

## **“I Made a Wrong Mistake”:<sup>1</sup> Sentencing & Post-Trial in 2005**

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### **Introduction**

The 2005 term for the Court of Appeals of the Armed Forces (CAAF) and service courts produced several significant cases pertaining to both sentencing and post-trial. The sentencing cases involve issues of improper questions being asked and improper answers being given. The post-trial cases involve a number of cases concerning errors in the staff judge advocate’s recommendations (SJARs) and two significant and somewhat earth-shattering cases that grabbed the attention of every military justice practitioners. This article addresses these noteworthy and important cases.

In the area of sentencing, *United States v. Griggs*<sup>2</sup> was arguably the most significant case dealing with, and hopefully settling, the question of whether Rule for Court-Martial (RCM) 1001(b)(5)(D), which limits the scope of presentencing opinions to rehabilitate potential,<sup>3</sup> applies to the defense sentencing case. In *Griggs*, the court clarified that evidence of rehabilitative potential under RCM 1001(b)(5)(D) does not apply to defense mitigation evidence.<sup>4</sup> Moreover, the rule does not preclude testimony that a witness would willingly serve with an accused again.

In terms of post-trial procedures, *United States v. Jones*<sup>5</sup> likely was the court’s most important ruling during its 2005 term. In *Jones*, the CAAF granted substantial relief to an accused who demonstrated difficulty in securing civilian employment due to the lengthy delay in the government’s processing of his post-trial matters. In rendering its decision, the court found denial of due process resulted from the delay.<sup>6</sup> The CAAF concluded that Jones suffered as a result of the government failing to provide timely post-trial processing and appellate review of his case.<sup>7</sup> Although not a case from the 2005 term, *United States v. Moreno*<sup>8</sup> is also a noteworthy case and is important to mention in the area of post-trial.

### **Sentencing**

#### *Sentencing Evidence*

To kick off the discussion of the various “wrong mistakes,” an examination of *United States v. Griggs*<sup>9</sup> is certainly an appropriate place to begin. A court-martial panel tried and convicted Senior Airman Griggs of various drug-related offenses.<sup>10</sup> During the presentencing segment of his case, the defense counsel offered six letters with opinions commenting specifically on Grigg’s rehabilitative potential in the Air Force as opposed to generally being a productive member of

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<sup>1</sup> Yogi Berra Quotes, DigitalDreamDoor.com, <http://www.digitaldreamdoor.com/pages/quotes/yogiberra.html> (last visited Jan. 25, 2006).

<sup>2</sup> 61 M.J. 402 (2005).

<sup>3</sup> MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1001(b)(5)(D) (2005) [hereinafter MCM].

<sup>4</sup> *Id.* at 409.

<sup>5</sup> 61 M.J. 80 (2005).

<sup>6</sup> *Id.* at 85.

<sup>7</sup> *Id.* *United States v. Moreno*, issued by the CAAF on 11 May 2006, significantly overshadowed *Jones*.

<sup>8</sup> 63 M.J. 129 (2006).

<sup>9</sup> 61 M.J. 402 (2005).

<sup>10</sup> *Id.* at 403. In accordance with his plea, the court-martial convicted Jones of wrongful use of marijuana. Contrary to his pleas, the court-martial convicted him of wrongful use of methylenedioxymethamphetamine (MDMA), a.k.a. ecstasy, and two specifications of distribution of ecstasy under Art. 112a, Uniform Code of Military Justice (UCMJ). *Id.*

society.<sup>11</sup> The government counsel objected to the letters on the grounds that the statements were recommendations for retention and would confuse the members.<sup>12</sup> The military judge sustained the trial counsel's objection. Eventually, the defense counsel conceded the issue, agreeing with the military judge that RCM 1001(b)(5)(D) applied to the defense as well as the prosecution.<sup>13</sup> Accordingly, the military judge ordered the following underscored language redacted from the defense exhibits:

I have no doubt SrA Griggs will continue to be an asset to the mission of the squadron and Air Force. I can honestly say his future is not in my hands, but I ask the panel to have compassion and SrA Griggs is given a second chance to be a productive member of the United States Air Force.

I would still like to be able to work with SrA Griggs. In fact I have two airmen I'd gladly trade just to keep him. I feel the Air Force could use more airmen like him. Even with the stress of a pending court-martial he has remained dedicated, motivated, and faithful till [sic] the end.

I would not hesitate to have SrA Griggs working for me or with me. I continue to hear, "This is not a one mistake Air Force" so I feel SrA Griggs can learn a valuable lesson from this experience.

I believe strongly that everyone deserves a second chance to prove him or herself. I have no doubt SrA Griggs will continue to be an asset to the mission of the squadron and Air Force. I ask the panel to have compassion and SrA Griggs is given a second chance to be a productive member of the United States Air Force.

I am convinced that he has learned from this experience and can still be of great potential to the United States Air Force . . . . We seem to "eat our young" sometimes and see the only course of action is to toss them out after investing so much time, effort, and money.<sup>14</sup>

The adjudged and approved sentence included reduction to E-1, forfeiture of all pay and allowances, confinement for 150 days, and a bad-conduct discharge.<sup>15</sup> The issue certified by the CAAF on appeal was whether the Air Force Court of Criminal Appeals (AFCCA) prejudicially erred in holding that the military judge did not abuse his discretion in applying RCM 1001(b)(5)(D)<sup>16</sup> to defense sentencing evidence.<sup>17</sup> The CAAF determined that the excluded evidence may have substantially influenced the panel in adjudging the sentence in Grigg's case.<sup>18</sup> Accordingly, CAAF ordered a rehearing. Distinguishing *Griggs* from other cases, the court stated that "the better view is that RCM 1001(b)(5)(D) does not apply to defense mitigation evidence, and specifically does not preclude evidence that a witness would willingly serve with the accused again."<sup>19</sup> The CAAF found this to be consistent with the structure of RCM 1001(b)(5)(D).<sup>20</sup> The CAAF further noted that so-called "retention evidence," such as that offered in this case, is a classic matter in mitigation, which is expressly

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<sup>11</sup> *Id.* at 406.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 403.

<sup>16</sup> Rule for Court-Martial 1001(b) covers matters to be presented by the prosecution. Rule for Court-Martial 1001(b)(5)(D) covers the scope of a witness's opinion when offering rehabilitative potential evidence. Specifically it states:

An opinion offered under this rule is limited to whether the accused has rehabilitative potential and the magnitude or quality of any such potential. A witness may not offer an opinion regarding the appropriateness of a punitive discharge or whether the accused should be returned to the accused's unit. *Id.*

MCM, *supra* note 3, R.C.M. 1001(b)(5)(D) (2005).

<sup>17</sup> *Jones*, 61 M.J. at 403.

<sup>18</sup> *Id.* at 410.

<sup>19</sup> *Id.* at 409.

<sup>20</sup> *Id.*

permitted to be presented by the defense.<sup>21</sup> It further cautioned, however, that “if an accused ‘opens the door’ by bringing witnesses before the court to testify that they want him or her back in the unit, the government is permitted to prove that such evidence is not a consensus view of the command.”<sup>22</sup>

For practitioners, although this case seems to be favorable to the defense by allowing retention evidence to be presented as mitigation evidence, if the government is prepared in advance for this evidence, it has the opportunity to present fairly damaging rebuttal evidence, thereby negating the defense’s mitigation evidence.<sup>23</sup>

*United States v. Gorence*<sup>24</sup> is another 2005 sentencing case addressing the extent of permissible questioning by trial counsel. In *Gorence*, the government counsel offered evidence during presentencing from the accused’s personnel records reflecting three disciplinary infractions during his seventeen months of military service.<sup>25</sup> During the defense sentencing case, Gorence’s mother testified on behalf of her son.<sup>26</sup> At the conclusion of defense counsel’s direct examination of the mother, the government conducted no cross examination.<sup>27</sup> The military judge, however, asked the accused’s mother several questions regarding whether her son had a substance abuse problem.<sup>28</sup> The government counsel then followed the military judge by asking Gorence’s mother a series of questions about whether her son had used marijuana while he was in high school.<sup>29</sup> The defense counsel objected to these questions.<sup>30</sup> The military judge overruled the objection, stating that he was not going to consider her answer for any uncharged misconduct purposes.<sup>31</sup> Gorence’s mother went on to state that she believed that Gorence had experimented with marijuana while in high school.<sup>32</sup>

The following issues were presented on appeal: (a) whether the AFCCA improperly conducted its appellate review under Article 66(c), UCMJ,<sup>33</sup> by considering evidence outside the record in violation of *United States v. Holt*,<sup>34</sup> and (b) whether the military judge abused his discretion by permitting the trial counsel to elicit information from the accused’s mother concerning Gorence’s pre-service drug use to “rebut” matters to which the military judge himself “opened the door.”<sup>35</sup> The CAAF distinguished *Gorence* from *Holt*. While *Holt* held that a court of criminal appeals “may not resurrect

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<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 410 (citing *United States v. Aurich*, 31 M.J. 95, 96-97 (1990)).

<sup>23</sup> *See United States v. Barrier*, 61 M.J. 482, 483 (2005).

<sup>24</sup> 61 M.J. 171 (2005).

<sup>25</sup> *Id.* at 172.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 173.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> UCMJ art. 66 deals with review by the Service Courts of Criminal Appeals. Specifically, Article 66(c) states:

In a case referred to it, the Court of Criminal Appeals may act only with respect to the findings and sentence as approved by the convening authority. It may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, it may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.

UCMJ art. 66 (2005).

<sup>34</sup> 58 M.J. 227 (2003). The CAAF has held that Article 66(c) limits the courts of criminal appeals “to a review of the facts, testimony, and evidence presented at the trial, and precludes a Court of Criminal Appeals from considering ‘extra-record’ matters when making determinations of guilt, innocence, and sentence appropriateness.” *United States v. Mason*, 45 M.J. 483, 484 (1997) (citing *United States v. Bethea*, 46 C.M.R. 223, 224-25 (C.M.A. 1973)); *see also United States v. Reed*, 54 M.J. 37, 43 (2000); *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993).

<sup>35</sup> *Gorence*, 61 M.J. at 171.

excluded evidence during appellate review under Art. 66(c),”<sup>36</sup> here the court of criminal appeals “did not resurrect any *excluded* evidence, [but] rather . . . found an alternative foundational basis for the rebuttal evidence *considered* by the military judge.”<sup>37</sup> The CAAF also noted that, if there was error, it was harmless.<sup>38</sup> In reaching its decision, the court focused on the fact that Gorence was tried by military judge alone and that the judge did not give significant weight to the accused’s mother’s testimony that Gorence used drugs in high school.<sup>39</sup> Moreover, the military judge stated that he was not going to “impose any other punishment for experimental use in high school.”<sup>40</sup>

In contrast, *United States v. McNutt*<sup>41</sup> was a case not of saying the wrong thing on the record, but of saying the wrong thing off the record. Following McNutt’s trial, the military judge met with defense and government counsel to conduct a “Bridging the Gap” session.<sup>42</sup> During this meeting, the military judge explained to both counsel that he sentenced the accused to seventy days of confinement rather than sixty days because he was aware of the correctional facilities’ policy of granting five days of confinement credit per month for sentences that include less than twelve months of confinement.<sup>43</sup> The Army Court of Criminal Appeals (ACCA) affirmed the sentence on the basis that the trial “judge’s knowledge about the Army policy was extraneous but properly within the common knowledge of a military judge and that Military Rule of Evidence 606(b) . . . did not provide a basis for impeaching McNutt’s sentence.”<sup>44</sup>

On appeal, the issue before the CAAF was whether the military judge erred in adjudging the sentence by “considering the collateral administrative effect of the Army regional correctional facilities’ policy of granting a service member five days confinement credit per month for sentences which include less than twelve months of confinement . . . .”<sup>45</sup> The court determined that the military judge improperly considered the collateral administrative effect of the “good-time” policy in determining McNutt’s sentence and, as a result, this error prejudiced McNutt.<sup>46</sup> In reaching this conclusion, the court restated the longstanding rule that “[c]ourts-martial [are] to concern themselves with the appropriateness of a particular sentence for an accused and his offense, without regard to the collateral administrative effects of the penalty under consideration.”<sup>47</sup> In a judge-alone case, as at a trial with members, “collateral consequences are not germane.”<sup>48</sup>

The CAAF considered the military judge’s statements and concluded that he improperly lengthened McNutt’s sentence by ten days.<sup>49</sup> Having found substantial prejudice under UCMJ art. 59(a), the CAAF returned the case to ACCA to determine an appropriate remedy.<sup>50</sup>

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<sup>36</sup> *Id.* at 174 (quoting *Holt*, 58 M.J. at 232-33).

<sup>37</sup> *Id.* (emphasis added).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> 62 M.J. 16 (2005).

<sup>42</sup> *Id.* at 17. “Bridging the Gap” sessions are informal post-trial meetings intended to be used as professional and skill development for trial and defense counsel. See *United States v. Copening*, 34 M.J. 28, 29 n.\* (C.M.A. 1992).

<sup>43</sup> *McNutt*, 62 M.J. at 17.

<sup>44</sup> *Id.* Military Rule of Evidence 606(b) protects the confidentiality of panel deliberations. See *MCM*, *supra* note 3, MIL. R. EVID. 606(b)..

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 19 (quoting *United States v. Griffin*, 25 M.J. 423, 424 (C.M.A. 1988)).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 23.

<sup>50</sup> *Id.* UCMJ art. 66 defines the service courts’ power to order remedies. See UCMJ art. 66 (2005).

### Accused's Unsworn Statement

Rule for Courts-Martial 1001(c)(2) permits an accused to testify, make an unsworn statement, or both in extenuation, mitigation, or to rebut matters presented by the prosecution, or for all purposes whether or not the accused testified prior to findings.<sup>51</sup> An accused's unsworn statement is an area of sentencing that is almost, but not completely, without bounds, the accused can say just about anything he wants to say. However, if an accused talks about matters in his unsworn statement that are otherwise inadmissible, the military judge, if he finds it necessary, can address such comments with an appropriate instruction to members. Likewise, if an accused makes a statement of fact that is not accurate, the government may rebut that portion of the accused's unsworn statement with extrinsic evidence. An accused's right to make an unsworn statement "is a valuable right . . . [that has] long been recognized by military custom."<sup>52</sup> However, the right of an accused "to make a statement in allocution is not wholly unfettered."<sup>53</sup>

During the 2005 term, the CAAF heard three cases dealing with an accused's allocution rights.<sup>54</sup> In *United States v. Barrier*, a panel of officers sentenced Barrier, pursuant to his pleas, for two specifications of drug use in violation of Article 112a, UCMJ.<sup>55</sup> During the presentencing phase, Senior Airman Barrier provided an unsworn statement. A portion of that statement contained the following language:

When deciding whether your sentence should include some amount of confinement, I know that each case has to be decided on its own merits. But I also believe that similar cases should receive similar punishments. Such as last year, Senior Airman Watson from Tyndall was charged with using ecstasy and the confinement portion of his sentence was only three months.<sup>56</sup>

Following Barrier's unsworn statement, and over defense counsel's objection, the military judge issued what is known as the *Friedmann* instruction<sup>57</sup> to the panel members.<sup>58</sup> In essence, the military judge instructed the members that they were not to rely on the disposition that occurred in other cases in determining what should be an appropriate punishment for the accused in the present case.<sup>59</sup>

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<sup>51</sup> Rule for Court-Martial 1001(c)(2) provides:

(A) *In general*. The accused may testify, make an unsworn statement, or both in extenuation, in mitigation or to rebut matters presented by the prosecution, or for all three purposes whether or not the accused testified prior to findings. The accused may limit such testimony or statement to any one or more of the specifications of which the accused has been found guilty. This subsection does not permit the filing of an affidavit of the accused.

(B) *Testimony of the accused*. The accused may give sworn oral testimony under this paragraph and shall be subject to cross-examination concerning it by the trial counsel or examination on it by the court-martial, or both.

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

MCM, *supra* note 3, R.C.M. 1001(c)(2).

<sup>52</sup> *United States v. Rosato*, 32 M.J. 93, 96 (1991) (citations omitted).

<sup>53</sup> *United States v. Grill*, 48 M.J. 131, 133 (1998).

<sup>54</sup> *United States v. Johnson*, 62 M.J. 31 (2005), *United States v. Sowell*, 62 M.J. 150 (2005), and *United States v. Barrier*, 61 M.J. 482 (2005).

<sup>55</sup> *Barrier*, 61 M.J. at 482-83.

<sup>56</sup> *Id.* at 483. During rebuttal, the trial counsel smartly presented the promulgating order from Senior Airman (SrA) Watson's case showing that SrA Watson had actually received four months confinement, forfeitures, reduction to E-1, and a bad-conduct discharge. *Id.*

<sup>57</sup> The *Friedmann* instruction comes from the case of *United States v. Friedmann*, 53 M.J. 800 (A.F. Ct. Crim. App. 2000), wherein the accused, during his unsworn statement, told the members that two of the four airmen who pled guilty to drug use with him received nonjudicial punishment and administrative discharges. He then asked the members to allow his commander to administratively discharge him in lieu of adjudging a punitive discharge. In response, the military judge instructed the members to disregard the possibility that the accused might be administratively discharged and to disregard the sentences given to others in related cases. *United States v. Friedmann*, 53 M.J. 800 (A.F. Ct. Crim. App. 2000).

<sup>58</sup> *Barrier*, 61 M.J. at 483.

<sup>59</sup> *Id.* The full text of the instruction pertaining to this issue in the *Barrier* case is as follows:

On appeal, Barrier contended that the military judge's instruction "interfered with his right of allocution."<sup>60</sup> The CAAF held that the judge's instruction correctly applied the longstanding tenet set forth in *United States v. Mamaluy*, namely that "sentences in other cases cannot be given to court-martial members for comparative purposes."<sup>61</sup> Such evidence is neither extenuation, mitigation, nor rebuttal evidence within the meaning of RCM 1001(c). The CAAF concluded that the military judge acted within his discretion by instructing the panel members that the comparative sentencing information offered during the accused's unsworn statement was irrelevant and should be disregarded.<sup>62</sup>

In *United States v. Sowell*,<sup>63</sup> a court-martial panel tried Sowell and found him guilty of conspiracy to commit larceny and larceny of two government computers in violation of Articles 81 and 121, UCMJ, respectively.<sup>64</sup> Two of Sowell's three co-conspirators were not court-martialed but were subsequently administratively discharged from the service.<sup>65</sup> The third co-conspirator, Fire Controlman Third Class (FC3) Elliott, was court-martialed and acquitted of identical charges prior to Sowell's court proceedings.<sup>66</sup> Fire Controlman Third Class Elliott testified on Sowell's behalf at trial and stated that she and the accused never talked about stealing computers, she herself never took any computers, and she never saw the accused take any computers.<sup>67</sup> Following FC3 Elliott's testimony, a panel member asked her, "what legal actions have been taken/or are pending against you for this incident?"<sup>68</sup> The trial counsel objected to the question based on relevance, and the military judge sustained the objection.<sup>69</sup>

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Now, during the accused's unsworn statement, he alluded to a case of another individual who the accused had stated had received a certain degree of punishment. In rebuttal, the trial counsel offered you Prosecution Exhibit 6, which was the court-martial order from that case which stated what that individual got in that case.

The reason I mention this is for the following reason, and that is because, in fact, the disposition of other cases is irrelevant for your consideration in adjudging an appropriate sentence for this accused. You did not know all the facts of those other cases, or other cases in which sentences were handed down, nor anything about those accused in those cases, and it is not your function to consider those matters at this trial. Likewise, it is not your position to second guess the disposition of other cases, or even try to place the accused's case in its proper place on the spectrum of some hypothetical scale of justice.

Even if you knew all the facts about other offenses and offenders, that would not enable you to determine whether the accused should be punished more harshly or more leniently because the facts are different and because the disposition authority in those other cases cannot be presumed to have any greater skill than you in determining an appropriate punishment.

If there is to be meaningful comparison of the accused's case to those of other [sic] similarly situated, it would come by consideration of the convening authority at the time that he acts on the adjudged sentence in this case. The convening authority can ameliorate a harsh sentence to bring it in line with appropriate sentences in other similar cases, but he cannot increase a light sentence to bring it in line with similar cases. In any event, such action is within the sole discretion of the convening authority.

You, of course, should not rely on this in determining what is an appropriate punishment for this accused for the offenses of which he stands convicted. If the sentence that you impose in this case is appropriate for the accused and his offenses, it is none of your concern as to whether any other accused was appropriately punished for his offenses.

You have the independent responsibility to determine an appropriate sentence, and you may not adjudge an excessive sentence in reliance upon mitigation action by higher authority.

*Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 485 (quoting *United States v. Mamaluy*, 10 C.M.R. 102, 106 (C.M.A. 1959)).

<sup>62</sup> *Id.* at 485-86.

<sup>63</sup> 62 M.J. 150 (2005).

<sup>64</sup> *Id.* at 151.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

During her findings argument, the trial counsel challenged the credibility of FC3 Elliott's testimony.<sup>70</sup> She described how FC3 Elliot, the co-conspirator, had the biggest motive to lie.<sup>71</sup> Defense counsel made no objection to these comments.<sup>72</sup> In an Article 39(a) session,<sup>73</sup> before the trial's pre-sentencing phase, the trial counsel requested that the military judge instruct the defense not to disclose evidence of FC3 Elliott's acquittal to the panel members.<sup>74</sup> Pointing to *United States v. Grill*,<sup>75</sup> the defense counsel responded that if his client wished to disclose such evidence in her unsworn statement, it was her right to do so.<sup>76</sup> The military judge granted the government's motion, stating that referring to Elliott's acquittal would be "irrelevant and direct impeachment of the verdict of the members . . . ."<sup>77</sup>

On appeal, the United States Navy-Marine Corps Court of Criminal Appeals (NMCCA) reversed and remanded for a rehearing on the sentence.<sup>78</sup> Dissatisfied with NMCCA's decision, the government sought and obtained an en banc rehearing.<sup>79</sup> Before the full NMCCA panel, a four-to-three majority reversed the previous panel's decision and reinstated the military judge's ruling and the accused's sentence.<sup>80</sup> The issue certified before the CAAF was whether the NMCCA erred when it held that the military judge did not abuse his discretion by restricting the accused's unsworn statement, not allowing her to state that the co-conspirator had been acquitted.<sup>81</sup>

The CAAF reversed NMCCA's decision as to the sentence.<sup>82</sup> Following *Grill*, the court restated that although the right of allocution is "generally considered unrestricted," it is not "wholly unrestricted."<sup>83</sup> The court distinguished *Sowell*, however, finding that the "tenor of trial counsel's argument on findings opened the door" to proper rebuttal during Sowell's unsworn statement on sentencing.<sup>84</sup> The court focused on the fact that the trial counsel was aware of FC3 Elliott's acquittal the previous week and FC3 Elliott's status was already an issue with at least one panel member.<sup>85</sup> In CAAF's view, the trial counsel's references to FC3 Elliott as a co-conspirator implied that FC3 Elliott was guilty of the same offense as Sowell and therefore had a motive to lie.<sup>86</sup> Accordingly, "Appellant should have been permitted an opportunity to fairly respond to the implications of trial counsel's argument on findings."<sup>87</sup> The CAAF found that the military judge's error in not permitting Sowell to reference Elliot's acquittal could have had a "substantial influence" on the sentence adjudged.<sup>88</sup>

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<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> UCMJ art. 39(a) (2005).

<sup>74</sup> *Sowell*, 62 M.J. at 151.

<sup>75</sup> 48 M.J. 131 (1998) (upholding an accused's right to present an unsworn statement and recognizing such right as "broadly construed for decades").

<sup>76</sup> *Sowell*, 62 M.J. at 151.

<sup>77</sup> *Id.*

<sup>78</sup> *United States v. Sowell*, 59 M.J. 552 (N-M. Ct. Crim. App. 2003).

<sup>79</sup> *Sowell*, 62 M.J. at 151.

<sup>80</sup> *Id.* (ruling that any mention of Elliot's acquittal would have challenged the members' decision on findings, and was thus not relevant).

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 153.

<sup>83</sup> *Id.* at 152 (quoting *United States v. Grill*, 48 M.J. 131, 132 (1998)).

<sup>84</sup> *Id.* at 153.

<sup>85</sup> *Id.* at 152, 153.

<sup>86</sup> *Id.* at 152.

<sup>87</sup> *Id.* at 153.

<sup>88</sup> *Id.* (quoting *United States v. Pablo*, 53 M.J. 356, 359 (2000)).

*United States v. Johnson* was yet another unsworn statement case decided by CAAF this term.<sup>89</sup> *Johnson* involved two friends, both Air Force staff sergeants, who were traveling in separate vehicles from Oklahoma City to Monroe, Louisiana.<sup>90</sup> While traveling through east Texas, local law enforcement stopped Staff Sergeant (SSgt) Johnson for a routine traffic violation.<sup>91</sup> During the stop, SSgt Johnson consented to a search of his vehicle.<sup>92</sup> The search revealed that SSgt Johnson was transporting a box containing marijuana.<sup>93</sup> Contrary to his pleas, a general court-martial composed of members convicted the accused of wrongful possession of marijuana and possession with intent to distribute in violation of Article 112a, UCMJ.<sup>94</sup>

Prior to his court-martial, SSgt Johnson took a privately administered polygraph examination arranged by his defense counsel.<sup>95</sup> The private polygrapher concluded that the accused was not deceptive when he denied knowing that he transported the marijuana.<sup>96</sup> During the presentencing phase of the court-martial, SSgt Johnson sought to refer to his “exculpatory” polygraph test during his unsworn statement.<sup>97</sup> The accused’s proposed unsworn statement included the following language:

Never in my wildest dreams did I ever once imagine that my life would end here in your hands especially after I took and passed a polygraph. I was asked point blank if I knew there was marijuana in the box to which I responded no. The polygrapher found no deception with my answers. I was hopeful at that point based on the fact that I did pass, I would not face charges again; however, that was not to be and now my future is in your hands.<sup>98</sup>

The military judge ruled that a reference by the accused to his polygraph test results were inadmissible.<sup>99</sup>

On appeal, the CAAF looked at whether the military judge erred by directing the accused not to discuss a polygraph examination during his unsworn statement when a limiting instruction to the members would have been sufficient to address the military judge’s concerns while still preserving SSgt Johnson’s allocution rights.<sup>100</sup> The court ruled that the military judge did not err in preventing SSgt Johnson from discussing his polygraph results during his unsworn statement.<sup>101</sup> Supporting its decision, the court found “that an accused is entitled to vigorously contest his innocence on findings, but is not entitled to do so on . . . sentencing.”<sup>102</sup> Staff Sergeant Johnson’s statement that “[t]he polygrapher found no deception with my answers. I was hopeful at that point that based on the fact that I did pass, I would not face charges again[,]” could not reasonably have been offered for any reason other than to suggest to the members that their findings were wrong.<sup>103</sup>

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<sup>89</sup> 62 M.J. 31 (2005).

<sup>90</sup> *Id.* at 32.

<sup>91</sup> *Id.* at 33.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 32.

<sup>95</sup> *Id.* at 36.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 36-37.

<sup>99</sup> *Id.* at 37. Specifically, “the military judge ruled that polygraph test results were not permitted under either Military Rule of Evidence (MRE) 707 or RCM 1001(c). The military judge further explained that such information would impeach the verdict and thus precluded the accused from including any reference to the polygraph test results in his unsworn statement.” *Id.* Military Rule of Evidence 707(a) specifically states, “notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence.” MCM, *supra* note 3, MIL. R. EVID. 707a.

<sup>100</sup> *United States v. Johnson*, 62 M.J. 31, 32 (2005).

<sup>101</sup> *Id.* at 37.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

Furthermore, the court was not persuaded that exculpatory polygraph information qualifies as extenuation, mitigation, or rebuttal under RCM 1001(c).<sup>104</sup>

### Post-Trial

In addition to the ever-large number of unpublished SJAR error cases, there were several post-trial processing cases as well. The most significant post-trial case decided during the 2005 term was undoubtedly *United States v. Jones*.<sup>105</sup> The accused, a Marine lance corporal (LCpl), pleaded guilty to two specifications of unauthorized absence and two specifications of missing movement by design in violation of Articles 86 and 87, UCMJ.<sup>106</sup> The military judge sentenced LCpl Jones to reduction to E-1, confinement for forty-five days, and a bad-conduct discharge.<sup>107</sup> The guilty plea proceedings lasted only fifty-five minutes and resulted in a short, thirty-seven page record of trial (ROT).<sup>108</sup> However, it took over six months (187 days)<sup>109</sup> for the record of trial to be transcribed, authenticated, and served on LCpl Jones's defense counsel.<sup>110</sup> The SJAR's post-trial recommendation was not prepared until 253 days after sentencing.<sup>111</sup> The SJAR was served on defense counsel nine days later.<sup>112</sup> The convening authority took action on the 289th day.<sup>113</sup> The record of trial was not received at the NMCCA until 9 January 2001 (363 days).<sup>114</sup>

During this delay, Jones was released from custody and had applied for a position as a truck driver with U.S. Xpress.<sup>115</sup> While on appellate leave in May and June of 2000, Jones completed a course of study at a truck driver's school and received a truck driver's license.<sup>116</sup> He submitted to the NMCCA his own declaration and declarations from three officials of a potential employer stating that he would have been considered for employment or actually hired if he had possessed a Certificate of Release or Discharge from Active Duty, DD Form 214, even if his discharge was less than honorable.<sup>117</sup> The employer was aware of Jones's court martial and conviction.<sup>118</sup> The government presented no information to rebut any of these declarations.<sup>119</sup>

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<sup>104</sup> *Id.*

<sup>105</sup> 61 M.J. 80 (2005).

<sup>106</sup> *Id.* at 81.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> The number in this and subsequent notes refers to the number of days from the conclusion of Jones's trial.

<sup>110</sup> *Jones*, 61 M.J. at 81.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 82.

<sup>116</sup> *Id.*

<sup>117</sup> Specifically, the accused submitted three declarations from various personnel associated with U.S. Xpress Enterprises. *Id.* at 82.

A position with U.S. Xpress would have produced an average salary of \$ 3,500 to \$ 4,000 per month, in addition to substantial employee benefits. When Jones did not obtain a position with U.S. Xpress, he obtained alternative employment as a delivery truck driver earning about \$7 to \$10 per hour working part-time or through temporary agencies. *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

Despite calling these delays “excessive,” the NMCCA found no prejudice.<sup>120</sup> On appeal, the issue before the CAAF was whether the excessive post-trial delay prejudiced the accused.<sup>121</sup> The CAAF held that Jones’s un rebutted declarations were sufficient to demonstrate ongoing prejudice.<sup>122</sup>

In reaching its decision, the court examined the following four factors from the speedy trial analysis of *Barker v. Wingo*<sup>123</sup> to determine whether LCpl Jones’s due process rights were violated: (1) the length of the delay; (2) the reasons for the delay; (3) the accused’s assertion of the right to a timely appeal; and (4) prejudice to the accused.<sup>124</sup> When analyzing these four factors, the court looks at the length of delay first. The length of delay serves as a “triggering mechanism.”<sup>125</sup> “[U]nless there is a period of delay that appears, on its face, to be unreasonable under the circumstances, there is no necessity for inquiry into other factors that go into the balance.”<sup>126</sup> The CAAF quickly determined that the post-trial delay in the present case was “facially unreasonable,” and therefore examined the remaining three factors.<sup>127</sup> The court found that Jones demonstrated ongoing actual prejudice by showing that his ability to have his employment application considered was hindered due to the lengthy post-trial delay.<sup>128</sup> The CAAF concluded that setting aside the bad-conduct discharge was a remedy proportionate to the prejudice that the unreasonable post-trial delay had caused.<sup>129</sup> Whether the accused would have been offered the job was not relevant in the court’s decision; however, the employer’s requirement for potential employee’s to submit a DD Form 214 and the accused’s lack of a DD Form 214 were relevant.<sup>130</sup> Moreover, the government presented no evidence to counter the four declarations submitted by LCpl Jones.<sup>131</sup>

### *New Post-Trial Processing Standards*

Though not a case from the 2005 term, *United States v. Moreno*<sup>132</sup> is so significant in the post-trial arena that it warrants special mention in this article. The CAAF issued *Moreno* on 11 May 2006. In addition to hearing an implied bias issue, the CAAF addressed whether the accused’s due process right to timely review of his appeal was denied.<sup>133</sup> *Moreno* pleaded not guilty to rape in violation of Article 120, UCMJ.<sup>134</sup> The panel members convicted *Moreno* and sentenced him to reduction to E-1, forfeiture of all pay and allowances, confinement for six years, and a dishonorable discharge.<sup>135</sup>

On appeal, Corporal *Moreno* asserted that he was denied due process because there was unreasonable delay in the 1,688 days between the end of his trial and the date that the NMCCA rendered its decision in the case.<sup>136</sup> The following is a chronology of certain key post-trial events:

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<sup>120</sup> *Id.* at 83.

<sup>121</sup> *Id.* at 84.

<sup>122</sup> *Id.* at 85.

<sup>123</sup> 407 U.S. 514, 530 (1972).

<sup>124</sup> *Jones*, 61 M.J. at 83 (citing *Toohey v. United States*, 60 M.J. 100, 102 (2004) (citing *Barker*, 407 U.S. at 530)).

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* (citing *Toohey*, 60 M.J. at 102). For clarification as to what now constitutes a presumption of unreasonable delay, see the discussion of *United States v. Moreno*, *infra*.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 84.

<sup>129</sup> *Id.* at 86.

<sup>130</sup> *Id.* at 85.

<sup>131</sup> *Id.*

<sup>132</sup> 63 M.J. 129 (2006).

<sup>133</sup> *Id.* at 132.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

- Accused sentenced on 29 September 1999.
- 746-page ROT authenticated on 4 May 2000 (208 days).
- Convening authority took action on 31 January 2001 (490 days).
- Case docketed at NMCCA (566 days).
- Eighteen defense motions for enlargement of time granted before defense brief filed on 20 March 2003 (1,268 days)<sup>137</sup>
- Government filed its brief on 29 October 2003 (1,491 days)
- NMCCA issued unpublished decision on 13 May 2004 (1,688 days).<sup>138</sup>

The CAAF has recognized that servicemembers convicted of crimes enjoy a due process right to a timely review and appeal of their courts-martial convictions.<sup>139</sup> As in *United States v. Jones*,<sup>140</sup> the CAAF applied the four *Barker v. Wingo* factors in *Moreno*.<sup>141</sup> In looking at the “prejudice” factor, the court will assess whether or not an accused has been prejudiced by looking at three interests: “(1) prevention of oppressive incarceration pending appeals; (2) minimization of anxiety and concern of those convicted awaiting the outcome of their appeals; and (3) limitation of the possibility that a convicted person’s grounds for appeal, and his or her defenses in case of reversal and retrial, might be impaired.”<sup>142</sup>

In examining the *Barker* factors, the court concluded that due to the “unreasonably lengthy delay, the lack of any constitutionally justifiable reasons for the delay, and the prejudice suffered by Corporal Moreno as a result of oppressive incarceration and anxiety,” he was denied his due process right to speedy review and appeal.<sup>143</sup> Before addressing appropriate relief in his case, the court laid out specific post-trial processing standards.

In an effort to curb excessive delay in the appellate process<sup>144</sup> and remedy those instances where there are unreasonable delay and due process violations, the CAAF fashioned the following standards. For those cases completed more than thirty days after the date of the court’s opinion (for post-*Moreno* cases), the CAAF will apply a presumption of unreasonable delay that will trigger the *Barker* four-factor analysis if the following three factors are present:

- (1) the action of the convening authority is not taken within 120 days of the completion of the trial;
- (2) the record of trial is not docketed by the service Court of Criminal Appeals within 30 days of the convening authority’s action; or
- (3) appellate review is not completed and a decision is not rendered within 18 months of docketing the case before the Court of Criminal Appeals.<sup>145</sup>

In terms of relief, the CAAF set aside the findings and sentence because of another issue in the case and ruled that “a rehearing may be ordered.”<sup>146</sup> Specifically addressing relief for the post-trial delay, the court held that if a rehearing results “in a conviction and sentence, the convening authority may approve no portion of the sentence exceeding a punitive discharge.”<sup>147</sup>

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<sup>137</sup> A motion for enlargement is a thirty day extension of time to file an appellate brief.

<sup>138</sup> *Moreno*, 63 M.J. at 133.

<sup>139</sup> *Toohy v. United States*, 60 M.J. 100, 101 (2004).

<sup>140</sup> *United States v. Jones*, 61 M.J. 80, 83 (2005).

<sup>141</sup> *Moreno*, 63 M.J. at 135. As mentioned in the *Jones* discussion *supra*, the four *Barker v. Wingo* factors are: (1) the length of the delay; (2) the reasons for the delay; (3) the accused’s assertion of the right to a timely appeal; and (4) prejudice to the accused.

<sup>142</sup> *Id.* at 138-39 (citations omitted).

<sup>143</sup> *Id.* at 141.

<sup>144</sup> “*Moreno*’s case is not an isolated case that involves excessive post-trial delay issues.” *Id.* at 142.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 144.

<sup>147</sup> *Id.*

## Conclusion

Although there were some key decisions handed down under the sentencing heading, they were no doubt overshadowed this year by these post-trial cases. Military justice practitioners will feel the impact of both *Jones* and *Moreno*. Exactly what impact it will have remains to be seen. Undoubtedly, there will be significant discussion pertaining to *Moreno* over the course of the year as SJA offices look for ways to cut post-trial processing times on pre-*Moreno* cases, while closely monitoring the clock on post-*Moreno* cases. Additionally, the military services may seek to make policy adjustments, in an effort to deal with post-trial processing, backlogs, and appellate review.