

The Year in Voir Dire and Challenges, and Pleas and Pretrial Agreements

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Introduction

Case law in voir dire and panel member challenges, pleas and pre-trial agreements has continued to develop during this most recent Court of Appeals for the Armed Forces (CAAF) term.¹ In the area of voir dire and challenges, the CAAF focused on two issues: (1) implied bias, and (2) the timing of peremptory challenges under Article 41, Uniform Code of Military Justice (UCMJ).² In *United States v. Moreno*, the court held that a member's extensive knowledge of and prior inquiry into the case required his excusal under an implied bias theory.³ In *United States v. Leonard*, the court found that a member's prior interaction with the alleged victim necessitated his dismissal on implied bias grounds.⁴ The CAAF, in *United States v. Dobson*, clarified that the parties may use their peremptory challenge, if, after the issuance of all challenges for cause, Article 16, UCMJ quorum,⁵ which requires five members for a general court-martial or three members for a special court-martial, is met but Article 25, UCMJ quorum,⁶ requiring panel composition of at least one-third enlisted members, is lacking.⁷ In the pleas and pre-trial agreements arena, the CAAF, as exemplified in *United States v. Gosselin*,⁸ *United States v. Phillippe*,⁹ and *United States v. Gaston*,¹⁰ continues to reverse findings, sentences, or both, because the record of trial lacks a sufficient factual predicate outlining the accused's criminal misconduct. Lastly, in the area of pretrial agreements, the CAAF, in *United States v. Lundy*, determined that specific performance by the government of a pretrial agreement term is feasible years after the initial court-martial if the accused fails to demonstrate the term's materiality.¹¹

Voir Dire and Challenges

Overview

Rule for Court-Martial (RCM) 912(f)(1)(N) states that a member should not serve when "the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality"¹² is raised. Two grounds exist for a challenge for cause against a member: (1) actual bias; and (2) implied bias.¹³ Whether an actual bias exists is determined by the military

¹ See Major Deidra J. Fleming, *Another Broken Record—The Year in Court-Martial Personnel, Voir Dire and Challenges, and Pleas and Pretrial Agreements*, ARMY LAW., April 2006, at 36 [hereinafter Fleming, *Broken Record*]; Major Deidra J. Fleming, *Out, Damned Error Out, I Say! The Year in Court-Martial Personnel, Voir Dire and Challenges, and Pleas and Pretrial Agreements*, ARMY LAW., May 2005, at 45 [hereinafter Fleming, *Error Out*].

² UCMJ art. 41 (2005).

³ 63 M.J. 129, 134 (2006).

⁴ 63 M.J. 398, 403 (2006).

⁵ UCMJ art. 16.

⁶ UCMJ art. 25.

⁷ 63 M.J. 1, 10 (2006).

⁸ *Gosselin*, 62 M.J. 349 (2006) (overturning a wrongful introduction of a controlled substance onto a base specification because the providence inquiry failed to establish the accused's guilt).

⁹ *Phillippe*, 63 M.J. 307 (2006) (narrowing the length of time for an absent without leave (AWOL) specification because the accused stated during his unsworn sentencing testimony that he attempted to return to military control).

¹⁰ *Gaston*, 62 M.J. 404 (2006) (reversing the accused's absent without out leave terminated by apprehension conviction because the record failed to establish a factual predicate for the accused's plea).

¹¹ 63 M.J. 299, 304 (2006).

¹² MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 912(f)(1)(N) (2005) [hereinafter MCM].

¹³ *United States v. Armstrong*, 54 M.J. 51, 54 (2000).

judge's subjective review of the member's credibility. "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."¹⁴ The CAAF gives "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."¹⁵ Implied bias focuses on the member's status or life experiences and whether, as "viewed through the eyes of the public," their continued panel membership is fair and appropriate.¹⁶ 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*."¹⁷ Implied bias arises when "regardless of an individual member's disclaimer of bias, most people in the same position would be prejudiced, [that is biased]."¹⁸

Member's Case or Witness Knowledge

This past term, the CAAF reversed two cases because of the implied bias of a panel member.¹⁹ In *United States v. Leonard*, the CAAF centered on a panel member's prior interaction with an alleged rape victim²⁰ and in *U.S. v. Moreno* the court centered on a panel member's prior investigation of an alleged rape.²¹

In *Leonard*, a contested rape case, the military judge denied defense's challenge for cause against two panel members: Lieutenant Colonel (LTC) D, whose own daughter had been raped five years earlier; and Captain (CPT) P, who frequently interacted with the alleged rape victim.²² The defense used their sole peremptory challenge against LTC D but failed to preserve for appeal the military judge's ruling denying LTC D's challenge for cause.²³ Pursuant to the then existing RCM 912(f)(4),²⁴ the defense failed to state that "but for" the denial of LTC D's challenge for cause they would have exercised their peremptory challenge against another member.²⁵

On appeal, the issue turned on whether the defense waived appellate review of the denied challenge for cause against CPT P by their failure to comply with RCM 912(f)(4) when peremptorily striking LTC D.²⁶ The court held that the RCM 912(f)(4) "but for" requirement applied only to the peremptorily struck member, LTC D, so the denied challenge for cause against CPT P was reviewable.²⁷ The CAAF then held that the military judge abused his discretion by denying the challenge

¹⁴ *United States v. Wiesen*, 56 M.J. 172, 174 (2001), *recon. denied*, 57 M.J. 48 (2002).

¹⁵ *United States v. Napolitano*, 53 M.J. 162, 166 (2000).

¹⁶ *United States v. Rome*, 47 M.J. 467, 469 (1998).

¹⁷ *United States v. Downing*, 56 M.J. 419, 422 (2002).

¹⁸ *Napolitano*, 53 M.J. at 167.

¹⁹ *United States v. Leonard*, 63 M.J. 398 (2006); *United States v. Moreno*, 63 M.J. 129 (2006).

²⁰ *Leonard*, 63 M.J. 398.

²¹ *Moreno*, 63 M.J. 129.

²² *Leonard*, 63 M.J. at 400-01. The court did not give the panel members' full names. *Id.*

²³ *Id.*

²⁴ An amendment to RCM 912(f)(4), adopted after the accused's court-martial, eliminated the "but for" rule. See Exec. Order No. 13,387, 3 C.F.R. 178 (2006), *reprinted in* 10 U.S.C. §§ 801-946; MCM, *supra* note 12, R.C.M. 912(f)(4). The old RCM 912(f)(4) "but for" rule stated:

When a challenge for cause has been denied, failure by the challenging party to exercise a peremptory challenge against any member shall constitute waiver of further consideration of the challenge upon later review. However, when a challenge for cause is denied, a peremptory challenge by the challenging party against any member shall preserve the issue for later review, provided that where the member who was unsuccessfully challenged for cause is peremptorily challenged by the same party, that party must state that it would have exercised its peremptory challenge against another member if the challenge for cause had been granted.

MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 912(f)(4) (2002).

²⁵ *Leonard*, 63 M.J. at 401.

²⁶ *Id.* at 403.

²⁷ *Id.*

for cause against CPT P.²⁸ The CAAF stated “CPT P, [a pilot,] acknowledged that he had encountered CH, [the victim] at least once a week. Most importantly he revealed that her responsibilities for his flying gear included packing his parachute and servicing his pilot helmet. This relationship must have been one of trust.”²⁹ This “significant relationship of trust” between CPT P and the victim created an appearance of unfairness in the court-martial process which warranted the excusal of CPT P under an implied bias theory.³⁰

Similarly, in *United States v. Moreno*, the military judge denied defense’s challenge for cause against a panel member.³¹ In *Moreno*, the accused, who worked in the comptroller’s disbursing office, was convicted of rape by an officer panel.³² The eventual panel president, LTC F, the deputy comptroller, obtained pretrial knowledge of the accused’s case through his own investigative efforts and newspaper articles.³³ LTC F described his efforts as “simply fact finding” so he had a “complete picture” of the incident to report to his boss, the comptroller.³⁴ The military judge granted seven of defense’s eight requested challenges for cause but denied the challenge for cause against LTC F without providing any findings for his decision.³⁵ The CAAF held that LTC F’s “inquiry went beyond a routine passing of information to a superior. . . he subjectively believed he knew all there was to know – that he had the ‘complete picture’” of the case.³⁶ Under an implied bias standard, an objective observer could reasonably question LTC F’s impartiality and the military judge erred in denying defense’s challenge for cause.³⁷

The *Leonard* and *Moreno* opinions spotlight the CAAF’s willingness to invoke the implied bias doctrine. While a panel member may not demonstrate actual bias, military judges and counsel must remain sensitive to the appearance of any possible implied bias issues. Military judges, when denying a challenge for cause, need to make findings of fact on both actual and implied grounds. If a military judge fails to make these findings of facts, the trial counsel should request such a ruling.

Challenges for Cause – Timing of Challenges

The CAAF, this year, addressed the timing of casual challenges under Article 41, UCMJ.³⁸ In *United States v. Dobson*, the accused selected an enlisted panel to hear her contested premeditated murder case.³⁹ After the military judge granted challenges for cause and peremptory challenges the general court-martial convening authority (GCMCA) needed to twice detail additional members for the court-martial to obtain one-third enlisted members, as requested by the accused and required by Article 25, UCMJ.⁴⁰ The CAAF, in their opinion, provided the following chart as to the progression of the panel’s composition:

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Moreno*, 63 M.J. 129 (2006).

³² *Id.* at 132.

³³ *Id.* at 132-33. The court did not give LTC F’s full name. *Id.*

³⁴ *Id.* at 133.

³⁵ *Id.*

³⁶ *Id.* at 134-35.

³⁷ *Id.* at 135.

³⁸ UCMJ art. 41 (2005).

³⁹ 63 M.J. 2, 3 (2006). The accused was charged with the premeditated murder of her husband. *Id.*

⁴⁰ *Id.* at 7. Article 25 (c) states “the accused may not be tried by a general or special court-martial the membership of which does not include enlisted members in a number comprising at least one-third of the total membership of the court,” if the accused requests court-martial by enlisted panel. UCMJ art. 25(c).

Panel Composition⁴¹	Total	Officer	Enlisted
Initial	10	6	4
<u>After 1st causal challenges</u>	<u>7</u>	<u>5</u>	<u>2 (No 25 quorum)</u>
After 1st peremptory challenges	5	4	1
After 1st additions	10	6 (<i>added 2</i>)	4 (<i>added 3</i>)
<u>After 2nd causal challenges</u>	<u>8</u>	<u>6</u>	<u>2 (No 25 quorum)</u>
After 2nd peremptory challenges	7	5	2
After 2nd additions	10	5 (<i>added 0</i>)	5 (<i>added 3</i>)
After 3rd causal challenges	9	5	4
Final (after 3rd peremptory challenges)	8	5	3

The issue on appeal was whether the military judge erred by granting the parties' peremptory challenges when the one-third enlisted membership quorum was broken after the first and second round of challenges for cause were granted.⁴² Even so the panel membership never dropped below five members as required for a general court-martial under Article 16, UCMJ.⁴³ The defense, on appeal, argued that the military judge should not have granted the parties' peremptory challenges once the one-third enlisted quorum was broken under Article 25, even though the total membership requirements of Article 16 were met.⁴⁴ Article 41, UCMJ states that if the exercise of challenges for cause drops panel membership below Article 16 requirements that additional members will be detailed and peremptory challenges will not be granted at that time.⁴⁵ Article 41, however, does not address panel membership falling below Article 25 one-third enlisted requirements.⁴⁶ The CAAF held that the military judge did not err by granting peremptory challenges when Article 25 quorum was lacking but Article 16 quorum was satisfied.⁴⁷ The CAAF reasoned that "[t]he enlisted representation requirement in Article 25 employs a percentage, not an absolute number, [unlike Article 16,] . . . [a]s a result, there are circumstances in which an enlisted representation deficit under Article 25 can be corrected through exercise of a peremptory challenge against an officer."⁴⁸

⁴¹ *Dobson*, 63 M.J. at 8.

⁴² *Id.* at 7-8.

⁴³ *Id.* at 7. See UCMJ art. 16.

⁴⁴ *Id.* at 8-9. The defense also objected to the GCMCA detailing additional officers to the panel after the first challenges for cause were granted as an attempt to dilute enlisted representation. *Id.* at 9-10. The CAAF stated that the accused is entitled only to one-third enlisted membership and the rules do not "require the [GCMCA] to add only the minimum number and type [of members] necessary to address a deficit under Article 16 or 25." *Id.* at 10.

⁴⁵ See UCMJ art. 41. Article 41 states:

If the exercise of a challenge for cause reduces the court below the minimum number of members required by [Article 16], all parties shall . . . either exercise or waive any challenge for cause then apparent against the remaining members of the court before additional members are detailed to the court. However, peremptory challenges shall not be exercised at that time.

Id.

⁴⁶ *Dobson*, 63 M.J. at 9.

⁴⁷ *Id.*

⁴⁸ *Id.*

Pleas

Introduction

The CAAF, in *United States v. Care*, developed the requirements for a guilty plea from then current Supreme Court precedent.⁴⁹ *Care* states that a guilty plea providence inquiry must:

[R]eflect 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.⁵⁰

“In 1984, RCM 910, based generally on Article 45, UCMJ and the Federal Rules of Criminal Procedure (FRCP) 11 (Pleas), codified the *Care* requirements.”⁵¹ “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.⁵² One of these safeguards includes requiring the accused to provide the military judge with an underlying factual predicate for the offenses to which the accused pleads guilty.⁵³

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

As discussed in last year’s symposium article, a military judge must inquire into the factual basis for the accused’s plea.⁵⁴ The accused must describe all relevant facts surrounding his offense(s) to establish his guilt.⁵⁵ Rule for Court-Martial 910(e) states 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.”⁵⁶ A mere “yes” or “no” answer by the accused in response to the military judge’s legally conclusive questions does not suffice.⁵⁷ “Mere conclusions of law recited by an accused are insufficient to provide a factual basis for a guilty plea.”⁵⁸ A military judge must resolve any inconsistent matter or defense raised either by the accused or by any other witness or evidence presented during the court-martial.⁵⁹ Article 45, UCMJ states “[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.”⁶⁰ An appellate court will only

⁴⁹ 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)).

⁵⁰ *Id.* at 250.

⁵¹ See Fleming, *Broken Record*, *supra* note 1, at 47. See MCM, *supra* note 12, R.C.M. 910 analysis, at A21-58.

⁵² *United States v. Felder*, 59 M.J. 444, 445 (2004) (citing DAVID A. SCHLEUTER, *MILITARY CRIMINAL JUSTICE* 372 (5th ed. 1999)).

⁵³ See MCM, *supra* note 12, R.C.M. 910 analysis, at A21-58.

⁵⁴ UCMJ art. 45 (2005); *Care*, 40 C.M.R. 247 (C.M.A. 1969). The sentences from footnote fifty-one to footnote fifty-nine incorporate a verbatim discussion of the law from last year’s symposium article. See Fleming, *Broken Record*, *supra* note 1, at 48-49.

⁵⁵ MCM, *supra* note 12, R.C.M. 910(e) discussion.

⁵⁶ *Id.* R.C.M. 910(e).

⁵⁷ *United States v. Outhier*, 45 M.J. 326, 330-32 (1996) (ruling that the accused’s affirmative responses to the military judge that his actions could have produced grievous bodily harm were 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 did not establish a factual predicate for the charged offense). See also *United States v. Jordan*, 57 M.J. 236 (2002) (determining that an accused’s mere “yes” response to the military judge’s question as to whether the accused’s 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).

⁵⁸ *Outhier*, 45 M.J. at 331.

⁵⁹ *Id.* “[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).

⁶⁰ UCMJ art. 45(a) (2005).

overturn a guilty plea if the record of trial, in its entirety, shows a substantial basis in law and fact for questioning the plea.⁶¹ Although this appears to define a high standard, the CAAF and the service courts, in published and unpublished opinions, continue to reverse numerous findings and sentences because a review of the entire record fails to establish a factual predicate for the accused's plea or an inconsistent matter or defense remains unresolved on the record.⁶² Over the past couple of years, Article 86, UCMJ,⁶³ absent without leave (AWOL) offenses resulted in numerous cases in this area.⁶⁴ This year, the CAAF issued two opinions involving AWOL offenses warranting discussion.⁶⁵

AWOL Offenses

In *United States v. Gaston*, during the providence inquiry, the accused told the military judge that his 2003 AWOL was terminated by apprehension when his "dormitory manager" came to his room and told him that his squadron was looking for him.⁶⁶ On review, the CAAF noted that the military judge's inquiry was "bare bones" and the court looked to the entire record, to include the accused's testimony during a pretrial motion, to clarify the facts surrounding the accused's interaction with his dormitory manager.⁶⁷ During a pretrial motion, the accused said that the dormitory manager told him that his squadron was looking for him, that the accused told the manager he would get dressed and meet him down at the dormitory's front, and that the manager said he would call the accused's first sergeant to pick him up.⁶⁸ In its reversal, the CAAF held that the record failed to show that the accused's contact with the dormitory manager established a return to military control.⁶⁹ The court reasoned:

Nothing in the record establishes that the dorm manager believed Gaston had committed an offense or that the dorm manager had the authority to take him into custody. Without this authority, the mere fact that the dorm manager made contact with Gaston while he was on base and in his dormitory room is not sufficient to establish that Gaston was under military control.⁷⁰

The CAAF amended the finding to the lesser-included offense of AWOL and affirmed the sentence.⁷¹

Similarly, in *United States v. Phillippe*, the accused pleaded guilty to being AWOL.⁷² The accused, however, in an unsworn statement given during sentencing, stated that he twice attempted to return to military control.⁷³ The accused first

⁶¹ *Jordan*, 57 M.J. at 238 (citing *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991)).

⁶² See *United States v. Gilchrist*, 61 M.J. 785 (Army Ct. Crim. App. 2005); *United States v. Harding*, 61 M.J. 526 (Army Ct. Crim. App. 2005); *United States v. Jackson*, 61 M.J. 731 (N-M. Ct. Crim. App. 2005); *United States v. Littleton*, 60 M.J. 753 (N-M. Ct. Crim. App. 2004); *United States v. Sierra*, 62 M.J. 539 (Army Ct. Crim. App. 2005).

⁶³ UCMJ art. 86.

⁶⁴ See *United States v. Pinero*, 60 M.J. 31 (2004); *United States v. Hardeman*, 59 M.J. 389 (2004); *United States v. Duncan*, 60 M.J. 973 (Army Ct. Crim. App. 2005); *United States v. Adams*, 60 M.J. 912 (N-M. Ct. Crim. App. 2005); *Gilchrist*, 61 M.J. 785.

⁶⁵ *United States v. Gaston*, 62 M.J. 404 (2006); *United States v. Phillippe*, 63 M.J. 307 (2006). The CAAF also issued an opinion involving the doctrine of deliberate avoidance. See *United States v. Adams*, 63 M.J. 223, 226 (2006) (finding the "deliberate avoidance" doctrine applicable the court reasoned that "a literal application of actual knowledge to Article 86, UCMJ, offenses would result in absurd results in a military context. Servicemembers might avoid their duties and criminal sanction by hunkering down in their barracks rooms or off-base housing, taking care to decline all opportunity to learn of their appointed place of duty at formation or through the receipt of orders."). See also *United States v. Harrow*, 62 M.J. 649 (A.F. Ct. Crim. App. 2006) (overturning AWOL specification because a substantial conflict existed as to whether the accused's mental health status precluded her ability to report); *United States v. Estes*, 62 M.J. 544 (Army Ct. Crim. App. 2005) (stating that "[w]e decline to take our sister court's position that ownership or control of a barracks building is the determining factor in whether a soldier is absent from his unit while remaining in those barracks . . . [a] unit is comprised of soldiers, not buildings.>").

⁶⁶ *Gaston*, 62 M.J. at 405-06. The accused's dormitory manager was apparently a Department of Defense civilian employee. *Id.*

⁶⁷ *Id.* at 406-07.

⁶⁸ *Id.* at 407.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* at 408.

⁷² *Phillippe*, 63 M.J. 307 (2006).

⁷³ *Id.* at 308.

attempted to return to military control at an Air Force base in Montana right after 11 September 2001.⁷⁴ The accused alleged that Air Force personnel refused to take him under military control because no warrant for his arrest existed and he lacked a military identification card.⁷⁵ In the summer of 2002, on his second attempt to return to military custody, the accused tried to meet his hometown recruiter in Illinois to sign papers to resolve his AWOL status.⁷⁶ The Army Court of Criminal Appeals (ACCA) affirmed the conviction when it held the accused's unsworn statement raised no more than a "mere possibility" that he attempted to terminate his AWOL.⁷⁷ The ACCA stated "[i]n neither circumstance did [the accused] ever submit to actual or constructive military control. As such, [the accused's] assertions evince nothing 'more than an inchoate desire to return at an earlier date.'" ⁷⁸ Subsequently, the CAAF in reversing the ACCA, held that the accused's unsworn statement about his first attempt to return to military control after 11 September 2001 raised a matter factually inconsistent with pleading guilty to an almost three year AWOL.⁷⁹ While the accused's statement did not affirmatively sustain the defense of voluntary termination, once the issue was raised the military judge was required to further inquire into the potential validity of the defense.⁸⁰ The CAAF then proceeded to affirm a shorter AWOL, ending on 11 September 2001, when the accused allegedly attempted to return to military control at the Montana Air Force base.⁸¹

The cases of *Gaston* and *Phillippe* emphasize the CAAF's close review and scrutiny of the factual predicate underlying an accused's providence inquiry. During a providence inquiry, a military judge must obtain detailed information from the accused surrounding the offenses. Any inconsistent statement given by the accused during the providence inquiry or even in the sentencing phase of the courts-martial, as in *Phillippe*, requires a re-opening of and further inquiry and resolution by the military judge. Without this further inquiry, the record is incomplete and potential appellate reversal exists.

Drug Offenses

While the CAAF focused on AWOL offenses in *Gaston* and *Phillippe*, a more controversial case dealing with factual predicate issues this recent term involved a drug offense.⁸² In *United States v. Gosselin*, the accused, stationed in Germany, was approached by another airman about driving to the Netherlands to purchase hallucinogenic mushrooms.⁸³ During the providence inquiry for wrongfully introducing hallucinogenic mushrooms onto a base, the accused admitted that he and the co-accused drove to the Netherlands to purchase mushrooms, that he was present when the mushrooms were purchased, that he knew the mushrooms were in the co-accused's car when they reached the base gate, and that he also used mushrooms that night from roughly the same bag in which the mushrooms were purchased.⁸⁴ During the providence inquiry the accused also stated that his main desire in traveling to the Netherlands was to buy a dragon statue.⁸⁵

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* at 309

⁷⁸ *Id.* (citing *United States v. Acemoglu*, 45 C.M.R. 335 (C.M.A. 1972)).

⁷⁹ *Id.* at 311.

⁸⁰ *Id.*

⁸¹ *Id.* at 312.

⁸² *United States v. Gosselin*, 62 M.J. 349 (2006). The service courts also reviewed drug offense cases. See *United States v. Denaro*, 62 M.J. 663 (C.G. Ct. Crim. App. 2006) (finding that the accused's plea to wrongfully interfering with an adverse administrative proceeding, and conspiracy to do such, was provident because it was reasonable to conclude that an adverse administrative proceeding would commence against his coworker based on a positive cocaine urinalysis and the accused intended to assist his coworker in masking her results); *United States v. Thomas*, No. 200401690, 2005 CCA LEXIS 404 (N-M. Ct. Crim. App. 2005), *review granted*, 63 M.J. 469 (2006) (holding, on an issue of first impression, that to sustain a plea of guilty to the wrongful introduction of a controlled substance onto an installation an accused is not required to know at the time of the offense that he entered a military installation).

⁸³ 62 M.J. 349, 350 (2006).

⁸⁴ *Id.* at 350-51.

⁸⁵ *Id.* at 350. The accused was apparently successful in obtaining a dragon statue but the opinion, unfortunately, did not provide a further description of the statue. *Id.*

The military judge repeatedly asked the accused to describe his original purpose for his trip to the Netherlands and advised him that mere presence at a crime scene could not establish co-conspirator vicarious liability or an aiding and abetting offense.⁸⁶ The military judge twice recessed the courts-martial for the accused to discuss his case with his defense counsel.⁸⁷ After the second recess, the defense counsel stated that the accused was pleading guilty under an “aiding and abetting” theory, however, the accused never affirmatively agreed on the record with his counsel’s representations.⁸⁸ Specifically, the defense counsel stated that:

Gosselin agreed to go to [the Netherlands] knowing that [the co-accused] intended to purchase mushrooms, Gosselin did nothing to discourage this, Gosselin indicated he had been there before and could help navigate, Gosselin did help navigate on the way there, Gosselin voluntarily went into the shop where he knew [the co-accused] intended to purchase the mushrooms, and Gosselin knew [the co-accused] bought the mushrooms and knew they were in the car and yet Gosselin said nothing to the gate guard when they entered the base.⁸⁹

In the appeal to the Air Force Court of Criminal Appeals (AFCCA), the court found a satisfactory factual basis existed to sustain the accused’s plea to aiding and abetting the co-accused.⁹⁰ The court consistently referenced the military judge’s methodical and pressing inquiry of the accused as a basis in affirming the conviction.⁹¹ The CAAF, however, reversed the plea finding that “[t]he providence inquiry failed to establish that Gosselin intended to facilitate [the] introduction of mushrooms onto a military installation or assisted or participated in the commission of the offense.”⁹² The court noted that the accused never personally indicated on the record that he provided navigational assistance to the Netherlands.⁹³ Even if the accused provided navigational assistance to the Netherlands, the court noted that it would only sustain an offense of aiding and abetting the purchase of marijuana but that action would not “translate into an affirmative act for the later separate offense of introduction of the mushrooms onto the base.”⁹⁴ The accused’s conclusory statements that he was a mere party to the offense and that he owed a duty to tell the base gate guards about the drugs in response to leading questions by the military judge were not sufficient because “[c]onclusions of law alone do not satisfy” providence inquiry requirements.⁹⁵

Gosselin underlines the military judge’s burden to ensure that the accused’s statements establish a sound factual predicate for a plea and not raise an inconsistent matter or possible defense. While this mission is easier said than done, *Gosselin* reminds military judges to conduct an open ended inquiry with the accused and to refrain from the temptation of using otherwise leading questions to obtain conclusory responses from an accused.

Unintended Consequences

The issue of unintended consequences involves the government’s failure to comply with an unambiguous pretrial agreement (PTA) term. Typically, the problem involves the convening authority’s inability to defer or suspend automatic or

⁸⁶ *Id.* at 351.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* The accused, however, never admitted on the record that he provided navigational assistance. *Id.*

⁹⁰ United States v. Gosselin, 60 M.J. 768, 770-71 (A.F. Ct. Crim. App. 2004).

⁹¹ *Id.* at 769. The court noted that the inquiry took up twenty-two pages of a hundred page record. *Id.*

⁹² *Gosselin*, 62 M.J. at 352.

⁹³ *Id.* Judge Crawford, in dissent, found that the majority failed to follow Supreme Court precedent in the jurisprudence of guilty pleas, which allows for sustaining the plea based on the defense counsel’s representations as to the actions supporting the accused’s plea to aiding and abetting the offense. *Id.* at 354-58 (Crawford, J., dissenting). See Bradshaw v. Stumpf, 545 U.S. 175 (2005) (holding that a judge is not required to advise the accused of the elements himself “[r]ather, constitutional requirements may be satisfied where the record accurately reflects that the charge’s nature and the crime’s elements were explained to the defendant by his own, competent counsel.”).

⁹⁴ *Gosselin*, 62 M.J. at 352-53.

⁹⁵ *Id.* at 353.

adjudged forfeitures because of a regulatory restriction.⁹⁶ “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.’”⁹⁷ The following remedial options exist: (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.⁹⁸ This past term, the CAAF explored the ability of the government to specifically perform a PTA term years after the initial court-martial.⁹⁹

In *United States v. Lundy (Lundy I)*, the accused entered into a pretrial agreement term, whereby the convening authority agreed to defer any and all reductions and forfeitures until the sentence was approved and, at action, to suspend all adjudged and to waive any and all automatic reductions and forfeitures.¹⁰⁰ For sexually assaulting his children, the accused, a staff sergeant (E-6), was sentenced to a dishonorable discharge, confinement for twenty-three years, and a reduction to the pay grade of E-1.¹⁰¹ Per Articles 58a and 58b, UCMJ the imposed discharge and confinement in excess of six months subjected the accused to an automatic reduction and forfeitures.¹⁰² 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 rate, as opposed to the E-1 rate, as provided for in the pretrial agreement.¹⁰³ The parties, however, overlooked Army Regulation (AR) 600-8-19, 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.¹⁰⁴ 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.¹⁰⁵

The CAAF, reversing the ACCA, held if the government fails to comply with a material term of a pretrial agreement three options exist: (1) the government’s specific performance of the term, (2) the accused’s withdrawal from the pretrial agreement, or (3) alternative relief, if the accused consents to such relief.¹⁰⁶ “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.”¹⁰⁷ The court remanded the case for ACCA to 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.¹⁰⁸

⁹⁶ 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. Williams*, 53 M.J. 293 (2000); *United States v. Hardcastle*, 53 M.J. 299 (2000); *United States v. Smith*, 56 M.J. 271 (2002); *United States v. Perron*, 58 M.J. 78 (2003).

⁹⁷ *Smith*, 56 M.J. at 272 (quoting *United States v. Bedania*, 12 M.J. 373, 375 (C.M.A. 1982)).

⁹⁸ *Perron*, 58 M.J. at 82.

⁹⁹ *United States v. Lundy (Lundy IV)*, 63 M.J. 299 (2006). Procedurally, the *Lundy* case traveled extensively through the appellate courts; starting at ACCA, proceeding to the CAAF, remanded back to ACCA, then finally back at the CAAF. See *United States v. Lundy (Lundy I)*, 58 M.J. 802 (Army Ct. Crim. App. 2003); *United States v. Lundy (Lundy II)*, 60 M.J. 52 (2004); *United States v. Lundy (Lundy III)*, 60 M.J. 941 (Army Ct. Crim. App. 2005); *United States v. Lundy (Lundy IV)*, 63 M.J. 299 (2006).

¹⁰⁰ *Lundy I*, 58 M.J. 802, 803 (Army Ct. Crim. App. 2003). The sentences from footnote ninety-six to one hundred and eleven incorporate a verbatim discussion of *Lundy* from a previous symposium article. See Fleming, *Error Out*, *supra* note 1, at 66-67.

¹⁰¹ *Lundy II*, 60 M.J. at 53. The pretrial agreement limited the accused’s confinement to eighteen years. *Id.* at 56.

¹⁰² UCMJ arts. 58a, 58b (2005).

¹⁰³ *Lundy II*, 60 M.J. at 55.

¹⁰⁴ *Id.* See U.S. DEP’T OF ARMY, REG. 600-8-19, ENLISTED PROMOTIONS AND REDUCTIONS para. 7-1d (1 May 2000).

¹⁰⁵ *Lundy II*, 60 M.J. at 57.

¹⁰⁶ *Id.* at 60 (citing *United States v. Perron* 58 M.J. 78 (2003). See *Lundy I*, 58 M.J. 802 (Army Ct. Crim. App. 2003) (holding that the convening authority technically erred but no material prejudice accrued to the accused requiring 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).

¹⁰⁷ *Lundy II*, 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.

¹⁰⁸ *Id.* at 60.

On remand, the ACCA affirmed the convening authority's specific performance.¹⁰⁹ On January 3, 2005, the Secretary of the Army (SA) granted an exception to AR 600-8-19 in this case, 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 reduction.¹¹⁰ This exception permitted the government to provide the accused's family forfeitures at the E-6 rate.¹¹¹ 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 2000.¹¹² 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."¹¹³ The government, however, failed to seek approval from the SA for an interest payment on the difference between the E-6 and E-1 amounts.¹¹⁴ 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.¹¹⁵ The ACCA remanded the case to the SA to approve the interest payment or to otherwise return the case for the ACCA to set aside the findings and sentence.¹¹⁶ In October, 2005 the SA approved the three thousand dollar interest payment and the government paid the accused's wife.¹¹⁷ Subsequently, the CAAF granted review to determine whether the SA's actions constituted specific performance by the government.¹¹⁸

In the summer of 2006, the CAAF, affirming the ACCA as to the propriety of specific performance, found that the accused failed to show that the timing of the payment was a material term.¹¹⁹ The court stated that the accused "bears the burden of establishing that a term or condition of the agreement was material to his decision to plead guilty."¹²⁰ The accused did not complain to the convening authority about the failure to make full payment for thirteen months.¹²¹ The failure to complain "negates [the accused's] assertion that the timing of the payment was material to his decision to plead guilty because [the accused] appears not to have been concerned whether or not his wife had received the benefit of the agreement at the time it was due."¹²²

The four separate *Lundy* opinions, spanning three years of scrutiny of appellate review, 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 affects a proposed pretrial agreement term.

¹⁰⁹ See *United States v. Lundy (Lundy III)*, 60 M.J. 941 (Army Ct. Crim. App. 2005).

¹¹⁰ *Id.* at 943.

¹¹¹ *Id.*

¹¹² *Id.* at 942.

¹¹³ *Id.* at 944.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 944-45.

¹¹⁶ *Id.* at 945.

¹¹⁷ *United States v. Lundy (Lundy IV)*, 63 M.J. 299, 301 (2006).

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 304.

¹²⁰ *Id.* at 302.

¹²¹ *Id.* at 304.

¹²² *Id.*

Conclusion

This past term, the CAAF issued several decisions in the areas of voir dire and challenges, and pleas and pretrial agreements. These cases, involving implied bias¹²³ and the factual predicate underlying a court's providence inquiry,¹²⁴ reaffirm the CAAF's generally paternalistic approach to the military courts-martial process.

¹²³ United States v. Moreno, 63 M.J. 129 (2006); United States v. Leonard, 63 M.J. 398 (2006).

¹²⁴ United States v. Gosselin, 62 M.J. 349 (2006); United States v. Phillippe, 63 M.J. 307 (2006); United States v. Gaston, 62 M.J. 404 (2006).