

# The CAAF Drives On: New Developments in Post-Trial Processing

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## Introduction

As Lieutenant Colonel Lovejoy noted in last year's article,<sup>1</sup> *United States v. Chatman*<sup>2</sup> put the Court of Appeals for the Armed Forces (CAAF) at a crossroad in the post-trial arena. With the court's 1998 decisions in *United States v. Cornwell*<sup>3</sup> and *United States v. Wheelus*,<sup>4</sup> the CAAF drove right through that crossroad into an unmapped area of post-trial processing at the appellate level.

Although the CAAF's modification of the post-trial process is by far the most significant development in post-trial this past year, it has not been the only development. This article discusses standards of review at the appellate courts, disqualifications from post-trial processing, allegations of legal error, and a suggested approach for government responses, and the ever-present problem of "new matter." This article also addresses handling post-trial allegations of ineffective assistance, sentence conversion, and concludes with a look at sentence reassessment on appeal.

## The Evolving Standard: To Boldly Go Where No Man Has Gone Before . . . .

Practitioners should read *Chatman*, *Cornwell*, and *Wheelus* in conjunction with the appellate courts' prior handling of post-trial errors to fully understand their significant impact on post-trial processing. The key to understanding these cases—and why their changes are so fundamental—is the clemency power exercised by convening authorities under Article 60, UCMJ<sup>5</sup> and Rule for Courts-Martial (R.C.M.) 1107.<sup>6</sup>

Prior to *Chatman*, *Cornwell*, and *Wheelus*, the appellate courts treated errors in the post-trial process that affected the convening authority's clemency function<sup>7</sup> as "presumptively prejudicial"<sup>8</sup> and would send the case back to the convening authority for a new staff judge advocate post-trial recommendation (SJA PTR) and convening authority action. Because the appellant has broad discretion on what to submit for the convening authority's consideration,<sup>9</sup> and the convening authority's clemency power is completely unrestrained,<sup>10</sup> the appellate courts were loath to speculate on what would have made a difference to the convening authority.<sup>11</sup> Accordingly, when an appellate court found an error, it would not substitute its judgment.<sup>12</sup> Rather, it would return the case to the convening authority.<sup>13</sup>

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1. Lieutenant Colonel James Kevin Lovejoy, *The CAAF at a Crossroads: New Developments in Post-Trial Processing*, ARMY LAW., May 1998, at 25.
  2. 46 M.J. 321 (1997) (requiring future appellants who allege new matter in the addendum to the staff judge advocate's post-trial recommendation (SJA PTR) to show what they would have said in response to that new matter).
  3. 49 M.J. 491 (1998).
  4. 49 M.J. 283 (1998).
  5. UCMJ art. 60 (West 1999).
  6. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1107 (1998) [hereinafter MCM].
  7. This includes "new matter" in an unserved addendum to the SJA PTR, which was the issue in *Chatman*.
  8. *United States v. Chatman*, 46 M.J. 321, 323 (1997) (citing *United States v. Jones*, 44 M.J. 242, 244 (1996)).
  9. See MCM, *supra* note 6, R.C.M. 1105. The SJA also has the right to submit any matter from outside the record of trial for the convening authority's consideration, provided that the defense is given the opportunity to review and comment upon those extra-record matters. See *id.* 1105, 1106.
  10. *United States v. Busch*, 46 M.J. 562 (N.M. Ct. Crim. App. 1997). *Busch* was withdrawn from the bound volume at the request of the court. In *Busch*, the Navy-Marine Corps Court of Criminal Appeals (NMCCA) recognized that the convening authority can give clemency for a good reason, a bad reason, or no reason at all. *Id.*
  11. *United States v. Leal*, 44 M.J. 235 at 237 (1996); *Chatman*, 46 M.J. at 324 (citing *United States v. Jones*, 36 M.J. 438 at 439 (C.M.A. 1993)). "[W]e will not speculate on what the convening authority would have done if defense counsel had been given an opportunity to comment." *Id.* Anecdotal evidence also illustrates that one can never be certain as to what will "push the convening authority's button."

Last year, *Chatman* began a fundamental change to that process. Responding to new matter in the unserved SJA addendum, the CAAF found that sending the case back to the convening authority was not a “productive judicial exercise”<sup>14</sup> if the appellant was not going to submit anything different to the new convening authority.<sup>15</sup> To prevent this perceived waste of time and judicial resources, the CAAF now requires appellants who allege error as a result of new matter in an unserved SJA addendum to demonstrate prejudice. To demonstrate prejudice,<sup>16</sup> these appellants must show “what, if anything, would have been submitted to ‘deny, counter, or explain’ the new matter [in the SJA addendum].”<sup>17</sup> Harking back to its prior position on post-trial errors, however, the CAAF said that if those appellants could satisfy this low threshold, the court would give them the “benefit of the doubt,” implying that it would order the case returned to the convening authority.<sup>18</sup>

In *Cornwell*, without specifically citing *Chatman*, the CAAF applied the *Chatman* analysis to R.C.M. 1107. Captain Cornwell was an Air Force officer who pleaded guilty to false official statement, damaging military property and conduct unbecoming an officer.<sup>19</sup> The military judge sentenced Captain

Cornwell to a dismissal, confinement for two months, and forfeiture of \$1000 pay per month for two months. His post-trial processing was uneventful,<sup>20</sup> until the convening authority wrote a note to the SJA asking him what the appellant’s commanders thought about clemency. The SJA phoned the commanders and verbally advised the convening authority that they disagreed with clemency.<sup>21</sup> The SJA then typed a memorandum for record (MFR)<sup>22</sup> that memorialized his conversation with the convening authority. The government did not serve the MFR on the defense, but did include it in the record of trial.<sup>23</sup>

On appeal, Captain Cornwell contended that this information was effectively new matter that should have been served on the defense in accordance with R.C.M. 1106(f)(7).<sup>24</sup> The CAAF, however, summarily dismissed this assertion.<sup>25</sup> The CAAF did comment, however, that this could be information “with knowledge of which the accused is not chargeable” under R.C.M. 1107(b)(3)(B)(iii).<sup>26</sup> Nevertheless, even assuming that the government should have served the MFR on the defense for rebuttal, the CAAF affirmed because “the appellant has provided no indication . . . as to what response he would have made with respect to the subordinate commanders’ recommenda-

12. Whether the appellate courts have clemency power appears to be an open question as far as the CAAF is concerned. Although the CAAF expressly says that clemency power is strictly an executive function, the CAAF appears to have fashioned a quasi-clemency power from Article 66, UCMJ. *United States v. Wheelus*, 49 M.J. 283, 289 (1998).

13. For the last 40 years, the appellate courts have consistently intoned that the convening authority is the accused’s last best chance for relief in the post-trial process. *See United States v. Boatner*, 43 C.M.R. 216, 217 (C.M.A. 1971); *United States v. Wilson*, 26 C.M.R. 3 (1958).

14. *Chatman*, 46 M.J. at 323.

15. If the accused was not going to submit anything different to the convening authority the second time around, the CAAF was probably justified in saying, in effect, “Why bother sending it back? We’re just going to get it back to us in the same shape it’s in now.” This underlying theme of saving time and judicial resources has manifested itself in other areas as well. Objecting to appellate review of decisions to dismiss without prejudice under R.C.M. 707, Judge Wynne of the NMCCA said: “[Dismissal without prejudice] essentially prescribes that the accused may be tried again in exactly the same manner.” *United States v. Robinson*, 47 M.J. 770 (N.M. Ct. Crim. App. 1997) (Wynne, J., dissenting).

16. The term “prejudice” here appears to be used as a term of art. In this context, prejudice means interference with the appellant’s right to proper clemency consideration by the convening authority, under Article 60, UCMJ.

17. The court relied upon Article 59, UCMJ, as authority for this requirement. This is the same provision upon which appellate courts commonly rely when finding “harmless error.” This standard will essentially shift the bulk of post-trial advocacy from the trial level (before convening authorities, in the form of defense R.C.M. 1105 and R.C.M. 1106 submissions) to the appellate level (before service courts in the form of appellate briefs).

18. *Chatman*, 46 M.J. at 323-24. Even if the court found new matter in an unserved addendum, it would not send the case back if the new matter was neutral or trivial.

19. *United States v. Cornwell*, 49 M.J. 491, 492 (1998).

20. The SJA wrote the SJA PTR and properly served it on the defense. After receiving the defense submissions, the SJA wrote an addendum to the SJA PTR, but did not include any new matter requiring service on the defense. The defense did not challenge the post-trial process to this point. *Id.*

21. *Id.*

22. In the MFR, the SJA stated: “I personally talked to each of the above commanders for . . . [the convening authority]. They each informed me that the recommended to approve the sentence as adjudged. I verbally informed . . . [the convening authority] of their recommendation.” *Id.*

23. *Id.* at 493.

24. *Id.*

25. *Id.*

26. *Id.*

tions.”<sup>27</sup> Although the CAAF did not cite *Chatman* and its requirement for a showing of prejudice, it applied that standard to affirm Captain Cornwell’s conviction and sentence. *Cornwell* is yet another indication that the CAAF is willing to expand *Chatman*’s reach beyond merely errors involving new matter under R.C.M. 1106(f)(7).

In *United States v. Wheelus*,<sup>28</sup> the CAAF further expanded *Chatman*’s reach. First, the court applied the *Chatman* threshold to all errors in the convening authority’s post-trial review” process.<sup>29</sup> Second, the court tapped the courts of criminal appeals to take the first opportunity to remedy errors.<sup>30</sup>

In *Chatman*, the CAAF said that if the accused made a colorable showing of prejudice, the court would not speculate on what the convening authority would have done. Again, this deference to the convening authority showed the depth of the CAAF’s dedication to allowing the convening authority—the only one in the post-trial process with clemency power—the chance to exercise that awesome and unfettered power.

*Wheelus* marks an historic turning point. For forty years, the CAAF has told practitioners that the convening authority is the accused’s best chance for clemency.<sup>31</sup> In *Wheelus*, the CAAF

explicitly questioned whether a *different* convening authority, years after the trial, who does not know the case, the accused, the commanders, or the SJA involved, may truly be the accused’s best chance for clemency.<sup>32</sup> The CAAF reasoned that sending the case back to such a convening authority would also be a waste of judicial resources. Drawing upon the service courts’ authority in Article 66(c), UCMJ, and R.C.M. 1106(d)(6), the CAAF fashioned a way to give the service courts the first opportunity to remedy post-trial errors. By allowing the service courts to remedy the error post-trial, the court partially abandoned the forty-year tradition of supporting the convening authority’s clemency power.<sup>33</sup>

Related to this second aspect of *Wheelus*, and its impact on the convening authority’s clemency power, is the CAAF’s creation of limited quasi-clemency power in the service courts under the guise of Article 66(c), UCMJ, and R.C.M. 1106(d)(6). Even though the CAAF specifically said that the appellate courts do not have clemency power and that clemency was “an [e]xecutive function” exercised by the convening authority,<sup>34</sup> it directed the service courts to “remedy the error and provide meaningful relief.”<sup>35</sup> True devotion to the clemency power of the convening authority would require a remand in every case in which there was error in the convening author-

27. *Id.*

28. The CAAF decided *Cornwell* on 1 October 1998 and *Wheelus* on 30 September, 1998.

29. *United States v. Wheelus*, 49 M.J. 283, 288 (1998). Some courts appear to be having trouble applying the *Chatman / Wheelus* standards. For example, in *United States v. Leslie*, the accused, a Marine, pleaded guilty to unauthorized absence. *United States v. Leslie*, 49 M.J. 517 (N.M. Ct. Crim. App. 1998). At trial, the military judge asked the defense counsel what awards and ribbons the accused was authorized to wear. The defense counsel listed awards, but did not include a Combat Infantryman’s Badge (CIB) from the accused’s prior Army service. The SJA did not include the award in the SJA PTR. The defense did not comment on the omission. On appeal, the accused alleged plain error, citing *United States v. Demerse*. See *United States v. Demerse*, 37 M.J. 488 (C.M.A. 1993). Citing *Wheelus* and *Chatman*, the NMCCA said the accused had not met the threshold test and had not made a colorable showing of prejudice. The NMCCA said that Private First Class Leslie needed to “articulate why . . . the mention of this award [the CIB] in the SJAR would have made a difference to the convening authority.” *Leslie*, 49 M.J. at 520. It seems that the NMCCA misses the point. *Chatman* says that the accused need only demonstrate “prejudice” by stating what, if anything, he would have submitted to “deny, counter, or explain” the error in (as expanded by *Wheelus*) the post-trial process. *United States v. Chatman*, 46 M.J. 283, 323 (1997) (citing *United States v. Leal*, 44 M.J. 235, 237 (1996)). If the accused did so, the court would return the matter to the convening authority (CA), since clemency is an executive function and the court would not speculate on what would make a difference to the convening authority. The “prejudice” here is to the accused’s right to have the CA make a clemency determination, which includes the additional information that the accused demonstrates he would have submitted. The whole point of *Chatman* was to avoid sending cases back to the CA when the accused would not have submitted anything new; therefore, his right to a fair clemency determination has not been “prejudiced.” *Wheelus* did not change the standard; it merely said the courts of criminal appeals could take action to remedy the situation, instead of an automatic return to the CA. When *Wheelus* said that if there was no prejudice, the CA should say so, it meant that to apply to situations where the accused has not shown “what, if anything, [he would submit to] deny, counter, or explain” the mistake in the post-trial process. In *Leslie*, the appellant alleged that he would have told the convening authority about his CIB. This should have been sufficient “prejudice” (as the term is used in *Chatman* and *Wheelus*) to satisfy the low threshold.

30. *Wheelus*, 49 M.J. at 288-89.

31. *United States v. Wilson*, 26 C.M.R. 3 (C.M.A. 1958).

32. *Wheelus*, 49 M.J. at 288.

33. In *Wheelus*, the CAAF did not go so far as to question the utility or continued vitality of the convening authority’s clemency power at initial action under R.C.M. 1107. The CAAF’s statement in *Wheelus* just recognizes reality, that sending cases back to the convening authority—years after all the players have changed—most likely will not result in any change to appellant’s ultimate position.

34. *Wheelus*, 49 M.J. at 289.

35. *Id.* The CAAF also empowers the service courts to find harmless error, something that Judge Crawford has espoused. See *United States v. Catalani*, 46 M.J. 325, 330 (1997) (Crawford, J., dissenting). In *Catalani*, Judge Crawford assumed that the SJA injected new matter and did not inform the convening authority of clemency submissions. Nevertheless, she asked “were these errors harmless?” The CAAF appears to have some discomfort with this position, since later in the same paragraph, it tells the service courts to either provide meaningful relief or “return the case to The Judge Advocate General concerned for a remand to a convening authority . . . .” *Id.*

ity's post-trial process. No appellate court, however, can tell what would or would not "push a convening authority's button."

In summary, *Chatman* created a new approach to dealing with allegations of new matter in the addendum to the SJA PTR. *Cornwell* extended that approach to R.C.M. 1107. *Wheelus* took the last step of applying the *Chatman* approach to all errors in the convening authority's post-trial process,<sup>36</sup> expanded the role of the service courts, and anointed them with limited quasi-clemency powers. This trilogy of cases shows the CAAF's willingness to move away from forty years of previous precedent holding that the convening authority is the last best chance for clemency. Taking a very pragmatic approach when faced with the continued onslaught of cases involving post-trial error, the CAAF now appears willing to recognize a quasi-clemency power in the service courts. This power serves as a substitute for a new convening authority action, which it recognizes as—in many cases—an exercise in judicial futility.

The effect of these decisions will be to shift the burden of post-trial advocacy from the trial defense counsel (through post-trial submissions under R.C.M. 1105 and R.C.M. 1106) to the appellate defense counsel (through briefs at the appellate level). The appellate defense counsel will now assist the appellant in clearing the low *Chatman* threshold of demonstrating prejudice. Once cleared, the appellant will again have to rely on the appellate defense counsel to carry the ball in front of the service court, which, in light of *Wheelus*, has the first opportunity to remedy the situation.

Whether the CAAF will further expand appellate authority in the area of post-trial appellate practice remains to be seen. Nevertheless, unless the CAAF is willing to interpret the words "entire record" in Article 66(c), UCMJ, to include matters from outside the record, it should not be able to further expand the quasi-clemency power it gave to the service courts in *Wheelus*.

## Plain Error: It's Not As Obvious As You Might Think

In *United States v. Powell*,<sup>37</sup> the CAAF tried to sort out the standard (and the burdens) that appellate courts should apply when dealing with errors not preserved by an objection at trial. One must first understand the review process in the civilian and military appellate systems before trying to understand *Powell*.

### *Civilian Standards for Appellate Review*

As a general rule of appellate practice, an alleged error that is not objected to at trial is considered forfeited,<sup>38</sup> unless it is "plain error."<sup>39</sup> In federal criminal practice, Federal Rule of Evidence (FRE) 103(a) provides that errors that are not preserved by objection at trial are forfeited.<sup>40</sup> Federal Rule of Evidence 103(d) mitigates this "object or forfeit" rule by allowing appellate courts to notice errors to which there was no objection at trial, provided the error is "plain" and "affect[s a] substantial right[]." <sup>41</sup>

Supreme Court decisions have further explained "plain error" in federal criminal practice as covering "(1) error[s], (2) that [are] plain, and (3) that affect[] substantial rights. If these three conditions are met, an appellate court may exercise its discretion to notice a forfeited error, but only if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings."<sup>42</sup>

### *Military Standards for Appellate Review*

Although the military has no equivalent to Federal Rule of Criminal Procedure 52, Military Rule of Evidence (MRE) 103(d) is based on FRE 103(d), which, in turn, was taken from Federal Rule of Criminal Procedure 52.<sup>43</sup> In the military, the same "object or forfeit" rule applies to errors, via MRE 103(a). As in federal criminal practice, MRE 103(d) mitigates the "object or forfeit" rule and allows appellate courts to notice

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36. After describing new matter in the addendum, "lawyer problems," and errors in the SJA PTR as three areas that "bedevil" post-trial practice, the CAAF established a three-step process for resolving those claims. "First, the appellant must allege the error at the Court of Criminal Appeals. Second the appellant must allege prejudice as a result of the error. Third, the appellant must show what he would do to resolve the error if given such an opportunity." *Wheelus*, 49 M.J. at 288.

37. 49 M.J. 460 (1998).

38. Although the CAAF in *Powell* uses the term "waiver" to describe the effect of failing to object at trial to an alleged error, the more accurate term is "forfeiture." See *United States v. Olano*, 507 U.S. 725, 733 (1993).

39. See *id.* at 731; FED. R. EVID. 103(a),(d); FED. R. CRIM. P 52(b); MCM, *supra* note 6, MIL. R. EVID. 103(a), (d); *Powell*, 49 M.J. at 462-63.

40. FED. R. EVID. 103(a). This rule states that "error may not be predicated upon a ruling . . . unless a substantial right of the party is affected, and (1) Objection. In case the ruling is one admitting evidence, a timely objection . . . appears of record . . ." *Id.*

41. *Id.* 103(d). This rule states that "nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court." *Id.* This rule is based on Federal Rule of Criminal Procedure 52(b), which says states that "plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." FED. R. EVID. 103(d) Advisory Committee Notes.

42. See *Johnson v. United States*, 520 U.S. 461, 462 (1997). This article will refer to the first three steps in this analysis as "civilian plain error." This article refers to civilian plain error, plus the fourth point which triggers its application, as "civilian plain error plus." See also *Olano*, 507 U.S. at 725; *United States v. Young*, 470 U.S. 1 (1985); *United States v. Atkinson*, 297 U.S. 157 (1936).

plain errors that “materially prejudice substantial rights [of the accused] . . . .”<sup>44</sup> Military Rule of Evidence 103(d) is effectively identical to FRE 103(d), substituting the terms “material[] prejudice”<sup>45</sup> to a substantial right in place of the civilian term “affects” a substantial right.<sup>46</sup>

Article 66(c), UCMJ, limits the ability of the courts of criminal appeals to affirm a case.<sup>47</sup> At the opposite end of the spectrum, Article 59(a), UCMJ, determines when the courts of criminal appeals and the CAAF can reverse a case.<sup>48</sup>

#### *Powell and Plain Error Plus*

In *Powell*, the CAAF attempted to clarify whether Article 59(a), UCMJ, is a mandatory trigger or just a minimum threshold for appellate action (to which the fourth point of the “civilian plain error plus” analysis from *United States v. Olano*<sup>49</sup> and *United States v. Johnson*<sup>50</sup> is applied).

First, the CAAF said that because of Article 66(c), UCMJ, the courts of criminal appeals do not need to rely on the “plain error” analysis (military or civilian) to notice errors in courts-martial.<sup>51</sup> Because of Article 59(a), UCMJ, however, the courts of criminal appeals can only reverse if they find an error that materially prejudices a [substantial right](#).<sup>52</sup>

Next, the CAAF said that because the military plain error standard (error to the material prejudice of a substantial right) was higher than the requirement for civilian plain error (error which only *affects* a substantial right), satisfying the *Johnson/*

*Olano* civilian plain error analysis does not equal military plain error.<sup>53</sup> In no uncertain terms, the CAAF told the service courts not to use the civilian plain error standard when determining plain error in the military.

While the CAAF does seem clear that the four-point “military plain error plus” analysis applies to review at the CAAF,<sup>54</sup> the court is not clear whether that four-point analysis applies at the service court level. As discussed below, appellate counsel could make valid arguments that support and oppose the “military plain error plus” analysis at the service court level. The CAAF will need to address this issue directly before the service courts and appellate counsel can apply plain error analysis with certainty.

#### *“Military Plain Error Plus” at the Service Courts—Opposed*

In *Johnson/Olano*, the Supreme Court said that even when an appellate court finds civilian plain error, it need not act on it unless that plain error “seriously affects the fairness, integrity, or public reputation of judicial proceedings.”<sup>55</sup> In *Powell*, the CAAF said that “*Johnson* applies only to courts exercising discretionary powers of review.”<sup>56</sup> Because the service courts are not courts of discretionary review,<sup>57</sup> the CAAF implied that the fourth *Johnson/Olano* point does not apply in the service courts; the service courts should apply military plain error analysis (Article 59(a), UCMJ), not “military plain error plus.”

43. *United States v. Powell*, 49 M.J. 460, 462-63 (1998).

44. See MCM, *supra* note 6, MIL. R. EVID. 103(d). This article refers to this standard as “military plain error.”

45. These terms are substituted to be consistent with Article 59(a), UCMJ. *Powell*, 49 M.J. at 462.

46. See FED. R. CRIM. P 52(b); FED. R. EVID. 103(d).

47. UCMJ art. 66(c) (West 1999). The courts of criminal appeals can only affirm findings and sentences that they find “correct in law and fact and determine[], on the basis of the entire record, should be approved.” *Id.* See *Powell*, 49 M.J. at 464.

48. UCMJ art. 59(a). Military appellate courts can only reverse if they find an error that “materially prejudices the substantial rights of the accused.” *Id.*

49. 507 U.S. 725 (1993)

50. 520 U.S. 461 (1997).

51. *Powell*, 49 M.J. at 464.

52. *Id.*

53. *Id.* at 465.

54. “[The alleged error] falls short of the standard for prejudicial plain error established by Article 59(a) and *Fisher*.” *Id.* See *United States v. Fisher*, 21 M.J. 327, 328 (C.M.A. 1986) (quoting *United States v. Atkinson*, 297 U.S. 157, 160 (1936)). The language in *Fisher* eventually became the fourth point in *Johnson/Olano*: that plain errors should only be remedied when they “seriously affect the fairness, integrity, or public reputation of judicial proceedings.” *Id.*

55. *Johnson v. United States*, 520 U.S. 461, 462 (1997).

56. *Id.* at 465.

57. UCMJ art. 66 (West 1999). Query whether the CAAF is completely a court of discretionary review, given its statutory mission under Article 67, UCMJ.

The plain language of Article 66(c), UCMJ, is also consistent with not applying “military plain error plus” analysis at the service court level. Article 66(c), UCMJ, is a unique limitation on the power of the service courts to affirm; however, the CAAF is not under such a limitation. The “military plain error plus” analysis would determine a violation of Article 59(a) (material prejudice to a substantial right), but would not reverse because the error did not “seriously affects the fairness, integrity, or public reputation of judicial proceedings” (the fourth *Johnson/Olano* point). By its very terms, however, Article 66(c), UCMJ, only allows the service courts to affirm if they find that the findings and sentence are *both* “correct in law and fact” *and* “should be approved.” Finding an error, which triggers Article 59(a), UCMJ, precludes the service courts from affirming the findings and the sentence based on the fourth *Johnson/Olano* point. In such a case, the findings and sentence are not “correct in law.”

#### “Military Plain Error Plus” at the Service Courts—In Favor

Although defense appellate counsel may argue for only the military plain error analysis, several service court opinions since *Powell*<sup>58</sup> have applied the “military plain error” plus analysis. The CAAF is correct that the service courts, by virtue of Article 66(c), UCMJ, are not limited to noticing only plain errors that make it through trial without objection.<sup>59</sup> That freedom to notice other errors, however, does not necessarily translate into a *requirement* that the service courts act on those

errors.<sup>60</sup> This lack of a requirement to act on errors is at the heart of the fourth point of both the military and the “civilian plain error plus” analysis. The policy factors that support this fourth point<sup>61</sup> apply equally to the service courts.<sup>62</sup> Additionally, applying only the military plain error analysis at the service court level while applying the “military plain error plus” analysis at the CAAF risks depriving a deserving appellant of his due relief.<sup>63</sup>

#### The Burdens in Appellate Review

The CAAF said that in the military plain error analysis, the accused has the burden of persuasion to establish that there was plain error.<sup>64</sup> Once the accused has done so, the burden shifts to the government to show lack of prejudice.<sup>65</sup>

Although the CAAF cites *Olano* for the above statement of shifting burdens, *Olano* supports an opposite conclusion—that the accused always has the burden to establish plain error. In *Olano*, the Supreme Court was very clear in stating the difference between a harmless error analysis and plain error analysis.<sup>66</sup> The harmless error analysis is based on Federal Rule of Criminal Procedure 52(a), when the defense preserves error at trial by objecting. In such a case, the government has the burden to show that the error was not prejudicial.<sup>67</sup> In the plain error analysis (based on FRE 103 and FRCP 52(b)), “the defendant rather than the government bears the burden of persuasion with respect to prejudice.”<sup>68</sup> Appellate government counsel

58. *United States v. Damico*, No. 9701016, 1999 CCA LEXIS 17 (N.M. Ct. Crim. App. Jan. 22, 1999); *United States v. Ruiz*, No. 529454, 1998 CCA LEXIS 495 (A.F. Ct. Crim. App. Dec. 21, 1998); *United States v. Lanier*, No. 9700598, 1999 CCA LEXIS 52 (Army Ct. Crim. App. Apr. 2, 1999).

59. See UCMJ art. 66(c); *Powell*, 49 M.J. at 464. See also *United States v. Claxton*, 32 M.J. 159, 162 (C.M.A. 1991); *United States v. Riley*, 47 M.J. 276, 281 (1997)(Gierke, J., concurring).

60. Although Article 66(c), UCMJ says that the service courts cannot affirm unless the findings and sentence are “correct in law and fact . . . .” The responding argument goes something like this: since the fourth *Johnson/Olano* point is the law, as stated by the Supreme Court, finding an error (although satisfying Article 59(a)) does not “seriously affect the fairness, integrity, or public reputation of judicial proceedings” makes the findings and sentence “correct in law.” This finding allows the service court to affirm, under Article 66(c), UCMJ.

61. The bottom line for the military and civilian plain error plus analysis is that the appellate court will not grant relief because of an error (even a plain one) unless there would be a “miscarriage of justice” without such relief. See *United States v. Frady*, 456 U.S. 152, 162 n.14 (1982). The balance is between “our need to encourage all trial participants to seek a fair and accurate trial the first time around [by encouraging objections (and resolution at the trial level) through forfeiture] against our insistence that obvious injustice be promptly redressed.” *Id.* at 162.

62. Even though the service courts *can* (because of Article 66(c)) notice errors that would otherwise be forfeited, does that mean they *should* do something about them? The lawyer in *Jurassic Park* was involved in doing something (creating dinosaurs) because he *could* (rather than because he *should*—at least according to Jeff Goldblum’s character, Dr. Malcolm), and look what happened to him. As Chief Justice Rehnquist observed in his closing comment in *Johnson*, sometimes reversing the conviction (even in the face of error) would run afoul of the fourth *Johnson/Olano* point. *Johnson v. United States*, 520 U.S. 461, 462 (1992).

63. Consider the following situation with military plain error analysis at the service court and military plain error plus analysis at the CAAF. Assume that the service court finds no plain error, using the military plain error analysis. On review, the CAAF says that the service court erred when it did not find plain error, but applying military plain error plus, it determines that the appellant’s case has not been harmed and affirms. In such a case, it seems that the CAAF essentially deprived the appellant of the relief that he should have had at the service court. This insight comes from Lieutenant Colonel Eugene Milhizer, Government Appellate Division. Telephone Interview with Major Patricia Ham, Government Appellate Division, United States Army Legal Services Agency (5 Apr. 1999) [hereinafter Ham Interview].

64. *Johnson*, 520 U.S. at 464-65.

65. *Id.*

66. *Id.*

should cite *Olano* as authority that in the plain error arena, the onus is on the defense to establish the required elements for relief.

### *Powell and Chatman / Wheelus: Same Song, Second Verse?*

In *Chatman* and *Wheelus*, the CAAF said that it was not going to take any remedial action based on post-trial errors unless the appellant could show prejudice. *Powell*, with its “military plain error plus” analysis, also requires the appellant to demonstrate prejudice to obtain relief. *Powell* seems to continue the CAAF’s *Chatman / Wheelus* trend to take no action unless the appellant can demonstrate that his ox has been gored.<sup>69</sup> Absent such a demonstration, the CAAF’s position appears to be that taking corrective action is “not a productive judicial exercise.”<sup>70</sup>

### Who Can or Should Write the SJA PTR?

The person who gives the convening authority post-trial advice—in the form of the SJA PTR—is supposed to be neutral.<sup>71</sup>

Several recent decisions have attempted to set some additional limits on who writes the SJA PTR.

In *United States v. Johnson-Saunders*,<sup>72</sup> the assistant trial counsel (ATC) wrote the SJA PTR in her capacity as the acting chief of military justice. She forwarded her recommendation to the SJA, who added one line indicating he had reviewed the record of trial and the recommendation, and that he concurred.<sup>73</sup> On appeal, the defense raised the disqualification issue, arguing that the author could not be impartial because of her significant involvement in the trial.<sup>74</sup> Not surprisingly, the CAAF found the author clearly disqualified under Article 6(c), UCMJ, and R.C.M. 1106(b). Accordingly, the CAAF set aside the convening authority’s action, and returned the case for a new SJA PTR and convening authority action.<sup>75</sup>

The CAAF’s opinion in *Johnson-Saunders* is significant for two reasons. First, the court held the author of the PTR disqualified even though she had routed the SJA PTR through an apparently *qualified* SJA, who concurred in her assessment. Second, the CAAF also articulated what may become the standard for disqualification in non-statutory situations: where the author’s “extensive participation . . . would cause a disinterested observer to doubt the fairness of the post-trial proceed-

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67. *Id.* at 731, 734.

68. *Id.* To drive home that point, the Supreme Court also said:

[R]espondents have not met their burden of showing prejudice under Rule 52(b). Whether the [g]overnment could have met its burden of showing the absence of prejudice, under Rule 52(a), if respondents had not forfeited their claim of error, is not at issue here. This is a plain-error case, and it is the respondents who must persuade the appellate court that the [error] was prejudicial.

*Id.* at 741.

FED. R. CRIM. P. 52(a) says: “HARMLESS ERROR. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.” Earlier in *Olano*, the court referred to Federal Rule of Criminal Procedure 52(a) as the provision “which governs unforfeited errors.” *Id.* at 731. In *Powell*, the CAAF appears to have mixed harmless error and plain error analysis in reaching its burden-shifting conclusion.

69. Major Patricia Ham made this astute observation. Ham Interview, *supra* note 63.

70. *United States v. Chatman*, 46 M.J. 321, 323 (1997).

71. *See United States v. Rice*, 33 M.J. 451 (C.M.A. 1991); *United States v. Spears*, 48 M.J. 768 (A.F. Ct. Crim. App. 1998), *overruled in part United States v. Owen*, ACM 33140 (A.F. Ct. Crim. App. Dec. 3 1998).

72. 48 M.J. 74 (1998). Note also Judge Crawford’s exasperation with mistakes in the post-trial process and her suggestion that The Judge Advocates General or their equivalents, as well as rating officials, be told who the SJA was at the time of the error.

73. *Id.* at 75. It is apparently not the practice of the Air Force to have the author actually sign the SJA PTR. *See MCM, supra* note 6, R.C.M. 1106(c). The SJA PTR and defense clemency matters, however, are commonly forwarded to the convening authority by an Air Force Form 1768. This form does contain the signatures and recommendations of all those who have been involved in the post-trial process. Telephone Interview with Major Christopher vanNatta, Instructor, Civil Law Department, U.S. Air Force Judge Advocate General’s School (2 March 1999). Major vanNatta also pointed out that *Air Force Instruction 51-201*, specifically cautions Air Force SJAs to “[a]void use of the staff summary sheet in conjunction with the SJA’s [Post-trial] Recommendation . . . .” U.S. DEP’T OF AIR FORCE INSTR. 51-201, ADMINISTRATION OF MILITARY JUSTICE (3 Oct. 1997). That paragraph goes on to say that if the staff summary sheet is used to forward the case to the convening authority for action, it needs to be served on the defense “for comment and attached to the record of trial.” *Id.*

74. *Johnson-Saunders*, 48 M.J. at 75. The ATC swore the accuser, served the charges on the accused, conducted a portion of the voir dire (including a challenge for cause), examined witnesses during the findings portion, took the lead on the government sentencing case and made the sentencing argument for the government (which included a request that the court-martial impose the maximum sentence at that special court-martial).

75. *Id.* This case preceded *Wheelus*’ application of *Chatman* to all post-trial errors. Otherwise, the CAAF would have required the appellant here to demonstrate prejudice by showing what she would have said or done to respond to the fact the SJA PTR had been written by the ATC.

ings.”<sup>76</sup> Staff judge advocates must make sure that they either author the SJA PTR themselves or ensure that the actual author is not disqualified under either the Article 6(c)/R.C.M. 1106(b) standard or the new standard articulated by the CAAF in *Johnson-Saunders*. Defense counsel should determine who actually wrote the PTR and decide if they have a basis to object to the PTR.<sup>77</sup>

Although the SJA may personally prepare the PTR and not be disqualified under Article 6(c), UCMJ, or R.C.M. 1106(b), the SJA must be wary of other potential pitfalls that might prevent his further participation in the case post-trial.

Generally, preparation of the pretrial advice by itself is not enough to disqualify an SJA from preparing the PTR.<sup>78</sup> Nevertheless, intemperate remarks in the pretrial advice may do so. In *United States v. Plumb*,<sup>79</sup> the Air Force Court of Criminal Appeals (AFCCA) reviewed the SJA’s pretrial advice and disqualified him based on comments contained therein. Captain Plumb was an Air Force officer, serving with the office of special investigations, who was eventually convicted of adultery and fraternization.<sup>80</sup> The acting SJA who prepared the pretrial advice characterized the accused “[l]ike a shark in the waters, [who] goes after the weak and leaves the strong alone.”<sup>81</sup> The AFCCA, finding that the acting SJA’s comments were “so contrary to the integrity and fairness of the military justice system that [they had] no place in the pretrial advice,”<sup>82</sup> disqualified the acting SJA from preparing the PTR and set aside the findings and the sentence.<sup>83</sup>

Finally, in *United States v. Spears*,<sup>84</sup> the AFCCA expanded the universe of documents to which disqualification may apply to include government responses to defense requests for waiver of automatic forfeitures under Article 58b, UCMJ.

Understanding *Spears* first requires understanding the case’s byzantine chronology. On 9 May 1997, a special court-martial convicted Airman Spears of wrongful appropriation and writing bad checks.<sup>85</sup> He was sentenced to a reduction to E-1, confinement for five months, a Bad-Conduct Discharge, and forfeiture of \$600 pay per month for six months.<sup>86</sup> On 16 May 1997, the accused requested waiver of the automatic forfeitures under Article 58b, UCMJ.<sup>87</sup> On 30 May 1997, the deputy SJA (DSJA) wrote the PTR, which did not address the waiver request.<sup>88</sup> The government served the SJA PTR on the defense. On 2 June 1997, the DSJA performed a legal review of the waiver request, and drafted a recommendation to the convening authority that he deny the request.<sup>89</sup> On 6 June 1997, the trial counsel (TC) did a staff summary sheet forwarding the DSJA’s legal review and recommendation. On the staff summary sheet she also recommended that the convening authority deny the request.<sup>90</sup> Neither the DSJA’s legal review and recommendation, nor the TC’s staff summary sheet, were served on the defense.<sup>91</sup> On 10 June 1997, after considering both recommendations, the convening authority denied the waiver request.<sup>92</sup> On 19 June 1997, the defense submitted its post-trial submissions, which did not mention the waiver denial. There was no addendum to the SJA PTR.<sup>93</sup>

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76. *Id.*

77. Should this issue be raised on appeal, appellate defense counsel need to comply with the *Chatman* threshold, as expanded by *Wheelus*, and tell the appellate court what the defense would have said to respond to the disqualification issue.

78. See *United States v. Collins*, 6 M.J. 256, 257 (C.M.A. 1979) (citing *United States v. Engle*, 1 M.J. 387 (C.M.A. 1976)).

79. 47 M.J. 771 (A.F. Ct. Crim. App. 1997).

80. *Id.* at 773.

81. *Id.* at 781.

82. *Id.*

83. The AFCCA set aside the findings and sentence based on additional errors beyond just the ASJA’s disqualification from preparing the SJA PTR. The AFCCA called this case an “often confusing testament to how not to conduct criminal investigations and prepare courts-martial for trial.” *Id.* at 773.

84. 48 M.J. 768 (A.F. Ct. Crim. App. 1998), *overruled in part* *United States v. Owen*, ACM 33140 (A.F. Ct. Crim. App. Dec. 3, 1998).

85. *Spears*, 48 M.J. at 770.

86. *Id.*

87. *Id.* Because Airman Spears’ adjudged forfeitures were less than the two-thirds automatic forfeitures under Article 58b, UCMJ, he requested the waiver.

88. *Id.* at 771.

89. *Id.*

90. *Id.*

91. *Id.*

On appeal, Airman Spears argued that the TC should not have been allowed to advise the convening authority on the waiver request, under Article 6(c), UCMJ, and R.C.M. 1106(b).<sup>94</sup> The AFCCA agreed with Airman Spears. The court found that the waiver request was a clemency submission under Article 60.<sup>95</sup> Because the “general principle underlying R.C.M. 1106(b) on disqualification is that the legal officer . . . [advising] the convening authority must be neutral,”<sup>96</sup> the AFCCA read Article 6(c) to “establish a rule of basic fairness which prevents a trial counsel from preparing *any* legal review for, or making *any* recommendation to, the convening authority at *any* stage of the post-trial process . . .” (emphasis added).<sup>97</sup> Whether the other service courts or the CAAF will join the AFCCA in expanding the reach of the disqualification provisions is an open question. The AFCCA’s analysis of the problem is sound. A request for waiver is essentially a request for clemency. The clemency process presumes that the government counsel who advises the convening authority on this issue is neutral (hence Article 6(c), UCMJ and R.C.M. 1106(b)). Therefore, legal advice to the convening authority on waiver requests should likewise come from a neutral source. Until the other service courts and the CAAF address this issue, government and defense would be well served to follow the AFCCA’s analysis from *Spears*.<sup>98</sup>

**Legal Error and the SJA Response To It:  
An Offer You Can’t Refuse**

At times, SJA’s may feel compelled to respond to allegations of legal error the defense may raise in post-trial submissions. Many times, that response does little more than inject “new

matter” into the process. Rule for Courts-Martial 1106(d)(4) makes clear that an SJA need only: (1) identify the legal error; (2) state his agreement or disagreement with the allegation; and (3) state whether, in his opinion, corrective action is necessary based on the allegation.<sup>99</sup>

In *United States v. McKinley*,<sup>100</sup> the CAAF reemphasized that responses to legal error should not be tools for rebutting the defense assertion. In his personal post-trial statement, Airman McKinley referred to differences in treatment among those involved in the offenses with which he was charged.<sup>101</sup> The appellant’s trial defense counsel did not directly raise the issue as legal error in his post-trial submission.<sup>102</sup> The SJA did not respond to the appellant’s personal statement as legal error, but as an assertion of sentence disparity.<sup>103</sup> The appellate defense counsel alleged a violation of R.C.M. 1106(d)(4) for the SJA’s failure to respond to an allegation of selective prosecution.<sup>104</sup> The CAAF determined that under the circumstances, the appellant had not raised selective prosecution and that the SJA was justified in treating the appellant’s personal assertion as one of sentence disparity.<sup>105</sup>

Even though the CAAF found that the appellant and his defense counsel did not reasonably raise legal error, which would have required the SJA to respond, Judge Cox provided counsel with a format for SJA responses to legal error:

The accused has asserted an issue of [\_\_\_\_\_].  
I disagree that the accused was [\_\_\_\_\_]  
or that corrective action is required.<sup>106</sup>

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92. *Id.* at 772.

93. *Id.*

94. *Id.* at 773.

95. *Id.*

96. *Id.* at 774 (citing *United States v. Rice*, 33 M.J. 451 (C.M.A. 1991)).

97. *Id.* at 775.

98. Certainly this puts small offices, with limited government staff, in a bind. Absent a change in Article 6(c), UCMJ, and R.C.M. 1106, the SJA at the smaller offices may have to be more directly involved in preparing SJA PTRs.

99. MCM, *supra* note 6, R.C.M. 1106(d)(4).

100. 48 M.J. 280 (1998).

101. *Id.* at 281. Airman McKinley said he had been “maligned by AB [L], a white female. And when the truth came out . . . the government turned a blind eye to her crimes and turned on me, a black male.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* at 281-82.

Staff judge advocates should use this as a model for responses to allegations of legal error contained in defense post-trial submissions.

### “New Matter”: I Know It When I See It . . . .

Two cases this year significantly expanded the areas from which “new matter” can creep into the post-trial process.

In *United States v. Spears*,<sup>107</sup> discussed above as it relates to disqualification, the AFCCA expanded the reach of “new matter” to government responses to requests for waiver of automatic forfeitures. In *Spears*, both the DSJA and the TC referred to matters outside the record of trial when advising the convening authority on Airman Spears’ request for waiver.<sup>108</sup> On appeal, Airman Spears argued that this was new matter under R.C.M. 1106(f)(7), which required service on the defense for comment.<sup>109</sup> Although the AFCCA found that R.C.M. 1106(f)(7) was strictly inapplicable here,<sup>110</sup> it did “apply concepts of basic fairness and procedural due process to such situations. The clear purpose behind [R.C.M. 1106(f)(7)] was to give the defense an opportunity to respond to the SJA’s position in post-trial legal advice provided to the convening authority.”<sup>111</sup> The AFCCA determined that such concepts “prevent[] the SJA from bringing up new issues from outside the record to the convening authority and getting the last say without the defense even knowing about it.”<sup>112</sup> Because the government’s responses to the defense waiver request contained new matter and were not served on the defense, the AFCCA set aside the convening authority’s action and returned the case to the convening authority for a new SJA PTR and convening authority action.

In *United States v. Cornwell*,<sup>113</sup> the CAAF addressed another potential source of new matter—SJA / convening authority conversations.

Prior to taking this case to the convening authority for initial action, the SJA bundled together the SJA PTR, defense submissions, and the addendum. Accompanying these documents was a staff summary sheet upon which the convening authority wrote a note to the SJA asking him what subordinate commanders thought about clemency. The SJA added a typewritten MFR that stated:

I personally talked to each of the above commanders for . . . [the convening authority]. They each informed me that they recommended approving the sentence as adjudged. I verbally informed . . . [the convening authority] of their recommendations.

The CAAF disagreed with Captain Cornwell that such verbal conversations were new matter under R.C.M. 1106(f)(7). Citing the change to the post-trial process enacted by the Military Justice Act of 1983,<sup>114</sup> the CAAF said that to require the SJA to memorialize and serve on the defense any oral conversations between the SJA and the convening authority would be to “transform the [SJA PTR] and addenda thereto into something that Congress and the President intended to eliminate.”<sup>115</sup>

The CAAF, however, did state that such conversations might run afoul of R.C.M. 1107(b)(3)(B)(iii).<sup>116</sup> The CAAF assumed (without deciding) that the subordinate commanders’ recommendations should have been served on the defense for review and comment under that Rule, but found the error harmless.<sup>117</sup>

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106. *Id.* at 281.

107. 48 M.J. 768 (A.F. Ct. Crim. App. 1998).

108. Both the DSJA and the TC called the appellant’s wife a co-conspirator in his offenses and called both the appellant and his wife bad parents. *Id.* at 771.

109. The government did not serve either the DSJA legal review and recommendation or the TC’s staff summary sheet and recommendation on the defense.

110. Because the “legal advice provided [related to] issues which [arose] before the SJAR was written . . . .” *Spears*, 48 M.J. at 775, *overruled in part* *United States v. Owen*, ACM 33140 (A.F. Ct. Crim. App. Dec. 3, 1998).

111. *Id.* at 775.

112. *Id.*

113. *United States v. Cornwell*, 49 M.J. 491 (1998). As discussed, Captain Cornwell pleaded guilty to false official statement, damaging government property and conduct unbecoming an officer. The court-martial sentenced him to a dismissal, confinement for two months, and forfeiture of all pay and allowances for two months. After trial, the SJA prepared and served the SJA PTR, and the defense submitted matters. The SJA prepared an addendum, but did not serve it on the defense. All parties agreed that the addendum did not contain new matters. *Id.*

114. The Act deleted the requirement that the SJA perform a detailed legal review of the case for the convening authority. According to the CAAF, the new “skeletal” SJA PTR “necessarily contemplates that a convening authority may ask questions and expect his SJA to answer them.” *Id.*

115. *Id.*

116. *Id.*

**Ineffective Assistance Post-trial:  
If Only My Lawyer Had . . .**

In *United States v. Cavan*,<sup>118</sup> the AFCCA did an admirable job of laying out for the practitioner what should happen when a client alleges ineffective assistance of counsel (IAC) during the post-trial process. Most defense counsel would not be shocked by the statement that, immediately after trial, many clients blame their defense counsel for their conviction. In such a case, the counsel is in an awkward position of still trying to zealously represent the client, while defending his own honor against the client's IAC accusation.

In *Cavan*, the AFCCA laid out a three-step process for such IAC allegations. First, the defense counsel must confront the client and determine whether the client is sincere in his IAC allegation, or whether he is merely "venting his frustration."<sup>119</sup> This may be an extremely difficult—and a potentially unworkable—distinction to expect the trial defense counsel to help the client draw. Hopefully, the counsel can encourage the client to be forthright with his feelings. Often, a client, while willing to rant against the counsel behind his back, is reluctant to tell the counsel to his face that he is unsatisfied with his representation. A defense counsel should muster all of his advocacy and client control skills to get the client to "come clean" on this issue. Assuring the client that you will not be offended by such an allegation is a good start. Telling the client that you want what is best for him and that if he feels you have been ineffective, you want him to say so might also bring down some barriers to honest communication.

Supervising defense counsel strongly should consider a requirement that trial defense counsel tell them of any allegations of IAC that arise post-trial. As an additional step in the process—or as a substitute for the first step—supervising defense counsel can talk to the client to determine the client's sincerity. Armed with this information, the supervising defense counsel can independently determine the need for substitute defense counsel for post-trial matters. Having the supervising defense counsel discuss this with the client would be preferable and more effective.

Second, the AFCCA stated that defense counsel need to advise the client of his right to conflict-free counsel in the post-trial process.<sup>120</sup> Again, while this step is certainly necessary, it may be better to have the supervising defense counsel discuss this with the client.

Finally, the AFCCA also placed a burden on the SJA, requiring him to notify the defense counsel of any known allegations of IAC, so the defense counsel can resolve them prior to "proceeding with the post-trial process." The SJA should be able to identify conflict-free counsel prior to service of the SJA PTR and authenticated record of trial. There is no point in serving these documents on, and getting defense post-trial submissions from, counsel with a conflict.

While the AFCCA in *Cavan* identified the minimum actions the defense bar should take when faced with an allegation of IAC during the post-trial phase, defense counsel should also notify their immediate supervisors of these allegations. Senior defense counsel should contact the clients themselves to determine whether the allegations are genuine or merely made from frustration. This removes the trial defense counsel from the awkward—and conflicting—position of determining the sincerity of the allegation.

The CAAF reviewed another allegation of IAC during the post-trial phase in *United States v. Sylvester*.<sup>121</sup> Aviation Structural Mechanic Airman Sylvester was convicted at a Special Court-Martial of use and distribution of methamphetamines.<sup>122</sup> On appeal, he alleged that neither his civilian nor his military defense counsel submitted written matters for the convening authority's consideration under R.C.M. 1105 and 1106.<sup>123</sup> Prior to action by the convening authority, however, civilian counsel had arranged a face-to-face meeting with the convening authority for both himself and the appellant's father.<sup>124</sup> During the meetings, the appellant's father asked for clemency, and the civilian defense counsel presented an oral submission to the convening authority, also asking for clemency.<sup>125</sup>

The CAAF looked at R.C.M. 1105 and 1106 and found no requirement that a defense counsel "supplement[] or memorial-

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117. The CAAF effectively applied the *Chaman* standard to this post-trial error; since "there is no hint that the appellant would have anything of substance to offer if a new recommendation and action were ordered, there is [no point to sending this back to the convening authority for a new recommendation and action]." *Id.*

118. 48 M.J. 567 (A.F. Ct. Crim. App. 1998).

119. *Id.* at 569.

120. *Id.*

121. 47 M.J. 390 (1998).

122. *Id.* at 391.

123. *Id.* at 392.

124. *Id.*

125. *Id.*

ize[] [a] personal presentation to the convening authority with a written submission . . . .”<sup>126</sup> Refusing to create such a requirement, although commenting that such supplementation or memorialization would have been “preferable,”<sup>127</sup> the CAAF found no IAC.<sup>128</sup>

### Sentence Conversion: Be Careful What You Ask For . . . .

Rule for Courts-Martial 1107(d)(1) allows a convening authority at initial action to “change a punishment to one of a different nature as long as the severity of the punishment is not increased.” The discussion to R.C.M. 1107(d)(1) cites conversion of a Bad-Conduct Discharge (BCD) to six months of confinement as an example of R.C.M. 1107(d)(1)’s operation. The courts have yet to fully define the outer limits of the convening authority’s conversion power.

In *United States v. Carter*,<sup>129</sup> the CAAF found proper a convening authority’s conversion of a BCD to an additional two years of confinement. Given *Carter*’s unique facts, however, practitioners should not rely on a straight BCD-equals-two years conversion.<sup>130</sup> The CAAF currently has pending before it the case of *Frazier v. McGowan*.<sup>131</sup> Under circumstances substantially different than those in *Carter*,<sup>132</sup> the CAAF has been asked to determine if converting a BCD, two months of restriction and three months of hard labor without confinement to twelve months confinement is in violation of R.C.M. 1107(d)(1).<sup>133</sup>

### Sentence Reassessment: More Power to the Service Courts

In two cases this past year, *United States v. Davis*,<sup>134</sup> and *United States v. Boone*,<sup>135</sup> the CAAF provided counsel with a good synopsis of the appellate court’s power after finding error in the sentencing portion of the case.

Airman Davis was charged with assault with intent to commit rape. At trial, the military judge failed to instruct the members on the lesser-included offense of indecent assault. Finding error and reducing the findings to indecent assault, the AFCCA reassessed the sentence and affirmed. Agreeing with the AFCCA, the CAAF held that a sentence rehearing is not always required when there has been a finding of error during the sentencing phase of the trial.<sup>136</sup>

Discussing the role of the service courts, the CAAF said “[t]he [service] court may reassess a sentence instead of ordering a sentence rehearing, if it ‘confidently can discern the extent of the error’s effect on the sentencing authority’s decision.’”<sup>137</sup>

In his case, Specialist Boone alleged that his counsel was ineffective during the sentencing portion of his court-martial. Again, the CAAF said that upon a finding of error in the sentencing portion of the case, a service court can order a rehearing, if it cannot “reliably determine what sentence should have been imposed at the trial level if the error had not occurred.”<sup>138</sup> If, on the other hand, the service court can determine that the sentence “would have been of at least a certain magnitude”<sup>139</sup>

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126. *Id.* at 393.

127. *Id.*

128. Counsel should be extremely careful in relying only on oral presentations to convening authorities. The 1998 change to R.C.M. 1105 makes clear that the convening authority is only required to consider *written* submissions. While as a practical matter, face-to-face meetings with convening authorities may be beneficial, the convening authority is legally free to completely ignore them.

129. 45 M.J. 168 (1996).

130. In *Carter*, the appellant, a retirement-eligible senior enlisted soldier, asked for disapproval of the discharge in exchange for additional confinement. The accused did not limit the amount of additional confinement he was willing to serve to avoid the discharge (and loss of retirement). The court also noted that the additional two years for disapproval of the discharge saved the appellant \$750,000.00 in retirement benefits.

131. No. 98-8021 (C.A.A.F. 1998)

132. The case is on an appeal of the denial of an extraordinary writ by the Coast Guard Court of Criminal Appeals. See *Frazier v. McGowan*, 48 M.J. 828 (C.G. Ct. Crim. App. 1998) (holding that conversion of a BCD (and several months of restriction and hard labor without confinement) to 12 months of confinement was permissible). In *Frazier*, the appellant was not retirement-eligible, opposed the conversion, and did not receive *any* confinement as part of the adjudged sentence.

133. Note that the CAAF (then known as the Court of Military Appeals) has previously held that converting a BCD to 12 months confinement when the defense successfully requested a discharge in lieu of confinement violates R.C.M. 1107(d)(1). *Waller v. Swift*, 30 M.J. 139 (C.M.A. 1990).

134. 48 M.J. 494 (1998).

135. 49 M.J. 187 (1998).

136. *Davis*, 48 M.J. at 495.

137. *Id.* (citing *United States v. Reed*, 33 M.J. 98, 99 (C.M.A. 1991)).

138. *Boone*, 49 M.J. at 194 (citing *United States v. Sales*, 22 M.J. 305, 307 (C.M.A. 1986)).

absent the error, it can reassess the sentence itself, without ordering a rehearing. If the service court reassess the sentence itself, the CAAF said that the “standard for reassessment is not what would have been imposed at a rehearing, but what would have been imposed at the original trial absent the error.”<sup>140</sup>

In *Boone*, the CAAF again relied on its prior opinion in *United States v. Peoples*,<sup>141</sup> to support the service courts’ ability and power to reassess sentences. Consistent with the CAAF’s other actions in the post-trial area to expand the service courts’ role in the name of expedience and judicial economy, the CAAF quoted *Peoples*: “Furthermore, we are well aware that it is more expeditious and less expensive for the Court of Military Review to reassess the sentence than to order a rehearing and sentence at the trial level.”<sup>142</sup>

While *Davis* and *Boone* are good compilations of the law on sentence reassessment on appeal, *Boone*’s quote from *Peoples* is also another subtle indicator of the underlying current behind many of the CAAF’s decisions relating to post-trial this year—expedience and judicial economy.

## Conclusion

Building on last year’s decision in *Chatman*, the CAAF took two giant steps away from forty years of post-trial precedent in *Cornwell* and *Wheelus*. The CAAF recognized that the convening authority, in certain circumstances, might *not* be the accused’s last, best chance for clemency in the post-trial process. To address this situation, the CAAF effectively gave the service courts quasi-clemency power to take appropriate action in post-trial error cases, rather than sending the case back to the convening authority.

Activism seems to have been the watchword in the post-trial arena within this last year. Whether and to what extent the CAAF and the service courts (particularly the AFCCA) will continue driving headlong into this unmapped area remains to be seen.

139. *Id.*

140. *Id.* at 195 (citing *United States v. Taylor*, 47 M.J. 322, 325 (1997)).

141. 29 M.J. 426 (C.M.A. 1990).

142. *Boone*, 49 M.J. at 195 (citing *Peoples*, 29 M.J. at 429).