that courts will require prosecution sentencing evidence under R.C.M. 1001(b)(2) to be “made or maintained according to departmental regulations.”¹⁵ Trial counsel who offer documentary evidence that reflects past misconduct of the accused should be prepared to argue that the records “reflect the past conduct and performance of the accused”¹⁶ and that such evidence responds to a characterization presented by the accused or on his behalf. For defense counsel, the lesson is always to examine any records for errors or omissions that might render a record not relevant or reliable. Additionally, defense counsel should scrutinize documentary sentencing evidence offered by the prosecution for any contention that it might inflame the sentencing authority.¹⁷

R.C.M. 1001(b)(3): Evidence of Prior Convictions of the Accused

Prior convictions of the accused are less frequently available or used than in civilian jurisdictions, but are another category of permissible prosecution evidence at sentencing.¹⁸ The Air Force Court of Criminal Appeals (AFCCA) addressed the age of such convictions in *United States v. Tillar*.¹⁹ After a panel convicted Tillar of larceny of government property, the prosecution introduced a prior special court-martial conviction against Tillar for larceny of military property.²⁰ Because the prior conviction was eighteen years old, the defense objected that it was not probative and should be excluded.²¹ The defense relied on other time limitations in the *Manual*—ten years for impeachment by conviction²² and three years for certain sentence enhancements²³—to argue against the admissibility of the prior conviction. In affirming admission of the eighteen year-old prior conviction, the AFCCA noted that the age of the conviction in and of itself did not render it inadmissible, though age could be a factor in balancing under Military Rule of Evidence 403.²⁴

12. *Id.* at 37.

13. *Id.* (citing *Ariail*, 48 M.J. at 287).

14. *Id.* See *United States v. Zakaria*, 38 M.J. 280, 283 (C.M.A. 1993). In *Zakaria*, the court held it was an abuse of discretion for the military judge, in a case involving an accused about to be sentenced on larceny charges, to admit a letter of reprimand for indecent acts with four minor girls under R.C.M. 1001(b)(2), since the letter was “evidence of sexual perversion” and would “[brand] him as a sexual deviant or molester of teenage girls.” *Id.*

15. MCM, *supra* note 2, R.C.M. 1001(b)(2). See *United States v. Davis*, 44 M.J. 13 (1996) (Gierke, J., concurring). In *Davis*, Judge Gierke noted the record at issue, a Discipline and Adjustment Board Report, was prepared and maintained pursuant to regulations of the United States Disciplinary Barracks. Judge Gierke determined the document in issue, offered under R.C.M. 1001(b)(2), was not a record “made or maintained in accordance with departmental regulations,” but the defense waived the issue by failing to object at trial. *Id.*

16. MCM, *supra* note 2, R.C.M. 1001(b)(2).

17. See *Zakaria*, 38 M.J. 280.

18. MCM, *supra* note 2, R.C.M. 1001(b)(3). “The trial counsel may introduce evidence of military or civilian convictions of the accused.” *Id.* But see *United States v. White*, 47 M.J. 139, 141 (1997) (“[A]dmissibility of major categories of prior civilian judgments is a matter that readily could be clarified through an amendment to R.C.M. 1001(b)(3).”).

19. 48 M.J. 541 (A.F. Ct. Crim. App. 1998).

20. *Id.* at 542.

21. *Id.* The appellate defense counsel stated the position as follows:

[A prior conviction] loses significance, and probative value, with the passage of time A person changes a lot in 18 years. For the record of a conviction to be admissible, it must convey something relevant about the accused as he stands before that court-martial to be sentenced, not as he was at some time in the distant past.

Id.

22. MCM, *supra* note 2, MIL. R. EVID. 609(b). “Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction” *Id.*

23. *Id.* R.C.M. 1003(d)(2). “[P]roof of two or more previous convictions adjudged by a court-martial during the 3 years next preceding the commission of any offense of which the accused stands convicted shall authorize a bad conduct discharge” *Id.*

24. See *Tillar*, 48 M.J. at 543. See also MCM, *supra* note 2, MIL. R. EVID. 403.

R.C.M. 1001(b)(4): Evidence in Aggravation

Evidence in aggravation under R.C.M. 1001(b)(4)²⁵ allows the prosecution to focus on the effects of the crime and its victims, and not just on the accused, as a basis for an appropriate sentence. The service courts rendered several decisions over the past year that remind both trial and defense counsel of the limits of R.C.M. 1001(b)(4).

The threshold for evidence in aggravation under R.C.M. 1001(b)(4) is that it be “directly relating to or resulting from the offenses of which the accused has been found guilty.”²⁶ The Navy-Marine Corps Court of Criminal Appeals (NMCCA) highlighted the disjunctive nature of this requirement in *United States v. Sanchez*.²⁷ Following the accused’s conviction for misprision of aggravated assault,²⁸ the prosecution introduced evidence in aggravation under R.C.M. 1001(b)(4) of the injuries sustained by the victim of the assault. Defense objections to evidence of the injuries noted that such injuries resulted from the underlying aggravated assault committed by the co-accuseds, and not to the misprision offense committed by Sanchez.²⁹ In upholding admission of the evidence of the assault victim’s injuries, the NMCCA held that although the injuries did not *result from* misprision of a serious offense by Sanchez, it was “evidence *directly relating to* that offense.”³⁰ For a court to determine an appropriate sentence in a case, the court-martial may properly receive evidence of the “nature and circumstances of the particular underlying [offense].”³¹

Separating the *directly relating to* or *resulting from* prongs for evidence in aggravation, as in *Sanchez*, does not relieve the prosecution of the burden of linking the accused to the evidence in aggravation. In *United States v. Mance*, the NMCCA pointed out that the prosecution failed to make this connection.³² After convicting the accused of, *inter alia*, assault, assault consummated by battery, adultery, and wrongful cohabitation, the prosecution called the assault victim to testify at sentencing. The victim described a threat that the accused made to him over the telephone, while on duty. Additionally, the victim contended that the accused had committed additional assaults against the accused’s paramour in the adultery and wrongful cohabitation charges, notwithstanding that such allegations constituted uncharged misconduct.³³ The prosecution, however, failed to show the accused made the alleged phone threat or committed the uncharged assaults.³⁴ Absent evidence specifically linking the effects described to the accused’s conviction, it was error to allow the testimony.³⁵

Another prosecution failure to link evidence to the accused’s offenses occurred in *United States v. Kelley*.³⁶ At sentencing for a conviction of wrongful use of marijuana and opium, the prosecution introduced a letter written by the accused indicating that she was frustrated and had thoughts of getting “drunk or high.”³⁷ Because the accused wrote the letter to a friend following her drug use and after she completed a substance abuse rehabilitation program, the prosecution argued the letter “was relevant because it went to the [accused’s] ‘mental attitude toward the crimes she’s committed.’”³⁸ The AFCCA, however, found the letter bore no relevance to the accused’s charged offenses since the accused wrote the letter months following the charged offenses.³⁹

25. MCM, *supra* note 2, R.C.M. 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.” *Id.*

26. *Id.*

27. 47 M.J. 794 (N.M. Ct. Crim. App. 1998).

28. *See id.* at 795. *See also* MCM, *supra* note 2, pt. IV, para. 95(c)(1). “Misprision of a serious offense is the offense of concealing a serious offense committed by another but without such previous concert with or subsequent assistance to the principal as would make the accused an accessory.” *Id.*

29. *Sanchez*, 47 M.J. at 797.

30. *Id.*

31. *Id.*

32. 47 M.J. 742 (N.M. Ct. Crim. App. 1997).

33. *Id.* at 747.

34. *Id.*

35. *Id.*

36. 50 M.J. 501 (A.F. Ct. Crim. App. 1998).

37. *Id.* at 502.

38. *Id.*

When it meets the *directly relating to or resulting from* requirement, evidence in aggravation may address a broad range of factors or conditions. Two recent service courts expounded on the types of evidence that are admissible under R.C.M. 1001(b)(4). In *United States v. Duncan*,⁴⁰ following convictions for rape, forcible sodomy, kidnapping, and attempted murder, among others,⁴¹ the prosecution called a therapist who had counseled the victim. Relying on approximately twenty hours of counseling with the victim, the therapist described the victim's testimony as "becoming progressively more traumatizing," and her "motivation for continuing to testify was to protect herself and to protect other women from the appellant."⁴² The NMCCA upheld the testimony of the therapist as proper evidence in aggravation under R.C.M. 1001(b)(4).⁴³

In addition to evidence in aggravation that shows impact or effect on the individual victim, R.C.M. 1001(b)(4) evidence may also properly show the effect or impact on a unit.⁴⁴ In *United States v. Alis*,⁴⁵ the AFCCA upheld the admission of evidence relating to a degraded work environment in a base staff judge advocate (SJA) office as a result of crimes committed by the accused SJA. A court-martial convicted the accused of fraternization and conduct unbecoming an officer based on his relationship with a female non-commissioned officer assigned to the base SJA office.⁴⁶ Evidence in aggravation offered by the prosecution included the impact on the office and the accused's attitude toward his offenses. As to the former, a judge advocate described the tension in the office and the adverse effect on the office's ability to provide legal advice because others knew of

the on-going improper relationship.⁴⁷ As to the latter, the accused had—in the midst of his own improper relationship—encouraged harsh discipline against a junior officer for similar misconduct, asserting it was necessary "to maintain core values."⁴⁸ The AFCCA held the statements of the accused SJA reflected his knowledge of the importance and seriousness of the misconduct, and constituted proper evidence in aggravation.⁴⁹

The foregoing cases illustrate the range of evidence in aggravation from the accused's knowledge of the seriousness of his own misconduct, to the effect of his crimes on an individual victim or on the unit. Effect on the victim may include not only obvious descriptions of injury suffered, but also the motivation for the individual victim to testify and prognosis for recovery. All evidence in aggravation, however, must *directly relate* to or *result from* the offenses of which the accused is convicted. Additionally, the prosecution bears the burden of establishing that link in order to introduce the evidence properly under R.C.M. 1001(b)(4).

R.C.M. 1001(b)(5): Evidence of Rehabilitative Potential

The last category of prosecution sentencing evidence is of rehabilitative potential of the accused under R.C.M. 1001(b)(5).⁵⁰ The CAAF affirmed the inadmissibility of evidence of specific acts of conduct⁵¹ in building a foundation for evidence of rehabilitative potential in *United States v. Powell*.⁵² In *Powell*, the prosecution called three witnesses from the accused's chain of command to assess his potential for rehabil-

39. *Id.* at 503. The charges alleged wrongful use of marijuana and opium compounds or derivatives between 6 November 1996 and 2 January 1997. The accused wrote the letter on 28 March 1997. The court rejected the government's claim the letter would have been proper rebuttal evidence. The court reasoned that this would require speculation "as to what the defense would have presented if the letter had not been admitted by the military judge." *Id.*

40. 48 M.J. 797 (N.M. Ct. Crim. App. 1998).

41. *Id.* at 800. The convictions included the following offenses against victim [M]: conspiracy to commit kidnapping, conspiracy to commit rape and forcible sodomy, two specifications of rape, five specifications of forcible sodomy, kidnapping, and attempted murder. *Id.*

42. *Id.* at 806.

43. *Id.*

44. MCM, *supra* note 2, R.C.M. 1001(b)(4), discussion. "Evidence in aggravation may include . . . evidence of significant adverse impact on the mission, discipline, or efficiency of the command directly and immediately resulting from the accused's offense." *Id.*

45. 47 M.J. 817 (A.F. Ct. Crim. App. 1998).

46. *Id.* at 820.

47. *Id.* at 825-26.

48. *Id.* at 825.

49. *Id.*

50. MCM, *supra* note 2, R.C.M. 1001(b)(5)(A). "The trial counsel may present . . . evidence in the form of opinions concerning the accused's previous performance as a service member and potential for rehabilitation." *Id.*

51. *Id.* R.C.M. 1001(b)(5)(D), discussion. "The witness or deponent, however, generally may not further elaborate on the accused's rehabilitative potential, such as describing the particular reasons for forming the opinion." *Id.*

itation. In laying foundations for their opinions, the witnesses commented on several specific problems of the accused, including failing to pay his rent, failing to attend a chaplain's counseling program, showing up for work late, losing his military identification card, and writing bad checks.⁵³ The CAAF held that such evidence—to the extent not acknowledged or admitted by the accused⁵⁴—was inadmissible because it violated R.C.M. 1001(b)(5)(F) by referring to specific conduct.

R.C.M. 1001(c): Matter to be Presented by the Defense

Whereas in recent years military appellate courts have issued a number of decisions opening the doors for more evidence in aggravation, the past year saw several CAAF decisions that broadened the type and the amount of information provided by the defense at sentencing. These cases identify areas of extenuation⁵⁵ and mitigation⁵⁶ evidence, and expand the bounds of what an accused may address in an unsworn statement.⁵⁷

In *United States v. Simmons*,⁵⁸ a court-martial convicted the accused of offenses arising out of an assault against his

spouse.⁵⁹ Prior to the court-martial, the state of California prosecuted the accused for spousal abuse, and sentenced him to confinement and probation.⁶⁰ At sentencing for the same misconduct, the military judge determined that the state court sentence was not relevant information for the panel in determining an appropriate sentence.⁶¹ The CAAF, however, held that it was error to exclude such evidence. The CAAF reasoned that the accused was not using this evidence as a basis for a sentence comparison. Rather, he offered the state court sentence to show that he had already been punished for the misconduct.⁶² The CAAF noted the purpose of the sentencing rules in the *Manual* is “to admit legally and logically relevant evidence . . . if the proponent establishes relevance based upon the relationship of the evidence to the offense charged.”⁶³

As with prosecution evidence under R.C.M. 1001(b)(4), the CAAF in *United States v. Perry* required the defense to link its evidence to the particular court-martial.⁶⁴ Convicted of attempted sodomy, conduct unbecoming an officer, and indecent acts, the accused requested an instruction that a dismissal may cause him to have to pay back the cost of his Naval Academy education.⁶⁵ The CAAF upheld the military judge's deci-

52. 49 M.J. 460 (1998).

53. *Id.* at 461-62.

54. *Id.* at 465. The court noted that while the testimony of the accused's tardiness to work was improper evidence of specific conduct, “it merely repeated what [the accused] admitted by his guilty pleas and his responses during the plea inquiry.” *Id.*

55. MCM, *supra* note 2, R.C.M. 1001(c)(1)(A). “Matter in extenuation of an offense serves to explain the circumstances surrounding the commission of an offense, including those reasons for committing the offense which do not constitute a legal justification or excuse.” *Id.*

56. *Id.* R.C.M. 1001(c)(1)(B). “Matter in mitigation of an offense is introduced to lessen the punishment to be adjudged by the court-martial, or to furnish grounds for a recommendation of clemency.” *Id.*

57. *Id.* R.C.M. 1001(c)(2)(C). “The accused may make an unsworn statement and may not be cross-examined by the trial counsel upon it or examined upon it by the court-martial. The prosecution may, however, rebut any statements of facts therein. The unsworn statement may be oral, written, or both, and may be made by the accused, by counsel, or both.” *Id.*

58. 48 M.J. 193 (1998).

59. *Id.* at 193-94. The accused was convicted of four specifications of assault, aggravated assault, and kidnapping.

60. *Id.* at 194. The state court in California sentenced the accused to time served—18 days—and two years' probation.

61. *Id.*

62. *Id.* at 196. The court stated:

The civilian sentence was not offered for sentence comparison purposes, but to show that appellant had already been punished for this conduct. The defense should have had the choice of whether to introduce evidence of the civilian sentence, even though it arguably could have either benefited or harmed the defense. Defense counsel was in the best position to decide whether or not a sentence of 18 days' confinement plus 2 years' probation would have helped or hurt his client.

Id.

63. *Id.*

64. 48 M.J. 197 (1998).

65. *Id.* at 197-98. The defense-requested instruction read as follows: “A dismissal may cause Ensign Perry to be liable to reimburse the U.S. Government for all or a portion of the costs associated with his education at the U.S. Naval Academy. As computed by the U.S. Naval Academy, the total cost of education for the past four years is approximately \$80,000.” *Id.*

sion not to give the instruction because there was no evidence that the Navy intended to seek reimbursement from Perry.⁶⁶ The defense failed to establish the factual predicate linking the existing law and policy on reimbursement to this particular accused.⁶⁷

The accused does not have an unlimited right to introduce evidence, since such evidence must be relevant and reliable.⁶⁸ The accused, however, can make a strong case for admission by showing that the evidence is a factor that might “lessen the punishment to be adjudged by the court-martial.”⁶⁹ In *United States v. Bray*,⁷⁰ the defense called a psychiatric social worker as a sentencing witness. The purpose of the testimony was to demonstrate that the accused “was not responsible for his actions because of having sprayed insecticide . . . thus precipitating . . . a psychotic reaction.”⁷¹ In assessing a claim of ineffective assistance of counsel, the CAAF examined the mitigation evidence and concluded that it was relevant sentencing evidence.⁷²

In *United States v. Loya*,⁷³ the CAAF again considered evidence that bore on the accused’s culpability, but was offered in extenuation and mitigation. After the accused pleaded guilty to involuntary manslaughter, the defense called a medical doctor at sentencing to testify to inadequate medical care given to the victim immediately following the stabbing.⁷⁴ The defense offered the evidence to show additional factors that contributed to the victim’s death that, though not rising to the level of an intervening proximate cause,⁷⁵ might lessen the punishment of the accused.⁷⁶ Overruling the military judge who determined the defense medical evidence was not relevant, a majority of the CAAF found that the medical evidence was relevant to show the circumstances surrounding the victim’s death, and helpful since it might reduce the culpability of the accused.⁷⁷

R.C.M. 1001(c)(2)(c): Unsworn Statement of the Accused

The CAAF further opened the door for defense sentencing evidence in a trio of decisions last year that addressed the

66. *Id.* at 199.

67. *Id.* at 200 (Effron, J., concurring). Concurring in the result, Judge Effron commented that “[the accused] did not introduce any evidence that he had signed such an agreement or that he had received the applicable notice. He simply introduced a Naval Academy memorandum generally directed at all midshipmen addressing the possibility of reimbursement.” *Id.*

68. See *United States v. Boone*, 49 M.J. 187 n.14 (1998); MCM, *supra* note 2, R.C.M. 1001(c)(3). “The military judge may, with respect to matters in extenuation or mitigation or both, relax the rules of evidence. This may include admitting letters, affidavits, certificates of military and civil officers, and other writings of similar authenticity and reliability.” *Id.*

69. MCM, *supra* note 2, R.C.M. 1001(c)(2)(B).

70. 49 M.J. 300 (1998).

71. *Id.* at 302. The accused had undergone a sanity board and was found to be fit for trial and mentally responsible. When the defense chose to use the evidence regarding the insecticide, the military judge refused to accept the plea. Accordingly, the accused was denied the twenty-year time limitation he had agreed to with the convening authority. When the accused was later sentenced at another court-martial for the same offenses to 35 years confinement, he made a claim of ineffective assistance against his civilian attorney for bringing in the insecticide evidence and losing the guilty plea agreement for a 20 year limitation on confinement.

72. *Id.* at 304.

73. 49 M.J. 104 (1998).

74. *Id.* at 105. The defense counsel stated:

We’d like to put forth to this court exactly what was the medical treatment which was administered to [the victim], the quality of that medical treatment, the timeliness of the operation, and whether or not [the victim] would have had a chance to survive had things been done differently that day. Therefore, this is extenuating and mitigating, sir.

Id.

75. ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 791 (1982).

An intervening cause is one ‘which is neither operating in defendant’s presence, nor at the place where defendant’s act takes effect at the time of defendant’s act, but comes into effective operation at or before the time of the damage.’ It may have been produced by the first cause or it may merely happen to take effect upon a condition created by the first cause.

Id.

76. *Loya*, 49 M.J. at 106.

77. See *id.* at 107-08. Chief Judge Cox, however, noted the evidence should be analyzed under Mil. R. Evid. 403, and the judge’s ruling would have been measured against an abuse of discretion standard, and more likely have survived. *Id.* (Cox, C.J., dissenting).

bounds of matters that can be covered in an accused's unsworn statement.⁷⁸ In *United States v. Grill*,⁷⁹ *United States v. Jeffery*,⁸⁰ and *United States v. Britt*,⁸¹ the CAAF faced the issue of limitations on matters that accuseds can address in their unsworn statements. In *Grill*, the accused sought to refer to sentences imposed by civilian courts against his co-conspirators.⁸² *Jeffery* and *Britt* involved whether an accused can raise the possibility of an administrative discharge following the court-martial as a means to avoid a punitive discharge.⁸³ In all three cases the CAAF held that it was error to restrict the unsworn statements of the accuseds.⁸⁴

In light of these cases, do any limits exist on an accused's unsworn statement? While "the right to make a statement in allocution is not wholly unfettered . . . the mere fact that a statement in allocution might contain matter that would be inadmissible if offered as sworn testimony does not, by itself, provide a basis for constraining the right of allocution."⁸⁵ Further, the CAAF noted that, though some limits might apply to an unsworn statement, "comments that address options to a punitive separation from the service . . . are not outside the pale."⁸⁶ Existing restrictions on the unsworn statement include matter that is "gratuitously disrespectful toward superiors or the court [or] a form of insubordination or defiance of authority;"⁸⁷ alle-

gations regarding prior sexual behavior of a sexual offense victim; and matter that re-litigates guilty findings in a contested case.⁸⁸ Lest too broad a right of allocution lead to irrelevant information in the sentencing process, one judge commented the broad right of the accused to make an unsworn statement would not "require the military judge to permit [the accused] to read the Manhattan telephone book to the court-members."⁸⁹

Since the *Manual* does not otherwise limit the unsworn statement of the accused, the CAAF looked to the trial counsel and military judge to put the unsworn statement in proper context for the panel. "A military judge has adequate authority to instruct the members on the meaning and effect of an unsworn statement Such instructions, as well as trial counsel's opportunity for rebuttal and closing argument, normally will suffice to provide an appropriate focus for the members' attention on sentencing."⁹⁰ Judge Crawford, while raising a concern for mini-trials over issues in an unsworn statement, expounded on areas of possible government rebuttal relating to administrative discharge as an option to a punitive discharge, including who would initiate, forward, and approve a request for discharge and what other administrative actions might be relevant.⁹¹ As a result of the CAAF's decisions in *Grill*, *Jeffery*, and *Britt*, trial counsel and military judges must play a greater role—

78. MCM, *supra* note 2, R.C.M. 1001(c)(2). See *United States v. Britt*, 44 M.J. 731 (A.F. Ct. Crim. App. 1996) (providing a description of the history and evolution of the unsworn statement).

79. 48 M.J. 131 (1998).

80. 48 M.J. 229 (1998).

81. 48 M.J. 233 (1998).

82. *Grill*, 48 M.J. at 132.

83. *Jeffery*, 48 M.J. at 230; *Britt*, 48 M.J. at 234.

84. *Grill*, 48 M.J. at 132; *Jeffery*, 48 M.J. at 230; *Britt*, 48 M.J. at 234.

85. *Grill*, 48 M.J. at 133.

86. *Jeffery*, 48 M.J. at 231.

87. *Grill*, 48 M.J. at 132 (citing *United States v. Rosato*, 32 M.J. 93, 96 (1991)).

88. *Id.* at 134 (Crawford, J., dissenting).

89. *Id.* at 135 (Gierke, J., dissenting).

90. *Grill*, 48 M.J. at 133. The court noted that "we have confidence that properly instructed court-martial panels can place unsworn statements in the proper context, as they have done for decades." *Id.* The instruction relating to an accused's unsworn statement provides:

The court will not draw any adverse inference from the fact that the accused has elected to make a statement, which is not under oath. An unsworn statement is an authorized means for an accused to bring information to the attention of the court, and must be given appropriate consideration. The accused cannot be cross-examined by the prosecution or interrogated by court members or myself upon an unsworn statement, but the prosecution may offer evidence to rebut statements of fact contained in it. The weight and significance to be attached to an unsworn statement rests within the sound discretion of each court member. You may consider that the statement is not under oath, its inherent probability or improbability, whether it is supported or contradicted by evidence in the case, as well as any other matter that may have a bearing upon its credibility. In weighing an unsworn statement, you are expected to utilize your common sense and your knowledge of human nature and the ways of the world.

U.S. DEP'T OF ARMY, PAM 27-9, LEGAL SERVICES: MILITARY JUDGES' BENCHBOOK, ch. 2, at 101 (30 Sept. 1996) [hereinafter BENCHBOOK].

through rebuttal evidence,⁹² argument and instruction—to “place unsworn statements in the proper context.”⁹³

R.C.M. 1001(g): Argument

In 1998, the service courts, on several occasions, addressed the bounds of proper argument at sentencing under R.C.M. 1001(g).⁹⁴ In *United States v. Weisbeck*,⁹⁵ a court-martial convicted the accused of indecent acts and related offenses against two teenage brothers at Fort Rucker. An earlier court-martial at Fort Devens had acquitted the accused of similar charges against two other teenage brothers.⁹⁶ During the merits phase of the Fort Rucker trial, the prosecution introduced evidence of the earlier allegations, alleging a common plan by the accused.⁹⁷

When arguing on sentence in *Weisbeck*, the prosecution proposed a sentence for what the accused had done to *both* sets of brothers—from Fort Rucker in the present court-martial and from Fort Devens in the earlier court-martial that resulted in acquittal. Further, the prosecution stated that “this is not the

first time, because you heard evidence about the similarities.”⁹⁸ The military judge each time interrupted the prosecution argument and gave a curative instruction, limiting the panel to its guilty findings in the present court-martial in determining a sentence.⁹⁹ Normally, at sentencing, a court may consider evidence properly admitted on the merits.¹⁰⁰ In this case, however, the “trial counsel’s argument crossed the line when he specifically asked the members not only to consider [the accused’s] prior bad acts, but also to sentence [the accused] for them. Due process of law dictates that an accused may be sentenced only for convicted offenses.”¹⁰¹

In *United States v. Fortner*,¹⁰² the trial counsel invoked the Navy’s “core values,” and argued, “[the accused’s] service, no matter how meritorious, is incompatible with the very core values that we must all support.”¹⁰³ Although R.C.M. 1001(g) proscribes reference in argument to “the views of . . . [the convening or higher] authorities or any policy directive relative to punishment,”¹⁰⁴ the NMCCA held the service core values were “aspirational concepts” that did not prescribe a given punishment for noncompliance.¹⁰⁵ In *United States v. Sanchez*,¹⁰⁶

91. *United States v. Jeffery*, 48 M.J. 229, 231 (1998) (Crawford, J., dissenting).

92. MCM, *supra* note 2, R.C.M. 1001(d). “The prosecution may rebut matters presented by the defense.” *Id.*

93. *Grill*, 48 M.J. at 133.

94. MCM, *supra* note 2, R.C.M. 1001(g). “Trial counsel may not in argument purport to speak for the convening authority or any higher authority, or refer to the views of such authorities or any policy directive relative to punishment or to any punishment or quantum of punishment greater than that court-martial may adjudge.” *Id.*

95. 48 M.J. 570 (Army Ct. Crim. App. 1998).

96. *Id.* at 572-73.

97. *Id.* at 573. MCM, *supra* note 2, MIL. R. EVID. 404(b).

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident

Id.

98. *Weisbeck*, 48 M.J. 576-77.

99. *Id.* at 576. The military judge instructed the court that, “[t]he accused is to be sentenced only for the offenses of which you have found him guilty. You may not consider, in adjudging a sentence, any other prior acts committed by the accused or that may have been committed by the accused;” and further that, “[t]he members will disregard the counsel’s remark. The issue of the previous matter was introduced for a limited matter and may not be otherwise considered in the course of this matter.” *Id.*

100. MCM, *supra* note 2, R.C.M. 1001(f)(2)(A). “[T]he court-martial may consider (2) Any evidence properly introduced on the merits before findings, including: (A) Evidence of other offenses or acts of misconduct even if introduced for a limited purpose” *Id.*

101. *Weisbeck*, 48 M.J. at 576.

102. 48 M.J. 882 (N.M. Ct. Crim. App. 1998).

103. *Id.* at 883.

104. MCM, *supra* note 2, R.C.M. 1001(g).

105. *Fortner*, 48 M.J. at 883. The trial counsel had established a factual basis for the argument, having examined one of the witnesses regarding the Navy’s “core values.” The defense did not object to the argument.

Conclusion

the prosecution argued that “the accused’s behavior made him unsuitable for further military service and that his commission should be taken away.”¹⁰⁷ Viewing this comment in the overall context of the prosecution argument, the AFCCA held that the statement did not improperly blend an administrative and punitive discharge, but represented a call for imposition of a dismissal.¹⁰⁸ Finally, in *United States v. Garren*,¹⁰⁹ the trial counsel impugned the accused for failing “to accept responsibility for his actions,” and noted that, “[e]ven in his unsworn statement, he still is not accepting responsibility for what he has done.”¹¹⁰ In response to the prosecution argument, the military judge instructed on the mendacity of the accused.¹¹¹ The ACCA found trial counsel’s comment a proper “observation of the [accused’s] mendacious trial testimony and lack of remorse during the sentencing phase of the court-martial.”¹¹²

So long as the court-martial sentencing process exists as an adversarial system, both trial and defense counsel will be responsible for providing information to the sentencing authority. Sentencing evidence must fit within one of the categories specified under R.C.M. 1001, and both sides should determine the appropriate category in order to particularize the offer of or objection to evidence. As the cases above illustrate, counsel and the courts continue to shape the outer limits of evidence and argument that fit within the rules. Thus, counsel must continue to seek evidence that will assist the sentencing authority in determining an appropriate sentence for an accused based on the offenses of which he has been found guilty.¹¹³

106. 50 M.J. 506 (A.F. Ct. Crim. App. 1998).

107. *Id.* at 512.

108. *Id.* at 513.

109. 49 M.J. 501 (Army Ct. Crim. App. 1998).

110. *Id.* at 503. In his unsworn statement, the accused stated, “deep down in my heart, I still believe that, you know, I didn’t have nothing (sic) to do with this.” *Id.*

111. *Id.* at 504. The judge’s instructions on mendacity provide:

The evidence presented (and the sentencing argument of trial counsel) raised the question of whether the accused testified falsely before this court under oath. No person, including the accused, has a right to seek to alter or affect the outcome of a court-martial by false testimony. You are instructed that you may consider this issue only within certain constraints. First, this factor should play no role whatsoever in your determination of an appropriate sentence unless you conclude that the accused did lie under oath to the court. Second, such lies must have been, in your view, willful and material before they can be considered in your deliberations. Finally, you may consider this factor insofar as you conclude that it, along with all the other circumstances in the case, bears upon the likelihood that the accused can be rehabilitated. You may not mete out additional punishment for the false testimony itself.

BENCHBOOK, *supra* note 90, ch. 2, at 103.

112. *Garren*, 49 M.J. at 504. The court, however, cautioned:

[Trial counsel] must be ever cautious that any such statement is based on a reasonable inference drawn from the evidence. Trial counsel must not cross the line and comment upon an accused’s fundamental right to plead not guilty. This can be a dangerously thin line which trial counsel crosses at his own peril and risks reversal.

Id.

113. The *Benchbook* instruction states:

Members of the court, you are about to deliberate and vote on the sentence in this case. It is the duty of each member to vote for a proper sentence for the offense(s) of which the accused has been found guilty. Your determination of the kind and amount of punishment, if any, is a grave responsibility requiring the exercise of wise discretion. Although you must give due consideration to all matters in mitigation and extenuation, (as well as to those in aggravation), you must bear in mind that the accused is to be sentenced only for the offense(s) of which [he] has been found guilty.

BENCHBOOK, *supra* note 90, ch. 2, at 91.