

**Out, Damned Error Out, I Say!
The Year in Court-Martial Personnel,
Voir Dire and Challenges,
and Pleas and Pretrial Agreements**

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Introduction

Shakespeare's Lady Macbeth uttered the infamous words "Out, damned spot out, I say!" in response to blood stains covering her murderous hands.¹ In the areas of court-martial personnel, voir dire and challenges, and pleas and pretrial agreements, this year's cases are bloody with the stain of error from the unwitting hands of military judges and counsel.² This bloodshed is forcing appellate courts to reverse findings, sentences, or both and, in the words of Lady Macbeth, these holdings shout "Out, damned error out, I say!"

This article discusses recent developments related to court-martial personnel, voir dire and challenges, and pleas and pretrial agreements. This article, as did former annual review articles, focuses on opinions from the Court of Appeals for the Armed Forces (CAAF) and service courts and attempts to discern trends and practical implications for the field.³ The most notable decision in the area of court-martial personnel involves the CAAF's refusal to use its supervisory powers to overhaul the panel member selection process under Article 25, Uniform Code of Military Justice (UCMJ), if the selection method is inclusive, the convening authority's motive is proper, and the selection complies with Article 25's "best qualified criteria." In the area of voir dire and challenges, the CAAF and the Navy and Marine Court of Criminal Appeals (NMCCA), which usually review the propriety of a denied defense challenge for cause, focused on a new factual twist—whether a military judge abuses his discretion by granting a government challenge for cause based on a member's pro-defense sentencing philosophy. In the pleas and pretrial agreements arena, the appellate courts continued to reverse numerous findings, sentences, or both, because of a lack of attention to detail by military judges and counsel. Prevalent providence inquiry errors include, among others, the failure to advise the accused of his rights, the failure to advise the accused of the elements of the offense, the failure to establish a factual predicate for the accused's plea, and the failure to clarify a potential defense raised by the accused's statements.

Court-Martial Personnel

Convening Authority—Panel Member Selection under Article 25, UCMJ

A convening authority must personally select the best qualified panel members based on the following Article 25, UCMJ criteria: age, education, experience, training, length of service, and judicial temperament.⁴ Scholars and military critics debate whether this selection power, combined with a convening authority's ability to refer a case to court-martial and to

¹ William Shakespeare (1564-1616), *MACBETH*, act v, sc. i, l. 38.

² The most recent article in this area noted that the opinions from the CAAF and the service courts "reflected and bemoaned an alarming lack of attention to detail by participants in the military justice process, especially the military judge and trial counsel." See Lieutenant Colonel Patricia A. Ham, *Crossing the I's and Dotting the T's: The Year in Court-Martial Personnel, Voir Dire and Challenges, and Pleas and Pretrial Agreements*, *ARMY LAW.*, July 2004, at 10.

³ See generally *id.* at 10-40 (discussing opinions from the CAAF and service courts from 2003 to 2004 in court-martial personnel, voir dire and challenges, and pleas and pretrial agreements); see also Major Bradley J. Huestis, *You Say You Want a Revolution: New Developments in Pretrial Procedures*, *Army Law.*, Apr./May 2003, at 17 [hereinafter Huestis, *Revolution*]; Major Bradley J. Huestis, *New Developments in Pretrial Procedures: Evolution or Revolution?*, *ARMY LAW.*, Apr. 2002, at 20 [hereinafter Huestis, *Evolution*].

⁴ See UCMJ art. 25 (2002). Article 25(d)(2), UCMJ states "the convening authority shall detail . . . such members of the armed forces as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament." *Id.* Rule for Courts-Martial 502(a)(1) states the following:

each [panel] member shall be on active duty with the armed forces and shall be: (A) a commissioned officer; (B) a warrant officer, except when the accused is a commissioned officer; or (C) an enlisted person if the accused is an enlisted person and has made a timely request under R.C.M. 503(a)(2).

grant post-trial clemency, is too encompassing.⁵ While these challengers exist, Article 25 remains untouched by Congress. In its last term, the CAAF refused an invitation to craft a judicially created panel selection system.⁶

Under the current system, the convening authority normally obtains member nominations from subordinate commanders, applies the Article 25 criteria, and selects the best qualified members from the recommended nominees or unit roster.⁷ Subordinate commanders, involved staff members, and the convening authority cannot arbitrarily exclude a certain group or class from panel member selection.⁸ Frequently, defense counsel allege that a convening authority improperly excluded certain groups from panel membership.⁹ This year the CAAF and the Air Force Court of Criminal Appeals (AFCCA) addressed a defense claim that a convening authority improperly excluded individuals from the panel selection process.¹⁰

In *United States v. Dowty*, the assistant staff judge advocate (ASJA) applied a “novel approach” to panel member selection by soliciting volunteers in a unit bulletin “help wanted” advertisement.¹¹ From a compiled volunteer pool of over twenty officers, the ASJA nominated nine officers for panel member selection to the convening authority.¹² The convening authority selected eight of the nine ASJA nominated volunteer officers.¹³ At trial, the defense moved to stay the proceedings, under Rule for Courts-Martial (RCM) 912, alleging the convening authority improperly selected panel members.¹⁴ Defense argued the sole use of volunteers improperly excluded a category of “otherwise eligible service members, that is, non-volunteers.”¹⁵ This systematic exclusion of non-volunteers from the selection process constituted impermissible court packing.¹⁶ Further, the defense alleged that the convening authority did not personally select the members, as required by Article 25 because the solicitation process gave the volunteers the power of self-selection.¹⁷ The trial judge denied defense’s motion and found that the convening authority personally selected the nominated volunteers and no systematic exclusion existed.¹⁸ The case proceeded to a contested court-martial before an officer panel consisting of, after challenges, three volunteer and four non-volunteer officers.¹⁹

In affirming the case, the NMCCA held the convening authority did not systematically exclude a specified group of members from panel selection.²⁰ The court rejected the accused’s argument that “non-volunteers are a discrete group that

⁵ See Major Christopher W. Behan, *Don’t Tug on Superman’s Cape: In Defense of Convening Authority Selection and Appointment of Court-Martial Panel Members*, 176 MIL. L. REV. 190 (2003); Honorable Walter T. Cox, III *et al.*, Report of the Commission on the 50th Anniversary of the Uniform Code of Military Justice (May 2001) (on file with author); Huestis, *Revolution*, *supra* note 3, at 17; Huestis, *Evolution*, *supra* note 3, at 20; Major Guy P. Glazier, *He Called for His Pipe and He Called for His Bowl, and He Called for His Members Three—Selection of Juries by the Sovereign: Impediment to Military Justice*, 157 MIL. L. REV. 1 (1998).

⁶ See *United States v. Dowty*, 60 M.J. 163 (2004).

⁷ *Id.* at 164-65.

⁸ See MCM, *supra* note 4, R.C.M. 912(b) Discussion. Certain groups, however, are excluded per statute, case law, or regulation. Excluding a member junior to the accused is permitted by statute. See UCMJ art. 25(d)(1); MCM, *supra* note 4, R.C.M. 912(f)(1)(K). See also *United States v. Yager*, 7 M.J. 171 (C.M.A. 1979) (holding the exclusion of E1s and E2s from panel membership is sanctioned because of the remote possibility that such grades meet the Article 25, UCMJ criteria). Exclusion of chaplains, inspector generals, nurses, medical, dental, and veterinary officers is authorized per regulation. See U.S. DEP’T OF ARMY, REG. 27-10, MILITARY JUSTICE ch. 7 (27 Apr. 2005).

⁹ See MCM, *supra* note 4, R.C.M. 912(b)(1). Rule for Courts-Martial 912(b)(1) states “a party may move to stay the proceedings on the ground that members were improperly selected.” *Id.* See also *United States v. Kirkland*, 53 M.J. 22 (2000) (holding E7s and below were improperly excluded from the nomination process).

¹⁰ See *Dowty*, 60 M.J. at 163; *United States v. Fenwick*, 59 M.J. 737 (A.F. Ct. Crim. App. 2003).

¹¹ *Dowty*, 60 M.J. at 166.

¹² *Id.* The ASJA did not disclose to the convening authority that a volunteer solicitation process was used to obtain the nominees. *Id.* Additionally, the written legal advice provided to the convening authority on membership selection failed to list education and experience as required criteria determinations under Article 25, UCMJ. *Id.*

¹³ *Id.* at 167.

¹⁴ *Id.*

¹⁵ *United States v. Dowty*, 57 MJ 707, 714 (2002).

¹⁶ *Dowty*, 60 M.J. at 168-69.

¹⁷ *Dowty*, 57 M.J. at 714.

¹⁸ *Id.* The trial judge concluded that “the convening authority made personal selections of the members in this case and that he did so understanding that he could choose from the entirety of his command . . .” and while “soliciting volunteers was ‘both novel and potentially troubling’ . . . there was no effort to unlawfully deny consideration of a ‘class of individuals.’” *Id.*

¹⁹ *Dowty*, 60 M.J. at 168. The defense did not challenge any member based on their volunteer status. *Id.* A challenge for cause against one volunteer was granted on a non-related issue and two additional volunteers were peremptorily challenged. *Id.*

²⁰ *Dowty*, 57 M.J. at 714.

cannot be excluded without violating [an accused's] substantial rights."²¹ The volunteers' self-selection for duty, combined with the ASJA's nominee recommendations, did not otherwise undermine the controlling fact that the convening authority personally selected the best qualified members based on his application of the Article 25, UCMJ criteria.²² The defense failed to show that the convening authority selected members to reach a particular result, instead, members were selected in an attempt to acquire a qualified, fair, and impartial panel.²³ While the selection process was "potentially troubling" no material prejudice accrued to the accused.²⁴

The CAAF, affirming, identified three, non-exhaustive, factors to use in determining the propriety of a convening authority's panel selection process.²⁵ The CAAF described these three factors stating:

First, we will not tolerate an improper motive to pack the member pool. Second, systematic exclusion of otherwise qualified potential members based on an impermissible variable such as rank is improper. Third, the court will be deferential to good faith attempts to be inclusive and to require representatives so that court-martial service is open to all segments of the military community.²⁶

The court held the convening authority did not improperly pack the court or exclude members based on an impermissible variable; however, it was error to inject the "irrelevant variable" of volunteering into the selection process.²⁷ Then, placing the burden on the government to show the error did not materially prejudice the accused, the court determined prejudice did not exist because the convening authority personally selected the panel after applying the Article 25 criteria.²⁸

Recently the AFCCA considered whether the non-selection of junior officers constituted improper systematic exclusion. In *United States v. Fenwick*, the AFCCA set aside and remanded a case where the trial judge dismissed, with prejudice, the accused's case for lack of jurisdiction because the convening authority allegedly systematically excluded lieutenants from court-martial membership.²⁹ At trial, the defense raised a RCM 912 motion, as in *Dowty*, alleging the convening authority improperly excluded lieutenants from court-martial selection.³⁰ After receiving evidence on the motion, the military judge ruled the convening authority systematically excluded lieutenants because he selected only one lieutenant to serve in the fourteen court-martials referred that fiscal year.³¹ The government filed a motion for reconsideration arguing that in the four months prior to the current fiscal year, the convening authority selected a lieutenant to serve in six of the fifteen referred court-martials.³² The convening authority testified that he selected the best qualified members based on Article 25 criteria and he "rarely . . . determined that an individual more junior in age, time in service, education and experience is better qualified to sit."³³ After this testimony, the military judge ordered the convening authority to select a new panel free from the systematic exclusion of lieutenants.³⁴ The convening authority selected a new panel without lieutenants, causing the military judge to dismiss the case with prejudice, and leading to the government's appeal under Article 62, UCMJ.³⁵

On appeal, the AFCCA reversed, holding that the convening authority's consideration, not his selection, of junior officers is the key.³⁶ The AFCCA posed two questions: (1) was the selection process proper; and (2) if proper, did the

²¹ *Id.*

²² *Id.* See *United States v. Benedict*, 55 M.J. 451 (2001) (holding a convening authority may rely on his staff to nominate members).

²³ *Dowty*, 57 M.J. at 715.

²⁴ *Id.* The court especially considered the defense's comprehensive voir dire of each member regarding their volunteer status to determine that no prejudice accrued.

²⁵ *Dowty*, 60 M.J. at 171.

²⁶ *Id.*

²⁷ *Id.* at 172. The court held volunteering is an "irrelevant variable" creating error because federal criminal practice prohibits the use of volunteers. *Id.* at 172-73 (citing Jury Selection and Service Act of 1968, 28 U.S.C. § 1861-1869; *United States v. Kennedy*, 548 F.2d 608 (5th Cir. 1977)).

²⁸ *Id.* at 173-75.

²⁹ *United States v. Fenwick*, 59 M.J. 737 (A.F. Ct. Crim. App. 2003), *pet. denied*, 60 M.J. 118 (2004).

³⁰ *Id.* at 739. Instead of referring cases to a standing panel the convening authority selected a panel for each accused's court-martial. *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.* at 740.

³⁴ *Id.*

³⁵ *Id.* at 742.

³⁶ *Id.* at 744.

statistics otherwise infer a systematic exclusion?³⁷ Before answering these questions, the AFCCA noted that the CAAF “has always focused its review on the process of putting together lists of nominees,” as opposed to the court’s ultimate composition.³⁸ The process used to solicit nominees from the subordinate commanders and the convening authority’s consideration of those nominees was proper.³⁹ The convening authority has the prerogative to select members who are, “in his opinion,” the best qualified under Article 25 and “[t]his is a subjective determination.”⁴⁰ As to statistical data, the AFCCA required the defense to “clearly indicate” the existence of systematic exclusion.⁴¹ “While a military judge may rely on statistical evidence to discern a ‘subconscious’ desire by the convening authority to improperly exclude certain grades, such statistical evidence must clearly indicate such an exclusion.”⁴² The court declined to define “clearly indicate” but ruled the presented statistics did not suffice.⁴³

For practitioners, *Dowty* and *Fenwick* show that the likelihood of raising error and establishing prejudice based on alleged improper panel selection is slight if the process includes all required groups, the convening authority lacks an improper motive, and his personal selection of members complies with Article 25’s “best qualified” criteria. Defense attorneys, however, should continue to raise RCM 912 motions if any evidence exists for a military judge to rule that the statistical data “clearly indicated” systematic exclusion by the convening authority. While *Dowty* is likely limited to its “novel” facts, the two following impacts exist: (1) the CAAF’s articulation of three factors to use to determine the propriety of the convening authority’s selection process; and, most importantly, (2) the CAAF’s unwillingness to adopt the proposed amicus position inviting the court to use its supervisory powers to overhaul the Article 25 selection process. *Dowty* potentially signals a halt to what some scholars and critics argue has been an era of recent judicial activism by the CAAF to rewrite Article 25.⁴⁴ The court, in *Dowty*, clarified its position stating “[b]ut long ago regarding this matter of members selection, we stated ‘this Court sits as a judicial body which must take that law as it finds it, and that any substitution of a new system of court selection must come from the Congress.’”⁴⁵

Accused’s Rights—Article 32, UCMJ Hearing

On an issue of first impression, the CAAF decided whether the waiver of an Article 32, UCMJ, investigation is an accused’s personal right.⁴⁶ In *Garcia*, the accused’s civilian defense counsel, Mr. Bruce J. Cockshoot, signed a written waiver unconditionally waiving the Article 32 hearing.⁴⁷ The case proceeded to a contested members’ court-martial with the accused’s ultimate conviction for numerous charges, mainly related to robbery and other larceny offenses, and a sentence of, among other things, a dishonorable discharge, confinement for one hundred and twenty-five years, and a sixty thousand dollar fine.⁴⁸ On appeal, the accused asserted that he was unaware of the Article 32 waiver until after his court-martial, he

³⁷ *Id.* at 743-44.

³⁸ *Id.* (citing *United States v. Kirkland*, 53 M.J. 22 (2000); *United States v. Roland*, 50 M.J. 66 (1999); *United States v. Bertie*, 50 M.J. 489 (1999); *United States v. White*, 48 M.J. 251 (1998)). The evidence showed the subordinate commanders provided the convening authority with “ample choices of lieutenants for selection.” *Id.* The convening authority testified he would personally select members from the unit roster if the suggested nominees were not the “best qualified.” *Id.* at 740.

³⁹ *Id.*

⁴⁰ *Id.* at 744.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ See *United States v. Wiesen*, 56 M.J. 172 (2001). In *Weisen*, the court held the military judge erred by failing to grant a defense challenge for cause based on implied bias against the board president who had an actual or potential command relationship over six of the other nine members of the panel. *Id.* at 56. Because the president and the six other members formed the two-thirds majority to convict the CAAF determined an “intolerable strain [was placed on the] public perception of the military justice system.” *Id.* Some scholars interpret *Wiesen* as a limit on the convening authority’s power to select members. See Behan, *supra* note 5 at 269-76 (stating *Wiesen* “effectively rewrites UCMJ Article 25(d)(2), burdening convening authorities with a requirement to consider actual and potential command and supervisory relationships when appointing panel members”); Information Paper, Criminal Law Division, U.S. Army, Office of the Judge Advocate General, subject: Rationale for Rule Changes in Light of *Armstrong* and *Wiesen* (6 Dec. 2002) (on file with author).

⁴⁵ *United States v. Dowty*, 60 M.J. 163, 176 (2004) (quoting *United States v. Kemp*, 46 C.M.R. 152 (1973)).

⁴⁶ See *United States v. Garcia*, 59 M.J. 447 (2004).

⁴⁷ *Id.* at 449.

⁴⁸ *Id.* at 450. Three days into the government’s case-in-chief the defense counsel advised the accused that they were “getting ‘killed’ by the Government evidence.” *Id.* The defense strategy then turned to the accused confessing to the offenses during the defense case-in-chief in the “hope that the members would be lenient if Garcia candidly accepted responsibility.” *Id.* The CAAF also reviewed whether the defense counsel’s advice to provide confessional testimony constituted ineffective assistance of counsel. *Id.* at 452-53.

“would not have authorized it had he known,” and his counsel’s unadvised waiver constituted ineffective assistance of counsel.⁴⁹

In determining if the waiver constituted ineffective assistance of counsel, the CAAF noted the right at stake determines whether an attorney can waive the issue without the accused’s knowledge and consent.⁵⁰ While some decisions are routine and within a lawyer’s sole discretion, other decisions are so fundamental to the accused’s rights that his active participation is required.⁵¹ The court held the waiver of an Article 32 hearing is not a routine decision but “rather, a decision fundamentally impacting a ‘substantial pretrial right’ of the accused.”⁵² The CAAF reasoned the right is personal to the accused because, during a guilty plea, a military judge is required to ensure any Article 32 waiver by the accused is voluntary and knowing.⁵³ The court carved a narrow category of circumstances which could justify an uncounseled waiver, “for example[,] where there is good cause for the failure to obtain personal consent, a sound tactical decision, or a lack of resultant prejudice.”⁵⁴ Mr. Cockshoot’s waiver, however, lacked good cause or a sound tactical reason.⁵⁵ The lack of an Article 32 hearing prejudiced the accused because he did not see the strength of the government’s case prior to court-martial, which might have otherwise led him to attempt to enter into a favorable pretrial agreement.⁵⁶

After *Garcia*, what constitutes a proper personal waiver by the accused? The court declined to specify a “precise form or procedure for a waiver.”⁵⁷ Absent additional guidance from the CAAF, the safest approach is to require a signed waiver from the accused and, at a minimum, to obtain the accused’s oral consent to the waiver on the record.

Accused’s Rights—Forum Election

Article 25 and RCM 903(b)(1) require any “request for membership of the court-martial to include enlisted persons [to] be in writing and signed by the accused or [to] be made orally on the record” by the accused.⁵⁸ In *United States v. Andreozzi*, the accused failed to orally request on the record or in writing his desire for a one-third enlisted member panel.⁵⁹ At arraignment, the military judge explained the various forum election rights but the accused, through counsel, deferred forum selection.⁶⁰ At trial, the member’s names and ranks were announced, the members wore uniforms with their names and ranks visible, and the civilian defense counsel not only conducted voir dire with the members, including individual voir dire with some enlisted members, but also consulted the accused concerning member challenges.⁶¹ The accused, however, never stated on the record or in writing his desire for enlisted members.⁶²

The CAAF’s previous rulings in this area held “procedural non-compliance with [these] statutory provisions” is not jurisdictional error and the test is whether the accused’s substantial rights were materially prejudiced.⁶³ Based on this standard, the Army Court of Criminal Appeals (ACCA) ordered two *Dubay* hearings to determine, not withstanding the procedural defects, whether the accused’s actions substantially complied with Article 25 so as to remove the taint of material

⁴⁹ *Id.* at 449. The accused’s assertions remained unrebutted on appeal. *Id.* Attempts to contact Mr. Cockshoot were unsuccessful and the detailed military counsel was unable to remember the specific details. *Id.*

⁵⁰ *Id.* at 451.

⁵¹ *Id.* Chief Judge Crawford, in dissent, stated the majority erred by failing to adopt the practice of the federal criminal system which allows counsel to waive a preliminary hearing or grand jury indictment. *Id.* at 453 (Crawford, C.J. dissenting).

⁵² *Id.* at 451 (citing *United States v. Chuculate*, 5 M.J. 143, 145 (C.M.A. 1978)).

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at 451-52.

⁵⁷ *Id.* at 451.

⁵⁸ MCM, *supra* note 4, R.C.M. 903(b)(1); UCMJ art. 25(c)(1) (2002).

⁵⁹ *United States v. Andreozzi*, 60 M.J. 727 (Army Ct. Crim. App. 2004).

⁶⁰ *Id.* at 730.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 733 (citing *United States v. Morgan*, 57 M.J. 119 (2002); *United States v. Townes*, 52 M.J. 275 (2000); *United States v. Turner*, 47 M.J. 348 (1997); *United States v. Mayfield*, 45 M.J. 176 (1996)).

prejudice.⁶⁴ The substantial compliance test is based on whether the accused directs the forum election.⁶⁵ The ACCA, affirming, held under the totality of the circumstances that the accused personally directed the election of an enlisted panel.⁶⁶ Because of the accused's substantial compliance with Article 25, his rights were not materially prejudiced.⁶⁷

While *Andreozzi* provides a list of circumstances equaling substantial compliance, the ACCA did not mandate any particular factor's existence to find substantial compliance. Recently the NMCCA, however, held a military judge must advise the accused of his forum rights in order to find substantial compliance with Article 16, UCMJ.⁶⁸ In *Goodwin*, the military judge failed to advise the accused of his forum rights and failed to obtain the accused's personal election in writing or orally on the record as required by Article 16.⁶⁹ The NMCCA, as the ACCA did in *Andreozzi*, first analyzed the CAAF's precedent on forum election error to find "[t]he common denominator in all of the cases discussed . . . is a proper advisement of forum rights."⁷⁰ Absent a military judge's official notice to the accused of his forum rights, the NMCCA, in setting aside the case, hesitated to presume substantial compliance with Article 16 stating "we should not settle for inference and presumption when certainty is so readily obtained."⁷¹

The obvious fix to a forum selection problem is to ensure the accused submits a personally signed written request to the court or advises the military judge on the record of his election choice. Every party to the court-martial is responsible for forum election as the ACCA observed "[t]he military judge was not alone, however, in his error by omission. Appellant's trial defense counsel erred by failing to state on the record that appellant desired a court including enlisted members, and trial counsel erred by failing to call this omission to the military judge's attention."⁷² Even if this process is skipped at court-martial, the military judge could convene a post-trial Article 39, UCMJ, session to clarify any omission.⁷³

Staff Judge Advocate Disqualification

In its last term the CAAF reviewed a staff judge advocate's (SJA) disqualification during the post-trial phase.⁷⁴ In *Taylor*, during the pre-sentencing phase, the military judge excluded portions of the accused's adverse personnel records because of numerous clerical errors.⁷⁵ Eight days after the accused's court-martial, the trial counsel published an article in the base newspaper warning commanders to properly prepare adverse personnel records.⁷⁶ The article, although omitting the accused's name, stated "[j]ustice was not served" because the panel failed to receive a "complete picture" of the accused's negative service record so they lacked information "that he was not a good candidate for rehabilitation."⁷⁷ After the article, the accused's defense counsel demanded the SJA and the convening authority's disqualification from post-trial action.⁷⁸

⁶⁴ *Id.* at 729 (citing *United States v. Lanier*, 50 M.J. 772, 780 (Army Ct. Crim. App. 1999)). The initial *Dubay* did not provide sufficient facts because the trial counsel and military judge did not testify in person or by affidavit. *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* The circumstances indicating the accused's personal selection included: the military judge's explanation of the accused's forum rights at arraignment; the defense counsel's written submission for trial by enlisted members to the military judge; the defense counsel's testimony that his normal practice was to discuss and explain forum rights to the accused and to follow the accused's wishes, the accused's presence in the courtroom when the panel was assembled and voir dire'd, the accused's age, education, and intelligence; and the accused's active participation in his own defense. *Id.* at 730-33.

⁶⁷ *Id.* at 733.

⁶⁸ *United States v. Goodwin*, 60 M.J. 849 (N-M. Ct. Crim. App. 2005). Article 16, UCMJ, as well as Article 25, UCMJ, requires the accused to state orally on the record or in writing his desire for the case to be tried by military judge alone. UCMJ art. 16 (2002).

⁶⁹ *Goodwin*, 60 M.J. at 850.

⁷⁰ *Id.* at 851 (discussing *United States v. Townes*, 52 M.J. 275 (2000); *United States v. Seward*, 49 M.J. 369 (1998); *United States v. Turner*, 47 M.J. 348 (1997); *United States v. Mayfield*, 45 M.J. 176 (1996)). The only evidence of the accused's intent existed in a single sentence in his pretrial agreement that agreed to request trial by military judge alone. *Id.* The military judge, however, also failed to discuss this pretrial agreement term with the accused. *Id.*

⁷¹ *Id.* (quoting *United States v. Hansen*, 59 M.J. 410, 413 (2004)). See also *United States v. Follord*, No. 20020350 (Army Ct. Crim. App. Feb. 15, 2005) (unpub.) (holding that numerous errors in apprising the accused of his rights to a five member officer panel constituted a lack of compliance with Article 16).

⁷² *Andreozzi*, 60 M.J. at 733.

⁷³ See *Mayfield*, 45 M.J. at 177-78 (holding that a post-trial advisement of the accused's forum rights by the military judge is authorized).

⁷⁴ *United States v. Taylor*, 60 M.J. 190 (2004).

⁷⁵ *Id.* at 191. The military judge stated "if the [unit] can't comply with dates on when [sic] they issue letters, honestly, the only way that gets brought to their attention is if the judge says that kind of stuff is not acceptable." *Id.*

⁷⁶ *Id.* at 192. The article also outlined the possible trial ramifications of non-compliance. *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* The defense counsel imputed the trial counsel's article to the SJA as the supervisor of the legal office. *Id.* The defense counsel imputed the article to the convening authority because he was the first person listed in the paper as a member of the base newspaper staff. *Id.*

The CAAF, reviewing the case *de novo*, stressed the importance of a participant's neutrality in the post-trial process to ensure fairness to the accused and to uphold the integrity of the system.⁷⁹ The convening authority, who "was unaware of the article" prior to the defense's notification and signed an affidavit specifying that he did not consider the article in his post-trial action, was not disqualified.⁸⁰ The SJA, however, in his addendum recommendation, "acknowledged that the article may be imputed to him," which, for practical purposes, meant he adopted⁸¹ all the article's sentiments, to include that the accused "was not a good candidate for rehabilitation."⁸² The SJA's acknowledgement created the appearance that he had prejudged the accused's clemency.⁸³

All justices agreed that the SJA's failure to disqualify himself constituted error; the court split three to two, however, on whether the error created "some colorable showing of possible prejudice" to the accused.⁸⁴ The majority held the accused met this low standard of "colorable possible prejudice" and remanded the case to a new convening authority for a recommendation from a non-disqualified SJA.⁸⁵ In finding prejudice, the majority focused on the court's inability to predict the convening authority's action had he received advice from a neutral SJA.⁸⁶ Two separately filed dissents, by Chief Judge Crawford and Judge Baker, stated the error was harmless because only the remotest possibility existed that the original convening authority would have granted clemency or that a new convening authority would grant clemency based on the nature of the accused's offenses and sentence.⁸⁷

The CAAF's finding of error is predictable when the SJA forthrightly acknowledges his disqualification. Any SJA who notes his own disqualification should cease further action on a case instead of risking reversal, as in *Taylor*. The more difficult question for the government arises when an arguable disqualification exists, which the SJA does not clearly acknowledge, but which an appellate court could later rule is a disqualification constituting error and requiring reversal. While *Taylor* does not address this situation, the majority's analysis whether "possible colorable prejudice" accrues to the accused centers on the government's failure to follow a defined process as opposed to, but for the error, the case's likely outcome. If the court rules that the SJA is disqualified, it is likely the court will also find "some colorable prejudice" to the accused based on the government's inability to comply with the integrity of the process concerned.⁸⁸ Ultimately a SJA's decision to act will depend on the nature of the alleged disqualification, the ease of replacing the SJA, an assessment of the validity of the issue on appeal, and the SJA's level of risk aversion. Likewise, *Taylor* encourages defense counsel to raise a SJA disqualification issue as soon as possible because the CAAF cited, during its prejudice analysis, that the accused's counsel quickly raised the issue and urged disqualification as a cure.⁸⁹

⁷⁹ *Id.* at 193.

⁸⁰ *Id.* at 193-94.

⁸¹ *Id.* at 194.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.* at 195.

⁸⁵ *Id.*

⁸⁶ *Id.* at 196.

⁸⁷ *Id.* at 196-97 (Crawford, C.J., Baker, J., dissenting). The accused was convicted of reviewing pornographic material on a government computer while at work and willful dereliction of his hospital respiratory technician duties by failing to give patient's appropriate medication and erroneously annotating medical charts. *Id.* The accused had previously received Article 15, UCMJ punishment for three assaults, drunk and disorderly conduct, and communicating a threat. *Id.* at 196. At court-martial the accused received a bad conduct discharge, no confinement, and reduction to the lowest enlisted grade. *Id.* at 197.

⁸⁸ *Id.* at 196. The majority stated that the SJA did not do his job and

[r]emanding the case for a new convening authority action will ensure that Appellant is not prejudged by that failure. It will also ensure that, regardless of the new action's outcome, that the military justice system's integrity will be protected from a disqualified individual influencing the outcome of Appellant's post-trial review.

Id.

⁸⁹ *Id.* at 195.

Voir Dire and Challenges

Challenges for Cause

The Sixth Amendment right to trial by “an impartial jury of the State” does not apply to the military.⁹⁰ As previously discussed, the convening authority selects a “jury” (panel) based on Article 25, UCMJ, criteria.⁹¹ The Sixth Amendment right to “impartial” members does apply to the military through the Fifth Amendment due process clause.⁹² This right “is the cornerstone of the military justice system.”⁹³ A member should not serve where “the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality” is questioned.⁹⁴ Voir dire is the process used to obtain information regarding a member’s impartiality so counsel can intelligently exercise challenges.⁹⁵ Both sides are entitled to unlimited challenges for cause and one peremptory challenge.⁹⁶

A challenge for cause under RCM 912(f)(1)(N) encompasses two grounds: (1) actual bias; and (2) implied bias.⁹⁷ “The test for actual bias is whether any bias is such that it will not yield to the evidence presented and the judge’s instructions.”⁹⁸ Actual bias is based on the military judge’s subjective determination of the member’s credibility.⁹⁹ The CAAF has given “the military judge great deference when deciding whether actual bias exists because it is a question of fact, and the judge has observed the demeanor of the challenged member.”¹⁰⁰ Implied bias, however, is an objective standard “viewed through the eyes of the public, focusing on the appearance of fairness.”¹⁰¹ While a military judge’s ruling on actual bias is reviewed for an abuse of discretion; “[b]y contrast, issues of implied bias are reviewed under a standard less deferential than abuse of discretion but more deferential than *de novo*.”¹⁰²

While either party may seek a member’s challenge for cause, the military judge may *sua sponte* excuse a member in the interest of justice.¹⁰³ The CAAF recently explored a military judge’s duty to excuse an unchallenged member based on implied bias grounds.¹⁰⁴ In *Strand*, the acting convening authority’s son served as panel president after challenges.¹⁰⁵ During voir dire, First Lieutenant (1LT) Olson answered questions regarding his potential impartiality because of his familial relationship with Colonel Olson, the acting convening authority.¹⁰⁶ After voir dire, the defense challenged four officers for cause but did not challenge 1LT Olson.¹⁰⁷ The defense did not allege error with 1LT Olson’s panel membership during RCM

⁹⁰ United States v. Witham, 47 M.J. 297, 301 (1997). “[T]he Sixth Amendment right to trial by jury with accompanying considerations of constitutional means by which juries may be selected has no application to the appointment of members of courts-martial.” United States v. Kemp, 22 C.M.A. 152, 154 (1973).

⁹¹ See United States v. Dowty, 60 M.J. 163, 169 (2004) (discussing Congress’ power under Article I, Section 8, Clause 14 to establish the court-martial system).

⁹² United States v. Downing, 56 M.J. 419, 421 (2002); United States v. Wiesen, 56 M.J. 172, 174 (2001); United States v. Roland, 50 M.J. 66, 68 (1999).

⁹³ United States v. Hilow, 32 M.J. 439, 442 (C.M.A. 1991).

⁹⁴ MCM, *supra* note 4, at R.C.M. 912(f)(1)(N).

⁹⁵ *Id.* R.C.M. 912(d) Discussion. Counsel’s voir dire “should be used to obtain information for the intelligent exercise of challenges.” *Id.* “The reliability of a verdict depends upon the impartiality of the court members. Voir dire is fundamental to a fair trial.” United States v. Jefferson, 44 M.J. 312, 321 (1996).

⁹⁶ UCMJ art. 41(a)(1) (2002). A military judge should liberally grant challenges for cause because of a counsel’s limited ability to use a peremptory challenge. *Downing*, 56 M.J. at 422.

⁹⁷ United States v. Armstrong, 54 M.J. 51 (2000).

⁹⁸ *Wiesen*, 56 M.J. at 174.

⁹⁹ *Id.*

¹⁰⁰ United States v. Napolitano, 53 M.J. 162, 166 (2000).

¹⁰¹ United States v. Rome, 47 M.J. 467, 469 (1998).

¹⁰² *Downing*, 56 M.J. at 422.

¹⁰³ MCM, *supra* note 4, R.C.M. 912(f)(4). The rule states “[n]otwithstanding the absence of a challenge or waiver of a challenge by the parties, the military judge may, in the interest of justice, excuse a member against whom a challenge for cause would lie.” *Id.*

¹⁰⁴ United States v. Strand, 59 M.J. 455 (2004).

¹⁰⁵ *Id.* at 456. Colonel Olson’s only action in the case involved signing a modified court-martial convening order because the accused requested court-martial before one-third enlisted members. *Id.* at 458. Colonel Olson relieved eight officer members from panel membership leaving only his son and one other officer from the originally selected list of ten officers. *Id.* at 456.

¹⁰⁶ *Id.* at 458. First Lieutenant Olson’s answers did not suggest a potential bias besides the mere existence of the familial relationship. *Id.* at 456-57.

¹⁰⁷ *Id.* at 457. Defense challenged one officer because his father was a police officer in New York. *Id.* After defense’s challenges, the trial counsel raised the potential conflict with LT Olson’s panel membership to the military judge. *Id.* The military judge responded “[w]ell neither side challenged for cause

1105 matters.¹⁰⁸ On appeal, the defense asserted that the military judge committed plain error for failing to *sua sponte* excuse 1LT Olson.¹⁰⁹

In affirming, the CAAF reviewed the totality of the circumstances to determine 1LT Olson's membership "did not raise a significant question of legality, fairness, impartiality, to the public observer pursuant to the doctrine of implied bias."¹¹⁰ A member's familial relationship with the convening authority does not per se constitute implied bias.¹¹¹ Significantly, the CAAF focused on the defense's opportunity to question and refusal to challenge 1LT Olson in light of defense's other four challenges for cause, including a challenge to a member whose father served as a police officer.¹¹² Although the implied bias test turns on public perception, the CAAF appears hesitant to impose a *sua sponte* duty on the military judge to excuse members absent an objection of bias lodged directly by defense. Additionally, the CAAF, in reviewing implied bias, considered the member's demeanor and responses, an actual bias factor, citing 1LT Olson's disclaimer of bias as a relevant consideration.¹¹³ The CAAF noted a member's demeanor is not dispositive on the issue of implied bias but "[n]onetheless, a 'member's unequivocal statement of a lack of bias can . . . carry weight' when considering the application of implied bias."¹¹⁴ *Strand* did not address whether a particular set of circumstances would ever mandate a military judge's *sua sponte* duty to dismiss a member for implied bias.

A military judge's responsibility, as opposed to a *sua sponte* duty, is more clearly defined when a party challenges a member for cause. A military judge must make a ruling whether to grant or deny the challenge based on actual or implied bias or both.¹¹⁵ Recently, the NMCCA affirmed a case even though the military judge failed to fully consider implied bias when ruling on the defense's challenges for cause.¹¹⁶ In *Richardson*, a contested officer member's case for wrongful possession and distribution of marijuana, the military judge and the defense counsel questioned members during group and individual voir dire regarding their relationship with the trial counsel.¹¹⁷ After extensive group and individual voir dire, the defense counsel asked to again individually question three members regarding their interactions with the trial counsel.¹¹⁸ The military judge denied defense's request.¹¹⁹ Defense then challenged four members for cause based on their alleged special relationship with the trial counsel.¹²⁰ The military judge granted one challenge for cause; however, his findings were based on an actual bias standard and did not include a clear-cut implied bias determination.¹²¹ As to the denied challenges, the military judge stated "in making that [causal] determination, I specifically relied upon their answers here in court and they're demeanor as I observed it in their answering. I believe that they said they could follow the instructions as I gave them. And they would not give deference to either side."¹²²

The NMCCA affirmed and held that the record "does not clearly show that the military judge applied the correct objective standard for implied bias" but more importantly a factual predicate did not exist to grant any challenge under the implied bias theory.¹²³ In finding that implied bias did not exist, the court reasoned that "the trial counsel provided advice to

or peremptorily challenged First Lieutenant Olson . . . so I see no need to make further findings as to the matter. His answers were fairly – quite clear and direct on individual voir dire." *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 458.

¹¹⁰ *Id.* at 460. The court determined an actual bias challenge did not exist based on 1LT Olson's voir dire responses. *Id.*

¹¹¹ *Id.*

¹¹² *Id.* at 459.

¹¹³ *Id.* at 460.

¹¹⁴ *Id.* (quoting *United States v. Youngblood*, 47 M.J. 338, 341 (1997)) (citations omitted).

¹¹⁵ *United States v. Armstrong*, 54 M.J. 51 (2000) (holding that a challenge for cause asserts both an actual and implied bias basis).

¹¹⁶ *United States v. Richardson*, No. 200101917, 2003 CCA LEXIS 180 (N-M Ct. Crim. App. Aug. 22, 2003) (unpub.), *pet. granted*, 60 M.J. 124 (2004).

¹¹⁷ *Id.* at *2-3.

¹¹⁸ *Id.* at *3-4. The record contained ninety-two pages of individual voir dire. *Id.*

¹¹⁹ *Id.* at *4.

¹²⁰ *Id.* at *4-5.

¹²¹ *Id.* at *9-10. The military judge granted the one casual challenge because of the member's extensive drug interdiction experiences and "to a very lesser degree his dealings with the trial counsel." *Id.* at *9.

¹²² *Id.* at *10.

¹²³ *Id.* at *11 (citing *United States v. Downing*, 56 M.J. 419, 422 (2002)).

these [challenged] members strictly in their official capacities as commanding officer, operations officer, and executive officer, respectively.”¹²⁴ Mere official legal representation, without additional factors, between a member and a trial counsel does not constitute an implied bias challenge.¹²⁵ The court cautioned military judges to provide a “clear signal” that any challenge for cause ruling incorporates both an actual and implied bias determination.¹²⁶

Although the warning to military judges to apply both tests is solid advice, the rest of the NMCCA’s *Richardson* decision is subject to revision based on the CAAF’s decision to review whether the military judge erred by limiting defense’s individual voir dire of the members or by failing to apply the “implied bias” test or both.¹²⁷ Any attempt to predict the CAAF’s impending ruling is like traveling barefoot on a dark, steep, snow covered mountain pass. It is noteworthy, however, that the CAAF has traditionally deferred to a military judges’ authority to control the voir dire process and to limit additional requests for individual voir dire.¹²⁸ The more consequential issue is the CAAF’s potential ruling on whether official legal interaction between a trial counsel and a member warrants an implied bias challenge for cause.¹²⁹ The frequency of courts-martial, tried before members who receive official legal representation from the in-court trial counsel, underlines the importance of the CAAF’s impending decision and its future application to practitioners.

Challenges for Cause—Sentencing Philosophy

A member should not sit if they exhibit an “inelastic opinion concerning an appropriate sentence for the offenses charged.”¹³⁰ The test is whether a member’s bias will yield to the evidence presented and the military judge’s instructions.¹³¹ In a death penalty case, the test is whether the member’s view would “prevent or substantially impair the performance of his duties as a [member] in accordance with his instructions and his oath.”¹³² An inflexible member is disqualified; a tough member is not.¹³³ The CAAF has frequently ruled on cases involving a member who exhibits a pro-government sentencing philosophy.¹³⁴ This year presented a new factual twist—whether a military judge errs by granting a government challenge for cause based on a member’s pro-defense sentencing philosophy. Two cases addressed this issue—one is awaiting potential CAAF review,¹³⁵ and another is pending the CAAF’s ruling.¹³⁶

In *Quintanilla*, a death penalty case, the NMCCA overturned the findings and sentence because the military judge erroneously granted a government challenge for cause against one member.¹³⁷ The government challenged two members, Lieutenant Colonel D’Ambra and Master Sergeant (MSgt) Buckham, based on their religious beliefs and alleged inability to

¹²⁴ *Id.* at *6.

¹²⁵ *Id.* at *11.

¹²⁶ *Id.*

¹²⁷ United States Court of Appeals for the Armed Forces, *Scheduled Hearings*, at <http://www.armfor.uscourts.gov/Nov2004.htm#9> (last visited Apr. 28, 2005) (providing a list of scheduled hearings, including *United States v. Richardson* on November 9, 2004).

¹²⁸ See *United States v. Dewrell*, 55 M.J. 131 (2001) (affirming military judge’s discretion to control voir dire by restricting either party from conducting group voir dire); *United States v. Lambert*, 55 M.J. 293, 296 (2001) (holding that “neither the UCMJ nor the [MCM] gives the defense the right to individually question the members”); *United States v. Belflower*, 50 M.J. 306 (1999) (finding a military judge’s decision to deny individual voir dire is reviewed for an abuse of discretion).

¹²⁹ See *United States v. Hamilton*, 41 M.J. 32 (C.M.A. 1994) (affirming a military judge’s denial of challenges for cause against members who were prior legal assistance clients of the trial counsel).

¹³⁰ MCM, *supra* note 4, R.C.M. 912 (f) Discussion.

¹³¹ *United States v. Reynolds*, 23 M.J. 292 (C.M.A. 1987).

¹³² *Gray v. Mississippi*, 481 U.S. 648 (1987) (quoting *Wainwright v. Witt*, 469 U.S. 412 (1985)).

¹³³ See *United States v. Giles*, 48 M.J. 60 (1998) (determining the military judge clearly abused his discretion by failing to grant a challenge for cause against a member who categorically stated that anyone who distributed drugs should receive a bad conduct discharge); *Cf. United States v. Schlamer*, 52 M.J. 80 (1999) (holding that a member who states “you take a life, you owe a life” is not per se disqualified if she agrees to review the evidence and follow the military judge’s instructions).

¹³⁴ *United States v. Rolle*, 53 M.J. 187 (2000); *United States v. Schlamer*, 52 M.J. 80 (1999); *United States v. Giles*, 48 M.J. 60 (1998); *United States v. Dale*, 42 M.J. 384 (1995).

¹³⁵ *United States v. Quintanilla*, 60 M.J. 852 (N-M. Ct. Crim. App. 2005).

¹³⁶ *United States v. James*, 2003 CCA LEXIS 298 (A.F. Crim. Ct. App. Dec. 10, 2003) (unpub.), *pet. granted*, 60 M.J. 124 (2004).

¹³⁷ *Quintanilla*, 60 M.J. at 854. The accused was convicted of killing his battalion executive officer and seriously wounding his battalion commander. *Id.*

consider the death penalty.¹³⁸ The military judge granted both challenges ruling “that based on [the members’] strongly held religious beliefs they will have difficulty in considering the entire range of punishments.”¹³⁹ First, the NMCCA determined the military judge erroneously applied an incorrect legal standard for his ruling.¹⁴⁰ “The test for removal of a court-martial member based on opposition to the death penalty is whether the member’s view would ‘prevent or substantially impair the performance of his duties as a [member] in accordance with his instructions and his oath.’”¹⁴¹ Based on rehabilitative questions by the defense counsel, MSgt Buckham responded that he could consider the death penalty.¹⁴² The military judge applied not only the incorrect legal standard but also clearly erred in his factual findings.¹⁴³ Master Sergeant Buckham’s voir dire responses did not indicate a substantial impairment to the performance of his panel duties.¹⁴⁴ The court noted that military judges are usually afforded “great discretion” on granting challenges for actual bias but in a death penalty case “we are not willing to allow . . . ‘great’ deference.”¹⁴⁵

The court presumed prejudice to the accused based on the court’s inability to determine if MSgt Buckham’s vote would have changed the outcome.¹⁴⁶ In light of the court’s presumption of prejudice, the government argued that prior Supreme Court decisions favored affirming the findings of guilt and approving a lesser sentence of life without parole.¹⁴⁷ In rejecting the government’s argument, the court quoted the accused’s brief:

The improper exclusion of a member is particularly harmful in a military capital case, where a death sentence requires three unanimous votes, one during the findings stage and two during the sentencing stage, after which every member still retains the complete discretion to reject the death sentence. Thus, the improperly-granted challenge had the practical consequence of ceding a vote to the government at each of the four death penalty gates. . . . We will never know [how the voting might have been different] because the military judge erroneously excluded MSgt Buckham from the panel.¹⁴⁸

The majority, distinguishing the government’s cited Supreme Court authority, relied on recent military opinions reversing not only sentences but also findings in cases involving an improperly denied challenge for cause against a member based on their sentencing philosophy.¹⁴⁹

Several factors make *Quintanilla* ripe for the CAAF’s review. The first, and most obvious, factor is the case’s nature—the reversal of a death penalty sentence and murder conviction. Secondly, the NMCCA articulates a new standard of review for actual bias challenges in a death penalty case by failing to afford the military judge “great deference.”¹⁵⁰ The court fails to cite a military or Supreme Court decision for this new standard instead relying solely on a fifth circuit decision.¹⁵¹ Before extending this test’s applicability beyond NMCCA cases, Air Force and Army practitioners, based on the limited cited authority, should wait for the CAAF’s full endorsement of this new standard. Lastly, the majority’s refusal to apply Supreme Court precedent and reliance on more recent military cases to overturn the findings is subject to debate as

¹³⁸ *Id.* at 856. Lieutenant Colonel D’Ambra stated as far as he knew the Catholic church was against the death penalty and that he would have to wrestle with considering the death penalty. *Id.* at *10-11. Master Sergeant Buckham stated that as a Baptist he would make the decision whether to vote for the death penalty a matter of prayer. *Id.* at 856-57.

¹³⁹ *Id.* at 856.

¹⁴⁰ *Id.* at 860.

¹⁴¹ *Id.* at 860 (citing *Gray v. Mississippi*, 481 U.S. 648 (1987)) (quoting *Wainwright v. Witt*, 469 U.S. 412 (1985)).

¹⁴² *Id.* at 858. The defense asked MSgt Buckham “If the [military judge] tells you the death penalty may be authorized in this case, and this [is] an authorized punishment, you have to be able to consider using the death penalty or ordering the death penalty. Can you do that?” *Id.* Master Sergeant Buckham responded “Yes, I can, sir.” *Id.*

¹⁴³ *Id.* at 861.

¹⁴⁴ *Id.* “MSgt Buckham indicated, without equivocation or reservation, that he could consider imposing the death penalty.” *Id.*

¹⁴⁵ *Id.* at 859 (citing *United States v. Gonzalez-Balderas*, 11 F.3d 1218, 1222 (5th Cir. 1994)).

¹⁴⁶ *Id.* at 862.

¹⁴⁷ *Id.* (citing *Adams v. Texas*, 448 U.S. 38 (1980); *Gray v. Mississippi*, 481 U.S. 648 (1987)).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 862-63 (citing *United States v. Giles*, 48 M.J. 60 (1998) (holding that the improper denial of a challenge for cause based solely on a member’s sentencing philosophy warranted setting aside the sentence and the findings); *United States v. Pritchett*, 48 M.J. 609 (N-M. Ct. Crim. App. 1998) (stating “the reason prejudice is presumed from such an error of law is that this Court has no way to determine how the ineligible member voted or whether his vote may have controlled the sentence imposed by the court.”)). The dissent argued to affirm the findings and authorize a sentence rehearing stating that the majority failed to adequately distinguish the Supreme Court cases cited by the government. *Id.* at 868-69. (Ritter, S.J., dissenting).

¹⁵⁰ *Id.* at 859.

¹⁵¹ *Id.* (citing *United States v. Gonzalez-Balderas*, 11 F.3d 1218, 1222 (5th Cir. 1994)).

discussed in the dissent.¹⁵² Senior Judge Ritter, dissenting, states “the majority fails to distinguish this binding [Supreme Court] precedent . . . [and] neither [cited military] case involved a member being dismissed because of his views concerning the death penalty, as occurred in this case and the two United States Supreme Court cases.”¹⁵³ More persuasively, Senior Judge Ritter distinguishes the facts of the majority’s military cases as “the military judge improperly allow[ing] a member who should have been dismissed to remain on the panel” in contrast to the case at bar where “the military judge’s error left no member on the panel who harbored an actual bias against the [accused].”¹⁵⁴

With final resolution to *Quintanilla* pending, the CAAF recently heard argument in an Air Force case involving a member with pro-defense sentencing sentiments.¹⁵⁵ *James* involves a guilty plea for use and distribution of ecstasy before an officer panel for sentencing.¹⁵⁶ During voir dire the trial counsel questioned a member, Major (MAJ) W, regarding her views on punishment in drug cases.¹⁵⁷ Major W responded that

it almost feels like it is a one shot deal . . . everyone has seen the Air Force Times showing the big drug bust in the Virginia area and all the [accused], and what sentences they have received . . . and it was kind of shocking to me . . . I just thought, wow, these guys made a mistake and look at the punishment for this.¹⁵⁸

Major W told the military judge that she would feel uncomfortable sitting on the case and that a “young person shouldn’t be probably kicked out and put in jail or whatever.”¹⁵⁹ Major W, however, stated she could perform her court member duties and be fair to both sides.¹⁶⁰ The military judge granted the government’s challenge for cause against MAJ W finding she would have an extremely difficult time considering the entire range of punishments.¹⁶¹

The AFCCA, affirming, found that the military judge did not abuse his discretion in determining that MAJ W’s responses amounted to actual bias.¹⁶² “The military judge’s assessment of her demeanor and the tenor of her responses to voir dire questions viewed as a whole establish a rational basis for granting the challenge.”¹⁶³ While this holding is not unreasonable, it remains undecided what significance, if any, the CAAF will give MAJ W’s statement that she could perform her duties and be fair to both sides. Based on this statement, the CAAF could hold that the military judge abused his discretion by granting a challenge for cause against a defense oriented member. Both *Quintanilla* and *James*, more importantly, emphasize to defense counsel the significance of asking rehabilitative questions to defense favorable members to force the military judge to make a more difficult challenge for cause ruling and to preserve potential error for appeal.

Pleas

Introduction

In *United States v. Care*, the Court of Military Appeals, the CAAF’s predecessor, established guilty plea requirements based on Supreme Court case law interpreting the Constitution.¹⁶⁴ A guilty plea providence inquiry must:

¹⁵² *Id.* at 868-69 (Ritter, S.J., dissenting).

¹⁵³ *Id.* (Ritter, S.J., dissenting).

¹⁵⁴ *Id.* at 869. (Ritter, S.J., dissenting).

¹⁵⁵ United States Court of Appeals for the Armed Forces, *Scheduled Hearings*, at <http://www.armfor.uscourts.gov/Nov2004.htm> (last visited Apr. 28, 2005) (providing a list of scheduled hearings, including *United States v. James* on November 8, 2004).

¹⁵⁶ *United States v. James*, 2003 CCA LEXIS 298, at *1 (A.F. Crim. Ct. App. Dec. 10, 2003) (unpub.), *petition granted* 60 M.J. 124 (2004).

¹⁵⁷ *Id.* at *9. The decision did not provide MAJ W’s full name. *Id.*

¹⁵⁸ *Id.* at *9-10. In response to MAJ W, the trial counsel stated “I don’t read the Air Force Times, so I don’t know what articles you are talking about.” *Id.* at *10. Major W stated “Actually there was a big drug bust in Virginia . . . I saw all their sentences and I was shocked, I was taken back.” *Id.*

¹⁵⁹ *Id.* at *9-10.

¹⁶⁰ *Id.* at *10.

¹⁶¹ *Id.* at *11.

¹⁶² *Id.* at *12.

¹⁶³ *Id.* As evidence of the military judge’s impartiality, the court noted that the military judge denied an additional government challenge for cause and granted two defense challenges for cause. *Id.* at *13.

¹⁶⁴ *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969) (citing *Boykin v. Alabama*, 395 U.S. 238 (1969); *Halliday v. United States*, 394 U.S. 831 (1969); *McCarthy v. United States*, 394 U.S. 459 (1969)).

reflect not only that the elements of each offense charged have been explained to the accused but also that the military trial judge . . . has questioned the accused about what he did or did not do, and what he intended (where this is pertinent), to make clear the basis for a determination by the military trial judge . . . whether the acts or the omissions of the accused constitute the offense or offenses to which he is pleading guilty.¹⁶⁵

In 1984, RCM 910, generally based on Article 45, UCMJ, and the Federal Rules of Criminal Procedure (FRCP) 11 (Pleas), codified the *Care* requirements.¹⁶⁶ “The Military Judge’s Benchbook provides a detailed script for the military judge to follow to ensure that the mandates of *Care* and subsequent case law expanding the required colloquy are scrupulously followed.”¹⁶⁷ This year’s cases mark a continuing trend of military judges failing to follow the script, failing to obtain a factual basis for the accused’s plea, and failing to resolve matters or defenses inconsistent with the accused’s plea.¹⁶⁸ Trial counsel are failing to advise military judges of these omissions and errors. In 2004, the CAAF imposed a stiff burden on military judges and trial counsel to scrupulously follow the script or risk reversal even if the defense fails to object to the omission or error at court-martial.¹⁶⁹ This CAAF imposed government burden contrasts with Supreme Court precedent which places the burden on defense counsel to object or the issue is waived absent a showing of plain error.¹⁷⁰ In July 2004, the Supreme Court further clarified this defense imposed burden in *United States v. Benitez*.¹⁷¹

Advice Concerning Rights Waived by Plea

In *Benitez*, the trial judge, without objection from either counsel, failed to discuss with the accused a pretrial agreement term in violation of FRCP 11.¹⁷² The government agreed to make a safety valve recommendation to the sentencing court to lower the accused’s confinement below an otherwise mandatory ten year minimum.¹⁷³ The pretrial agreement stated that the accused could not withdraw his guilty plea if the sentencing court rejected the government’s safety valve recommendation.¹⁷⁴ Between the accused’s accepted guilty plea and his sentence hearing, the probation office discovered that the accused possessed convictions under an alias making him ineligible for the safety valve reduction regardless of the government’s recommendation.¹⁷⁵

On appeal, the accused alleged that the judge’s failure to advise him of his rights under FRCP 11 warranted reversal.¹⁷⁶ The Supreme Court ruled when a FRCP 11 error is raised on appeal, to which the accused failed to object at trial, the defense must show the error is “plain” and “a reasonable probability that, but for the error, the [accused] would not have plead guilty.”¹⁷⁷ Based on the evidence against the accused and the warning provided in the pretrial agreement, the Court ruled that the FRCP 11 error “tends to show that [it] made no difference to the outcome” of the accused’s case.¹⁷⁸ The Court provided

¹⁶⁵ *Care*, 40 C.M.R. at 250.

¹⁶⁶ See MCM, *supra* note 4, R.C.M. 910 analysis, at A21-58; 2 FRANCES A. GILLIGAN & FREDRIC LEDERER, COURT-MARTIAL PROCEDURE § 19-022.20 (2nd ed. 1999).

¹⁶⁷ Ham, *supra* note 2, at 32. “Because there are potential dangers in the abuse of [an] abbreviated method of disposing of charges, a number of safeguards have been included” for a military providence inquiry. *United States v. Felder*, 59 M.J. 444, 445 (2004) (citing DAVID A. SCHLEUTER, MILITARY CRIMINAL JUSTICE 372 (5th ed. 1999)).

¹⁶⁸ Ham, *supra* note 2, at 32.

¹⁶⁹ *United States v. Hansen*, 59 M.J. 410 (2004). In *Hansen*, the military judge failed to advise the accused of his right against self incrimination, his right to a trial of the facts, and his right to confrontation witnesses as required by RCM 910(c)(3). *Id.* at 412. Neither defense or trial counsel objected to the military judge’s omission. *Id.* The CAAF held “we will not presume or imply that a military accused understood [his rights] and waived them, absent a demonstrable showing in the record that he did in fact do so.” *Id.* at 414.

¹⁷⁰ See *United States v. Vonn*, 535 U.S. 55 (2002) (holding that if an accused is late in raising a FRCP 11 error reversal is not required unless the error is plain and affects the accused’s substantial rights, as proven by the defense, upon review of the entire record). See also Ham, *supra* note 2, at 32-34 (providing a thorough discussion on *Hansen* and *Vonn* and the application of these rulings to military providence inquiries).

¹⁷¹ *United States v. Benitez*, 124 S. Ct. 2333 (2004).

¹⁷² *Id.* at 2337.

¹⁷³ *Id.* at 2336. The accused was charged with possession of more than five hundred grams of methamphetamine with intent to distribute which carried a mandatory minimum sentence of ten years confinement. *Id.*

¹⁷⁴ *Id.* at 2337.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 2338.

¹⁷⁷ *Id.* at 2340.

¹⁷⁸ *Id.* at 2341. The evidence against the accused included a controlled drug buy to an informant and a confession. *Id.* The Supreme Court stated “one can fairly ask a[n] [accused] seeking to withdraw his plea what he might ever have thought he could gain by going to trial.” *Id.*

three policy reasons for placing this burden on the defense: (1) it “encourages timely objections”; (2) it “reduce[s] wasteful reversals by demanding strenuous exertion to get relief on unreserved error”; and, (3) it places “particular importance of the finality of guilty pleas, which usually rest, after all, on the [accused’s] profession of guilt in open court [and which] is indispensable in the operation of the modern criminal system.”¹⁷⁹

Although *Benitez* and its 2002 predecessor *Vonn* clearly place a burden on defense to object to providence inquiry error, the CAAF, however, as demonstrated in *Hansen*, appears unwilling to apply this standard to military guilty pleas. The *Hansen* majority did not cite or otherwise distinguish *Vonn* even though RCM 910 is based on FRCP 11.¹⁸⁰ The lone discussion of Supreme Court precedent occurred in Chief Judge Crawford’s *Hansen* dissent when she urged the CAAF to “follow our superior court and hold that even where there is a failure to make a full inquiry, the failure of the defendant to object constitutes waiver absent plain error.”¹⁸¹ Chief Judge Crawford’s request, however, fell on apparent deaf ears. The CAAF continues to closely monitor not only a military judge’s failure to advise the accused of his constitutional rights but also a military judge’s failure to advise the accused of the elements or definitions of the offense to which the accused is pleading guilty.

Factual Basis for Plea—Failure to Discuss Elements and Definitions

The military judge must explain the elements of the offense to the accused.¹⁸² “If the military judge fails to do so, he commits reversible error, unless ‘it is clear from the entire record that the accused knew the elements, admitted them freely, and pleaded guilty because he was guilty.’”¹⁸³ The CAAF, on review, “rather than focusing on a technical listing of the elements of an offense, [will] look at the context of the entire record to determine whether an accused [was] aware of the elements, either explicitly or inferentially.”¹⁸⁴ A military judge’s failure to discuss the elements of a complex offense generally results in reversal whereas a military judge’s failure to discuss the elements of a simple offense, while erroneous, is not per se prejudicial to the accused’s rights if he expresses a belief in his own guilt and admits the facts necessary to sustain the element.¹⁸⁵ Last year’s decisions reveal this trend’s continuation with the CAAF reversing a complex offense case¹⁸⁶ and affirming a simple offense case.¹⁸⁷

In *Negron*, the accused pleaded guilty to depositing obscene matters in the mail in violation of Article 134, UCMJ.¹⁸⁸ During the providence inquiry the military judge failed to advise the accused of the definition of “obscene” as required by a depositing obscene matters in the mail charge.¹⁸⁹ The correct definition of obscene reads: “indecent language is that which is grossly offensive to modesty, decency, or propriety, or shocks the moral sense, because of its vulgar, filthy, or disgusting nature, or its tendency to incite lustful thought.” Language is indecent if it tends reasonably to corrupt morals or incite libidinous thoughts.¹⁹⁰ The CAAF held an accused is not provident to an offense when the military judge uses a substantially different definition of “obscene” from that proscribed by the offense charged.¹⁹¹ The definitional error tainted the entire

¹⁷⁹ *Id.* at 2340.

¹⁸⁰ See *Ham*, *supra* note 2, at 32-34. The majority also did not discuss the Supreme Court’s grant of certiorari and pending decision in *Benitez*. *United States v. Hansen*, 59 M.J. 410 (2004). *Hansen* was decided on 28 April 2004. *Id.* The Supreme Court decided *Benitez* on 14 June 2004. *Benitez*, 124 S. Ct. at 2333.

¹⁸¹ *Hansen*, 59 M.J. at 415 (Crawford, C.J., dissenting).

¹⁸² *United States v. Faircloth*, 45 M.J. 172 (1996); *United States v. Davenport*, 9 M.J. 364 (C.M.A. 1980). See *MCM*, *supra* note 4, R.C.M. 910 (e) Discussion (stating “the accused must admit every element of the offense(s) to which the accused pleaded guilty. Ordinarily, the elements should be explained to the accused.”).

¹⁸³ *United States v. Redlinski*, 58 M.J. 117, 119 (2003) (quoting *United States v. Jones*, 34 M.J. 270, 272 (C.M.A. 1992)).

¹⁸⁴ *Id.* at 119.

¹⁸⁵ See *id.* (recognizing that an attempt offense crime is more complex unlike some simple military offenses).

¹⁸⁶ *United States v. Negron*, 60 M.J. 136 (2004).

¹⁸⁷ *United States v. Barton*, 60 M.J. 62 (2004).

¹⁸⁸ *Negron*, 60 M.J. at 136-37. The accused, a postal clerk, stole one thousand five hundred and forty dollars from the postal safe. *Id.* at 137. The accused also wrote a bad check for five hundred dollars and attempted to obtain a bank loan to replenish his checking account. *Id.* After being denied the loan, the accused wrote a letter to the bank as follows: “Oh, yeah, by the way y’all can kiss my ass too!! Worthless bastards! I hope y’all rot in hell you scumbags. Maybe when I get back to the states, I’ll walk in your bank and apply for a blowjob, a nice dick sucking, I bet y’all are good at that, right?” *Id.*

¹⁸⁹ *Id.* at 137-38. The military judge’s definition of obscene was largely taken from the offense of an indecent act with another which states “‘Indecent’ signifies that form of immorality relating to sexual impurity which is not only grossly vulgar, obscene, and repugnant to common propriety, but tends to excite lust and deprave the morals with respect to sexual relations.” *Id.* See *MCM*, *supra* note 4, pt. IV, para. 90c.

¹⁹⁰ *MCM*, *supra* note 4, pt. IV, para. 89c.

¹⁹¹ *Negron*, 60 M.J. at 142.

hearing because it “focus[ed] the providency inquiry on the indecent nature of the acts that were the subject of [the accused’s] language rather than [the accused’s] ‘planned’ and ‘intended’ result from the use of his language.”¹⁹² The accused stated he wrote the letter out of anger and to offend the reader, but he failed to state that he planned to engage in or solicit sexual acts or to excite sexual thoughts in others as required to sustain a conviction for depositing obscene matters in the mail.¹⁹³

In *Barton*, in contrast to *Negron*, the accused pleaded guilty to three specifications of conspiracy to commit larceny.¹⁹⁴ The military judge advised the accused of the larceny elements for the first specification but did not restate the elements for the second and third specifications.¹⁹⁵ While discussing the second specification, the military judge asked the accused if he understood the previously provided larceny elements to which the accused affirmatively responded.¹⁹⁶ This cross-reference would not have been problematic but for the fact that the accused failed to state, and the stipulation of fact failed to mention, that the value of the stolen property in specification two exceeded one hundred dollars.¹⁹⁷ The only admission regarding value existed in the accused’s acknowledgement that he understood the cross-referenced larceny elements provided by the military judge in the first specification.¹⁹⁸

The CAAF, affirming, reasoned a value determination is not a complex legal concept and “an understanding of the element does not require an intricate application of the law to fact.”¹⁹⁹ The CAAF held the accused knowingly and voluntarily pled guilty to conspiring to steal property in an amount over one hundred dollars, as charged in specification two.²⁰⁰ The accused followed the charge sheet as the military judge read the elements, stated he understood the larceny elements for specification one, and he did not ask for a restatement of the elements for specification two in response to the military judge’s direct question if he desired such.²⁰¹ Although the CAAF affirmed, the court issued a warning that it “may have doubts that a similar methodology of cross-reference will work generally” to sustain a specification.²⁰² This warning reminds military judges and counsel of the necessity for the accused to affirmatively state on the record the facts establishing his guilt.

Failure to Establish a Factual Predicate or to Resolve an Inconsistent Matter or Defense

A military judge may not accept an accused’s guilty plea without inquiring into its factual basis.²⁰³ Rule for Court-Martial 910(e) mandates that a “military judge shall not accept a plea of guilty without making such inquiry of the accused as shall satisfy the military judge that there is a factual basis for the plea.”²⁰⁴ The accused must be convinced of his guilt and articulate all the facts necessary to establish guilt.²⁰⁵ “Mere conclusions of law recited by an accused are insufficient to provide a factual basis for a guilty plea.”²⁰⁶ An accused may not merely answer “yes” or “no” in response to a military judge’s legally conclusive questions.²⁰⁷ Additionally, the military judge must resolve any inconsistent matter or defense

¹⁹² *Id.*

¹⁹³ *Id.* at 142-43. The accused stated “I wasn’t paying so much attention to the technical definition of what it was, sir, I just threw the word out to offend them.” *Id.* at 142.

¹⁹⁴ *United States v. Barton*, 60 M.J. 62 (2004).

¹⁹⁵ *Id.* at 63-64. The military judge also advised the accused to follow along on his copy of the charge sheet while the elements were discussed. *Id.* at 63.

¹⁹⁶ *Id.* Additionally, the accused did not ask for a restatement of the elements in direct response to that specific question by the military judge. *Id.*

¹⁹⁷ *Id.* at 64. This case was tried prior to the 2002 presidential executive order changing the aggravating larceny value from one to five hundred dollars. *See MCM, supra* note 4, pt. IV, para. 46e.

¹⁹⁸ *Id.* at 65.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ UCMJ art. 45 (2002); *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969).

²⁰⁴ MCM, *supra* note 4, R.C.M. 910(e).

²⁰⁵ *Id.* R.C.M. 910(e) Discussion.

²⁰⁶ *United States v. Outhier*, 43 M.J. 326, 331 (1996).

²⁰⁷ *Id.* at 330-32 (ruling the accused’s affirmative responses to the military judge that his actions could have produced grievous bodily harm are not sufficient to sustain a guilty plea to the offense of aggravated assault by a means or force likely to produce death or grievous bodily harm when the actual facts elicited from the accused do not establish the factual predicate for the charged offense). *See also United States v. Jordan*, 57 M.J. 236 (2002) (determining an accused’s mere “Yes” response to the military judge’s question as to whether his conduct was prejudicial to good order and discipline or service discrediting does not sustain a plea if the factual circumstances revealed by the accused do not objectively support that element).

raised either by the accused or by any other witness or evidence presented during the court-martial.²⁰⁸ Article 45, UCMJ, states the following:

[i]f an accused, . . . after a plea of guilty[,] sets up matter inconsistent with the plea, or if it appears that he has entered the plea of guilty improvidently or through lack of understanding of its meaning and effect . . . a plea of not guilty shall be entered in the record, and the court shall proceed as though he had pleaded not guilty.²⁰⁹

An accused need not have personal recollection of the facts establishing his guilty plea but must “be convinced of, and able to describe all the facts necessary to establish guilt.”²¹⁰

A guilty plea will only be overturned if the record of trial, in its entirety, shows a substantial basis in law and fact for questioning the plea.²¹¹ Under this high standard, however, this past year the CAAF and the service courts, in published and unpublished opinions, reversed numerous findings because a review of the entire record failed to establish a factual predicate for the accused’s plea or left unresolved an inconsistent matter or defense raised during the court-martial. Numerous Article 86, UCMJ, absent without leave (AWOL) and failure to report (FTR), cases exemplify the magnitude of opinions discussing a trial court’s failure to obtain a factual predicate or failure to resolve an inconsistent matter or defense.²¹² In 2004, the CAAF reversed two cases for faulty AWOL providence inquiries.²¹³

In *Hardeman*, the accused received a bad conduct discharge (BCD), confinement for four months, and reduction to the pay grade of E-1 after pleading guilty to one FTR specification and one AWOL specification from 1 November 2001 to 14 December 2001.²¹⁴ During the providence inquiry, the accused failed to state a definitive commencement date for the AWOL.²¹⁵ The accused admitted at some point between 1 November 2001 and 14 December 2001 he knew he was AWOL but “the providence inquiry [did] not ultimately reveal the date on which [the accused] was willing to admit he absented himself without authority.”²¹⁶ Although the accused never provided a specific commencement date, the military judge accepted his plea to the entire forty-three day AWOL.²¹⁷ The CAAF, reversing, stated “[a] definitive inception date is indispensable to a successful prosecution for unauthorized absence [and] [m]oreover, the MCM authorizes increased punishment based upon, among other things, the duration of the absence.”²¹⁸ In *Hardeman*, the inception date was particularly significant because the forty-three day AWOL conviction was the only specification authorizing the accused’s

²⁰⁸ *Outhier*, 45 M.J. at 331. “[A]n accused servicemember cannot plead guilty and yet present testimony that reveals a defense to the charge.” *United States v. Clark*, 28 M.J. 401, 405 (C.M.A. 1989). *See also* *United States v. Brown*, No. 35837, 2004 CCA LEXIS 209 (A.F. Ct. Crim. App. Aug. 30, 2004) (unpub.) (holding that the military judge erred by failing to advise the accused on the defense of involuntary intoxication during his court-martial for the use of cocaine when the prosecutor presented witness statements during the pre-sentencing phase stating that the accused was “too drunk” to feel any other effects of the cocaine” and where the accused, during his unsworn statement, stated he was “pretty buzzed”).

²⁰⁹ UCMJ art. 45(a) (2002).

²¹⁰ MCM, *supra* note 4, R.C.M. 910(e) Discussion; *United States v. Moglia*, 3 M.J. 216 (C.M.A. 1977). *See also* *United States v. Parker*, 60 M.J. 666 (N-M. Ct. Crim. App. 2004) (holding that the rejection of the accused’s plea to missing movement was improper where the military judge erroneously focused on the credibility of the information the accused relied upon when the record otherwise established the accused’s actual knowledge of the unit’s movement).

²¹¹ *Jordan*, 57 M.J. at 238 (citing *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991)).

²¹² *See* *United States v. Pinero*, 60 M.J. 31 (2004); *United States v. Hardeman*, 59 M.J. 389 (2004). *See also* *United States v. Le*, 59 M.J. 859 (Army Ct. Crim. App. 2004) (ruling the military judge erred by failing to resolve the conflict between the accused’s plea of guilty to desertion and statements indicating that the accused deserted under duress); *United States v. Scott*, 59 M.J. 718 (Army Ct. Crim. App. 2004) (holding an AWOL plea from 16 August 2002 through November 2002 improvident because the accused signed in with his unit on 11 September 2002); *United States v. Banks*, No. 20021302 (Army Ct. Crim. App. Sept. 7, 2004) (unpub.) (failing to have the accused state in his own words why he failed to report to formation); *United States v. Boyd*, No. 20021264 (Army Ct. Crim. App. June 16, 2004) (unpub.) (reasoning the military judge erred by accepting accused’s plea without explaining the inability defense); *United States v. Gonzalez*, No. 20020744 (Army Ct. Crim. App. July 21, 2004) (unpub.) (determining a missing movement through neglect plea was not provident where the facts conflicted as to whether the accused possessed authority to change his flight).

²¹³ *United States v. Pinero*, 60 M.J. 31 (2004); *United States v. Hardeman*, 59 M.J. 389 (2004).

²¹⁴ *Hardeman*, 59 M.J. at 389-90.

²¹⁵ *Id.* at 390. The accused reported to a new base on October 22, 2001. *Id.* The accused was required to attend mandatory base training from 22 October 2001 to 29 October 2001 prior to joining his unit. *Id.* At the end of the training, the accused alleged his supervisor did not give him a specific date to report to his unit and he was expecting a phone call telling him when to report. *Id.*

²¹⁶ *Id.* at 392.

²¹⁷ *Id.* at 391.

²¹⁸ *Id.*

receipt of a BCD.²¹⁹ If the accused's AWOL commenced on or after November 14, 2001, a BCD could not have been imposed.²²⁰

In *United States v. Pinero*,²²¹ the CAAF faced a similar *Hardeman* situation. In *Pinero*, the accused pleaded guilty to a fifty-three day AWOL from 23 October 2000 to 15 December 2000.²²² During the providence inquiry the accused stated that in mid-November 2000, prior to Thanksgiving, a member of his command came to his house and ordered him to participate in a command directed urinalysis.²²³ After the urinalysis the accused returned home, but he failed to report to duty the following day as ordered by the command representative.²²⁴ The accused remained AWOL until his apprehension at his home on 15 December 2000.²²⁵ Based on these elicited facts, the military judge granted a short fact finding recess but neither counsel could confirm or deny the accused's story or his presence at the military medical center.²²⁶ Even with these inconsistent matters on the record, the military judge, ruling that the accused's presence at the medical center constituted a mere "de minimis interruption," accepted the plea to the fifty-three day AWOL.²²⁷

The CAAF, reversing, defined the military specific reasons requiring a close scrutiny of a servicemember's plea:

The military justice system takes particular care to test the validity of guilty pleas because the facts and the law are not tested in the crucible of the adversarial process. Further, there may be subtle pressures inherent to the military environment that may influence the manner in which servicemembers exercise (and waive) their rights. The providence inquiry and a judge's explanation of possible defenses are established procedures to ensure servicemembers knowingly and voluntarily admit to all elements of a formal criminal charge.²²⁸

This statement reaffirms the CAAF's burden placed on military judges, and likewise trial counsel, to ensure the accused's plea is knowing and voluntary. The military judge in *Pinero*, after ruling the accused submitted to a five hour urinalysis on an unspecified date in November, 2000, erroneously affirmed the accused's plea to one continuous fifty-three day AWOL.²²⁹ The court affirmed an AWOL from 23 October 2000 to 1 November 2000, described as the "earliest date the accused could have terminated his absence based on the plea colloquy."²³⁰ The court, even though the accused admitted he was AWOL immediately after his urinalysis until 15 December 2000, did not affirm an additional AWOL because the record lacked an inception date for the second AWOL.²³¹

Both *Hardeman* and *Pinero* underline the military judge's burden to ensure that the accused's statements establish a factual predicate for the plea and do not raise an inconsistent matter or defense. While this mission is easier said than done, in reviewing these types of cases, the courts frequently affirm, and cite approvingly, when a military judge conducts an intentionally slow and deliberative providence inquiry with the accused.²³²

²¹⁹ *Id.* 389. See MCM, *supra* note 4, pt. IV, para 10.e (outlining the maximum punishment for AWOL based on duration).

²²⁰ MCM, *supra* note 4, pt. IV, para 10.e. Only an AWOL that exceeds thirty days authorizes a discharge. *Id.*

²²¹ *United States v. Pinero*, 60 M.J. 31 (2004).

²²² *Id.* at 32.

²²³ *Id.* The accused stated he put on his uniform, proceeded to the military medical center with his unit's escort, provided his urinalysis sample, and returned home. *Id.*

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.* at 33.

²²⁸ *Id.*

²²⁹ *Id.* at 34.

²³⁰ *Id.* at 35.

²³¹ *Id.* (citing *United States v. Harris*, 45 C.M.R. 364. 367-68 (C.M.A. 1972)). Accord *United States v. Hardeman*, 59 M.J. 389 (2004).

²³² See *United States v. McCrimmon*, 60 M.J. 145 (2004) (affirming a bribery conviction based, to a degree, on the detailed dialogue between the military judge and the accused regarding bribery and its intent element); *United States v. Gosselin*, 60 M.J. 768 (A.F. Ct. Crim. App. 2004) (sustaining a plea to wrongful introduction of mushrooms containing a hallucinogen onto a base the AFCCA constantly referenced the military judge's methodical and pressing inquiry of the accused (twenty-two pages of a hundred page transcript) including the military judge's action of asking the accused to repeatedly describe the original purpose of the trip off base and twice adjourning a recess for the accused to discuss vicarious liability with his counsel).

Pretrial Agreements

Permissible & Impermissible Pretrial Agreement Terms

“While pretrial agreements are considered beneficial and acceptable components of military justice practice, if left unchecked, various provisions therein might well undermine the military justice system and render a particular court-martial an empty ritual.”²³³ Pretrial agreements terms, therefore, may not violate appellate case law, public policy, or the military judge’s notion of fairness.²³⁴ “Pretrial agreement provisions are contrary to ‘public policy’ if they interfere with court-martial fact-finding, sentencing, or review functions or undermine public confidence in the integrity and fairness of the disciplinary process.”²³⁵ Rule for Courts-Martial 705(c)(2) provides a list of permissible terms, to include: a promise to enter into a stipulation of fact, a promise to testify as a witness in the trial of another person, a promise to pay restitution, a promise to conform the accused’s conduct to certain conditions, a promise to waive the Article 32, UCMJ, investigation, or waive the right to a trial by members, or waive the right to the personal appearance of witnesses at sentencing proceedings.²³⁶ Rule for Courts-Martial 705(c)(1) provides a list of impermissible terms, to include: an agreement to deprive the accused of “the right to counsel, the right to due process, the right to challenge the jurisdiction of the court-martial, the right to a speedy trial, the right to complete sentencing proceedings, or the complete and effective exercise of post-trial and appellate rights.”²³⁷ “Even though it is clear that the military justice system may place some limits on the provisions permitted to be included in a valid pretrial agreement, it is recognized that the extent of those limits is not well-defined.”²³⁸ This past year, the Coast Guard Court of Criminal Appeals (CGCCA) tackled whether a pretrial agreement term requiring the accused to attend a sexual offender treatment program violated public policy.²³⁹

In *Cockrell*, the accused pleaded guilty to receiving, possessing, and watching child pornography, among other offenses, pursuant to a pretrial agreement.²⁴⁰ The pretrial agreement required the accused to enroll in a sexual offender treatment program after his release from confinement.²⁴¹ The term imposed numerous conditions, to include, the accused’s promise to cover treatment costs, the convening authority’s pre-approval of the program, the program’s use of polygraph exams, and the accused’s promise to waive his privacy rights so the convening authority could discuss the case with the treatment provider.²⁴² The term also stated “[f]ailure to enroll in an approved treatment program within two weeks following [the accused’s] release from confinement OR failure to remain compliant with treatment SHALL constitute a violation of this condition of [the accused’s] pretrial agreement with the convening authority.”²⁴³

At trial, the military judge failed to discuss the pretrial agreement term requiring the accused to enroll in a sexual offender treatment program and any possible adverse ramifications for non-compliance.²⁴⁴ The court stated:

[t]he record does not give us a clue as to the understanding of [the accused] and the Convening Authority on what may be done if [the accused] fails to comply with the treatment clause, or whether the Convening Authority’s discretion in determining what constitutes noncompliance is limited in any manner, or, for that matter, whether any protections in this regard are afforded [the accused].²⁴⁵

²³³ United States v. Cummings, 38 C.M.R. 174, 177 (C.M.A. 1968).

²³⁴ United States v. Green, 1 M.J. 453, 456 (C.M.A. 1976).

²³⁵ United States v. Cassity, 36 M.J. 759, 762 (N.M.C.M.R. 1992) (citing United States v. Mitchell, 15 M.J. 238, 240-241 (C.M.A. 1983); United States v. Green, 1 M.J. 453, 456 (C.M.A. 1976); United States v. Foust, 25 M.J. 647, 649 (A.C.M.R. 1987)). See also United States v. Thomas, 60 M.J. 521 (N-M. Ct. Crim. App. 2004) (ruling if an accused’s sentence could include death and required a mandatory minimum of confinement for life for a premeditated murder conviction any pretrial agreement provision precluding the accused from accepting clemency from the service secretary or president, if offered, was beyond the convening authority’s power and violated public policy); United States v. Schmelzle, No. 200400007, 2004 CCA LEXIS 148 (N-M. Ct. Crim. App. July 14, 2004) (unpub.) (holding if an accused is eligible for retirement a pretrial agreement term requiring the accused to agree to not request a transfer to the reserve, if a bad conduct discharge was not adjudged, violated public policy).

²³⁶ MCM, *supra* note 4, R.C.M. 705(c)(2).

²³⁷ *Id.* R.C.M. 705(c)(1)(B).

²³⁸ *Schmelzle*, 2004 CCA LEXIS at *151.

²³⁹ United States v. Cockrell, 60 M.J. 501 (C.G. Ct. Crim. App. 2004).

²⁴⁰ *Id.* at 502.

²⁴¹ *Id.* at 503. The term was located at paragraph twenty-one of the pretrial agreement and is over a page in length in the reported decision. *Id.* at 503-04.

²⁴² *Id.* at 503.

²⁴³ *Id.*

²⁴⁴ *Id.* at 504.

²⁴⁵ *Id.* at 505.

Because of this unresolved ambiguity the court struck the term and ruled the convening authority could not take adverse action against the accused based on any non-compliance with the sexual offender treatment program.²⁴⁶

While the ramifications for failing to comply with the sexual offender treatment program were unclear in the pretrial agreement, and left unexplained by the military judge, the court did not rule that enrollment in a treatment program is a per se impermissible term.²⁴⁷ While the term is potentially feasible, the uncertainty of drafting clear conditions to withstand later appellate scrutiny, and the effort required to monitor the accused's compliance, puts into doubt the wisdom of entering into such a term. Practitioners, who consider proposing such a term, should closely review the *Cockrell* pretrial agreement and remember to establish simple, clear-cut terms. *Cockrell* also underlines a military judge's duty to discuss the pretrial agreement with the accused and to clarify any ambiguous terms with both parties.

Military Judge's Pretrial Agreement Inquiry

A military judge must inquire into the terms of any pretrial agreement to ensure that the accused understands the agreement and that the parties agree to the terms.²⁴⁸ Failure to discuss the pretrial agreement brings into question the legitimacy of the accused's knowing and voluntary plea. Military judges and counsel play a critical role to "ensure that the record reflects a clear, shared understanding of the terms of any pretrial agreement between the accused and the convening authority."²⁴⁹ Trial and defense counsel must "confirm[] that the written agreement encompass[s] all of the understandings of the parties, and that the judge's interpretation of the agreement comport[s] with their understanding both as to the meaning and effect of the plea bargain."²⁵⁰ This past year the CAAF and the ACCA, respectively, issued opinions regarding a military judge's failure to discuss a pretrial agreement²⁵¹ and failure to resolve an ambiguous term.²⁵²

In *Felder*, the accused, in his pretrial agreement, agreed to request trial by military judge alone, to enter into a stipulation of fact, to use stipulations of expected testimony in lieu of the personal appearance of non-local witnesses, and to waive any motions for sentence credit based on Article 13 or restriction tantamount to confinement or both.²⁵³ The court stated "[t]he accused must know and understand not only the agreement's impact on the charges and specifications which bear on the plea, the limitation on the sentence, but also other terms of the agreement, including consequences of future misconduct or waiver of various rights."²⁵⁴ While the military judge's failure to discuss the pretrial agreement constituted error, to obtain relief, the accused must show his material rights were prejudiced by the error.²⁵⁵

Although the pretrial agreement was not discussed, the military judge, during separate inquires, established that the accused's forum selection and entrance into the stipulation of fact were knowing and voluntary.²⁵⁶ Further, the accused did not offer any stipulations of expected testimony nor did he allege on appeal that he would have but for the pretrial agreement's restriction.²⁵⁷ The significant issue was whether the military judge's failure to discuss the accused's waiver of any Article 13 or restriction tantamount to confinement motions materially prejudiced the accused's rights.²⁵⁸ The CAAF, in finding no material prejudice, relied on the defense counsel's statement to the military judge that no punishment occurred

²⁴⁶ *Id.* at 507. Striking the ambiguous term negated the issue whether the accused's plea was knowing and voluntary. *Id.*

²⁴⁷ *Id.*

²⁴⁸ MCM, *supra* note 4, R.C.M. 910(f); *United States v. King*, 3 M.J. 458 (C.M.A. 1977). *See also* *United States v. Green*, 1 M.J. 453 (C.M.A. 1976) (reasoning the military judge must establish "on the record that the accused understands the meaning and effect of each provision in the pretrial agreement").

²⁴⁹ *United v. Felder*, 59 M.J. 444, 445 (2004).

²⁵⁰ *King*, 3 M.J. at 461.

²⁵¹ *Felder*, 39 M.J. at 455.

²⁵² *United States v. Dunbar*, 60 M.J. 748 (Army Ct. Crim. App. 2004).

²⁵³ *Felder*, 39 M.J. at 455.

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ *Id.* at 446.

²⁵⁷ *Id.*

²⁵⁸ *Id.* at 445. *See also* *United States v. McFadyen*, 51 M.J. 289 (1999) (holding an accused may agree to waive any Article 13, UCMJ, or restriction tantamount to confinement credit in a pretrial agreement).

under Article 13 or restriction tantamount to confinement grounds in the accused's case.²⁵⁹ While the CAAF affirmed *Felder*, the ACCA reversed a case where the military judge failed to resolve an ambiguous pretrial agreement term.²⁶⁰

In *Dunbar*, the accused's quantum portion of his pretrial agreement stated:

Any adjudged confinement of three (3) months or more shall be converted into a [BCD], which may be approved; any adjudged confinement of less than three (3) months shall be disapproved upon submission by the accused of an administrative separation in lieu of court-martial IAW AR 635-200, Chapter 10 . . . with a handwritten annotation [on the side] stating 'with an Other Than Honorable (OTH) discharge.'²⁶¹

After accepting the accused's plea to larceny and making false claims, the military judge sentenced the accused to a BCD, two months confinement, and reduction to private first class (PFC) E-3.²⁶² The military judge then reviewed the pretrial agreement's quantum portion and announced that the convening authority could approve the adjudged BCD and reduction to PFC.²⁶³ A dispute ensued as to whether the convening authority could approve the BCD.²⁶⁴ Defense counsel argued that the convening authority could not approve the BCD.²⁶⁵ The government asserted that the accused could submit a Chapter 10 and the convening authority had to disapprove the two months confinement, but the pretrial agreement did not require the convening authority to approve the Chapter 10.²⁶⁶ The military judge did not ask the accused for his understanding of the term or otherwise resolve the discrepancy.²⁶⁷

The ACCA held the pretrial agreement was ambiguous and, while it was not specifically stated, "there [was] a strong inference that if [the accused] received less than three months confinement the convening authority would approve a Chapter 10 discharge in lieu of the [BCD]."²⁶⁸ Where a mutual misunderstanding as to a material term exists, which denies the accused of his benefit of the bargain, the military judge should attempt to resolve the inconsistency.²⁶⁹ Rule for Courts-Martial 910(h)(3) provides, after the sentence is announced, if the parties disagree with the pretrial agreement terms the military judge "shall conform, with the consent of the Government, the agreement to the accused's understanding or permit the accused to withdraw the plea."²⁷⁰ The ACCA, reversing the plea, did not conform the pretrial agreement to the accused's understanding because the government did not consent to the change instead requesting the court to set aside the findings and sentence.²⁷¹ While RCM 910(h)(3) discusses an accused's withdrawal from a pretrial agreement, a recent CAAF opinion discusses the government's authority to withdraw from a pretrial agreement.²⁷²

Government's Withdrawal from a Pretrial Agreement

The President set forth circumstances in RCM 705(d)(4)(B) authorizing a convening authority to withdraw from a pretrial agreement.²⁷³ Rule for Courts-Martial 705(d)(4)(B) states:

²⁵⁹ *Id.* at 446.

²⁶⁰ *United States v. Dunbar*, 60 M.J. 748 (2004).

²⁶¹ *Id.* at 749. A pretrial agreement's quantum portion contains all sentence limitations and is not reviewed until after the sentence is announced. *Id.* See also U.S. DEP'T OF ARMY, REG. 635-200, PERSONNEL SEPARATIONS: ENLISTED PERSONNEL ch. 10 (1 Nov. 2000) (Discharge in Lieu of Trial by Court-Martial) (discussing the procedures for the convening authority to accept the accused's administrative discharge and to dismiss the court-martial charges).

²⁶² *Id.* at 748-49.

²⁶³ *Id.* at 749.

²⁶⁴ *Id.*

²⁶⁵ *Id.* Defense counsel asked "how could we have an other than honorable discharge at the same time we have a bad[-]conduct discharge?" *Id.* "The military judge responded that the pretrial agreement did not expressly require the convening authority to disapprove the bad-conduct discharge" upon the accused's submission of a Chapter 10. *Id.*

²⁶⁶ *Id.*

²⁶⁷ *Id.* at 750.

²⁶⁸ *Id.* at 751.

²⁶⁹ *Id.*

²⁷⁰ MCM, *supra* note 4, R.C.M. 910(h)(3).

²⁷¹ *Dunbar*, 60 M.J. at 752.

²⁷² *United States v. Williams*, 60 M.J. 360 (2004).

²⁷³ MCM, *supra* note 4, R.C.M. 705(d)(4)(B).

[A] convening authority may withdraw from a pretrial agreement at any time before the accused begins performance of promises contained in the agreement, upon the failure by the accused to fulfill any material promise or condition in the agreement, when inquiry by the military judge discloses a disagreement as to a material term in the agreement . . .²⁷⁴

In *Williams*, the accused was charged with two specifications of larceny, seven specifications of forgery, and one specification of opening the mail.²⁷⁵ The pretrial agreement required the accused to reimburse his victim(s) “once those individuals and the amounts owed have been ascertained.”²⁷⁶ Prior to court-martial, the defense counsel advised the government that the accused might not be able to make restitution prior to trial.²⁷⁷ On the day of the court-martial the government withdrew from the pretrial agreement stating, under RCM 705(d)(4)(B), that the accused’s failure to reimburse his victim(s) prior to trial constituted a material breach of the pretrial agreement.²⁷⁸ Defense counsel argued that the accused did not breach the agreement because the material term failed to establish a time limit for performance; therefore, the accused could still perform his contractual obligations by providing restitution after trial.²⁷⁹ Requesting the military judge to order the government’s specific performance, the defense argued, also under RCM 705(d)(4)(B), that the accused’s execution of a stipulation of fact constituted his performance and he had not otherwise breached his obligations.²⁸⁰ The military judge, however, allowed the government to withdraw from the pretrial agreement ruling that the accused’s failure to provide restitution prior to the court-martial constituted a breach of a material term.²⁸¹

The CAAF stated “whatever else the record reflects in this case, the exchange between the parties and the military judge plainly demonstrates something far short of ‘a clear, shared understanding’ of the disputed restitution provision.”²⁸² Based on this misunderstanding, the court declined to rule whether the accused’s entrance into the stipulation of fact equaled performance or whether the accused’s failure to provide restitution prior to trial constituted a breach of the agreement.²⁸³ The CAAF, focusing on the parties’ failure to establish a meeting of the minds, held, under RCM 705(d)(4)(B), that the government validly withdrew from the agreement when the military judge “disclose[d] a disagreement as to a material term in the agreement.”²⁸⁴ The court clarified for the future that the government could not withdraw from a pretrial agreement by merely alleging a disagreement absent a military judge’s review and finding of fact as to the mutual misunderstanding.²⁸⁵

For practitioners, the *Williams*’ lesson is to draft defined, clear-cut pretrial agreement terms. The government should mandate a specific timeframe for the accused’s performance for any restitution clause. Likewise, a specific statement as to the victims’ identities and the amount owed, if at all possible, is recommended to ensure a meeting of the minds between the parties. After trial, absent a mutual misunderstanding, the government is required to comply with the pretrial agreement and ensure that the accused receives the benefit of his bargain. In its past term, the CAAF addressed available remedies when the government fails to comply with a term of a pretrial agreement.²⁸⁶

²⁷⁴ *Id.*

²⁷⁵ *Williams*, 60 M.J. at 360.

²⁷⁶ *Id.* at 361. In the agreement the convening authority agreed to disapprove any confinement in excess of six months. *Id.*

²⁷⁷ *Id.*

²⁷⁸ *Id.*

²⁷⁹ *Id.*

²⁸⁰ *Id.* See also *United States v. Parker*, 60 M.J. 666, 669 (N-M. Ct. Crim. App. 2004) (stating “[h]aving found that the military judge committed error in rejecting the accused’s plea . . . the rejection of the guilty plea was not a ‘failure of the accused’ to fulfill any material promise or condition in the agreement; therefore, the convening authority was not at liberty to withdraw from the pretrial agreement”).

²⁸¹ *Id.* The accused then pleaded guilty without a pretrial agreement and received seven months confinement. *Id.* at 362. On appeal, the accused did not ask the court to reject his plea but requested credit for the one month confinement difference between his pretrial agreement sentence limitation of six months confinement and the adjudged seven months confinement. *Id.*

²⁸² *Id.* at 362-63.

²⁸³ *Id.*

²⁸⁴ *Id.*

²⁸⁵ *Id.*

²⁸⁶ *United States v. Lundy*, 60 M.J. 52 (2004).

“The nightmare issue of unintended consequences versus mutual misunderstanding has been haunting military practitioners” since 1999.²⁸⁷ The issue of unintended consequences, as opposed to a mutual misunderstanding, involves the government’s failure to comply with an unambiguous pretrial agreement term. These terms typically involve the convening authority’s inability to defer or suspend automatic or adjudged forfeitures because of a regulatory restriction.²⁸⁸ “If the Government does not fulfill its promise, even through inadvertence, the accused is ‘entitled to the benefit of any bargain on which his guilty plea was premised.’”²⁸⁹ The following remedial options exist for the government’s non-compliance: (1) the government’s specific performance, (2) the accused’s withdrawal from the plea, or (3) the government’s provision of alternative relief, as agreed to by the accused.²⁹⁰

In *Lundy*, the accused entered into a pretrial agreement term, whereby the convening authority agreed to defer any reduction and forfeitures until the sentence was approved and agreed to, at action, suspend any adjudged and to waive any automatic reduction and forfeitures.²⁹¹ For sexually assaulting his children, the accused, a staff sergeant (SSG) (E6), was sentenced to a dishonorable discharge, confinement for twenty-three years, and a reduction to the pay grade of E-1.²⁹² Per Article 58a, UCMJ, and Article 58b, UCMJ, the imposed discharge and confinement in excess of six months subjected the accused to automatic reduction and forfeitures.²⁹³ At action, the convening authority attempted to suspend the accused’s automatic reduction to provide the accused’s family with waived forfeitures at the E-6, as opposed to the E-1, rate as provided for in the pretrial agreement.²⁹⁴ The parties, however, overlooked *Army Regulation (AR) 600-8-19*,²⁹⁵ which precluded the convening authority from suspending an automatic reduction unless the convening authority also suspended the confinement and the discharge triggering the automatic reduction.²⁹⁶ The convening authority did not suspend the accused’s confinement or discharge causing the accused’s family to receive forfeitures at the E-1 rate per *AR 600-8-19*.²⁹⁷

The CAAF, reversing the ACCA, held that the following three options exist if the government fails to comply with a material pretrial agreement term: the government’s specific performance of the term; the accused’s withdrawal from the pretrial agreement; or alternative relief, if the accused consents to such relief.²⁹⁸ “Because [the *AR 600-8-19*] regulatory impediment resulted from a departmental action rather than a statutory mandate . . . the Army was free to modify the regulation, create an exception, or grant a waiver.”²⁹⁹ The court remanded the case so the ACCA could determine if the government could specifically perform by receiving a waiver to *AR 600-8-19* or if the parties could agree to an alternate form of relief.³⁰⁰

On remand, the ACCA affirmed the convening authority’s specific performance.³⁰¹ On 3 January 2005, the Secretary of the Army (SA) granted an exception to *AR 600-8-19* allowing the convening authority to suspend the accused’s rank reduction without requiring the convening authority to suspend the discharge or the confinement triggering that automatic

²⁸⁷ Huestis, *Revolution*, *supra* note 3, at 34.

²⁸⁸ See *United States v. Mitchell*, 50 M.J. 79 (1999) (holding if the convening authority agrees to suspend forfeitures the accused fails to receive the benefit of his bargain if payment of the forfeitures does not occur because of a regulatory restriction). Accord *United States v. Perron*, 58 M.J. 78 (2003); *United States v. Smith*, 56 M.J. 271 (2002); *United States v. Williams*, 53 M.J. 293 (2000); *United States v. Hardcastle*, 53 M.J. 299 (2000).

²⁸⁹ *Smith*, 56 M.J. at 272 (quoting *United States v. Bedania*, 12 M.J. 373, 375 (C.M.A. 1982)).

²⁹⁰ *Perron*, 58 M.J. at 82.

²⁹¹ *Lundy*, 60 M.J. at 56.

²⁹² *Id.* at 53. The pretrial agreement limited the accused’s confinement to eighteen years. *Id.* at 56.

²⁹³ UCMJ arts. 58a, 58b (2002).

²⁹⁴ *Lundy*, 60 M.J. at 55.

²⁹⁵ *Id.* See U.S. DEP’T OF ARMY, REG. 600-8-19, ENLISTED PROMOTIONS AND REDUCTIONS para. 7-1d (1 May 2000).

²⁹⁶ *Lundy*, 60 M.J. at 55.

²⁹⁷ *Id.* at 57.

²⁹⁸ *Id.* See *United States v. Lundy*, 58 M.J. 802 (Army Ct. Crim. App. 2003) (affirming the ACCA held that the convening authority technically erred but that no material prejudice accrued to the accused that would require the government’s remedial action because the accused’s family was adequately compensated with transitional compensation which the ACCA determined the accused’s family was not entitled to because they were receiving waived forfeitures during the same time period).

²⁹⁹ *Lundy*, 60 M.J. at 58. Additionally, the CAAF held an accused’s family could receive transitional compensation while also receiving either deferred or waived forfeitures if the receipt of transitional compensation was based on the accused’s discharge. *Id.* at 58-60.

³⁰⁰ *Id.* at 61.

³⁰¹ See *United States v. Lundy*, 60 M.J. 941 (Army Ct. Crim App. 2005).

reduction.³⁰² This exception permitted the government to provide the accused's family forfeitures at the E-6 rate.³⁰³ The accused, however, alleged that the government's specific performance was impossible in 2005 because his family needed the agreed upon support at the time of his initial incarceration in May 2000.³⁰⁴ The ACCA succinctly stated "[a]lthough [the accused] argues that specific performance at this late date is, in actuality, a form of alternative relief because the timing of payments is a material provision of his pretrial agreement, he has failed to demonstrate such materiality."³⁰⁵ The government failed to seek approval for an interest payment of the difference between the E-6 and E-1 amount.³⁰⁶ The ACCA ruled it did not have the authority to provide the approximately three thousand dollars in interest owed on the original amount to the accused.³⁰⁷ The ACCA remanded the case for the SA to approve the interest payment or to otherwise return the case for the ACCA to set aside the findings and sentence.³⁰⁸

The three separate *Lundy* opinions demonstrate the confusion and problems that arise when the government agrees to a pretrial agreement provision in contravention of a controlling regulation. While easier said than done, practitioners should attempt to determine if any regulatory restriction could affect a proposed pretrial agreement term. This guidance is particularly relevant when the convening authority agrees to defer, waive, or suspend, as applicable, certain automatic or adjudged forfeitures or reduction. As exemplified by the *Lundy* cases, a pre-2000 pretrial agreement term can still create turmoil in 2005. Whether *Lundy* is laid to final rest depends on whether the SA decides to approve an interest payment and whether the CAAF decides to grant an additional review of the ACCA's newest decision. In her *Lundy* concurrence, Chief Judge Crawford advised the ACCA to "determine the materiality of the [payment's] timing and whether the [*Lundy*] case is different from *United States v. Perron*."³⁰⁹ While the ACCA ruled that the timing of the payment was not material in *Lundy*,³¹⁰ the CAAF may decide to grant review to further clarify this issue based on an appellate service court split. The AFCCA, in contrast to the ACCA's *Lundy* decision, recently held that the government could not specifically perform at a later date after failing to provide the accused's dependants with waived forfeitures during the accused's confinement as provided for in the pretrial agreement.³¹¹

In *Sheffield*, the accused, who pleaded guilty to numerous military specific offenses, received a BCD, four months confinement, and reduction to the pay grade of E-1.³¹² In the pretrial agreement the convening authority agreed to "waive automatic forfeitures in the amount of five hundred dollars, which sum was to be paid to the guardian appointed by the accused to care for his minor dependants."³¹³ The staff judge advocate's recommendation (SJAR) failed to mention the forfeiture term and the convening authority failed to pay the five hundred dollars to the accused's dependents.³¹⁴ During RCM 1105 submissions, however, the defense counsel and the accused failed to comment on the SJAR's omission.³¹⁵

³⁰² *Id.* at 943.

³⁰³ *Id.*

³⁰⁴ *Id.* at 942-43.

³⁰⁵ *Id.* at 944.

³⁰⁶ *Id.*

³⁰⁷ *Id.* at 945.

³⁰⁸ *Id.*

³⁰⁹ *United States v. Lundy*, 60 M.J. 52, 61 (2004) (Crawford, C.J., concurring). *See United States v. Perron*, 58 M.J. 78, 79 (2003) (holding that the timing of payment to the accused's family was a material term which the government could not specifically perform at a later date particularly when the accused alleged immediately after the convening authority's action that his "family [could not] survive financially without the aid"); *see also United States v. Morrison*, No. 30359, 2004 CCA LEXIS 203 (A.F. Ct. Crim. App. Aug. 18, 2004) (unpub.) (finding that the government could not specifically perform where time was of the essence and the convening authority agreed, but failed to waive, at action, any mandatory forfeitures for four months or until the accused's release from confinement, whichever was sooner, so that the accused's dependents failed to receive any of the agreed upon money during the accused's confinement).

³¹⁰ In *Perron*, the accused's family received no money as opposed to SSG *Lundy*'s family who received forfeitures at the E-1 rate. *Lundy*, 60 M.J. at 61. Similarly, SSG *Lundy* did not immediately demand payment from the convening authority or allege that his family could not make it financially absent payment as had *Boatswain's Mate Second Class Perron*. *Id.*

³¹¹ *United States v. Sheffield*, 60 M.J. 591 (A.F. Ct. Crim. App. 2004).

³¹² *Id.*

³¹³ *Id.* at 592. The military judge clarified that the five hundred dollars was per month during any confinement period. *Id.*

³¹⁴ *Id.*

³¹⁵ *Id.* Defense's failure to object to the SJAR subjects any later claim of error to a "plain error" analysis. *United States v. Kho*, 54 M.J. 63 (2000). The government conceded that the error at issue constituted "plain error." *Sheffield*, 60 M.J. 593.

On appeal, the accused requested the court to disapprove his adjudged BCD, or in the alternative, to allow him to withdraw from his plea.³¹⁶ The government contended specific performance was appropriate by “simply pay[ing] the [accused] what is owed now.”³¹⁷ The AFCCA, reversing the findings and relying heavily on *Perron*, held the government could not specifically perform because the accused did not receive the benefit of his pretrial agreement bargain—for his dependents to receive five hundred dollars per month during his incarceration.³¹⁸ The court also declined to grant the accused’s request to disapprove his BCD because the government did not agree to this alternative relief.³¹⁹ The AFCCA’s ruling appears to interpret *Perron* to hold that specific performance by the government is never appropriate if the accused’s dependents are initially denied receipt of the waived forfeitures.³²⁰ While any final decision as to the AFCCA and the ACCA’s interpretation of *Perron* awaits review and sanction from the CAAF, practitioners can best avoid this issue by ensuring that the government complies, as soon as possibly required, with any pretrial agreement term.

Conclusion

The CAAF and the service courts were very active this past year in the areas of court-martial personnel, voir dire and challenges, and pleas and pretrial agreements. The fields of the appellate courts were bloody with the dismissal of findings, the reversal of sentences, or both. This year’s cases reaffirmed the CAAF and the service courts’ generally paternalistic approach to the military courts-martial process, as compared to civilian criminal practice. Based on subtle, or perceived, pressures placed on a servicemember before, during, and after a court-martial, the appellate courts closely monitor the courts-martial process to ensure compliance with the accused’s due process rights.³²¹ Omissions or errors committed prior, during, and after courts-martial by the government, military judges, and sometimes even the defense creates a burden for the government because of this close scrutiny. The government must rise to the occasion and meet its burden or risk reversal. A large number of this year’s opinions sustain a recurring theme—a lack of attention to detail by the parties, in particular military judges and trial counsel. While some errors are inescapable, many errors are likely avoidable if the trial counsel or the military judge or both pay closer attention to detail. Additionally, trial counsel, chiefs of justice, staff judge advocates, and convening authorities should sometimes consider whether joining the defense’s position is a viable course of action, in light of the importance of the issue, and the magnitude of any reversal on appeal. Imagine the unenviable task faced by a government representative in the *Quintanilla* case—calling the deceased battalion executive officer’s family to tell them the accused’s conviction was reversed because one court-martial member erroneously sat on the case.

³¹⁶ *Id.*

³¹⁷ *Id.*

³¹⁸ *Id.* at 594.

³¹⁹ *Id.*

³²⁰ *Id.*

³²¹ *United States v. Pinero*, 60 M.J. 31 (2004) (providing a discussion of the military specific reasons for imposing a close review of court-martial cases).