

Litigating Article 32 Errors After *United States v. Davis*

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Introduction

The defense counsel reviewed the investigating officer's (IO) report of the Article 32 investigation with mounting frustration. Not only had the IO improperly determined that several defense witnesses were not "reasonably available" during the investigation, he failed to note the defense's objections to this determination. To make matters worse, the IO refused to consider or refer to any of the evidence offered by the defense in his report. Consequently, the convening authority could not review any favorable information that the defense counsel had painstakingly collected and presented during the Article 32 investigation in deciding how to dispose of the charges. The defense counsel considers what to do next. How and when would he be able to obtain relief for his client and to enforce his client's rights under Article 32 of the Uniform Code of Military Justice (UCMJ)?

This scenario is undoubtedly familiar to any judge advocate who has served as a defense counsel, along with the confusion in trying to determine the best course of action for protecting a client's rights. For many years, that confusion was largely the result of competing standards of review of Article 32 errors in the appellate courts and widespread inconsistency among the trial courts as to how to implement those standards. In 2006, the Court of Appeals for the Armed Forces (CAAF) resolved this conflict in the case of *United States v. Davis*.¹

In *Davis*, the CAAF held that an Article 59(a), UCMJ, harmless error analysis applies to all Article 32 errors considered on direct review of the findings and sentence of a court-martial. Prior to the *Davis* decision, case law diverged on the appellate standard of review for Article 32 defects. One standard set by the court allowed a case to be reversed without any specific showing of prejudice if the accused made a timely objection to the defect,² while a second standard of review required that appellate courts test Article 32 errors for prejudice.³ The CAAF resolved this conflict in

Davis by distinguishing between two standards of review. For Article 32 errors raised prior to trial, the trial court can grant relief without a showing of prejudice, and the appellate courts can grant relief before trial on a petition for extraordinary relief. In contrast, for Article 32 errors considered on direct review of the findings and sentence of a court-martial, the court must determine whether those errors resulted in material prejudice to an accused's substantial rights in accordance with Article 59(a).⁴

Demonstrating prejudice under Article 59(a) for an Article 32 error, however, is easier said than done. In *United States v. Von Bergen*,⁵ the CAAF signaled that the threshold for such prejudice is very high because the court found no prejudice to an accused who had been denied an Article 32 investigation altogether.⁶ *Von Bergen* involved an accused who asserted his right to an Article 32 investigation when he was retried after his conviction was overturned on appeal. In denying the accused a pretrial investigation, the government relied upon a conditional waiver in the pretrial agreement the accused entered into in his original trial. Notwithstanding the fact that the accused was no longer bound by the pretrial agreement, the trial court erroneously found that his right to a pretrial investigation had been extinguished by the previous waiver. On appeal from conviction at his retrial, the CAAF found no prejudice in the denial of a pretrial investigation. If outright denial of any pretrial investigation whatsoever fails to demonstrate actual prejudice, it seems unlikely that mere defects in an Article 32 investigation could ever rise to that threshold.

The requirement to demonstrate actual prejudice, in light of the CAAF's reluctance to find such prejudice, has all but eliminated the possibility of obtaining judicial enforcement of Article 32 rights on appeal. As a practical matter, the *Davis* decision means that if defense counsel hope to remedy Article 32 errors, they must do so at the trial level or not at all.⁷

This article will examine the issues surrounding errors in the Article 32 pretrial investigation, focusing specifically on the means by which defense counsel may obtain relief for

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¹ 64 M.J. 445 (C.A.A.F. 2007).

² See, e.g., *United States v. Mickel*, 26 C.M.R. 104, 107 (C.M.A. 1958); *United States v. Holt*, 52 M.J. 173, 184 (C.A.A.F. 1999); *United States v. Johnson*, 53 M.J. 459, 462 (C.A.A.F. 2000); *United States v. Stirewalt*, 60 M.J. 297, 302 (C.A.A.F. 2004).

³ See, e.g., *United States v. Worden*, 38 C.M.R. 284, 286-87 (C.M.A. 1968); *United States v. Maness*, 48 C.M.R. 512, 518 (C.M.A. 1974); *United States v. Donaldson*, 49 C.M.R. 542, 543 (C.M.A. 1975); *United States v. Chestnut*, 2 M.J. 84, 85 (C.M.A. 1976); *United States v. Chuculate*, 5 M.J. 143, 144-45 (C.M.A. 1978).

⁴ *Davis*, 64 M.J. at 449.

⁵ 67 M.J. 290 (C.A.A.F. 2009).

⁶ *Id.* at 292. Note, however, that that case was a retrial after a remand, and the finding of no prejudice was partly based on the opportunities afforded the defense by the previous trial. *Id.* at 294-95. The court still found error in the military judge's denial of an Article 32 investigation. *Id.* at 291.

⁷ Nothing in this article should be taken to downplay the continued importance of the Article 32 investigation itself, or the duty of defense counsel to prepare for the hearing (or to make an informed decision about whether to waive it). In particular, the hearing is often a good opportunity to commit government witnesses to their stories and to useful cross-examination answers.

such errors in the aftermath of *Davis*. Starting with a review of the nature and purpose of the pretrial investigation and the rights afforded to an accused under Article 32, UCMJ, this article will then examine the CAAF's decisions in *United States v. Davis* and *United States v. Von Bergen*, together with the practical consequences that flow from them. Finally, this article will address the means by which defense counsel may obtain relief from Article 32 errors in light of the current state of the law.

The Nature and Purposes of the Article 32 Investigation

It is difficult to precisely define the nature of the Article 32 pretrial investigation because it has no exact equivalent in any civilian criminal jurisdiction.⁸ The Article 32 investigation has been characterized by courts as “judicial in nature,”⁹ “an integral part of the court-martial proceedings,”¹⁰ and a “substantial pretrial right.”¹¹ Defects in the Article 32 investigation, however, are not jurisdictional.¹² Though the Article 32 investigation is an important element of the military justice process, it is not considered a part of the court-martial.¹³ Indeed, an Article 32 investigation precedes, and is intended to inform, the convening authority's decision with respect to disposition of the charges.¹⁴ In essence, the Article 32 pretrial investigation is a proceeding with a judicial character, but one that is entirely distinct from the actual trial and therefore can survive a greater degree of error.

At the highest level of abstraction, the goals of the Article 32 investigation are to “[operate] as a discovery proceeding for the accused and [stand] as a bulwark against baseless charges.”¹⁵ These broad goals are instantiated through the five specific purposes of the military pretrial investigation, three of which are statutory: (1) to inquire into the truth of the matters set forth in the charges; (2) to consider the form of the charges; and (3) to obtain a

recommendation as to the disposition that should be made of the case.¹⁶ The two remaining purposes, though not precisely articulated in the statute, are implicated by the *Manual for Courts-Martial*: (4) defense discovery¹⁷ and (5) preservation of testimony.¹⁸

The accused is afforded a number of rights at the Article 32 investigation. The first of these involves notice of the charges against him.¹⁹ Specifically, the accused should be notified of the name of his accuser, the names of witnesses against him, and that the charges against him are about to be investigated.²⁰ The accused also has the right to counsel²¹ and to be present throughout the investigation, though this right is not absolute.²² The accused has the right to confront and cross-examine the witnesses against him who are “reasonably available.”²³ In addition to the right to confront witnesses, the accused has the right to examine real and documentary evidence.²⁴ The accused also has the right to have available witnesses produced at the investigation who can give relevant, noncumulative testimony.²⁵ In addition to requesting the presence of witnesses, the accused is permitted to present anything in defense, extenuation, or

¹⁶ UCMJ art. 32(a) (2008).

¹⁷ MCM, *supra* note 14, R.C.M. 405(a) (2008) discussion (“The investigation also serves as a means of discovery.”).

¹⁸ *Id.* MIL. R. EVID. 613 (impeachment with prior inconsistent statements); *id.* R.C.M. 801(d)(1) (prior inconsistent statements of witnesses admissible as substantive evidence when given under oath “at a trial, hearing, or other proceeding”); *id.* R.C.M. 804(b)(1) (former testimony of unavailable witnesses admissible as substantive evidence when given under oath subject to cross-examination by the same opposing party).

¹⁹ *Id.* R.C.M. 405(f)(1), (2).

²⁰ *Id.* R.C.M. 405(f)(1), (3), and (5); *United States v. DeLauder*, 25 C.M.R. 160, 161 (C.M.A. 1958) (findings and sentence set aside where defense counsel, prior to the pretrial investigation, was not provided a copy of the charges, was not told of the time and place of the pretrial investigation, and was directed not to communicate with the principal prosecution witnesses).

²¹ MCM, *supra* note 14, R.C.M. 405(f)(4). The accused is entitled to be represented at the investigation by: (1) a civilian lawyer provided by the accused at no expense to the government, if the lawyer's appearance will not unduly delay the proceedings, *id.* R.C.M. 405(d)(2)(C); (2) an individually requested military lawyer if reasonably available and whose appearance will not unduly delay the proceedings, *id.* R.C.M. 405(d)(2)(B); (3) a lawyer appointed by the appropriate authority, *id.* R.C.M. 405(d)(2)(H); or (4) the accused may decide to represent himself. *United States v. Bramel*, 29 M.J. 958, 965–66 (A.C.M.R. 1990) (holding that accused's right to represent himself at the Article 32 investigation is coextensive with, and just as limited as, his right to represent himself at trial. MCM, *supra* note 14, R.C.M. 506(d)).

²² MCM, *supra* note 14, R.C.M. 405(f)(3). The Rule provides that an accused is entitled to be present “except in circumstances described in R.C.M. 804(b)(2) [sic]” Rule for Court-Martial (RCM) 804(c)(2), the rule to which RCM 405(f)(3) was apparently intended to refer, provides that an accused shall be considered to have waived the right to be present when “[a]fter being warned by the military judge that disruptive conduct will cause the accused to be removed from the courtroom, persists in conduct which is such as to justify exclusion from the courtroom.” *Id.*

²³ *Id.* R.C.M. 405(g)(1)(A).

²⁴ *Id.* R.C.M. 405(f)(10).

²⁵ *Id.* R.C.M. 405(f), (g).

⁸ Major Larry A. Gaydos, *A Comprehensive Guide to the Military Pretrial Investigation*, 111 MIL. L. REV. 49, 83 (1986).

⁹ *United States v. Payne*, 3 M.J. 354, 355 n.5 (C.M.A. 1977).

¹⁰ *United States v. Nichols*, 23 C.M.R. 343, 348 (C.M.A. 1957).

¹¹ *United States v. Davis*, 62 M.J. 645, 647 (A.F. Ct. Crim. App. 2006) (citing *United States v. Chuculate*, 5 M.J. 143, 144–45 (C.M.A. 1978)).

¹² Uniform Code of Military Justice (UCMJ) art. 32(e) (2008).

¹³ *United States v. Davis*, 64 M.J. 445, 449 (C.A.A.F. 2007).

¹⁴ MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 405(a) (2008) [hereinafter MCM] (requiring a thorough and impartial investigation of every charge or specification prior to referral to a general court-martial); *id.* R.C.M. 407(a)(5) (authorizing a commander exercising general court-martial jurisdiction to direct a pretrial investigation); *id.* R.C.M. 601(d)(2)(A) (prohibiting a convening authority from referring a specification to a general court-martial unless there has been substantial compliance with the pretrial investigation requirements of Rule for Courts-Martial (RCM) 405).

¹⁵ *United States v. Samuels*, 27 C.M.R. 280, 286 (C.M.A. 1959).

mitigation.²⁶ Finally, the accused is afforded the right to remain silent during the pretrial investigation.²⁷

On its face, Rule for Court Martial (RCM) 405 appears to provide a significant body of rights to an accused during the pretrial investigation. It is important to bear in mind, however, that rights are only as good as the means available to enforce them. If an accused can be deprived of a right casually and without consequence, the right becomes meaningless. Within this framework, “rights” seem comparable to privileges that the government may extend or withdraw at will. As the enforcement of Article 32 rights resides with the courts, the standard of review applied to such errors will largely determine whether the provisions of RCM 405 amount to more than mere privileges. As discussed in the next section, the appellate courts struggled to define the appropriate standard of review for Article 32 errors for nearly fifty years, until CAAF’s 2007 decision in *United States v. Davis*.²⁸

***United States v. Davis* and Appellate Review of Article 32 Errors**

In *United States v. Davis*, the CAAF resolved the conflicting standards of review for Article 32 errors raised on appeal. In order to place the *Davis* decision in context, however, it is necessary to first examine the decision of the Court of Military Appeals (CMA) in *United States v. Mickel*.²⁹ *Mickel* was one of the earliest cases to deal with the appropriate standard of review for Article 32 errors, and it figures prominently at both levels of appellate review in *Davis*.

The central issue in *Mickel* was whether the failure to provide the accused with qualified counsel at the Article 32 constituted reversible error.³⁰ The *Mickel* court initially noted that although the pretrial investigation is an integral part of general court-martial proceedings, and the right to counsel is a fundamental part of the pretrial investigation, there is a substantial difference between defects in the pretrial proceedings and defects in the trial. In the court’s view, when the accused objects to substantial pretrial errors

before trial, he is entitled to pretrial “judicial enforcement” of those rights, irrespective of whether they would actually benefit him at trial.³¹ After trial, pretrial errors require reversal only if the errors materially prejudiced the accused at trial.³² The court reasoned that once an accused is tried at court-martial, the pretrial proceedings are superseded by the trial proceedings, and pretrial rights then merge with trial rights. Consequently, if there is no reason to believe that an accused’s trial rights were adversely affected by an error in the pretrial proceedings, there is no reason to set aside his conviction on appeal.³³ Based on the facts in *Mickel*, the court determined that the accused had not been adversely affected at trial by his defense counsel’s lack of qualifications at the pretrial investigation, and concluded that the failure to provide the accused with qualified counsel at the Article 32 did not constitute reversible error.³⁴

Returning to *United States v. Davis*,³⁵ the central issue in the case was the IO’s decision to close the Article 32 investigation to the public during the testimony of two victim witnesses.³⁶ Shortly before the start of the pretrial investigation, the IO decided to close the proceedings while two of the alleged victims testified. Defense counsel objected to closing the investigation, noting that neither victim had expressed any embarrassment or timidity during his previous interviews with them.³⁷ Despite the fact that the IO had not spoken with either witness, and that there was no evidence to suggest that either witness was reluctant to testify in a public forum, the IO nevertheless overruled the objection and closed the investigation to the public during their testimony.³⁸

²⁶ *Id.* R.C.M. 405(f)(11).

²⁷ *Id.* R.C.M. 405(f)(7).

²⁸ 64 M.J. 445 (C.A.A.F. 2007).

²⁹ 26 C.M.R. 104 (1958).

³⁰ *Id.* at 106. Prior to the pretrial investigation, the accused had requested either of two officers to serve as his defense counsel, but both were unavailable. The defense counsel who was ultimately detailed to represent the accused was not yet a member of the bar nor certified by The Judge Advocate General of the Air Force in accordance with Article 27(b), UCMJ. Though the accused did not object to his defense counsel’s lack of qualifications at trial, the court did not deem the issue waived because they did not believe that the accused could have fully understood his right to qualified counsel.

³¹ *Id.* at 107 (“At that stage of the proceedings, [the accused] is perhaps the best judge of the benefits he can obtain from the pretrial right.”). In *Mickel*, the accused did not raise the issue of his counsel’s qualifications at the Article 32 hearing until after trial. The court held that “[i]f there is no timely objection to the pretrial proceedings or no indication that these proceedings adversely affected the accused’s rights at the trial, there is no good reason . . . to set aside his conviction.” The court did not say whether it would have tested for prejudice on appeal if the accused had made a timely objection, but the trial court had refused judicial enforcement. That was the issue finally settled by *Davis*.

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 107–08.

³⁵ 64 M.J. 445 (C.A.A.F. 2007).

³⁶ The misconduct at issue in the case involved the alleged rape, indecent assault, and battery of one woman, the alleged rape of a second woman, and the alleged battery of a third woman. *United States v. Davis*, 62 M.J. 645, 646 (A.F. Ct. Crim. App. 2006).

³⁷ *Id.* Prior to the pretrial investigation, both witnesses had made sworn written statements to Air Force investigators; at trial, the defense counsel represented to the military judge that he had interviewed both alleged victims prior to the Article 32 hearing and “neither had evinced any embarrassment or timidity regarding the alleged events.”

³⁸ *Id.*

After the conclusion of the pretrial investigation, the defense counsel presented written objections to the IO, and requested that he reopen the investigation so that the two alleged victims could testify in a public forum.³⁹ The IO refused to reopen the investigation.⁴⁰ The defense counsel subsequently raised the issue in a pretrial motion for appropriate relief, and moved the court to dismiss the charges.⁴¹ While the military judge determined the right to an open Article 32 investigation had been violated, he nevertheless declined to grant any relief as there had been no articulable harm to the accused.⁴²

On appeal, the Air Force Court of Criminal Appeals (AFCCA) reviewed the military judge's ruling under an abuse of discretion standard. The court also addressed the subsidiary issue of whether the accused was entitled to relief from a violation of his Article 32 rights without regard to prejudice.⁴³ The court concurred with the military judge's determination that the IO had improperly closed the pretrial investigation and violated the accused's right to a public pretrial investigation.⁴⁴ However, the court determined that the military judge erred in requiring the accused to demonstrate prejudice as a result of the violation in order to obtain relief.⁴⁵ The court relied on *Mickel* for the proposition that an accused who establishes a violation of his substantial pretrial rights at trial is entitled to judicial enforcement of those rights, without taking into consideration whether the enforcement will benefit him at trial, or whether he suffered prejudice as a result of the violation.⁴⁶ Having decided that the military judge should have dismissed the affected charges and ordered a reinvestigation under Article 32, the court then addressed the appropriate standard of review on appeal.⁴⁷

The court rejected the notion that they should apply a per se rule of reversal, and instead looked to Article 59(a) to resolve the issue.⁴⁸ Article 59(a) requires "material prejudice" to the "substantial rights" of the accused as a prerequisite to setting aside the findings or the sentence.⁴⁹ Consequently, the Article 32 error must result in material prejudice to the accused's rights at trial to warrant relief and

justify setting aside the findings and sentence. Similar to the pretrial enforcement of Article 32 rights, the court relied on *Mickel* to analyze this issue.⁵⁰ In *Mickel*, the CMA had stated that the accused's pretrial rights merge with his rights at trial, and that the question on appeal is whether the denial of a pretrial right adversely affected the accused's trial rights.⁵¹

In *Davis*, the AFCCA concluded that the IO's decision to close the pretrial investigation had no adverse impact on the accused's trial rights because, in addition to other factors,⁵² there was no evidence to suggest that the defense counsel's trial preparation was impeded or that the testimony of the two victim witnesses would have changed.⁵³ The court affirmed the findings and sentence, concluding that the military judge's error in denying the accused's motion for appropriate relief did not prejudice him at trial.⁵⁴

In its review of the case, the CAAF considered the law relating to the right of an accused to a public pretrial investigation, the decision of the IO to close part of the investigation to the public, and the AFCCA's prejudice analysis as applied to a violation of a pretrial right raised on appeal.⁵⁵ The CAAF determined that there were two issues before the court: (1) whether the AFCCA was correct in determining that the military judge's erroneous denial of relief should be tested for prejudice; and (2) whether the AFCCA correctly determined that the accused had not been prejudiced by the military judge's decision.⁵⁶

Before dealing with the substance of these issues, the CAAF identified two conflicting standards of review for evaluating errors in Article 32 proceedings.⁵⁷ The first, beginning with *Mickel*, held that Article 32 errors must be tested for prejudice.⁵⁸ As discussed previously, this line of authority is consistent with the approach taken by the AFCCA in the *Davis* case. The second line of authority,

³⁹ *Id.* Rule for Courts-Martial 405(h)(2) requires that objections be made to the investigating officer "promptly upon discovery," and provides that the investigating officer may require that they be filed in writing.

⁴⁰ *Id.*

⁴¹ *Id.* at 647.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 648.

⁴⁵ *Id.*

⁴⁶ *Id.* (citing *United States v. Mickel*, 26 C.M.R. 104, 107 (1958)).

⁴⁷ *Id.*

⁴⁸ *Id.* (citing *Mickel*, 26 C.M.R. at 107).

⁴⁹ UCMJ art. 59(a) (2008).

⁵⁰ *Davis*, 62 M.J. at 648.

⁵¹ *Mickel*, 26 C.M.R. at 107.

⁵² The court also considered the following: the fact that both witnesses had repeated their allegations a number of times, and these allegations remained consistent throughout the process; the fact that the defense counsel had the written statements of both witnesses, had interviewed both witnesses prior to the Article 32, and had cross-examined both witnesses at the Article 32; and the fact that the defense counsel conducted detailed cross-examinations of both witnesses at trial and effectively challenged their testimony, resulting in the accused's acquittal on the rape and sexual assault charges. *Davis*, 62 M.J. at 648-49.

⁵³ *Id.* at 648.

⁵⁴ *Id.* at 649.

⁵⁵ *United States v. Davis*, 64 M.J. 445, 446-48 (C.A.A.F. 2007).

⁵⁶ *Id.* at 448.

⁵⁷ *Id.*

⁵⁸ *Id.* (citing *Mickel*, 26 C.M.R. 107; *United States v. Holt*, 52 M.J. 173, 184 (C.A.A.F. 1999); *United States v. Johnson*, 53 M.J. 459, 462 (C.A.A.F. 2000); and *United States v. Stirewalt*, 60 M.J. 297, 302 (C.A.A.F. 2004)).

beginning with *United States v. Worden*,⁵⁹ called for reversal of the case without any showing of prejudice if there was a timely objection to the error.⁶⁰ Unable to identify a theory that would justify the conflicting standards of review, the CAAF held that the *Mickel* line of authority would apply to appellate review of Article 32 errors.⁶¹ Consequently, the CAAF's analysis of the issues in *Davis* closely mirrored that of the AFCCA, with the same result.

The essential holding in *Davis* declares that the test for prejudice found in Article 59(a) applies to all Article 32 errors considered for direct review of the findings and sentence in a court-martial, but not to Article 32 errors considered at the trial level.⁶² This is because Article 59(a) establishes an appellate standard of review of the findings and the sentence, and not a trial level standard for ruling on motions.⁶³ Thus, the requirement to show prejudice depends on when the error is raised: if the error is raised before trial, there is no need to show prejudice; but if the error is raised on appeal, the accused must show prejudice unless it is a "structural" error.⁶⁴

The U.S. Supreme Court defined structural errors in *Arizona v. Fulminante*.⁶⁵ The Court described structural errors as those "affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself,"⁶⁶ and include a total deprivation of the right to counsel at trial,⁶⁷ the presence on the bench of a judge who is not impartial,⁶⁸ a deprivation of the right to self-representation at trial,⁶⁹ and a deprivation of the right to a public trial.⁷⁰ All of these errors specifically implicate trial rights which affect the fundamental fairness of a trial from beginning to end. As the Article 32 investigation is entirely separate and distinct from the trial itself, it is difficult to conceive of an Article 32 error that could have the same kind

of impact on the fairness of a trial as the errors identified by the Supreme Court.

The CAAF reached this conclusion in *Davis*, stating that "the Article 32 investigation is not so integral to a fair trial that an error in the proceeding necessarily falls within the narrow class of defects treated by the Supreme Court as structural error subject to reversal without testing for prejudice."⁷¹ In support of this conclusion, the CAAF noted that special courts-martial are tried without any formal pretrial investigation.⁷² This is consistent with the CMA's reasoning in *Mickel*, where the court stated that "[o]nce the case comes to trial on the merits, the pretrial proceedings are superseded by the procedures at the trial; the rights accorded to the accused in the pretrial stage merge into his rights at trial."⁷³

Although the *Davis* decision fundamentally altered the landscape of appellate review of Article 32 errors, it was by no means a revolution. To the contrary, the *Davis* decision represents little more than an incremental advance of established legal principles. Faced with the dilemma of reconciling two divergent lines of cases regarding the appellate review of Article 32 errors, the court embraced one and abandoned the other. Though the CAAF did not expressly overrule *United States v. Worden* and its progeny, the CAAF has, in effect, done precisely that.

The question then arises, what does *Davis* mean for practitioners? In essence, it means that Article 32 errors raised on appeal will never be structural errors as defined by the Court. Structural errors are those which impact the fundamental fairness of the entire trial, but the Article 32 proceeding is not considered to be part of the trial at all. As a result, an accused who raises Article 32 errors on appeal will always need to demonstrate material prejudice to his substantial rights. This raises a second, related question: what types of Article 32 errors will result in material prejudice?

The CAAF's decision in *United States v. Von Bergen*⁷⁴ may provide the answer to the question of prejudice. *Von Bergen* involved retrial of a guilty plea which was reversed on appeal because it was improvident as a matter of law.⁷⁵

⁵⁹ 38 C.M.R. 284 (1968).

⁶⁰ *Davis*, 64 M.J. at 448 (citing *United States v. Worden*, 38 C.M.R. 284, 287 (C.M.A. 1968); *United States v. Maness*, 48 C.M.R. 512, 518 (C.M.A. 1974); *United States v. Donaldson*, 49 C.M.R. 542, 543 (C.M.A. 1975); *United States v. Chestnut*, 54 C.M.R. 290 (C.M.A. 1976); and *United States v. Chuculate*, 5 M.J. 143, 145-46 (C.M.A. 1978)).

⁶¹ *Id.*

⁶² *Id.* at 448-49.

⁶³ *Id.*

⁶⁴ *Id.* at 449.

⁶⁵ 499 U.S. 279, 309-10 (1991).

⁶⁶ *Id.* at 310. The structure of *Fulminante* is a little complicated. It consists of two opinions, each of which is partly the opinion of the court and partly dissent. The section discussed here—Part II of the opinion of Chief Justice Rehnquist—is the opinion of the court.

⁶⁷ *Id.* (citing *Gideon v. Wainwright*, 372 U.S. 335 (1963)).

⁶⁸ *Id.* (citing *Tumey v. Ohio*, 273 U.S. 510 (1927)).

⁶⁹ *Id.* (citing *McKaskle v. Wiggins*, 465 U.S. 168 (1984)).

⁷⁰ *Id.* (citing *Waller v. Georgia*, 467 U.S. 39 (1984)).

⁷¹ *United States v. Davis*, 64 M.J. 445, 449 (C.A.A.F. 2007).

⁷² *Id.*

⁷³ *United States v. Mickel*, 26 C.M.R. 104, 107 (C.M.A. 1958).

⁷⁴ 67 M.J. 290 (C.A.A.F. 2009).

⁷⁵ *Id.* at 292. At trial, the accused pled guilty to one specification of knowingly possessing a computer disk containing images of child pornography in violation of 18 U.S.C. § 2252A(a)(5)(A) (2006), a provision of the Child Pornography Prevention Act of 1996 (CPPA), and one specification of knowingly and wrongfully distributing child pornography in interstate or foreign commerce by means of a computer in violation of Article 134, UCMJ. The CPPA provision was charged under clause 3 of Article 134, but not clauses 1 or 2. The accused committed the possession offense while stationed in the United Kingdom. On appeal, the Court of

The guilty plea was made pursuant to a pretrial agreement which included a conditional waiver of the accused's right to an Article 32 investigation. The waiver was conditioned upon acceptance of the accused's guilty plea.⁷⁶ After the CAAF determined the plea to be improvident and remanded the case, the accused withdrew from the pretrial agreement.⁷⁷ When the case was referred to a general court-martial without a pretrial investigation, the accused took the position that his Article 32 waiver had been conditional (a position that was supported by the original guilty plea colloquy) and moved the trial court to order a new Article 32 hearing. The government took the position that the accused had received the benefit of his pretrial agreement when the convening authority took action following his original trial, and thus the Article 32 waiver continued to be effective.⁷⁸ The military judge denied the motion, and the accused was convicted, contrary to his plea.⁷⁹ On appeal, the AFCCA found that the Article 32 waiver in the pretrial agreement was effective and approved the findings and sentence.⁸⁰

When the CAAF took up the issue, it disagreed with the lower court's reasoning, but affirmed the result.⁸¹ The CAAF held that when the case was remanded, the parties had been returned to the *status quo ante*, and the accused therefore had the right to withdraw from his pretrial agreement and demand an Article 32 investigation.⁸² Having determined that the military judge erred in denying the accused's motion for an Article 32 investigation, the CAAF evaluated the error in accordance with Article 59(a).⁸³ Despite the fact that the accused had been denied *all* of his substantial pretrial rights under Article 32, the CAAF found no prejudice.⁸⁴

On its face, it is difficult to conceive of a scenario in which an accused would be in a better position to demonstrate prejudice on appeal, and the CAAF's determination that the accused suffered no prejudice appears to signal that appellate relief from Article 32 errors is illusory. On closer examination, however, *Von Bergen* may

Appeals for the Armed Forces (CAAF) reversed the finding on the specification of possession on the basis of *United States v. Martinelli*. 62 M.J. 52 (C.A.A.F. 2005) (concluding that the CPPA does not apply extraterritorially; thus, the CPPA as incorporated into Article 134(3), UCMJ, does not apply extraterritorially).

⁷⁶ *Von Bergen*, 67 M.J. at 291.

⁷⁷ *Id.* at 292.

⁷⁸ *Id.* at 291–92.

⁷⁹ *Id.* at 292.

⁸⁰ *Id.* at 292–93.

⁸¹ *Id.*

⁸² *Id.* at 293–94. *Status quo ante* is a Latin phrase meaning “the way things were before.”

⁸³ *Id.* at 294–95.

⁸⁴ *Id.* at 295.

not be cause for defense counsel to despair. The court suggests that the facts of *Von Bergen* were unusual, and that this was a factor in their prejudice analysis. In discussing prejudice, the CAAF noted that the previous trial gave the accused some of the same protections as an Article 32 hearing, particularly since the same misconduct was at issue and the government relied on the same evidence (witnesses who testified at the contested trial had had their statements introduced or stipulated to at the original guilty plea). Although some evidence was destroyed between the trials, witnesses testified as to the nature of the evidence, how it was found, and how it was traced to the accused.⁸⁵ The CAAF expressly stated that in a different context, the destruction of evidence and passage of time might well be prejudicial.⁸⁶

Interestingly, the CAAF did not view the denial of the investigation as being inherently prejudicial; additional factors, such as destruction of evidence or diminished witness memories would need to be present.⁸⁷ Extrapolating from these factors identified by the court, the loss or destruction of evidence might be prejudicial in the absence of an adequate substitute (e.g., testimony describing the evidence). Similarly, prejudice might be found where critical witnesses were no longer available or no longer had any recollection of the relevant facts. While it may be premature to render final judgment on the availability of judicial relief from Article 32 errors on appeal, it is fair to say that at this point the CAAF has set a very high bar for proving prejudice.

Litigating Article 32 Errors

As a preliminary matter, the first step in obtaining relief from an Article 32 error is to ensure that the error is properly preserved. Unfortunately, RCM 405 is far from a model of clarity when it comes to the issue of objections to Article 32 errors and preservation of the same. Rule for Courts-Martial 405 and the associated discussion sections identify several stages at which objections must be made or renewed, or additional steps that must be taken, if Article 32 errors are to be properly preserved.

The first stage occurs during the pretrial investigation itself.⁸⁸ Rule for Courts-Martial 405(h)(2) provides that “any objection alleging failure to comply with [R.C.M. 405]”⁸⁹ must be made to the IO “promptly after discovery.”⁹⁰ The IO may require that objections be made in writing,

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ MCM, *supra* note 14, R.C.M. 405(h)(2).

⁸⁹ *Id.*

⁹⁰ *Id.*

though he is not required to actually rule on or resolve objections.⁹¹ These objections are to be noted in the report of investigation upon request of a party.⁹² Failure to object will be treated as waiver unless the accused can later show good cause for that failure.⁹³ Even if a defense counsel promptly objects to the IO and requests that the objection be noted in the report, the objection might still be waived if the IO fails to reference the objection in his report.⁹⁴ The discussion to RCM 405(k) indicates that defense counsel must not only object during the investigation and request that the objection be noted in the report, but he must also ensure that every objection is referenced in the report.⁹⁵ Defense counsel must raise objections to the IO's report with the commander who ordered the investigation within five days of the receipt of the report by the accused.⁹⁶ Failure to object to an omitted objection will result in the waiver of that objection.⁹⁷

There is, however, at least one class of objections whose preservation will require a defense counsel to take steps beyond all of those described above. As noted previously, an accused has the right to confront and cross-examine witnesses who are reasonably available,⁹⁸ as well as the right to have reasonably available witnesses produced.⁹⁹ Consequently, an accused has the right to the personal appearance of any reasonably available witness, regardless of whether that witness's testimony would be favorable or adverse. If a defense request for the personal appearance of such a witness is erroneously denied, the accused not only must object to the error and ensure the IO records the objection in his report, but should also request a deposition, as the discussion to RCM 405(k) states that "[e]ven if the accused made a timely objection to failure to produce a witness, a defense request for a deposition may be necessary to preserve the issue for later review."¹⁰⁰ This was the

position taken by the AFCCA in *United States v. Simoy*.¹⁰¹ In *Simoy*, the IO erroneously denied a defense request for the personal appearance of two government witnesses who were alleged co-conspirators facing charges related to the accused's felony-murder charge.¹⁰² The court found the error harmless, and noted "[a]n accused who wants to preserve the right to the personal attendance of a witness at a pretrial investigative hearing must move to take the witness's testimony by deposition under RCM 702."¹⁰³

As a result, objections to Article 32 errors must first be raised with the IO during the pretrial investigation itself, and defense counsel must request that they be noted in the report of investigation.¹⁰⁴ Objections made during the pretrial investigation must then be referenced in the report. To the extent the objection is not referenced in the report, defense counsel must object to the report and renew the objections with the convening authority within five days of receipt.¹⁰⁵ If the objection concerns the personal appearance of a reasonably available witness, defense counsel must also request a deposition.¹⁰⁶ To the extent that a defense counsel is successful in shepherding an Article 32 objection through the rough terrain of RCM 405, the next stage is to raise the objection with the military judge.

If objections to defects in the Article 32 investigation have been preserved, the accused may be entitled to relief before trial by making a motion for appropriate relief.¹⁰⁷ Such a motion must be made prior to the entry of pleas.¹⁰⁸ Failure to move the court for relief prior to entering pleas will result in waiver of the error absent a showing of good cause for relief from waiver.¹⁰⁹ If the military judge denies the motion, defense counsel must take steps to preserve the only remaining pretrial avenue of relief: an extraordinary writ. The first step is to move the court to reconsider when the military judge's findings of fact or law appear clearly erroneous. If that fails, defense counsel should notify the court of counsel's intent to file a petition for extraordinary relief, request that the military judge make written findings of facts and conclusions of law, and authenticate the record of trial. Assuming a successful petition will result in either a

⁹¹ *Id.* The discussion to RCM 405(h)(2) provides that the investigating officer (IO) may take corrective action in response to an objection when he believes it to be appropriate. In addition, when the objection raises a substantial question concerning a matter within the authority of the commander who ordered the investigation, the IO should promptly inform that commander of the objection.

⁹² *Id.*

⁹³ *Id.* R.C.M. 405(k).

⁹⁴ *Id.* The discussion to RCM 405(k) states "[i]f the report fails to include reference to objections which were made under subsection (h)(2) of this rule, failure to object to the report will constitute waiver of such objections in the absence of good cause for relief from the waiver."

⁹⁵ *Id.*

⁹⁶ *Id.* R.C.M. 405(j)(4).

⁹⁷ *Id.*

⁹⁸ *Id.* R.C.M. 405(g)(1)(A).

⁹⁹ *Id.* R.C.M. 405(f), (g).

¹⁰⁰ *Id.* R.C.M. 405(k) discussion.

¹⁰¹ 46 M.J. 592 (A.F. Ct. Crim. App. 1996), *findings aff'd, sentence rev'd on unrelated grounds*, 50 M.J. 1, 3 (C.A.A.F. 1998).

¹⁰² *Id.* at 608.

¹⁰³ *Id.* (citing *United States v. Chuculate*, 5 M.J. 143, 145-46 (C.M.A. 1978)) (holding that the absence of certain witnesses at the Article 32 hearing "deprived the accused of a substantial pretrial right," but holding the error harmless "where a defense counsel fails to timely urge appellant's substantial pretrial right[;] in this instance, the opportunity to depose. . .")

¹⁰⁴ MCM, *supra* note 14, R.C.M. 405(k).

¹⁰⁵ *Id.* R.C.M. 405(j)(4).

¹⁰⁶ *Id.* R.C.M. 405(k) discussion.

¹⁰⁷ *Id.* R.C.M. 905(b)(1).

¹⁰⁸ *Id.* R.C.M. 905(e).

¹⁰⁹ *Id.*

reopening of the previous Article 32 investigation or a new investigation altogether (depending upon the nature of the error at issue), defense counsel would be wise to also request that the proceedings be stayed until the appropriate appellate court has decided whether or not to grant extraordinary relief. If the military judge denies any of these requests, the denials may be included in the petition for extraordinary relief.¹¹⁰

As the CAAF noted in *Davis*, an accused who has been denied relief from an Article 32 error by the military judge may file a petition for extraordinary relief.¹¹¹ An extraordinary writ is generally disfavored, and is reserved for cases where the petitioner has “a clear and indisputable entitlement to relief.”¹¹² Issuance of a writ constitutes “a drastic instrument which should be invoked only in truly extraordinary situations.”¹¹³ Military courts are empowered to consider extraordinary writs through the All Writs Act.¹¹⁴ Jurisdiction under the Act is narrowly circumscribed, and military courts may only issue process to the extent that doing so is in aid of its existing statutory jurisdiction.¹¹⁵

The jurisdiction of the Army Court of Criminal Appeals (ACCA) is defined by Article 66, and includes cases with an approved sentence that extends to death, dismissal of a commissioned officer or cadet, dishonorable or bad conduct discharge, or confinement for one year or more.¹¹⁶ The CAAF’s jurisdiction, defined by Article 67, includes cases in which ACCA has affirmed a sentence of death, or the Judge Advocate General orders a case sent to the CAAF for review, or cases reviewed by ACCA.¹¹⁷ It is not entirely clear which of the two courts is the most appropriate venue for a petition for extraordinary relief. While the ACCA would ordinarily be the proper venue, the CAAF has been willing to entertain such petitions in the context of an Article 32 error.¹¹⁸ In either case, a strict reading of the jurisdiction of either court does not appear to include authority to

address Article 32 errors. Nevertheless, military appellate courts have been willing to find that a petition for extraordinary relief is in aid of their jurisdiction on a variety of issues, despite there being no adjudged sentence in a case.¹¹⁹ They do so based on the theory that the All Writs Act includes petitions in aid of their actual or *potential* jurisdiction,¹²⁰ or even their “supervisory jurisdiction” over courts-martial in general, which extends to cases that lie outside their ordinary appellate jurisdiction.¹²¹ To the extent that a petition is in aid of the jurisdiction of either the ACCA or the CAAF, it is necessary to next consider the specific type of writ appropriate to the relief sought.

There are four types of writs commonly heard by military appellate courts: mandamus, prohibition, habeas corpus, and *coram nobis*.¹²² At issue in the case of an Article 32 error is the writ of mandamus. Mandamus, meaning “to command,” is used “to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.”¹²³ As ACCA noted in *Dew v. United States*, “[b]ecause of their extraordinary nature, writs are issued sparingly, and a petitioner bears an extremely heavy burden to establish a clear and indisputable entitlement to extraordinary relief.”¹²⁴ Indeed, during the three-year period from 2005 through 2007, the CAAF granted only four of the ninety petitions for extraordinary relief filed with them.¹²⁵ This fact suggests that the likelihood of obtaining relief from an Article 32 error through such petitions is small.

To the extent that an accused is unsuccessful in pursuing an extraordinary writ, his only remaining option is to preserve the issue for appeal by pleading not guilty, and to

¹¹⁰ Captain Patrick B. Grant, *Extraordinary Relief: A Primer for Trial Practitioners*, ARMY LAW., Nov. 2008, at 30, 36. Captain Grant also recommends consulting with the writs coordinator at the Defense Appellate Division before filing any such petition.

¹¹¹ *United States v. Davis*, 64 M.J. 445, 449 (C.A.A.F. 2007).

¹¹² *McKinney v. Jarvis*, 46 M.J. 870, 874 (A. Ct. Crim. App. 1997).

¹¹³ *United States v. Labella*, 15 M.J. 228, 229 (C.M.A. 1983) (referring specifically to writ of mandamus).

¹¹⁴ 28 U.S.C.A. § 1651 (LexisNexis 2011); *Dettinger v. United States*, 7 M.J. 216, 218–20 (C.M.A. 1979).

¹¹⁵ *Clinton v. Goldsmith*, 526 U.S. 529, 534–35 (1999).

¹¹⁶ UCMJ art. 66 (2008).

¹¹⁷ *Id.* art. 67.

¹¹⁸ *See ABC, Inc. v. Powell*, 47 M.J. 363, 364 (1997). The court stated that it required the Petitioners to show why they should not first have petitioned the Army Court of Criminal Appeals (ACCA), and ultimately accepted the case, in part because the issues being decided applied to all the services, and in part to save the time associated with an extra appeal and possible appeal from ACCA to the CAAF.

¹¹⁹ *See McPhail v. United States*, 1 M.J. 457, 462–63 (C.M.A. 1976) (holding that the court’s power to issue writs “in aid” of its jurisdiction was not limited to its appellate jurisdiction as defined by Article 67, but encompassed its supervisory power over the court-martial process); *McKinney v. Jarvis*, 46 M.J. 870, 873 (A. Ct. Crim. App. 1997) (finding that ACCA had jurisdiction to review cases at the Article 32 stage because the proceeding is “judicial in nature”); *San Antonio Express-News v. Morrow*, 44 M.J. 708–09 (A.F. Ct. Crim. App. 1996) (same holding for Air Force Court of Criminal Appeals).

¹²⁰ *Dew v. United States*, 48 M.J. 639, 645 (A. Ct. Crim. App. 1998).

¹²¹ *Id.* at 646 (citing *McPhail*, 1 M.J. at 642).

¹²² C.A.A.F. R. P. 4(b)(1) (2011), available at <http://www/armfor.us/courts.gov/newcaaf/rules.htm> (noting that the court may entertain petitions including, but not limited to, these four).

¹²³ *Dew*, 48 M.J. at 648 (quoting *Roche v. Evaporated Milk Ass’n*, 319 U.S. 21, 26 (1943)).

¹²⁴ *Id.* (citing *McKinney v. Jarvis*, 46 M.J. 870, 873 (A. Ct. Crim. App. 1997)).

¹²⁵ *Grant*, *supra* note 110, at 30 (citing U.S. COURT OF APPEALS FOR THE ARMED FORCES, ANNUAL REPORT OF THE CODE COMMITTEE ON MILITARY JUSTICE, FISCAL YEAR 2005, sec. 2, at 6 (2006); U.S. COURT OF APPEALS FOR THE ARMED FORCES, ANNUAL REPORT OF THE CODE COMMITTEE ON MILITARY JUSTICE, FISCAL YEAR 2006, sec. 2, at 4–5 (2007); U.S. COURT OF APPEALS FOR THE ARMED FORCES, ANNUAL REPORT OF THE CODE COMMITTEE ON MILITARY JUSTICE, FISCAL YEAR 2007, sec. 2, at 7 (2008)).

attempt to build a record of specific prejudice to his rights at trial. Generally speaking, a guilty plea at trial will waive any defects in the Article 32 investigation.¹²⁶ However, pleading not guilty alone will not preserve an objection to an Article 32 error; an accused must still raise the objection prior to entering pleas. When an accused with a properly preserved Article 32 error fails to move the trial court for a remedy prior to arraignment, pleads not guilty, and is able to demonstrate good cause for relief from waiver, courts have considered the Article 32 defects as having merged with the trial, and will grant relief only if the accused can demonstrate that he was prejudiced at trial.¹²⁷

Conclusion

In the aftermath of *Davis* and *Von Bergen*, it appears that defense counsel have little cause to celebrate the fact that the CAAF has resolved the conflict regarding the role of prejudice on review of Article 32 errors. While the CAAF indicated that Article 32 errors raised before trial should be remedied without regard to prejudice, an accused who is nevertheless denied relief at trial is generally left with no effective means of vindicating his rights. The right to petition for extraordinary writ is little comfort to an accused when the granting of such writs is disfavored as a matter of

law and rare in practice. Similarly, the application of Article 59(a) to Article 32 errors on appeal has rendered post-trial appellate review an empty exercise. Article 59(a) permits appellate courts to set aside the findings and sentence of a court-martial only where the substantial rights of the accused have been materially prejudiced. As only structural errors are inherently prejudicial, and Article 32 errors are not, by their nature, structural errors, defense counsel litigating Article 32 errors on appeal have a near impossible hurdle to clear to demonstrate prejudice and obtain relief. Unfortunately, the CAAF set the bar for prejudice so high in *Von Bergen* that it may well be unreachable for any Article 32 error. Consequently, if defense counsel wish to remedy Article 32 errors, they must do so at the trial level, or risk obtaining no remedy at all.

¹²⁶ See *United States v. Lopez*, 42 C.M.R. 268, 270 (C.M.A. 1970). Given the remote likelihood of appellate relief from Article 32 errors, preserving such errors should not be a major consideration in advising a client on whether to plead guilty.

¹²⁷ See *United States v. Cruz*, 5 M.J. 286, 289 (C.M.A. 1978).