

Annual Review of Developments in Instructions—2006

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Introduction

It is a basic rule that instructions must be sufficient to provide necessary guideposts for an “informed deliberation” on the guilt or innocence of the accused.¹

This annual installment of developments on instructions covers cases decided by military appellate courts during the Court of Appeals for the Armed Forces (CAAF) 2006 term.² As with earlier reviews, this article addresses instructional issues involving crimes, defenses, evidence, and sentencing. This article is written primarily for military trial practitioners, and will frequently refer to the relevant paragraphs in the *Military Judges’ Benchbook (Benchbook)*,³ the primary resource for drafting instructions.

Crimes

Deliberate Avoidance and Article 86 Offenses

Although *United States v. Adams*⁴ involved a guilty plea before a military judge alone,⁵ the CAAF’s holding is significant for properly instructing court members on the elements of certain offenses under Article 86.⁶ The CAAF considered whether the deliberate avoidance theory, which has been used in drug offenses,⁷ could be applied to the offense of failing to go to an appointed place of duty.⁸

Private Adams pled guilty to and was convicted of failing to go at the time prescribed to his appointed place of duty, the company armory.⁹ During the providence inquiry, the accused stated that it was his duty to be at the armory at 0630 hours.¹⁰ When asked by the military judge if he knew that he was required to be present at that appointed time and place of duty, the accused said, “I did not know, sir; and I didn’t find out during the day. I deliberately avoided my duties, sir.”¹¹ When the military judge later asked the accused how he deliberately avoided finding out where the rest of the unit was located, he said, “I stayed in my room, sir, instead of, like, trying to find anyone from my platoon or squad or asking the duty if they would have known the whereabouts.”¹²

¹ *United States v. Dearing*, 63 M.J. 478, 479 (2006) (quoting *United States v. Anderson*, 32 C.M.R. 258, 259 (C.M.A. 1962)).

² The 2006 term began on 1 October 2005 and ended on 30 September 2006.

³ U.S. DEP’T OF ARMY, PAM. 27-9, MILITARY JUDGES’ BENCHBOOK (15 Sept. 2002) [hereinafter BENCHBOOK].

⁴ 63 M.J. 223 (2006).

⁵ *Id.*

⁶ UCMJ art. 86 (2005).

⁷ See, e.g., *United States v. Brown*, 50 M.J. 262 (1999); *United States v. Newman*, 14 M.J. 474 (C.M.A. 1983).

⁸ *Adams*, 63 M.J. at 225.

⁹ *Id.* at 224.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

On appeal, the accused argued that his guilty plea was improvident because the offense of failing to go to place of duty requires actual knowledge and deliberate avoidance is insufficient.¹³ The CAAF disagreed. Although the offense does require actual knowledge of the appointed time and place of duty,¹⁴ the court held that “deliberate avoidance can create the same criminal liability as actual knowledge for all Article 86, UCMJ, offenses.”¹⁵

Unlike the *Manual for Courts-Martial (Manual)* explanation of knowledge for Article 112a offenses,¹⁶ the *Manual’s* explanation of actual knowledge for Article 86¹⁷ does not mention deliberate avoidance.¹⁸ The CAAF, however, reasoned that applying the deliberate avoidance theory to Article 86 would be a logical extension of its prior holding on deliberate avoidance; that it would be consistent with the position of a majority of the federal circuits that proof of deliberate ignorance is sufficient for actual knowledge; and that a literal application of actual knowledge to Article 86 offenses would result in absurd results in the military environment.¹⁹ Otherwise, servicemembers could evade criminal responsibility by hiding in their barracks rooms or quarters to avoid learning of their appointed time and place of duty.²⁰

Trial practitioners are reminded, however, that the evidentiary standard to raise deliberate avoidance is high. The evidence must allow a rational finder of fact to conclude, beyond a reasonable doubt, that the accused was subjectively aware of a high probability of the existence of illegal conduct and that the accused purposely contrived to avoid learning of the illegal conduct.²¹ Applying this standard to the facts in *Adams*, the CAAF held that the accused’s guilty plea to failing to go to his appointed place of duty was provident.²²

If raised by the evidence, the military judge should instruct the court members on the theory of deliberate avoidance for the offenses of failing to go to appointed place of duty; going from appointed place of duty; and absence from unit, organization, or place of duty with intent to avoid maneuvers or field exercises. The *Benchbook* does not currently include a model instruction on deliberate avoidance,²³ but a proposal is being circulated for review and comment. Until approved, if raised by the evidence, trial practitioners should draft an instruction tailored for the appropriate Article 86 offense.

Definition of “Lascivious Exhibition”

In child pornography cases, instructions on the elements include numerous definitions. Congress has provided some statutory definitions in 18 U.S.C. section 2256, but other terms are often defined to assist the members in correctly applying the law to the facts. For example, the statutory definition of “sexually explicit conduct” includes the phrase “lascivious exhibition of the genitals or pubic area of any person.”²⁴ The CAAF considered the meaning of the term “lascivious exhibition” in *United States v. Roderick*.²⁵ Although *Roderick* involved mixed pleas before a military judge alone, the

¹³ *Id.* at 225.

¹⁴ *Id.*

¹⁵ *Id.* at 226. In a footnote, the court stated that its holding reached all Article 86 offenses because the logic of the analysis applies to all five Article 86 “failure to go” offenses, and the court wanted to avoid confusion and uneven treatment. *Id.* at 226 n.3. However, actual knowledge is not required for the offenses of absence from unit, organization, or place of duty; and abandoning watch or guard. Actual knowledge is required for the offenses of failing to go to appointed place of duty; going from appointed place of duty; and absence from unit, organization, or place of duty with intent to avoid maneuvers or field exercises. MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 10b (2005) [hereinafter MCM]. Therefore, this holding would appear to apply only to the three Article 86 offenses that require actual knowledge.

¹⁶ MCM, *supra* note 15, pt. IV, ¶ 37c(5)(C).

¹⁷ *Id.* pt. IV, ¶ 10c(2).

¹⁸ *Adams*, 63 M.J. at 225.

¹⁹ *Id.* at 226.

²⁰ *Id.*

²¹ *United States v. Brown*, 50 M.J. 262, 266 (1999) (citations omitted) (holding that the military judge erred in giving deliberate avoidance instruction, because the evidence in the case did not reach the “high plateau” required to permit an inference that the accused was subjectively aware of a high probability that he was ingesting a controlled substance and there was no evidence that the accused contrived to avoid knowledge).

²² *Adams*, 63 M.J. at 227.

²³ BENCHBOOK, *supra* note 3, ¶¶ 3-10-1, 3-10-3.

²⁴ 18 U.S.C. § 2256(2)(A)(v) (2000).

²⁵ 62 M.J. 425, 429 (2006).

CAAF's adoption of a definition for lascivious exhibition will assist in properly instructing court members in child pornography cases.

Air Force Staff Sergeant Roderick, a single father of two young girls,²⁶ pled guilty to receiving and possessing child pornography in violation of 18 U.S.C. section 2252A; one specification of using a minor to create depictions of sexually explicit conduct in violation of 18 U.S.C. section 2251(a); and one specification of indecent acts upon a child, all charged under Article 134.²⁷ He was also found guilty, contrary to his pleas, by a military judge sitting alone, of two more specifications of using a minor to create depictions of sexually explicit conduct in violation of 18 U.S.C. section 2251(a) and three specifications of taking indecent liberties with a child.²⁸

On appeal to the CAAF, Roderick argued that the evidence was legally insufficient to convict him of the two specifications of using a minor to create depictions of sexually explicit conduct,²⁹ because the photographs of his two young daughters did not depict "sexually explicit conduct."³⁰ Congress statutorily defined "sexually explicit conduct" as actual or simulated sexual intercourse, bestiality, masturbation, sadistic or masochistic abuse, or "lascivious exhibition of the genitals or pubic area of any person."³¹ Congress has not specifically defined the term lascivious exhibition, so the federal courts have had to interpret it, and this was an issue of first impression for the CAAF.³² The federal courts use six factors from *United States v. Dost* to interpret lascivious exhibition:

- (1) whether the focal point of the visual depiction is on the child's genitalia or pubic area;
- (2) whether the setting of the visual depiction is sexually suggestive, i.e. in a place or pose generally associated with sexual activity;
- (3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child;
- (4) whether the child is fully or partially clothed, or nude;
- (5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity;
- (6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer.³³

Also, because there may be other important factors in determining if a visual depiction contains a lascivious exhibition, several of the federal circuit courts consider the overall totality of the circumstances along with the six, specific *Dost* factors.³⁴ The CAAF adopted this approach.³⁵

Applying this definition, the CAAF set aside the findings for one of the specifications of using a minor to create depictions of sexually explicit conduct.³⁶ Although the accused's daughter was fully or partially nude in the three photographs, none of them depicted her genitals or pubic area.³⁷ Before applying the *Dost* factors, the definition of sexually explicit conduct requires a "lascivious exhibition of the genitals or pubic area of any person."³⁸

²⁶ *Id.* at 428.

²⁷ *Id.* at 427.

²⁸ *Id.* The Air Force Court of Criminal Appeals affirmed the child pornography offenses as convictions of the lesser included offense of conduct of a nature to bring discredit upon the armed forces under clause 2 of Article 134 because of *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002). *Roderick*, 62 M.J. at 427.

²⁹ *Roderick*, 62 M.J. at 429.

³⁰ *Id.*

³¹ 18 U.S.C. § 2256(2)(A)(v) (2000). There is a slightly different definition when the visual depiction is a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct. *Id.* § 2256(2)(B).

³² *Roderick*, 62 M.J. at 429.

³³ *Id.* (citing *United States v. Dost*, 636 F. Supp. 828, 832 (S.D. Cal. 1986), *aff'd sub nom.*, *United States v. Wiegand*, 812 F.2d 1239 (9th Cir. 1987)).

³⁴ *Id.* at 429-30.

³⁵ *Id.* at 430.

³⁶ *Id.*

³⁷ *Id.*

³⁸ 18 U.S.C. § 2256(2) (emphasis added).

Thus, *Roderick* will assist the military judge in properly defining lascivious exhibition. Although military judges have been using the six *Dost* factors, the CAAF did not formally adopt them until *Roderick*. Based on *Roderick*, the military judge also should instruct the court members that the six *Dost* factors are non-exclusive, and according the military judge should also instruct the members to consider the overall content of the material in determining whether the visual depiction contains a lascivious exhibition of the genitals or the pubic area.

Lesser Included Offenses & Dangerous Weapons

In *United States v. Bean*,³⁹ the CAAF addressed whether the military judge erred by refusing to instruct on simple assault as a lesser included offense of aggravated assault with a dangerous weapon.⁴⁰

After drinking in a bar, Senior Airman Bean's friends tried to persuade him not to drive.⁴¹ He pulled out a knife, and three of his friends wrestled him to the ground and took the knife and his keys.⁴² After his friends released him, he got a .45 caliber handgun from his car and pointed it at each of his three friends. He told them, "Get out of my face or I'll kill you."⁴³ One of the three friends grabbed the gun.⁴⁴ At trial, that friend testified that, at the time he grabbed the gun, the hammer was all the way back and the safety was off.⁴⁵ The friend also testified that, when he later pulled the slide to the rear, he noticed that there was a round in the chamber and several rounds in the magazine.⁴⁶

During the trial, *Bean* admitted that the weapon was loaded, but he testified that the safety was engaged.⁴⁷ He also testified that he was intoxicated and did not remember some of the events from that night.⁴⁸ Based on the accused's testimony, the defense counsel requested an instruction on the lesser included offense of simple assault.⁴⁹ The defense counsel argued that, if the court members found that the safety was engaged, the members might also find that the weapon could not fire.⁵⁰ The military judge denied the requested instruction.⁵¹ The judge's rationale was that, with an offer type of aggravated assault with a loaded firearm, it does not even matter if the firearm is functional.⁵²

On appeal, the CAAF agreed with the appellant that the firearm must be functional for the offense of aggravated assault with a loaded firearm.⁵³ The CAAF agreed that the issue of whether the loaded firearm was used in a manner likely to produce death or grievous bodily harm was a question for the members.⁵⁴ The CAAF found, however, that under the facts of the case, the evidence did not "reasonably" raise the lesser included offense of simple assault.⁵⁵ As a matter of common sense, even if the safety is engaged, if an intoxicated person points a loaded, operable firearm at others after threatening them

³⁹ 62 M.J. 264 (2005).

⁴⁰ A military judge must instruct on all lesser included offenses reasonably raised by the evidence. A lesser included offense is reasonably raised if there is "some" evidence to which the members may attach credit or rely upon it, if they so choose. MCM, *supra* note 15, R.C.M. 920(e) discussion.

⁴¹ *Bean*, 62 M.J. at 265.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* at 265-66.

⁴⁹ *Id.* at 266.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at 267.

verbally and physically with a knife, the victim could reasonably be placed in fear of losing his life.⁵⁶ Therefore, the accused was not entitled to an instruction on the lesser included offense of simple assault.⁵⁷

The broader lesson from *Bean* is that engaging the safety of a loaded, operable firearm that is pointed at another does not, as a matter of law, change its character as a dangerous weapon.⁵⁸ In *United States v. Davis*,⁵⁹ the CAAF held that, as a matter of law under the President's narrowing interpretation of Article 128 in the *Manual*, an unloaded firearm is not a dangerous weapon.⁶⁰ In *Bean*, the accused tried to extend the court's holding in *Davis*.⁶¹ However, the CAAF refused to do so, because the holding in *Davis* was based on the explicit provision in the *Manual* that excluded an unloaded firearm, when used as a firearm and not a bludgeon, from the definition of dangerous weapon.⁶²

Lesser Included Offenses & Defense of Accident

As just discussed, determining whether a lesser included offense is in issue can be challenging. Determining whether an affirmative or special defense is in issue can likewise be challenging. When a lesser included offense is interrelated with a special defense, it is even more challenging. In *United States v. Brown*,⁶³ the Army Court of Criminal Appeals (ACCA) set aside convictions for, among other offenses, premeditated murder and a sentence of life without eligibility for parole because the military judge failed to instruct on a special defense and lesser included offenses.⁶⁴

The accused, Specialist (SPC) Brown, was charged with the premeditated murder of another soldier, SPC JK. During the trial, the military judge admitted into evidence two sworn statements that Brown made to CID agents.⁶⁵ The statements were ambiguous in some details, but generally asserted that Brown and SPC JK were target shooting at a remote site on Fort Lewis when Brown accidentally shot SPC JK.⁶⁶ Brown asserted that they "were always safe when shooting."⁶⁷ Brown was shooting at a can with SPC JK next to him.⁶⁸ On Brown's third shot, SPC JK "must have moved down range."⁶⁹ Specialist JK fell and Brown saw blood coming out of his neck.⁷⁰ Brown tried to talk to SPC JK, but he didn't respond.⁷¹ Brown was scared and just wanted to drive away.⁷² He could tell that SPC JK was suffering and he did not want him to suffer.⁷³ The accused knew that, if he put SPC JK in the truck, SPC JK would die.⁷⁴ Brown was afraid that no one would believe him.⁷⁵ The accused had no more ammunition, so he grabbed SPC JK's gun, backed up, closed his eyes, and shot SPC JK two times

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ 47 M.J. 484 (1998).

⁶⁰ *Id.* at 486.

⁶¹ *Bean*, 62 M.J. at 266.

⁶² *Id.* at 267. The CAAF opinion does not discuss this issue at length. It merely quotes its holding in *Davis*, which explicitly stated that it was based on the President's interpretation of Article 128. The rationale for this holding is articulated clearly in *Davis*. *Davis*, 47 M.J. at 486-87 (finding that paragraph 54c(4)(a)(ii) of Part IV of the *Manual* was an "Executive branch limitation on the conduct subject to prosecution").

⁶³ 63 M.J. 735 (Army Ct. Crim. App. 2006).

⁶⁴ *Id.* at 736, 741.

⁶⁵ *Id.* at 737.

⁶⁶ *Id.* at 736.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* at 736-37.

⁷⁴ *Id.* at 736.

⁷⁵ *Id.*

in the head.⁷⁶ Specialist JK's tongue and eyes stopped moving.⁷⁷ The second sworn statement, which was made later the same night and videotaped, was consistent with the first statement, and it also offered a theory that the first shot might have ricocheted off of an old washing machine or dryer.⁷⁸

A forensic pathologist, who conducted an autopsy, testified at trial. In his opinion, the first bullet caused the fatal injury.⁷⁹ He testified that the bullet entered at the back of the neck, passed through the spinal cord, and exited through the nose.⁸⁰ He stated that such an injury would cause a fatal shock of vital breathing and heart centers,⁸¹ although breathing and heart rate may continue in a fading fashion for seconds or minutes.⁸² He also testified that, because a different part of the brain controls eye and mouth movement, there might or might not be involuntary, uncontrolled movement.⁸³

The defense requested an instruction for the special defense of accident.⁸⁴ The military judge denied the request for two reasons. First, the military judge stated that the act was certainly a negligent act, and the accused even admitted that in the confession.⁸⁵ Second, when the defense counsel disputed that the confession admitted the act was negligent, the military judge stated, "Well, I'll take judicial notice that [S]oldiers are not allowed to go out in the back forty and shoot off rounds."⁸⁶ The military judge instructed on the lesser included offenses of intentional murder, voluntary manslaughter, involuntary manslaughter, and negligent homicide.⁸⁷ The defense did not request, and the military judge did not give instructions on the lesser included offenses of attempted premeditated murder, attempted intentional murder, or attempted voluntary manslaughter.⁸⁸

The ACCA concluded that the special defense of accident was "in issue."⁸⁹ "A matter is in issue when some evidence, without regard to its source or credibility, has been admitted upon which members might rely if they choose."⁹⁰ An accident is an "unintentional and unexpected result of doing a lawful act in a lawful manner."⁹¹ The ACCA listed three elements for the defense of accident: (1) the accused was engaged in an act not prohibited by law, regulation, or order; (2) this act was performed in a lawful manner, meaning with due care and without simple negligence; and (3) this act was done without any unlawful intent.⁹²

The court did not consider itself bound by the judicial notice that Soldiers are not allowed to shoot off rounds in the back forty, because the military judge did not identify, and the Army court could not find, any such law.⁹³ Therefore, the Army court could not conclude that the act was per se unlawful under the circumstances.⁹⁴ Also, there was some evidence, such as assertions in the accused's confessions of always being safe and SPC JK being to the accused's side, that the accused was target shooting in a lawful manner.⁹⁵ Lastly, there was some evidence that the accused did not initially intend to shoot SPC

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* at 737.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* at 739.

⁹⁰ *Id.* at 738 (quoting MCM, *supra* note 15, R.C.M. 920(e) discussion).

⁹¹ MCM, *supra* note 15, R.C.M. 916(f).

⁹² *Brown*, 63 M.J. at 738.

⁹³ *Id.* at 739.

⁹⁴ *Id.*

⁹⁵ *Id.*

JK.⁹⁶ Therefore, because there was some evidence of each element of the defense of accident, the ACCA concluded that the military judge erred by not instructing the members on that defense.⁹⁷

The ACCA also found that the testimony of the forensic pathologist about the possible speed of death placed attempted murder and attempted voluntary manslaughter at issue.⁹⁸ It was possible that SPC JK was already dead at the time of the second and third shots.⁹⁹ Apparently, all the parties overlooked that possibility, because neither party requested instructions on those lesser included offenses. The ACCA concluded that the military judge erred by not sua sponte instructing on those lesser included offenses.¹⁰⁰

In analyzing whether the errors were harmless beyond a reasonable doubt, the Army court assessed the evidence as extremely complicated.¹⁰¹ The evidence raised several possibilities, and the errors resulted in the instructions not addressing various possible factual scenarios: accidental homicide, negligent homicide, or involuntary manslaughter, followed by an attempted murder or attempted voluntary manslaughter.¹⁰² The ACCA concluded that the errors were not harmless.

The *Brown* case provides two valuable lessons for trial practitioners, both of which are not new lessons but rather reminders of black letter law on instructions. First, the standard for when a special defense is “in issue” is when there is *some* evidence of each element of the defense, regardless of its source or credibility.¹⁰³ In the *Brown* case, the military judge may have found that the act was negligent, but that is not the standard. The findings and sentence might indicate that the court members did not believe the accused’s version of what occurred.¹⁰⁴ However, because there was *some* evidence, even if its credibility was questionable, the instruction on the defense of accident should have been given.

The second lesson is a reminder that the military judge has a sua sponte duty to instruct on special defenses and lesser included offenses raised by the evidence.¹⁰⁵ In the *Brown* case, the lesser included offenses of attempted premeditated murder, attempted intentional murder, and attempted voluntary manslaughter were not obvious.¹⁰⁶ The victim was alive before any of the shots, the accused fired the three shots, and the victim died as a result of those shots. However, when analyzing the shots separately, the victim may have already been dead after the first shot and before the accused fired the last two shots.¹⁰⁷ Determining appropriate instructions for special defenses and lesser included offenses can be challenging, but all scenarios for which there is *some* evidence must be carefully considered, even if neither party is requesting such instructions.

Defenses

Escalation of the Conflict and the Right to Self-Defense

Although not mentioned in the provision on self-defense in RCM 916(e),¹⁰⁸ the concept that an aggressor or mutual combatant is still entitled to act in self-defense when the adversary escalates the level of the conflict has been recognized by

⁹⁶ *Id.*

⁹⁷ *Id.* at 739-40.

⁹⁸ *Id.* at 740.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.* at 740-41.

¹⁰³ MCM, *supra* note 15, R.C.M. 920(e) discussion.

¹⁰⁴ The court members adjudged a “sentence to a dishonorable discharge, confinement for life without eligibility for parole, forfeiture of all pay and allowances, and reduction to the grade of E-1.” *Brown*, 63 M.J. at 736.

¹⁰⁵ Although citing this case technically may be poaching from next year’s subject matter, *see United States v. Gutierrez*, 64 M.J. 374, 376 (2007) (military judge has a duty to instruct on reasonably raised affirmative defenses (and lesser included offenses) unless affirmatively waived by the accused).

¹⁰⁶ *Brown*, 63 M.J. at 737. It is possible that the defense was aware of these possible lesser included offenses, but did not want instructions on them for tactical reasons. However, there was no discussion of the issue on the record, and the defense did not affirmatively waive instructions on these lesser included offenses.

¹⁰⁷ *Id.* at 740.

¹⁰⁸ MCM, *supra* note 15, R.C.M. 916(e).

military appellate courts in the past.¹⁰⁹ In *United States v. Dearing*,¹¹⁰ the CAAF again recognized this concept. Because the military judge erred by refusing to give a requested instruction addressing the issue of escalation of the conflict, the CAAF reversed convictions for murder and aggravated assault.¹¹¹

Operations Specialist Seaman Dearing was involved in a “road rage” fight.¹¹² He, his girlfriend, another sailor, and that sailor’s girlfriend went to see a movie at the Norfolk Naval Base theater. Another group of sailors and their friends went to the same movie.¹¹³ Several of the individuals had been drinking alcohol that evening.¹¹⁴ After the movie, they left the theater in several vehicles. After a brief “road rage” incident, the two groups were engaged in a verbal confrontation that led to a fight in the Navy Exchange parking lot near the movie theater.¹¹⁵ At the end of the fight, one of the accused’s adversaries had been stabbed to death and two others had been seriously wounded.¹¹⁶ The accused was charged with unpremeditated murder, assault with intent to inflict grievous bodily harm, assault with a dangerous weapon, and obstruction of justice.¹¹⁷

At trial, the court members heard extensive and conflicting testimony on the involvement of several participants in the affray.¹¹⁸ Prosecution witnesses depicted the accused as the aggressor and assailant.¹¹⁹ Defense witnesses, including the accused, testified that the accused got involved in an attempt to protect his girlfriend.¹²⁰ The accused testified that, after his girlfriend got involved in a verbal dispute with men from the other group, he pushed the men away with his hands to protect her.¹²¹ He testified that, as he raised his hands, an unknown person hit him in the back of the head.¹²² He also testified that he heard someone ask, “Do you have a gun?”¹²³ This made him concerned for his safety.¹²⁴ The accused testified that he saw that one of the adversaries’ car trunk was open, and he thought someone had obtained a weapon.¹²⁵

According to the accused’s testimony, at this point he began to fight his way out of the bad situation.¹²⁶ As he fought with one person, another person hit him in the side, and yet another person kicked him. He testified that he was pushed to the ground and grabbed around the neck, as another person hit him in the chest.¹²⁷ According to the accused, he then remembered the knife he had in his pocket. He pulled out the knife and stuck it out twice in an upward thrust.¹²⁸ The accused claimed that he acted in self-defense to save his own life.¹²⁹

After the evidence, the civilian defense counsel requested that the military judge instruct the panel on the issue of escalation of the conflict as it related to self-defense.¹³⁰ The defense counsel cited *United States v. Cardwell* as authority.¹³¹

¹⁰⁹ See, e.g., *United States v. Cardwell*, 15 M.J. 124 (C.M.A. 1983).

¹¹⁰ 63 M.J. 478 (2006).

¹¹¹ *Id.* at 479.

¹¹² *Id.* at 480.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.* at 481.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

After a brief discussion, the military judge told the defense counsel to draft a proposed instruction. The civilian defense counsel submitted the following:

Even if the accused was an aggressor, the accused is entitled to use self-defense, if the opposing party escalated the level of the conflict. Accordingly, even if the accused was the aggressor, if the opposing party escalated the conflict by placing the accused in reasonable fear that he was at risk of death or grievous bodily harm, the accused would then be entitled to use deadly force in self-defense.¹³²

The military judge refused to give the requested instruction, holding that his instructions already adequately covered the issue, with the key explanation in the definition of aggressor.¹³³ When the military judge instructed the court members on the defense of self-defense, he defined “an aggressor” as follows:

There exists evidence in this case that the accused may have been an aggressor. An “aggressor” is one who uses force in excess of that believed by him to be necessary for defense. There also exists evidence that the accused may have voluntarily engaged in mutual fighting. An aggressor, or one who voluntarily engaged in mutual fighting, is not entitled to self-defense unless he previously withdrew in good faith.¹³⁴

After the instructions and deliberations, the members found the accused guilty as charged.¹³⁵ The Navy-Marine Corps Court of Criminal Appeals held that the military judge’s instructions substantially covered the issues raised in the defense request. The court also concluded that, even if it did not, the error did not deny the accused a fair trial, because it did not deprive him of a defense nor seriously impair the effective presentation of the defense.¹³⁶

The CAAF disagreed with the lower court on both points, holding that if self-defense was at issue in the case, then the military judge was obligated to give a correct instruction.¹³⁷ Based on the accused’s testimony, self-defense was at issue in the case.¹³⁸ The CAAF found that the instructions were erroneous and incomplete. In *United States v. Cardwell*, the court had stated that it was a well settled principle of the law of self-defense that “[e]ven a person who starts an affray is entitled to use self-defense when the opposing party escalates the level of the conflict.”¹³⁹ In order to explain the concept of escalation of the conflict, the CAAF quoted the following illustration from its opinion in *Cardwell*: “Thus, if A strikes B a light blow with his fist and B retaliates with a knife thrust, A is entitled to use reasonable force in defending himself against such an attack, even though he was originally the aggressor.”¹⁴⁰

The instruction provided by the military judge did not address the concept of escalation of the conflict.¹⁴¹ In fact, the instructions incorrectly limited the defense of self-defense.¹⁴² The instructions erroneously stated that an aggressor or mutual combatant is not entitled to self-defense, unless he previously withdrew in good faith.¹⁴³ This instruction precluded the members from considering whether the accused was still entitled to self-defense because the adversaries escalated the level of the conflict.¹⁴⁴

¹³¹ *Id.* See *United States v. Cardwell*, 15 M.J. 124 (C.M.A. 1983).

¹³² *Dearing*, 63 M.J. at 481.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.* The members adjudged a sentence of a dishonorable discharge, confinement for twenty-five years, forfeiture of all pay and allowances, and reduction to the grade of E-1. *Id.* at 481-82.

¹³⁶ *Id.* at 482.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ 15 M.J. 124, 126 (C.M.A. 1983).

¹⁴⁰ *Dearing*, 63 M.J. at 483 (quoting *Cardwell*, 15 M.J. at 126).

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 483-84.

The court acknowledged that the requested instruction was not completely inaccurate.¹⁴⁵ It was accurate on the concept of escalation of the conflict. However, instead of stating “the accused would then be entitled to use deadly force in self-defense,” the proposed instruction should have stated “the accused would then be entitled to use force the accused believed was necessary for protection against death or grievous bodily harm.”¹⁴⁶ But this deficiency did not excuse the failure to instruct the members on the concept of escalation of the conflict.¹⁴⁷

The CAAF found that the instructional error was not harmless beyond a reasonable doubt.¹⁴⁸ Escalation of the conflict was an essential theory for the defense, and a vital part of their case.¹⁴⁹ The accused was denied the opportunity to argue that, because of the escalating violence against him, he had the right of self-defense.¹⁵⁰ Also, without a correct instruction, the members did not have the guideposts for an informed decision.¹⁵¹ The court set aside the findings for the murder and aggravated assault offenses and the sentence.¹⁵²

Because affrays are not uncommon in the military environment, this is an important case for trial practitioners. If there is some evidence that the accused is an aggressor or mutual combatant, and if there is also some evidence that the adversary escalated the level of the conflict, then defense counsel may request a *Dearing* type instruction. Regardless, the military judge should be prepared to give such an instruction, even if not requested. The current model instructions on self-defense in the *Benchbook* do not adequately cover the issue of escalation of the conflict.¹⁵³ There is a *Benchbook* proposal currently being staffed that would add an instruction on escalation of the conflict. In the meantime, trial practitioners should closely read *Dearing* and be prepared to assist the court in drafting an appropriate instruction.

Mistake of Fact as to Age for Indecent Acts with a Child

Although *United States v. Zachary*¹⁵⁴ involved a guilty plea, the case is significant for providing correct instructions in cases involving the offense of indecent acts with a child. The ACCA’s holding in *Zachary*, which the CAAF affirmed, clarifies an issue that has confused trial practitioners; holding that an honest and reasonable mistake as to the age of the victim is a valid defense to the offense of indecent acts with a child.¹⁵⁵

Sergeant (SGT) Zachary pled guilty to one specification of indecent acts with a child (BA) and one specification of indecent acts with another (RL).¹⁵⁶ During the providence inquiry, SGT Zachary admitted, under oath, that he performed oral sodomy on both females while all three of them were in a friend’s room.¹⁵⁷ He admitted that he was married to neither of the females, the acts were done with the intent to arouse the lust and sexual desires of BA, the acts were indecent, and the acts were prejudicial to good order and discipline and service discrediting.¹⁵⁸ Sergeant Zachary further admitted, in regards to the indecent nature of the acts, that the acts were open and notorious because a third person was present.¹⁵⁹ He also asserted that both females told him that they were seventeen years old and about to turn eighteen years old.¹⁶⁰ In fact, RL was seventeen

¹⁴⁵ *Id.* at 484.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 484-85.

¹⁵⁰ *Id.* at 485.

¹⁵¹ *Id.*

¹⁵² *Id.* at 489.

¹⁵³ The instruction that the military judge provided in the *Dearing* case were similar to the model instructions in Note 5, paragraph 5-2-6 of the *Benchbook*. BENCHBOOK, *supra* note 3, ¶ 5-2-6.

¹⁵⁴ 63 M.J. 438 (2006).

¹⁵⁵ *Id.* at 444.

¹⁵⁶ *Id.* at 439.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 439-40.

¹⁵⁹ *Id.* at 440.

¹⁶⁰ *Id.*

years old, and BA was fourteen years old. He did not discover the true age of BA until a CID agent told him two weeks later.¹⁶¹

The military judge conducted an extensive providence inquiry, especially in regards to the offense of indecent acts with a child.¹⁶² The defense counsel and the accused agreed that, because of the open and notorious nature of the act, the act was indecent, prejudicial to good order and discipline, and service discrediting.¹⁶³ They all agreed that BA's age was not connected to those elements.¹⁶⁴ They also agreed that mistake of fact as to age was, therefore, not a defense to the offense of indecent acts with a child.¹⁶⁵ The military judge accepted the guilty plea.¹⁶⁶ During the presentencing phase of the trial, SGT Zachary made an unsworn statement to the panel members, in which he explained that he believed that both of the females were seventeen years old and almost eighteen years old.¹⁶⁷ He also explained the circumstances that gave him reason to believe that they were seventeen years old.¹⁶⁸ The members adjudged a sentence of a bad-conduct discharge, forfeiture of all pay and allowances, and reduction to the grade of E-1.¹⁶⁹

The ACCA determined that the victim's age was an element of the offense of indecent acts with a minor.¹⁷⁰ Therefore, an honest and reasonable mistake of fact as to age was a valid defense.¹⁷¹ The issue of whether the age of the child is a sentence enhancer or an element was an issue of first impression for the ACCA.¹⁷² The court, in general terms, first discussed the distinction between elements and aggravating factors.¹⁷³ In the *Manual*, the President has specified some offenses that fall within the conduct proscribed by Article 134, and the President provided elements for those offenses.¹⁷⁴ The courts have generally accepted the President's explanation of the elements as defining those offenses, and the courts look at both the statute and the President's explanation in the *Manual* to determine the elements of those offenses.¹⁷⁵ Aggravating factors, on the other hand, are facts or situations that increase the permissible punishment for an offense.¹⁷⁶ Aggravating factors must be proven beyond a reasonable doubt, but they are not required for a conviction of the offense.¹⁷⁷ Therefore, aggravating factors do not contain a mens rea component and mistake of fact as to aggravating factors does not ordinarily affect the maximum punishment.¹⁷⁸

The ACCA also discussed the determination of the mens rea component of elements. Under RCM 916(j)(1), the standard for, or the availability of, the defense of mistake of fact depends on whether the particular element is a specific intent element, a general intent element, or a strict liability element.¹⁷⁹ Determining whether it is a strict liability element,

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 440-41.

¹⁶⁸ *Id.* at 441.

¹⁶⁹ *Id.*

¹⁷⁰ *United States v. Zachary*, 61 M.J. 814, 823 (Army Ct. Crim. App. 2005).

¹⁷¹ *Id.* at 825.

¹⁷² *Id.* at 822.

¹⁷³ *Id.* at 818-19.

¹⁷⁴ *See MCM, supra* note 15, pt. IV, ¶¶ 61-113.

¹⁷⁵ *Zachary*, 61 M.J. at 818-19.

¹⁷⁶ *Id.* at 819.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 819-20.

which is not favored in the criminal law, is an issue of statutory construction.¹⁸⁰ There must usually be some indication that Congress, or the President in the case of a specified Article 134 offense, intended strict liability.¹⁸¹

The ACCA then analyzed the offense of indecent acts with a child, which the President specified as an offense under Article 134. In the *Manual*, the President outlined the elements, including the element “[t]hat the person was under 16 years of age and not the spouse of the accused.”¹⁸² Neither Article 134 nor the President’s explanation in the *Manual* indicates that the age element was intended to be a strict liability element.¹⁸³ Also, although the offense of indecent acts with a child, which first appeared in the *Manual* in 1951, was modeled after an offense in the District of Columbia Code, which provided that mistake as to age was not a defense, the President did not adopt that provision in the *Manual*.¹⁸⁴ The Army court concluded that the age of the victim is not a strict liability element.¹⁸⁵

With the issue squarely in front of the ACCA in *Zachary*, it found that indecent acts with a child is a distinct offense from indecent acts with another, rather than an aggravated version of the same offense.¹⁸⁶ In the *Manual*, the President designated indecent acts with a child as a distinct offense.¹⁸⁷ Also, indecent acts with a child has another unique element of intent to arouse, appeal to, or gratify the lust, passions, or sexual desires of the accused, the victim, or both.¹⁸⁸ The ACCA then held that, because the age of the victim is a general intent element, an honest and reasonable belief that the person was at least sixteen years old is a defense to indecent acts with a child.¹⁸⁹ The ACCA finished with a discussion of precedents involving strict liability and sex offenses, and it interpreted them as consistent with its holding.¹⁹⁰

The ACCA concluded that the accused’s guilty plea to the charge of indecent acts with a minor was improvident because the accused set forth matters inconsistent with his guilty plea.¹⁹¹ The ACCA affirmed a finding of guilty to the lesser included offense of indecent acts with another and affirmed only so much of the sentence as provided for reduction to the grade of E-1.¹⁹² When the government appealed, the CAAF agreed with the ACCA, embracing its excellent analysis on the law of mistake of fact as it applies to indecent acts with a child.¹⁹³

For trial practitioners, *Zachary* is a significant instructions case because, if there is some evidence that the accused reasonably believed that the victim was at least sixteen years old, the military judge must instruct the members that an honest and reasonable mistake of fact is a defense to the offense of indecent acts with a child.¹⁹⁴ The Army court’s opinion resolved an issue that had confused trial practitioners for over a decade. The holding in *Zachary* is legally sound and it is especially critical today, when Department of Defense Instruction 1325.7 lists indecent acts with a child as an offense whose conviction triggers the sex offender reporting and registration requirements.¹⁹⁵ For trial practitioners, the black letter law is now clear that the age of the victim is an element of the offense of indecent acts with a child, and an honest and reasonable mistake as to the victim’s age is a defense.

¹⁸⁰ *Id.* at 820.

¹⁸¹ *Id.*

¹⁸² MCM, *supra* note 15, pt. IV, ¶ 87(b)(1).

¹⁸³ *Zachary*, 61 M.J. at 821.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 823.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 823-25.

¹⁹¹ *Id.*

¹⁹² *Id.* at 826.

¹⁹³ *Zachary*, 63 M.J. at 441.

¹⁹⁴ In tailoring the instruction, the military judge should use the model instruction for a general intent element found at paragraph 5-11-2 of the *Benchbook*. BENCHBOOK, *supra* note 3, ¶ 5-11-2.

¹⁹⁵ U.S. DEP’T OF DEFENSE, INSTR. 1325.7, ADMINISTRATION OF MILITARY CORRECTIONAL FACILITIES AND CLEMENCY AND PAROLE AUTHORITY encl. 27 (17 July 2001).

Evidence

*Military Rule of Evidence 413: United States v. Dacosta*¹⁹⁶

After a contested trial, a panel of officer and enlisted members convicted SPC Dacosta of the unlawful entry into SPC L's room and subsequent rape in April 2002.¹⁹⁷ Prior to trial, the military judge litigated a Military Rule of Evidence (MRE) 412 motion regarding the admissibility of conduct between SPC L and the accused in January 2002.¹⁹⁸ The military judge determined that the conduct was both admissible under MRE 412 and MRE 413.¹⁹⁹

Prior to instructing the members on findings, the military judge asked counsel for their views on proper instructions and the defense counsel objected to the instruction on uncharged sexual misconduct.²⁰⁰ The defense counsel had referred to the January 2002 sexual encounter but only to lay the foundation for mistake of fact as to consent.²⁰¹ The government made no reference to the January 2002 sexual encounter during their argument,²⁰² nor did they request the uncharged sexual misconduct instruction.

After considering the issue, the military judge instructed the members regarding the January 2002 event both as to mistake of fact as to consent and uncharged sexual misconduct under MRE 413.²⁰³

On appeal, appellate defense counsel focused their efforts on persuading the ACCA that the uncharged sexual misconduct instruction was not warranted.²⁰⁴ The ACCA distinguished the military judge's responsibility regarding evidentiary instructions from her responsibility regarding affirmative defense instructions.²⁰⁵ Finding no precedent for a sua sponte duty to instruct on the MRE 413 issue, the ACCA created one—effective for all cases tried on or after 26 July 2006.²⁰⁶ The ACCA set out an eight-part instruction which the military judge must include in all cases in which MRE 413 evidence is properly admitted:

- (1) the accused is not charged with this other sexual assault offense;
- (2) the Rule 413 evidence should have no bearing on their deliberations unless they determine the other offense occurred;²⁰⁷

¹⁹⁶ 63 M.J. 575 (Army Ct. Crim. App. 2006), *review denied*, 64 M.J. 172 (2006).

¹⁹⁷ *Id.* at 577.

¹⁹⁸ Essentially, the evidence involved the accused and SPC L alone in the same bed for the night. Specialist L testified at the hearing that during that night, the accused touched her sexually and attempted to have sexual intercourse with her, but was unsuccessful. *Dacosta*, 63 M.J. at 577-78.

¹⁹⁹ *Id.* at 577.

²⁰⁰ *Id.* The government did not request the instruction. Although not specifically mentioned by the military judge, it is clear from the opinion that she was referring to *Benchmark* instr. 7-13-1, Other Crimes, Wrongs or Acts Evidence, Note 3, as this is the instruction she provided the members. *BENCHMARK supra* note 3, instr. 7-13-1.

²⁰¹ *Id.*

²⁰² *Dacosta*, 63 M.J. at 579.

²⁰³ *Id.* at 578.

²⁰⁴ "Appellate defense counsel concede, '[I]f the [MIL. R. EVID.] 413 instruction is warranted, then the correct instruction was given.'" *Id.* at 581.

²⁰⁵ *Id.* at 583. Summarizing, the ACCA said the military judge has a sua sponte duty to instruct on all affirmative defenses reasonably raised by the evidence in the case, but that the military judge's obligation to instruct on evidentiary matters clearly raised depends on counsel first requesting the instruction. (For greater detail on the military judge's responsibility regarding affirmative defenses and lesser included offenses, see generally *United States v. Gutierrez*, 64 M.J. 374 (2007)). The Army court continued this theme, albeit indirectly, in *United States v. Brown*. 63 M.J. 735 (Army Ct. Crim. App. 2006). In *Brown*, the ACCA discussed the military judge's obligations regarding instructions thus: "The military judge bears the primary responsibility for ensuring that mandatory [that is, required] instructions . . . are given and given accurately." *Id.* at 738 (citation omitted). Required instructions include the elements of the offenses, lesser included offenses and special, or affirmative, defenses reasonably raised by the evidence. *Id.*

Thus, as a general statement for evidentiary instructions, they are not required and there is no sua sponte duty to give them (although IAW R.C.M. 920(c) and (e)(7), counsel should be given the opportunity to request any evidentiary instructions they believe appropriate). Failure to object to an instruction or to the omission of an instruction before the members close to deliberate on findings—except the above noted required instructions—constitutes waiver. *MCM, supra* note 15, R.C.M. 902(f); *United States v. Davis*, 53 M.J. 202, 205 (2000).

²⁰⁶ *Dacosta*, 63 M.J. at 583.

²⁰⁷ The level of proof is by a preponderance of the evidence, according to the proposed instruction contained in the appendix to the opinion in *Dacosta*. *Id.* at 584.

- (3) if they make that determination, they may consider the evidence for its bearing on any matter to which it is relevant in relation to the sexual assault offenses charged;
- (4) the Rule 413 evidence has no bearing on any other offense charged;
- (5) [the members] may not convict the accused solely because they may believe the accused committed other sexual assault offenses or has a propensity or predisposition to commit sexual assault offenses;
- (6) they may not use the Rule 413 evidence as substitute evidence to support findings of guilty or to overcome a failure of proof in the government's case, if any;
- (7) each offense must stand on its own and they must keep the evidence of each offense separate; and
- (8) the burden is on the prosecution to prove the accused's guilt beyond a reasonable doubt as to each and every element of the offenses charged.²⁰⁸

Beyond the above sua sponte instruction, the ACCA held that “military judges should not unnecessarily highlight to panel members—absent a specific request from counsel—that Rule 413 evidence may be properly used to show a ‘propensity to engage in sexual assault.’”²⁰⁹

Most (but not all) of the information in the ACCA instruction was already explicit in the then-existing *Benchbook* Instruction 7-13-1, Note 3 and Instruction 7-17.²¹⁰ To address this case, however, the *Benchbook* Committee²¹¹ staffed a new instruction, approved for use on 6 January 2007.²¹² This new instruction replaces former Notes 3 and 4 of Instruction 7-13-1.

²⁰⁸ *Id.* at 583. The ACCA included as an appendix to this decision a suggested amendment to the *Benchbook*.

²⁰⁹ *Id.* A restriction on “highlighting” that MRE 413 evidence can be used to show propensity to commit a sexual assault seems inconsistent with the very purpose of MRE 413 itself. As an exception to MRE 404(b)'s prohibition on propensity evidence, it is a rule of inclusion, rather than exclusion. *United States v. Parker*, 2005 CCA LEXIS 340 (A.F. Ct. Crim. App. 18 Oct. 2005), *review denied*, 63 M.J. 282 (2006). The legislative history of Federal Rule Evidence (FRE) 413 (from which MRE 413 is drawn) shows a recognition that those who engage in sexual assault likely reoffend and thus propensity is important information for the members. Senator Robert Dole, a co-sponsor with Representative Susan Molinari of the legislation that ultimately led to FRE 413, said: “The courts should liberally construe the rules so that the defendant's propensities . . . can be properly assessed.” 140 CONG. REC. S12990 (daily ed. Sept. 20, 1994) (statement of Sen. Dole) (referring to what ultimately became Pub. L. No. 103-322, tit. 32, subtit. § 329035 (1994) Representative Molinari apparently made similar comments. 140 Cong. Rec. H8992 (daily ed. Sept. 20, 1994) (statement of Rep. Molinari). STEPHEN A. SALTZBURG, ET AL., MILITARY RULES OF EVIDENCE MANUAL sec. 413.02(2), at 4-204 (5th ed. 2003).

Likewise, the U.S. Supreme Court has characterized the potential for recidivism for those committing sexual offenses as “frightening and high.” *Smith v. Doe*, 538 U.S. 84, 103 (2003) (citing *McKune v. Lile*, 536 U.S. 24, 34 (2002)); *see also id.* (citing U.S. Dept. of Justice, Bureau of Justice Statistics, Sex Offenses and Offenders 27 (1997); U.S. Dept. of Justice, Bureau of Justice Statistics, Recidivism of Prisoners Released in 1983, at 6, 33 (1997)) (“When convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault.”) *Id.* at 33.

Although neither *Smith* nor *McKune* addressed FRE 413 (*Smith* addressed Alaska's sex offender registration law and *McKune* addressed Kansas' sex offender treatment program), the conclusions they both draw about sex offender recidivism clearly support the intent behind FRE 413, as expressed by both Senator Dole and Representative Molinari. Military Rule of Evidence 413 thus appears to be primarily concerned with propensity, and getting that information to the members.

Id.

²¹⁰ The information contained in paragraphs 5, 7 and 8 were explicitly contained in the *Benchbook*. BENCHBOOK, *supra* note 3, instrs. 7-13-1 n.3 and 7-17, as they existed at that time. The other paragraphs were arguably implicit in either those current instructions or the trial process itself. For example, the members have already seen the flyer by the time MRE 413 evidence is admitted during trial; they therefore know the accused is not charged with the sexual assault shown by the MRE 413 evidence. Regarding paragraph 2 of the ACCA instruction, although the military judge will address on the record the strength of the evidence supporting the MRE 413 evidence as a *Wright/Berry* factor when determining admissibility, the ACCA's instruction makes it clear the members must also find the prior acts occurred. *See United States v. Wright*, 53 M.J. 476 (2000) and *United States v. Berry*, 61 M.J. 91 (2005). Paragraph 3 comes directly from MRE 413(a), although it did not explicitly exist in any *Benchbook* instruction at the time. Paragraph 4 was implied in then-existing instructions, as the military judge tells the members they may use the MRE 413 evidence in relation to sexual assault. *See BENCHBOOK, supra* note 2, instr. 7-13-1 n.3 as it existed before the recent change. Finally, paragraph 6 was implicit in paragraphs 5 and 8, and in the then-existing *Benchbook*. BENCHBOOK, *supra* note 3, instr. 7-13-1 n.3.

²¹¹ The *Benchbook* Committee consists of members of the U.S. Army Trial Judiciary, in consultation with the Navy and Marine Corps, Air Force and Coast Guard Trial Judiciaries. The *Benchbook* Committee staffs suggested changes to the *Benchbook* and submits those changes to the Chief Trial Judge, U.S. Army Trial Judiciary, for final approval and inclusion in the *Benchbook*.

²¹² That instruction is as follows:

Replace the current note 3 and Note 4, instruction 7-13-1 (PAGES 871 and 871.1) with the following:

NOTE 3: Sexual assault and child molestation offenses – MRE 413 or 414 evidence. In cases in which the accused is charged with a sexual assault or child molestation offense, Military Rules of Evidence 413 and 414 permit the prosecution to offer, and the court to admit, *subject to an MRE 403 balancing*, evidence of the accused's commission of other sexual assault or child molestation offenses on any matter to which relevant. Unlike misconduct evidence that is not within the ambit of MRE 413 or 414, the members may consider this evidence on any matter to which it is relevant, to include the issue of the accused's propensity or predisposition to commit these types of crimes. The government is required to disclose to the accused the MRE 413 or 414 evidence that is expected to be offered, at least 5 days before trial, or at such later time as the military judge may find for good cause. When evidence of the accused's commission of other offenses of sexual assault under MRE 413, or of child molestation under MRE 414, is properly admitted prior to findings as an exception to the general rule excluding such evidence, the military judge **must** give the following appropriately tailored instruction based on the evidence admitted (the optional portions of the instruction should be given when requested by counsel or when otherwise raised by the evidence).

You heard evidence that the accused may have committed (another) (other) offense(s) of (sexual assault) (child molestation). The accused is not charged with (this) (these) other offense(s). This evidence may have no bearing on your deliberations unless you first determine by a preponderance of the evidence, that is more likely than not, (this) (these) uncharged offense(s) occurred. If you determine by a preponderance of the evidence (this) (these) other uncharged offense(s) occurred, you may then consider the evidence of (that) (those) offense(s) for its bearing on any matter to which it is relevant only in relation to (list the specification(s) for which the members may consider the evidence).

(You may consider the evidence of such other act(s) of (sexual assault) (child molestation) for its tendency, if any, to show the accused's propensity or predisposition to engage in (sexual assault) (child molestation)(,) (as well as its tendency, if any, to:

(identify the accused as the person who committed the offense(s) alleged in _____)

(prove a plan or design of the accused to _____)

(prove knowledge on the part of the accused that _____)

(prove that the accused intended to _____)

(show the accused's awareness of (his) (her) guilt of the offense(s) charged)

(determine whether the accused had a motive to commit the offense(s))

(show that the accused had the opportunity to commit the offense(s))

(rebut the contention of the accused that (his) (her) participation in the offense(s) charged was the result of (accident) (mistake) (entrapment))

(rebut the issue of _____ raised by the defense); (and)

(_____).

You may not, however, convict the accused solely because you believe (she) (he) committed (this) (these) other offense(s) or solely because you believe the accused has a propensity or predisposition to engage in (sexual assault) (child molestation). In other words, you cannot use this evidence to overcome a failure of proof in the government's case, if you perceive any to exist. The accused may be convicted of an alleged offense only if the prosecution has proven each element beyond a reasonable doubt. (However, by pleading to a lesser included offense, the accused has relieved the government of its burden of proof with respect to the elements of that offense.)

Each offense must stand on its own and you must keep the evidence of each offense separate. The prosecution's burden of proof to establish the accused's guilt beyond a reasonable doubt remains as to each and every element of (each) (the) offense(s) charged. Proof of one charged offense carries with it no inference that the accused is guilty of any other charged offense.

NOTE 4: Use of Charged MRE 413 or 414 Evidence. There will be circumstances where evidence relating to one charged sexual assault or child molestation offense is relevant to another charged sexual assault or child molestation offense. If so, the following instruction may be used, in conjunction with NOTE 3, as applicable.

(Further), evidence that the accused committed the (sexual assault) (act of child molestation) alleged in (state the appropriate specification(s) and Charge(s)) may have no bearing on your deliberations in relation to (state the appropriate specification(s) and Charge(s)) unless you first determine by a preponderance of the evidence, that is more likely than not, the offense(s) alleged in (state the appropriate specification(s) and Charge(s)) occurred. If you determine by a preponderance of the evidence the offense(s) alleged in (state the appropriate specification(s) and Charge(s)) occurred, even if you are not convinced beyond a reasonable doubt that the accused is guilty of (that) (those) offense(s), you may nonetheless then consider the evidence of (that) (those) offense(s) for its bearing on any matter to which it is relevant in relation to (list the offense(s) for which the members may consider the evidence). (You may also consider the evidence of such other act(s) of (sexual assault) (child molestation) for its tendency, if any, to show the accused's propensity or predisposition to engage in (sexual assault) (child molestation).)

You may not, however, convict the accused solely because you believe (she) (he) committed (this) (these) other offense(s) or solely because you believe the accused has a propensity or predisposition to engage in (sexual assault) (child molestation). In other words, you cannot use this evidence to overcome a failure of proof in the government's case, if you perceive any to exist. The accused may be convicted of an alleged offense only if the prosecution has proven each element beyond a reasonable doubt. (By pleading to a lesser included offense, the accused has relieved the government of its burden of proof with respect to the elements of that offense.)

Each offense must stand on its own and proof of one offense carries no inference that the accused is guilty of any other offense. In other words, proof of one (sexual assault) (act of child molestation) creates no inference that the accused is guilty of any other (sexual assault) (act of child molestation). (However, it may demonstrate that the accused has a propensity to commit that type of offense.) The prosecution's burden of proof to establish the accused's guilt beyond a reasonable doubt remains as to each and every element of each offense charged. Proof of one charged offense carries with it no inference that the accused is guilty of any other charged offense.

Again this term, the CAAF reviewed a government findings argument that arguably commented on one of the accused's constitutional rights—this time, the accused's right to counsel.²¹⁴ Under the unique facts of *Haney*, the CAAF did not find plain error.²¹⁵ However, the CAAF voiced disapproval of the argument—and implicitly the military judge's failure to sua sponte correct it.²¹⁶

Lance Corporal (LCpl) Haney was suspected of abusing controlled substances.²¹⁷ When initially questioned about it by law enforcement, he denied any such abuse. Eventually, LCpl Haney invoked his rights to silence and to counsel. However, he later returned and, after another rights advice, confessed to his crimes.

At trial, the accused argued his confession was coerced.²¹⁸ The accused took the stand for that purpose and during his direct examination, disclosed that he had invoked his rights to silence and to counsel before returning to confess.

During findings argument, the trial counsel made the following argument:

[The accused] says he gave a statement to avoid confinement. Well, let's look at that. I mean I think that's an interesting statement. Let's -- this is an important analysis that I think needs to be considered. *He gets his first rights warning from Master Sergeant Crecilius and he invokes his right, he says, I want to see an attorney. And he leaves the premises and what does he do? He doesn't see an attorney, he goes to the barracks. What would most people do in that situation if an individual was truly innocent? Wouldn't they go see a lawyer and get some sort of legal protection? Would they come back and admit to guilt without the benefit of legal advice? What is more reasonable is that if he knows he's guilty, he understands that there may be witnesses out there who can prove he's guilty, he has an incentive to come back and try to minimize things by being as cooperative as possible and hope that he gets some sort of leniency. If he was innocent, the government is arguing, he would have gone and seen a lawyer, and used that shield.*²¹⁹

There was no objection to any of this argument by the trial defense counsel. Likewise, the military judge did not sua sponte instruct the officer and enlisted members of the accused's panel regarding the comments in italics above. The members convicted the accused of three violations of Article 112a and one of Article 107.²²⁰

On appeal, LCpl Haney argued that the trial counsel's argument in italics above was an impermissible comment on his invoking his right to counsel.²²¹ Because there was no defense objection, the CAAF applied a plain error analysis.²²²

The CAAF avoided deciding whether error existed, holding that if there was error, it was harmless beyond a reasonable doubt given the unique facts of this case.²²³ However, the CAAF specifically disapproved of the trial counsel's argument.

²¹³ 64 M.J. 101 (2006).

²¹⁴ Last term, the CAAF reviewed trial counsel's implied comment on the accused's right to silence in *United States v. Carter*, finding plain error and affirming the Air Force Court of Criminal Appeals' (AFCCA) reversal of Airman Carter's conviction for indecent acts. *United States v. Carter*, 61 M.J. 30, 31 (2005).

²¹⁵ *Haney*, 64 M.J. at 102.

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.* at 103.

²¹⁹ *Id.* at 104 (court's emphasis).

²²⁰ *Id.* at 102.

²²¹ MCM, *supra* note 15, MIL. R. EVID. 301(f)(3) (stating that such evidence is inadmissible against the accused).

²²² *Haney*, 64 M.J. at 105.

²²³ *Id.*

Such a statement, in conjunction with the CAAF's focus on findings arguments and the military judge's responsibility therein from last term, could be read as an implication that the military judge should have given a curative instruction.²²⁴

*Avoiding Appellate Litigation: United States v. Washington*²²⁵

Staff Sergeant Washington's conviction by members of carnal knowledge and indecent acts is not significant from an instructional perspective, other than an illustration of the obvious²²⁶—following the *Benchbook* helps avoid potential error (and appellate litigation).

During the accused's contested trial, the accused's eight year old daughter, C.B., testified for the government.²²⁷ After the trial counsel discussed with C.B. the difference between the truth and a lie, and the importance of telling the truth, he began his direct examination without actually administering an oath to C.B.²²⁸ However, at the conclusion of her testimony, recognizing his failure to swear her before she testified, the trial counsel engaged in the following colloquy:

Q. [C.B.], your testimony today, was it the truth?

A. Yes.

Q. Was it the whole truth?

A. Yes.

A. Was it nothing but the truth?

Q. Yes.

A. So help you God?

Q. Yes.²²⁹

At no point did the defense object to the failure to swear C.B.

Because the defense did not object, the CAAF applied plain error analysis.²³⁰ Although the CAAF found obvious error,²³¹ it determined that the error was harmless and did not prejudice the accused's substantial rights.²³² However, reinforcing the judicial mantra of "follow the *Benchbook*," the CAAF said "adherence to the [B]enchbook formula will minimize dispute."²³³

Although the *Benchbook* does not specify the oath or affirmation for witnesses,²³⁴ it does remind the military judge that the trial counsel administers oaths *before* the witnesses testify,²³⁵ consistent with the requirement of MRE 603.²³⁶ While

²²⁴ BENCHBOOK, *supra* note 3, instr. 2-7-20 (Comment on Rights to Silence or Counsel addresses this issue). The note at the beginning of this instruction advises the military judge to determine whether such evidence is admissible if presented to the members, and if not admissible, to "fashion an appropriate remedy." Although it does not appear from the opinion that the military judge followed that note and affirmatively determined admissibility, it would be unfair to say the trial judge here did not recognize the issue just because such analysis does not appear in the opinion. To avoid (or at least expedite) potential appellate litigation on this issue, military judges should follow the guidance from the Note and include their analysis on the record.

²²⁵ 63 M.J. 418 (2006), *cert. denied*, 127 S. Ct. 842 (2006).

²²⁶ "Follow the *Benchbook* and avoid error" is an old saw. See *United States v. Llewellyn*, 32 M.J. 803, 805 n.3 (A.C.M.R. 1991):

Our holding should not be construed as approval for not following the time tested provisions of the *Benchbook*. Although we believe the omission of the instruction in this case was inadvertent, military judges are cautioned that failure to follow the *Benchbook* at worst may result in reversal and at best result in needless litigation at the appellate level.

Id.

²²⁷ *Washington*, 63 M. J. at 421.

²²⁸ *Id.* at 423.

²²⁹ *Id.*

²³⁰ "Under our plain error analysis, Appellant must show that there was error, the error was plain or obvious, and that the error materially prejudiced his substantial rights." *Id.* at 424 (citing *United States v. Powell*, 49 M.J. 460, 463-65 (1998)).

²³¹ "There is no doubt that the failure to administer the oath before C.B.'s testimony was error, and that the error was obvious. The plain text of MRE 603 required C.B., by oath or affirmation, to declare that she would testify truthfully 'before testifying.'" *Id.*

²³² *Id.* at 425.

²³³ *Id.*

²³⁴ See MCM, *supra* note 15, R.C.M. 807(b)(2) discussion, subpara. (F) (oath/affirmation for witnesses).

novel situations may require deviation from the *Benchbook*, those situations are generally few and far between. The advice from the Army Court of Military Review in *Llewellyn*²³⁷ rings true today as well: To avoid negative consequences later, all trial participants should—except in those novel situations—follow the *Benchbook*.²³⁸

Sentencing

*Insufficient Curative Instructions: United States v. Grover*²³⁹

Last term, the CAAF examined government findings arguments for error—and the military judge’s failure to correct them.²⁴⁰ This term, the Air Force Court of Criminal Appeals (AFCCA) followed that theme as it relates to a sentencing argument.

In *Grover*, after the military judge accepted Senior Airman Grover’s guilty pleas to violations of Articles 86, 107 and 112a, officer members sentenced him to confinement for nine months, reduction to E-1 and a bad conduct discharge.²⁴¹

During the sentencing argument, the trial counsel relied heavily on evidence that the AFCCA later determined was inadmissible under RCM 1001(b).²⁴² The trial counsel told the members that the accused’s ex-spouse “didn’t trust him,”²⁴³ that, because he was a husband and a father, he should be “held to a higher standard,”²⁴⁴ that the accused had left his child with a stripper (not supported by any evidence—proper or otherwise),²⁴⁵ and that the sentence imposed should force him to take responsibility—not for the offenses of which he stood convicted—but for his children.²⁴⁶

While the military judge did tell the members to disregard the comment about the accused leaving his child with a stripper, with regard to the trial counsel’s other arguments, he merely stated that they may have been “on the borderline.”²⁴⁷

²³⁵ For example, see the first Note in *Benchbook* sec. V, para. 2-5-5.

²³⁶ As the CAAF discussed at length in this case, MRE 603 requires the witness be administered the oath or affirmation “[b]efore testifying.” *Washington*, 63 M.J. at 424 (citations omitted).

²³⁷ *United States v. Llewellyn*, 32 M.J. 803, 806 n.3 (A.C.M.R. 1991).

²³⁸ The difficulty for practitioners is in determining, under the stress of trial, what is and is not a “novel” situation.

²³⁹ 63 M.J. 653 (A.F. Ct. Crim. App. 2006).

²⁴⁰ In *United States v. Fletcher*, 62 M.J. 175, 177 (2005), the CAAF found prejudicial error in the military judge’s failure to correct the government’s improper findings argument, over minimal defense objection. This term, the CAAF addressed findings arguments again in *Haney* finding no plain error under the unique facts of that case, absent any defense objection. *United States v. Haney*, 64 M.J. 101, 105-06 (2006). Contrast both those cases with *United States v. Hill*, 62 M.J. 271 (2006), where the CAAF praised sua sponte action by the military judge in correcting improper questioning on sentencing: “When the witness extended his answer to suggest what he might have done as a panel member, the trial judge promptly cut him off and said that the witness was not allowed to make such a comment. The prompt and decisive action by the trial judge reflected his awareness that the defense had not opened the door to unlimited remarks about retention of Appellant.” *Hill*, 62 M.J. at 275.

²⁴¹ *Grover*, 63 M.J. at 653.

²⁴² A good portion of the AFCCA’s opinion in this case is devoted to the inappropriate evidence admitted by the government, over defense objections the AFCCA characterized as both “frequent” and “to no avail.” *Id.* at 656. While the purpose of citing this case is to reinforce the military judge’s sua sponte obligation to stop improper argument by counsel and appropriately instruct the members, the entire opinion is a good reminder of what is – and is not – admissible on sentencing. The AFCCA generally reminds us that to be admissible, evidence offered in the government’s sentencing case in chief must fall within one of the five RCM 1001(b) categories. Here, the government offered evidence of a “no contact order issued to the appellant; about his problems maintaining control of his emotions when dealing with issues relating to divorce, child custody, and child visitation matters; and about [the accused’s] financial difficulties, including issues with car payments, insurance, and rent. The trial counsel even went to so far as to offer [the accused’s] traffic tickets. Indeed, there was, apparently, no limit to the prosecution’s determination to explore every one of [the accused’s] flaws [including his failure to keep his boots shined].” *Id.* at 655. Because the accused was convicted of failure to repair under Article 86, false official statement under Article 107 and two use offenses under Article 112a, the AFCCA had no difficulty in determining the government’s evidence above did not fall into any permissible category under RCM 1001(b). Particularly under RCM 1001(b)(4) (“aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty”) and RCM 1001(b)(5) (“opinions concerning the accused’s previous performance as a servicemember and potential for rehabilitation”). As the AFCCA noted dryly, “At no point did [the trial counsel] make even a token effort to link the condition of [the accused’s] footwear to his drug use or other misconduct.” *Id.* at 656.

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ *Id.* at 657.

²⁴⁶ *Id.*

²⁴⁷ *Id.*

In setting aside the accused's sentence, the AFCCA found that the sentencing phase of this trial had "devolve[d] . . . into a no-holds-barred trashing of the accused."²⁴⁸ During argument, the defense counsel objected to trial counsel's argument, and the military judge made sua sponte efforts to control the tone and substance of the trial counsel's argument. The AFFCA found that the efforts of the military judge were "at best weak."²⁴⁹

Although not expressly stated by the AFCCA, the tone of the opinion is clear—the military judge is more than a "mere referee"²⁵⁰ and has a sua sponte obligation to control excesses by counsel during argument. When counsel stray, the military judge has an obligation to stop the argument and appropriately instruct the members—regardless of the number of times it must be done.²⁵¹

*The Duration of Total Forfeitures: United States v. Stewart*²⁵²

At his contested general court-martial before members, Airman First Class Stewart was convicted of unlawful entry, indecent assault and indecent acts.²⁵³ The members imposed the following sentence: "reduction to the grade of Airman Basic (E-1), 15 months confinement and forfeiture of all pay and allowances."²⁵⁴ The members did not adjudge a discharge. The convening authority approved the sentence as adjudged.

Following his confinement, the accused was returned to active duty. However, the accused was initially subjected to total forfeitures after his return to duty status. Eventually, the forfeitures were reduced to two thirds forfeitures, until the convening authority remitted all uncollected forfeitures, some eight months after the accused returned to duty status.

On appeal, the accused argued that he should not have been subject to any forfeitures after his return to duty status. Specifically, the accused argued that, "because the members did not specify imposition of partial forfeitures as an additional punishment following total forfeitures, his sentence to forfeiture of all pay and allowances was intended to run only through his period of confinement."²⁵⁵ Additionally, the accused asserted that DFAS' continued imposition of forfeitures subjected him to a sentence more severe than that adjudged by the members."²⁵⁶

Unable to clearly divine the members' intent, the CAAF agreed with the accused and limited his total forfeitures to the period he was in confinement.²⁵⁷ The CAAF then held:

[W]here a sentence to forfeiture of all pay and allowances is adjudged, such sentence shall run until such time as the servicemember is discharged or returns to a duty status, whichever comes first, unless the sentencing authority expressly provides for partial forfeitures post-confinement. The sentencing authority shall specify the duration and the amount of such partial forfeitures, subject to R.C.M. 1103 [sic 1003] (b)(2), the discussion accompanying R.C.M. 1107(d)(2), and *Warner*.²⁵⁸

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *United States v. Graves*, 1 M.J. 50, 53 (C.M.A. 1975).

²⁵¹ As it relates to counsel's continued improper argument after correction by the military judge, the facts in this case are reminiscent of the CAAF opinion in *United States v. Carter*, 61 M.J. 30 (2005). There, as here, the military judge corrected improper argument by counsel by means of instructions to the members. *Id.* at 32. However, in both cases, the improper argument continued after the military judge's correction, thus "vitiat[ing] any curative effect" of the military judge's prior correction. *Id.* at 35. The appellate courts demand that when counsel persist with improper argument, the military judge must be similarly persistent with corrections.

²⁵² 62 M.J. 291 (2006).

²⁵³ *Id.* at 292.

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ *Id.* at 292-93.

²⁵⁷ *Id.* at 294.

²⁵⁸ *Id.* Practically speaking, this total forfeiture/partial forfeiture dichotomy becomes important when the accused returns to a duty status after some confinement. This likely would only occur after:

- (1) The accused is sentenced to confinement without a discharge and completes his confinement; or

The *Benchbook* currently does not have an instruction to cover this particular situation.²⁵⁹ For the members to accurately apply the holding from this case, they would need to be instructed that:

- (1) Although they may adjudge total forfeiture of all pay and allowances, that forfeiture is effective only until the accused either is discharged, reaches the end of his enlistment,²⁶⁰ or returns to active duty, whichever occurs first.
- (2) Should the accused return to active duty, he may be subject only to a maximum of 2/3 forfeitures of pay.²⁶¹
- (3) Should the members wish to adjudge a forfeiture that would be effective after the accused returns to active duty, they would need to “include an express statement of a whole dollar amount to be forfeited each month and the number of months the forfeiture is to continue”²⁶² after the accused returns to active duty.

In theory, to apply any such instruction, the members would need to know when the accused would be released from confinement. Instructing the members how to calculate when the accused would be released from confinement would be an impossible task, as that date depends in part on the accused’s conduct while in confinement; that is, whether and how much “good time” credit he receives.²⁶³ Thus, while a *Stewart* instruction including the above information might conceptually seem easy; practically, it is impossible to implement because the members would have to guess at the actual start time for any partial forfeitures.²⁶⁴

Conclusion

The cases from the 2006 term provide many lessons on instructions for military justice practitioners. The *Benchbook* is the primary resource for instructions, and varying from the standard *Benchbook* instructions should only be done for good reason and upon careful deliberation. However, the *Benchbook* is only the first step because it might not adequately reflect

(2) The accused is sentenced to confinement and a discharge, and the convening authority has not taken initial action prior to the accused completing the confinement.

In the latter case, the accused would return to a duty status unless he requests voluntary excess leave, which is a no-pay status after accrued leave is exhausted. See DEP’T OF DEFENSE FINANCIAL MANAGEMENT REG. 7000.14-R, vol. 7A, para. 010301.E & F (Sept. 2006) [hereinafter FMR]. After the convening authority takes initial action on an accused’s sentence which includes confinement and a discharge, the accused is routinely notified of the command’s intent to place him on involuntary excess leave (rather than return him to a duty status). See U.S. DEP’T OF ARMY, REG. 600-8-10, LEAVES AND PASSES para. 5-19 (15 Feb. 2006). While the Soldier is given a reasonable time to respond that he would like to remain on duty, Soldiers facing this excess leave are rarely occurs retained on duty. Like voluntary excess leave, involuntary excess leave is a no pay status after accrued leave is exhausted. See FMR, *supra*, paras. 010301.E & F.

²⁵⁹ The *Benchbook* Committee is currently considering an instruction to address this issue.

²⁶⁰ If a servicemember is confined pursuant to a court-martial sentence and reaches the end of his enlistment while so confined, his pay stops. The *Benchbook* currently addresses this impact of DOD Fin. Mgmt. Reg. 7000.14-R, vol. 7A, para. 010302.G5. See BENCHBOOK, *supra* note 3, sec. II, para. 2-2-6.

²⁶¹ This instruction could arguably run afoul of *United States v. Jobe* where the Court of Military Appeals disapproved an instruction that told the members the accused could not be sentenced to “forfeiture of more than two-thirds pay per month without also awarding a punitive discharge.” *United States v. Jobe*, 27 C.M.R. 350, 352 (C.M.A. 1959). While such a sentence was not prohibited by the UCMJ, the *Jobe* court determined such a sentence would likely run afoul of the Eighth Amendment prohibition on cruel and unusual punishment. *Id.* at 353. While the CMA said “some cautionary instruction on the imposition of total forfeitures might be legally desirable and practically beneficial to the accused” the instruction actually given was inappropriate because it could have been interpreted as a direction to give a punitive discharge. *Id.* A similar problem arguably exists here. The line between a “legally desirable and practically beneficial” instruction as mentioned in *Jobe* and an impermissible one is unclear. This is yet another practical obstacle to crafting an instruction to meet the issue set forth in this case.

²⁶² See BENCHBOOK, *supra* note 3, sec. V, para. 2-5-22.

²⁶³ Additionally, consider the following additional factors as examples of the practical impossibility of drafting an instruction implementing this opinion:

- (1) If the accused elects to be sentenced by members and is pleading guilty pursuant to a pretrial agreement (PTA), the PTA will impact his release date if the members’ sentence to confinement exceeds the PTA limitation. The members do not know the existence – or the terms – of any PTA.
- (2) The members are not told of collateral consequences of their sentence, including good time and parole, which also impact the accused’s release date.

²⁶⁴ *Stewart* would appear to allow the members to impose a sentence that would include the following: “forfeiture of all pay and allowances during the period the accused remains in confinement and forfeiture of ____ pay per month for ____ months upon return to active duty after release from confinement.” However, such a sentence would require the members, when crafting their sentence, to determine the accused’s release date. As mentioned above, this determination would be speculation on the members’ part. Also as mentioned above, providing them with enough information to avoid this speculation would be impossible.

new case law or cover the law in a unique situation. Military judges must pay careful attention to detail in order to provide clear, accurate and complete instructions to the members. Also, military judges must be ready to stop improper argument and provide curative instructions when necessary, often on a sua sponte basis. Instructions to the members are critical to a fair trial because they provide the necessary guideposts for an “informed deliberation.”²⁶⁵

²⁶⁵ United States v. Dearing, 63 M.J 478, 479 (2006).