

Appellate Issues in MJA 16
 (What is chum and what might be seismic?)

Appellate issues that...

- Arrive out of UCMJ, not RCMS (mostly)
- Aren't just things that are "new" (e.g. warrants)
- Probably reflect my biases, blind spots, pet rocks, etc. etc.

• Disclosures:
 • Not a judge (sad face)
 • These are my personal views, not those of the National Commission on Military Aviation Safety or the Cyberspace Solarium Commission

Process
 Should MIA 16 change how you approach an appellate issue?

Changes in Approaching an issue

- For the next 5-10 years, historical knowledge and case law is less reliable than it was in the past.
- Example: Article 12 – Was probably not included in your MJA 16 training.
- 1950-2018: “No member of the armed forces may be placed in confinement in immediate association with enemy prisoners or other foreign nationals not members of the armed forces.”
- US v. McPherson (CAAF 2014): Article 12 prohibits confinement with foreign nationals; including state facilities, e.g. “the Mexican.”

Changes in Approaching an issue

- Article 12, UCMJ (2019)
 - No member of the armed forces may be placed in confinement in immediate association with -
 - (1) Enemy prisoners; or
 - (2) other individuals –
 - (A) who are detailed under the law of war and are foreign nationals; and
 - (B) who are not members of the armed forces.

It’s not always a cosmetic change

- Passing a new law *matters*. It is worth asking whether prior case law on similar issue is imported with the new statute.
- Example: Interlocutory appeals : Article 62 & Article 6b.
- *Randolph v. H.V.*
 - Both parties assert CAAF has jurisdiction over an appeal from the CCA
 - “It’s a different statute.”
- If treated as a matter of first impression, rather than *stare decisis*, would the current CAAF decide the same issue the same way?
- Entire 1984 MCM was rescinded and republished.

Possible Sources of Litigation

With a special look at Article 45

Is *United States v. Care* good law?

"few cases are more interwoven into the fabric of military justice than *Care*. The central holding of *Care* has been reaffirmed over and over again by our superior court—and without much hesitation. There are literally volumes of cases affirming and applying *Care*."

US v. Mayo (ACCA 2017)

Harmless Error in Guilty Pleas

- When *Care* was decided in 1969 it was based on SCOTUS decision in *United States v. McCarthy*.
- CAAF described *McCarthy* as holding that a "defendant is entitled to plead anew if a United States District Court accepts a guilty plea without personally inquiring whether the defendant understood the nature of the charge."

"Rule 11 contemplates that disputes as to the understanding of the defendant and the voluntariness of his action are to be eliminated at the outset. When the ascertainment is subsequently made, greater uncertainty is bound to exist since in the resolution of disputed contentions problems of credibility and of reliability of memory cannot be avoided. There is no adequate substitute for demonstrating in the record at the time the plea is entered the defendant's understanding of the nature of the charge against him."

394 US 459 (1969) (cleaned up)

Harmless Error in Guilty Pleas

- *McCarthy* was based “exclusively” on interpretation of F.R.C.P. Rule 11
- *Care* was based on Article 45, UCMJ.
- In 1983 Congress amended Rule 11
 - “(h) Harmless Error. A variance from the requirements of this rule is harmless error if it does not affect substantial rights.”
- Circuit Courts have determined that Congress “overruled” *McCarthy*.

Harmless Error in Guilty Pleas

- Current Article 45:
- (c) HARMLESS ERROR. – A variance from the requirements of this article is harmless error if the variance does not materially prejudice the substantial rights of the accused.
- Rule 11: Error must “affect” substantial rights
 Art. 45: Error must “materially prejudice” substantial rights

- Example: You determine MJ violated *Care* when she doesn’t reopen the plea after Accused raises a defense during his unsworn statement. Do you reverse:
- (A) Always. Nothing has changed.
 - (B) If the Accused requests reversal.
 - (C) Only if the defense was reasonably likely to succeed.
 - (D) Only if the accused states he would not have plead guilty had the MJ explained the defense.

What is harmless error in a guilty plea?

- SCOTUS: . *US v. Vonn*, 535 U.S. 55 (2002)
 - No objection at trial = plain error review on appeal.
 - Burden is on appellant to show error.
 - Much higher burden than *Care*.
- Does the 4th prong of plain error apply?

Question:

When a guilty plea is submitted to the CCA on its merits, how could an appellant ever meet a plain error burden?

Harmless Error in Guilty Pleas

- But --- *Care* inertia is powerful:
- RCM 910 substantially copied FRCP Rule 11
 - 1969 Manual: accused must be "convinced that he is in fact guilty"
 - 1984 Manual: accused must provide a "factual basis" for guilt.

BenchBook colloquy begins by advising the accused with a near verbatim recitation of the provisions of the 1969 Manual. Judges still advise the accused based off of the 1969 Manual, virtually untouched by the 1969 Manual's revocation in 1984.

Art. 60: "CA" stands for Clemency Authority

- Changes to Article 60-60c:
 - Did not substantively change the CA's clemency power
 - BUT!!! Fundamentally altered the role of the CA.
- CA no longer "approves" findings and sentence
 - MJ signs the judgement.
- CA no longer sits between court-martial and CCA
- Who do you remand the case to?
 - Rehearing – the CA (Art 66 gives CA authority to order rehearing)
 - Post-trial – MJ must undo judgment, make corrections, etc.

Sentencing

- Article 62 – Are we now the same?
 - "(e) The provisions of this Article shall be liberally construed to effect its purposes."
 - Language now mirrors 18 USC 3771.
 - Prior cases stated government appeals are viewed "narrowly"
 - Prior cases deviated from federal case law because of different wording
- Art. 54(d) Sentence Appeals
 - Sentence is illegal or "plainly unreasonable."
 - There is a federal corollary.
 - May end practice of judges not explaining sentences.
 - Is there a UCI issue?

Sentencing Cont:

- Article 53a: When may a MJ reject a sentence limitation in a plea agreement?
- Article 56:
 - Congress specified 11 factors that must be considered when sentencing accused (broadly taken from US Sentencing Commission):
 - Sentencing proceedings are unchanged.
 - Tension? (Art. 367)

Art. 63: Be careful what you ask for

- Reversed guilty pleas now face original maximum punishment.
 - Does not apply to a "new trial."
 - Mismatch between RCM 810(d), Article 63 and Article 73?
- Change to Article 63 was proposed along side ending "automatic" appellate review.
- Is there a Double Jeopardy problem?

Article 79 – Nothing to see here

- Article 79 gave President explicit authority to determine LOs that are "reasonably included" in greater offense.
- Overruled US v. Jones: The case that spawned 10 page charge sheets
- Authority was minimally used:
 - Simple Arson & Aggravated Arson.
 - Negligent Homicide & Manslaughter
 - Obstruction of Justice & Prevention of Authorized Seizure
 - False Statement & False Swearing & Perjury & Subornation of Perjury

Article 134

- Codification of Article 134 offenses was a substantive change.
- No "preemption doctrine" for those offenses
- Elements do not necessarily tie together well:

Waiver Mania

- MCM now says "forfeiture absent affirmative waiver"
- Should cause reevaluation of everything CAAF has said about waiver in the last five years?
- Does it make sense?

Wavier

- BEFORE: Pretrial motions (suppression, discovery, defects in charges, defects in referral) are waived.
- NOW: Forfeited absent affirmative waiver

- How do you test for forfeiture on a motion never made?
- Is forfeiture a backdoor around *Strickland*?

Discovery

- OLD RCM 701: defense is entitled to any document that is "relevant and necessary" to defense preparation.
- NEW RCM 701: defense is entitled to any document that is "relevant" to defense preparation.
- Applies to anything under control of military authorities

Correcting Errors post trial

- MJA 16 allows parties to file motions to correct any error post trial.
 - Errors in accepting plea
 - Insufficient Evidence
 - Error in Statement of Trial Results
 - Error in CA's clemency decision.
- RCM: "post-trial motions shall be filed" 14 days after DC receives trial results.
- What is the effect of failing to file a motion?
 - Forfeiture?
 - Weighs against finding prejudice from the error?
